

# Do We Need New Regulations in International Humanitarian Law? One American's perspective

## 1. Introduction

In the years since the terrorists' attacks on 11 September 2001 (9/11), the United States (U.S.) has engaged in what U.S. attorney general Eric Holder recently characterised as an 'armed conflict' with al-Qaeda, the Taliban, and associated forces.<sup>1</sup> This armed conflict generated a host of thorny legal problems, some of which are of first impression. In particular, the fact that the adversaries the United States has confronted in this timeframe are mainly non-state actors has been one of the key complicating factors in the application of international humanitarian law (IHL) or, as I prefer, the international law of armed conflict (ILOAC).

Do we need new rules to address questions like the status of non-state actors in 21st century conflicts? Although as discussed below, the administration of President Barack Obama has called for U.S. ratification of some existing ILOAC and ILOAC-related agreements, there have been no formal requests by the U.S. government for additional ILOAC agreements. Can we then assume that the U.S. has found ILOAC as it exists today adequate? Or are there other reasons which diminish America's appetite for developing new ILOAC agreements?

Although as a retired American officer I cannot speak for the U.S. government, the purpose of this short presentation is to provide my personal views as to (1) whether certain possible proposals for ILOAC additions genuinely serve U.S. interests, and (2), even if so, whether it is probable that they – or any – proposed changes could garner the necessary U.S. domestic public and political support. This essay will attempt to provide context for considering – and anticipating – American approaches to these questions.

In general, this paper will conclude that the answer to both queries is no. This essay takes the position that existing law adequately serves U.S. interests, even if American interpretations of ILOAC do not always find consensus in the international community. This is not to suggest that, objectively, there are not areas worthy of further clarification or even revision; rather, I am simply assessing the likelihood of any such changes being so demonstrably in the U.S.'s interest as to raise reasonable expectations that an accord acceptable to the U.S. political process could be reached in the foreseeable future. Although formal agreements may not be forthcoming, the paper will offer suggestions for approaches that may be useful for America and like-minded nations to consider furthering the cause of ameliorating the risk to civilians in war.

## 2. Context

There is little doubt that ILOAC has become increasingly important in the 21st century, and has significantly affected – indeed, many would say, complicated – the conduct of military operations.<sup>2</sup> As former North Atlantic Treaty Organiza-

tion (NATO) commander General James Jones observed, warfare has now become "very legalistic and very complex", requiring "a lawyer or a dozen."<sup>3</sup> Exactly why this phenomenon has emerged is worthy of a separate article, but suffice to say it parallels a rise in the importance of international law generally.

I believe that the growth of globalised commerce has necessitated a growth of international law and international forums in order to create and maintain investor confidence in international trade.<sup>4</sup> This has raised the world's consciousness, so to speak, of international law. As has always been the case, what happens in the commercial arena inevitably spills over into the domain of war. History has shown us, for example, how civilian-sector industrialisation operated to transform first commerce and, eventually, the conduct of war. Now law – much influenced by the impact of the civilian-sector information revolution – is changing the conduct of war, even if the nature of warfare remains immutable.

Furthermore, as I have written elsewhere,<sup>5</sup> law has become, for want of a better term, 'weaponised', in that some belligerents are attempting to use it as a kind of asymmetric war-fighting capability. In this situation, law becomes a substitute for orthodox military means to achieve effects which, strategically speaking, can be indistinguishable from those sought from more traditional military methodologies, a phenomenon I call 'lawfare'.

Though lawfare can take many forms, U.S. adversaries often seek to exploit allegations of illegality to gain victories that they fail to win on conventional battlefields – if not in real courts, then in the so-called courts of public opinion. Consider what Professors Michael Riesman and Chris T. Antioiu point out in their 1994 book, *The Laws of War*: "In

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<sup>1</sup> See U.S. Department of Justice, Attorney General Eric Holder Speaks at Northwestern University School of Law, 5 March 2012, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

<sup>2</sup> See, e.g., M. Barone, *The Overlawyered War*, in: *RealClearPolitics*, 17 September 2007, [http://www.realclearpolitics.com/articles/2007/09/the\\_overlawyered\\_war.html](http://www.realclearpolitics.com/articles/2007/09/the_overlawyered_war.html) (19 March 2012).

<sup>3</sup> Lyric Wallwork Winik, *A Marine's Toughest Mission* (Gen. James L. Jones), in: *Parade Mag*, 19 January 2003, [http://www.parade.com/articles/editions/2003/edition\\_01-19-2003/General\\_Jones](http://www.parade.com/articles/editions/2003/edition_01-19-2003/General_Jones) (16 July 2011).

<sup>4</sup> C.J. Dunlap, Jr., *The Mottled Legacy of 9/11: A Few Reflections on the Evolution of the International Law of Armed Conflict*, in: *Yearbook of International Humanitarian Law* 15 (forthcoming 2012).

<sup>5</sup> C.J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, in: *Case Western Reserve Journal of International Law* 43 (2010), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2970&context=faculty\\_scholarship&sei-redir=1#search=%22Does%20Lawfare%20Need%20an%20Apologia%22](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2970&context=faculty_scholarship&sei-redir=1#search=%22Does%20Lawfare%20Need%20an%20Apologia%22) (20 March 2012).

modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.”<sup>6</sup>

Thus, in an era of instant communications especially, incidents of illegalities such as the detainee abuse scandal at Abu Ghraib can have a disastrous effect on military operations, and one that can persist. General David Petraeus has said, “Abu Ghraib and other situations like that are non-biodegradable. They don’t go away. The enemy continues to beat you with them like a stick.”<sup>7</sup> So adherence to the law, and especially ILOAC is essential, not just for its own sake, but for purely pragmatic, military reasons.

As a result, American military commanders are increasingly cognisant of the decisive importance of law,<sup>8</sup> and how vital it is for operations to be conducted in adherence to it in fact and – equally important – in appearance. This is why the recent allegations of troop misconduct in Afghanistan are disconcerting to them: not only because they represent breaches in discipline, but also because they are well aware that such actions can further complicate the accomplishment of their mission.

This consciousness of the importance and value of international law is not limited to U.S. military commanders, but also extends to the larger American polity. Contrary to what seems to be a rather widespread myth, Americans do not eschew international law generally. In fact, the U.S. has supported a considerable body of public and private international law.<sup>9</sup> Admittedly, this official support has a significant measure of self-interest. As Harold Koh, the legal advisor to the U.S. State Department, has said, “obeying international law promotes U.S. foreign policy interests and strengthens our international leadership.”<sup>10</sup> Thus, he adds, the “United States’ active participation in international tribunals and other international bodies formed an important part of our practice.”<sup>11</sup> Nowhere, however, does he call for additional ILOAC rules. What Koh does say is that: “In the area of the law of armed conflict, the United States continue[s] to place priority on ensuring that its detention operations, detainee prosecutions, and operations involving the use of force – including those in the armed conflict with al-Qaeda, the Taliban, and associated forces – are consistent with all applicable law, including international law.”<sup>12</sup>

Thus, he puts the U.S. squarely behind the proposition that U.S. military operations must (and do) comport with ILOAC. Notably, U.S. support of ILOAC is not limited to official pronouncements by government officials like Koh. A very recent analysis of polling data shows that the American body politic supports many international treaties that impact ILOAC, to include those that “impose constraints on the use of force and coercion.”<sup>13</sup> Indeed, polls even show that a “large majority also favors having an international body, such as a court, to judge compliance with treaties to which the United States is party.”<sup>14</sup>

### 3. Americans and ILOAC-Related Agreements

Broad public support for ILOAC principles generally does not, however, necessarily translate into support for specific

ILOAC-related agreements that may seem to compromise American interests. A classic example is the Rome Statute which established the International Criminal Court (ICC).<sup>15</sup> Although an early supporter of the ICC, the U.S. objected to the final version of the statute.

Not only did the U.S. Congress refuse to ratify it, it also passed legislation in 2002 entitled the American Servicemembers Protection Act.<sup>16</sup> Among other things, this Act took the unprecedented step of enshrining in law authority for the President “to use all means necessary and appropriate to bring about the release of any [U.S.] person [...] being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.”<sup>17</sup> In support of this legislation, the Congress made on-the-record findings that the Rome Statute: “[P]urports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.”<sup>18</sup>

The Congress had other concerns as well. It found that if U.S. troops were tried by the ICC, they would be “denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury.”<sup>19</sup> In an era in which the U.S. relies upon an all-voluntary military to serve in complex circumstances in any and every corner of the globe, it

<sup>6</sup> W.M. Reisman/C.T. Antoniou, *The Laws of War*, New York 1994, p. xxiv (emphasis added).

<sup>7</sup> J. Berger, US Commander Describes Battle of Marj as First Salvo in Campaign, in: *The New York Times*, 21 February 2010 (quoting General David H. Petraeus), <http://www.nytimes.com/2010/02/22/world/asia/22petraeus.html> (20 March 2012).

<sup>8</sup> Cf., C.J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, in: *Joint Force Quarterly* 54 (2009), <http://www.ndu.edu/press/lib/images/jfq-54/12.pdf> (20 March 2012).

<sup>9</sup> See, Office of the Legal Advisor, U.S. Department of State, in: E.R. Wilcox (ed.), *Digest of United States Practice in International Law, 2010*, <http://www.state.gov/documents/organization/179316.pdf> (17 March 2012).

<sup>10</sup> *Id.*, p. xxv.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.*, p. xxvii.

<sup>13</sup> Review of Polling Finds International and American Support for World Order Based on International Law, Stronger UN, in: *World Public Opinion*, 15 December 2011, [http://www.worldpublicopinion.org/pipa/articles/international\\_security\\_bt/703.php](http://www.worldpublicopinion.org/pipa/articles/international_security_bt/703.php) (15 March 2012).

<sup>14</sup> *Ibid.*

<sup>15</sup> *The Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998), 17 July 1998, <http://untreaty.un.org/cod/icc/statute/romefra.htm> (17 March 2012).

<sup>16</sup> *American Servicemembers’ Protection Act of 2002*, Public Law No. 107-206, §§ 2002-2015, 116, Stat. 899-909 (codified as amended at 22 U.S.C. §§ 7421-7432 (2002)).

<sup>17</sup> See U.S. Department of State, *American Servicemembers’ Protection Act*, Bureau of Political-Military Affairs, July 2003, <http://www.state.gov/t/pm/rls/othr/misc/23425.htm> (17 March 2012).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

may be even more important to assure those who do serve that they will not be abandoned to a foreign forum which does not adhere to basic standards of U.S. constitutional law. Currently, however, U.S. objections to the ICC focus primarily on concerns about the definition of the crime of aggression. At the international review conference in Kampala, Uganda, in 2010, the parties decided to delay implementation of the crime of aggression until 2017, an action supported by the U.S. It appears that serious U.S. consideration of the treaty will have to wait until then. Still, according to the U.S. State Department's Harold Koh, "Even as a non-State party, the United States believes that it can be a valuable partner and ally in the cause of advancing international justice."<sup>20</sup>

Interestingly, advocacy by the U.S. Department of Defense is no panacea. For example, the United Nations Convention on the Law of the Sea (UNCLOS)<sup>21</sup> has languished in the legislature despite explicit and long-standing military support for it.<sup>22</sup> Objections have varied over the years, but recently opponents have argued that with "China emerging as a major power, ratifying the treaty now would encourage Sino-American strife, constrain U.S. naval activities, and do nothing to resolve China's expansive maritime territorial claims."<sup>23</sup> In short, political opposition to UNCLOS seems to remain strong.

All of this should illustrate how difficult it can be to obtain the necessary consensus in the United States when an international treaty has security implications. This is not to say such agreements are impossible to achieve: the recent renewal of the Strategic Arms Reduction Treaty (START)<sup>24</sup> despite controversy<sup>25</sup> is an important example, as is the ratification – in 2008 – of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>26</sup> Rather, it is to acknowledge that they almost always have the potential to breed controversy in the U.S., and frequently can be resolved only after very lengthy negotiations, if ever.

Of the several treaties pending before the U.S. Senate for ratification,<sup>27</sup> the one with direct ILOAC relevance is Protocol II to the Geneva Conventions.<sup>28</sup> Ironically, when this protocol (which addresses certain non-international armed conflicts) was originally considered in the 1980s by President Ronald Reagan's administration, it was criticised as insufficiently expansive.<sup>29</sup> Now, however, the Obama Administration enthusiastically backs its ratification.<sup>30</sup> Before discussing potential issues with ratification, a little background about American attitudes towards the Geneva Conventions may be appropriate.

According to William Leitzau, the U.S. Department of Defense's Deputy Assistant Secretary of Defense for Detainee Policy, the U.S. is "committed to the Geneva Conventions and to educating our citizens of its provisions and protections."<sup>31</sup> Leitzau adds that "[w]e are at a time in history when the importance of International Humanitarian Law in general, and the Geneva Conventions in particular, cannot be overstated."<sup>32</sup> Still, despite such official pronouncements, it is nevertheless true that many Americans are not as familiar with the Geneva Conventions as they may think they are, and many hold views that may be inconsistent with them.

In February of 2011, for example, the American Red Cross conducted two polls, one of adults aged 18 and older, and an-

other of youth from 12-17 years old. Asked whether they were familiar with the Geneva Conventions, 55% of adults believed they were, but only 19% of youth shared the same belief about themselves. Additionally, according to the American Red Cross, the survey found that: 1. A majority of youth (59%) – compared to 51% of adults – believe there are times when it is acceptable to torture the enemy. 2. More

<sup>20</sup> H.H. Koh, The Obama Administration and International Law, U.S. Department of State, 25 March 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm> (18 March 2012).

<sup>21</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 1833 United Nations Treaty Series (UNTS). 3, 397; 21 International Legal Materials (ILM) 1261 (1982), [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm) (17 March 2012).

<sup>22</sup> See, e.g., J.J. Kruzell, Military Officials Urge Accession to Law of the Sea Treaty, American Services Press Service, 10 December 2007, <http://www.defense.gov/News/NewsArticle.aspx?ID=48379> (17 March 2012).

<sup>23</sup> See J. Bolton/D. Blumenthal, Time to Kill the Law of the Sea Treaty – Again, in: The Wall Street Journal, 29 September 2011, <http://online.wsj.com/article/SB10001424053111904836104576560934029786322.html> (17 March 2012).

<sup>24</sup> U.S. Department of State, New Start Treaty Entry into Force, Office of the Spokesman, 5 February 2011, <http://www.state.gov/r/pa/prs/ps/2011/02/156037.htm> (17 March 2012).

<sup>25</sup> Republican Amendment to START Accord Fails Senate; Debate Continues, in: Fox News, 19 December 2010, <http://www.foxnews.com/politics/2010/12/19/senate-return-sunday-debate-russia-nuclear-arms-reduction-treaty/> (18 March 2012).

<sup>26</sup> "The U.S. became a party to this convention on 13 March 2009, when it deposited its instrument of ratification at UNESCO." U.S. Department of State, Laws, Conventions, and Agreements, Bureau of Educational and Cultural Affairs, <http://exchanges.state.gov/heritage/culprop/laws.html> (17 March 2012).

<sup>27</sup> U.S. Department of State, Treaties Pending in the Senate, 12 February 2012, <http://www.state.gov/s/l/treaty/pending/> (17 March 2012).

<sup>28</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 609, reprinted in 16 ILM 1442 (1977), <http://www.icrc.org/ihl.nsf/full/475?opendocument> (17 March 2012).

<sup>29</sup> John Bellinger, the former legal advisor to the U.S. Department of State, observes that: "[W]ith respect to Additional Protocol II, ironically one of the Reagan Administration's concerns about the treaty was that it applies by its terms only to non-international armed conflicts with non-state groups where the non-state group controls some of the territory of a state. The Reagan Administration concluded that this limitation was too narrow because many conflicts, even in the 1980s, involved conflicts between a state and a group that did not control territory. Accordingly, the Reagan Administration recommended that the Senate include an understanding that the U.S. would apply Additional Protocol II in all non-international armed conflicts. Had the Senate acted on Additional Protocol II, as President Reagan had requested, it would have given the Bush and Obama Administrations a more robust international legal framework to apply in the conflict with Al Qaeda and the Taliban. The Obama Administration is right to push for Senate approval of this forgotten treaty."

J. Bellinger, Obama Administration's Announcement's on International Law, in: Lawfare (blog), 8 March 2011, <http://www.lawfareblog.com/2011/03/obamas-announcements-on-international-law/> (17 March 2012).

<sup>30</sup> Fact Sheet: New Actions on Guantánamo and Detainee Policy, The White House, 7 March 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> (17 March 2012).

<sup>31</sup> Red Cross Survey Finds Young Americans Unaware of Rules of War, American Red Cross, 12 April 2011, <http://www.redcross.org/portal/site/en/menuitem.94aae335470e233f6cf911df43181aa0/?vgnextoid=801dbe9f0e64f210VgnVCM10000089f0870aRCRD> (16 March 2012).

<sup>32</sup> *Ibid.*

than half of youth (56%) believe that there are times when it is acceptable to kill enemy prisoners in retaliation if the enemy has been killing American prisoners, while only 29% of adults agree.<sup>33</sup> 3. 41% of youth believe there are times when it is acceptable for the enemy to torture captured American prisoners, while only 30% of adults agree.

Obviously, even those adult Americans who do claim familiarity with the Geneva Conventions nevertheless approve, at least at certain times, of activities that breach them (for instance with respect to torturing the enemy “to get important military information”).<sup>34</sup> Additionally, 51% of the adults in that poll found it was always or sometimes acceptable to refuse visits to prisoners “by representative of a neutral organization to ensure [the prisoners] are being treated well,”<sup>35</sup> something that may also be inconsistent with Geneva Convention requirements.

Arguably, these contentious views might represent not so much any sort of generalised rejection of the Geneva Conventions, but more of a reflection of the trust, confidence, and deference accorded members of the armed forces and a reluctance to micro-manage what they may need to do in particular instances during wartime. Notwithstanding the occasional scandal or other well-publicised misdeed, Americans, it seems, believe their military will ‘do the right thing’ in difficult situations.

Bear in mind that in the U.S., the armed forces occupy a special, almost revered place in the American psyche. For the past several years polls show that the military is, for example, considered the most trusted institution in American society.<sup>36</sup> Moreover, a 2010 poll showed military leaders in specific as being tops in public confidence.<sup>37</sup> Likewise, according to another poll, Americans consider military officers second only to nurses as the profession having the highest honesty and ethics.<sup>38</sup>

To be sure, the popularity of the armed forces does not make them above criticism, but it does tend to cause civilians to be deferential to military judgments about operational matters. In fact, in the U.S. even the courts seldom second-guess military leaders. The Supreme Court, for example, has held that “it is difficult to conceive of an area of governmental activity in which the courts have less competence” than in the “complex, subtle, and professional decisions” military officers must make.<sup>39</sup> Even civilian juries, when confronted with allegations of military misconduct in combat, can feel inadequate to the task if they are required to question the judgment of what those in uniform did in combat.

The case of former Marine sergeant Jose Luis Nazario offers an illustration. In explaining his acquittal in a 2008 trial in civilian court of charges related to the killing of four civilians in Iraq, “several jurors acknowledged that they also did not feel qualified to judge a Marine’s actions in the midst of a battle.”<sup>40</sup> One said “she hoped the verdict would send a message to the troops in Iraq.”<sup>41</sup> Reportedly, she wanted the troops to “realize that they shouldn’t be second-guessed, that we support them and know that they’re doing the right thing.”<sup>42</sup>

Given the pragmatism and deference in American thinking about the conduct of military operations, let us return to the Obama administration’s proposal to ratify the Protocol II of the Geneva Conventions. The administration says that an “extensive interagency review concluded that United States

military practice is already consistent with the Protocol’s provisions.”<sup>43</sup> This rationale may, however, legitimately raise questions about the utility of ratification.

For example, if the U.S. is already adhering to the underlying rationale, what would be the purpose of making such adherence binding up on military commanders and others? Would it not be wiser, given the unknowability of the circumstances of future battlefields, to forgo an agreement that would limit or eliminate discretion? It seems that the administration’s answer is that it believes that ratification would “not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.”<sup>44</sup>

It is difficult, however, to find convincing, objective evidence that U.S. ratification of Protocol II or, for that matter, any other ILOAC agreement would matter much in terms of foreign public’s perceptions of America. And it is likewise hard to find much evidence that Americans are much concerned about foreign perceptions of themselves. Of course, it can only inure to the U.S.’s benefit that, for example, the Pew Research Center reported in July 2011 that “in most regions of the world, opinion of the United States continues to be more favorable than it was in the Bush years.”<sup>45</sup>

Nonetheless, it may very well be that most Americans think much as former Secretary of Defense Robert Gates does. In the aftermath of the Wikileaks disclosure of a huge amount of U.S. classified material, Gates dismissed the fears of many pundits who thought the leaks would irreparably harm U.S. foreign relations. Gates’ comments went well beyond the immediate issue of the Wikileaks case when he said: “The fact is governments deal with the United States because

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*; Survey on International Humanitarian Law, ORC International, March 2011, slide 8.

<sup>35</sup> *Ibid.*

<sup>36</sup> J.M. Jones, Americans Most Confident in Military, Least in Congress, in: Gallup, 23 June 2011, <http://www.gallup.com/poll/1597/confidence-institutions.aspx> (15 March 2012).

<sup>37</sup> A. Hall, Virtually No Change in Annual Harris Poll Confidence Index from Last Year, in: Harris Interactive, 9 March 2010, <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Education-Confidence-2010-03.pdf> (20 March 2012).

<sup>38</sup> “Honesty/Ethics in Professions”, 9-21 November 2010, in: Gallup, <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (20 March 2012).

<sup>39</sup> Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

<sup>40</sup> T. Perry, Marine Acquitted in Killings of 4 Iraqis, in: Los Angeles Times, 29 August 2008, <http://articles.latimes.com/2008/aug/29/local/memarine29> (18 March 2012).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Fact Sheet: New Actions on Guantánamo and Detainee Policy, The White House, 7 March 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> (17 March 2012).

<sup>44</sup> *Ibid.*

<sup>45</sup> U.S. Favorability Ratings Remain Positive; China Seen Overtaking U.S. as Global Superpower, Pew Research Center, 13 July 2011, <http://www.pewglobal.org/2011/07/13/china-seen-overtaking-us-as-global-superpower/?src=prc-headline> (15 March 2012).

it's in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets. Many governments – some governments – deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation.”<sup>46</sup>

Such thinking is not without critics. As one commentator rather nastily put it, many U.S. politicians and others “believe that principles of international relations somehow do not apply to the United States and that America is so different from other nations that it doesn't have to pay attention to what other people think.”<sup>47</sup> While this view may be rightly criticised – and probably is an overstatement – it nevertheless rings true enough to be worthy of consideration in assessing the degree to which foreign pressure might induce the U.S. to enter into ILOAC agreements not manifestly in its interests.

The fact is that Americans are willing to go their own way, so to speak, when security is involved – and this has not changed despite costly wars in Iraq and Afghanistan. Indeed, Americans remain prepared to use force when necessary, despite the fact that in December of 2011 66% said that they oppose the war in Iraq<sup>48</sup> and in March of 2012 it was reported that 60% of Americans believe the war in Afghanistan was not “worth it.”<sup>49</sup> President Obama may have quite accurately captured the attitude of many Americans when he declared in 2011 that: “It's true that America cannot use our military wherever repression occurs. And given the costs and risks of intervention, we must always measure our interests against the need for action. But that cannot be an argument for never acting on behalf of what's right.”<sup>50</sup>

Americans do understand that their view is not always shared by others. For instance, they overwhelmingly approve of certain counterterrorism activities that are quite controversial in many other parts of the world. Specifically, a poll conducted in early February of 2012 found that “the sharpest edges of President Obama's counterterrorism policy, including the use of drone aircraft to kill suspected terrorists abroad and keeping open the military prison at Guantánamo Bay, have broad public support [...]”<sup>51</sup> In another poll, in March 2012, a majority of Americans were found to support “taking military action against Iran if there is evidence that Iran is building nuclear weapons even if it causes gasoline and fuel prices in the United States to go up.”<sup>52</sup>

Such support for military action is not, however, undifferentiated. For example, a 2010 poll found that 79% of Americans believe that the “U.S. is playing the role of world policeman more than it should be.”<sup>53</sup> Accordingly, it should not be surprising that as of March of 2012, more than two-thirds of Americans did not think the U.S. has a responsibility to act regarding the ongoing fighting in Syria,<sup>54</sup> although two-thirds also “approve of the idea of the Arab League and Turkey establishing safe havens inside Syria.”<sup>55</sup>

Americans' inclination to think in terms of their own security interests does not mean that they reject collaborative efforts with other nations. For example, a 2011 poll found that eight out of ten Americans thought “it is important that the United States maintain an active role within the United Nations” even though a majority (51%) thought the United Nations (UN) was an “only somewhat effective” organisation.<sup>56</sup>

#### 4. ILOAC Controversies

It is certainly true that there are controversies and uncertainties in the ILOAC realm that would benefit from clarification. Yet it is hard to see where, realistically, there is much prospect for agreements that would not restrict or even compromise what many Americans steadfastly view as essential to U.S. security. In this regard, it may be helpful to review the U.S. position with regards to Additional Protocol I of the Geneva Convention, a key ILOAC agreement to which the U.S. is not yet a party.<sup>57</sup>

Although the Obama administration has not detailed its views, it has reconfirmed that it “continues to have significant concerns” with the Protocol.<sup>58</sup> In 1988, Abraham D. Sofaer, then legal advisor to the U.S. Department of State, explained the U.S.'s failure to become a party: “The reasons, spelled out in a detailed JCS [Joint Chiefs of Staff] report of more than a hundred pages, include the fact that the Protocol grants irregulars a legal status which is at times superior to that accorded regular forces; that it unreasonably restricts attacks against certain objects that have traditionally been

<sup>46</sup> Department of Defense, DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon, 30 November 2010, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4728> (19 December 2011).

<sup>47</sup> P.R. Pillar, American Politicians Should Care More About Global Public Opinion, in: *The Atlantic*, 7 January 2012, <http://www.theatlantic.com/international/archive/2012/01/american-politicians-should-care-more-about-global-public-opinion/251013/> (18 March 2012).

<sup>48</sup> Iraq, [pollingreport.com](http://www.pollingreport.com/iraq.htm) (reporting a CNN/ORC Poll, 16-18 December 2011), <http://www.pollingreport.com/iraq.htm> (15 March 2012).

<sup>49</sup> Afghanistan, [pollingreport.com](http://www.pollingreport.com/afghan.htm) (reporting ABC News/Washington Post Poll, 7-10 March 2012), <http://www.pollingreport.com/afghan.htm> (15 March 2012).

<sup>50</sup> B. Obama, Remarks On Libya Delivered at the National Defense University, 28 March 2011, <http://projects.washingtonpost.com/obama-speeches/speech/603/> (19 March 2012).

<sup>51</sup> S. Wilson/J. Cohn, Poll finds broad support for Obama's counterterrorism policies, in: *The Washington Post*, 8 February 2012, [http://www.washingtonpost.com/politics/poll-finds-broad-support-for-obamas-counterterrorism-policies/2012/02/07/gIQAfrSEyQ\\_story.html](http://www.washingtonpost.com/politics/poll-finds-broad-support-for-obamas-counterterrorism-policies/2012/02/07/gIQAfrSEyQ_story.html).

<sup>52</sup> Iran, [pollingreport.com](http://www.pollingreport.com/iran.htm) (reporting Reuters/Ipsos Poll conducted by Ipsos Public Affairs, 8-11 March 2012), <http://www.pollingreport.com/iran.htm> (15 March 2012).

<sup>53</sup> [Worldpublicopinion.org](http://www.worldpublicopinion.org), *supra* note 13 (citing Chicago Council on Global Affairs poll).

<sup>54</sup> Little Support for U.S. Intervention in Syrian Conflict, Pew Research Center, 15 March 2012, <http://www.people-press.org/2012/03/15/little-support-for-u-s-intervention-in-syrian-conflict/?src=prc-headline> (15 March 2012).

<sup>55</sup> American Public Favors Safe Havens in Syria, [Worldpublicopinion.org](http://www.worldpublicopinion.org), 20 March 2012, <http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/715.php?nid=&id=&pnt=715&lb>.

<sup>56</sup> Poll Shows More than Eight Out of Ten American Voters Support U.S. Engagement at the U.N., United Nations Foundation, 12 October 2011, <http://www.unfoundation.org/news-and-media/press-releases/2011/poll-shows-american-voters-support-us-engagement-at-un.html> (18 March 2012).

<sup>57</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 12 December 1977, UN Doc. A/32/144, Annex I. 11 (1977), reprinted in 16 *International Legal Materials* 1391 (1977), <http://www.icrc.org/ihl.nsf/full/470?opendocument> (19 March 2012).

<sup>58</sup> The White House, *supra* note 30.



legitimate targets; and that it eliminates significant remedies in cases where an enemy violates the Protocol.”<sup>59</sup>

It is quite possible that U.S. views have not only remained unchanged since 1988, but even become more solidified by the experience with ‘irregulars’ in the conflicts since 9/11. In particular, the international community has not been especially successful in compelling compliance with ILOAC by such non-state adversaries, and too often has focused its opprobrium on the U.S. merely because – it sometimes seems – it takes such criticisms seriously, as is so often not the case with America’s opponents.

One of the most serious ILOAC issues is civilian casualties, but there is scant indication that additional rules would help limit them. In February 2012 the report of the United Nations Assistance Mission to Afghanistan (UNAMA) found that in 2011, the Taliban and other anti-government forces were responsible for 77% of the civilian deaths.<sup>60</sup> After noting that the Taliban claimed to have a policy against targeting civilians, UNAMA concluded that: “UNAMA welcomes any public pronouncement of Taliban policy on reducing civilian casualties but asserts that such rules are only meaningful if implemented on the ground. Despite the Taliban’s improved messaging on protection of civilians in 2011, UNAMA did not document improved compliance with international humanitarian law by the Taliban or a reduction in civilian casualties caused by them. The Taliban continued to directly target civilians and use indiscriminate weapons such as pressure-plate IEDs [improvised explosive devices].”<sup>61</sup>

While it may be helpful to think about new regulations in ILOAC, Americans are more disposed to think about enforcing the existing rules in a fair and equitable manner. In fact, in the Red Cross poll noted above, 57% of Americans endorsed “strengthening the enforcement of laws and rules that limit what combatants can do in war.”<sup>62</sup> In the case of the Taliban anyway, it appears that there is yet much work to do within the existing framework.

Moreover, U.S. efforts to neutralise the source of the vast majority of civilian deaths have often been criticised on the basis of an interpretation of ILOAC with which it does not agree. I am talking here about the U.S.’s much-debated use of drones. It is beyond the scope of this essay to address that debate substantively, but in a series of speeches, U.S. government officials have repeatedly laid out the American position on drones, and in each case they asserted that the use of drones is clearly in conformance with existing international law.<sup>63</sup>

That others may have a different opinion does not necessarily render the U.S. interpretation suspect. In discussing, whether international law permits a drone strike against a threat in a country that is “unwilling or unable” to do anything about it, Harvard law professor Jack Goldsmith admits that international law is “not settled” on the point, but insists: “[I]t is sufficiently grounded in law and practice that no American president charged with keeping the country safe could refuse to exercise international self-defense rights when presented with a concrete security threat in this situation that no American president charged with keeping the country safe could refuse to exercise international self-defense rights when presented with a concrete security threat in this situation.”<sup>64</sup>

In any event, what incentive would the U.S. have to seek a new ILOAC agreement that might ‘settle’ the issue in a way that could compromise, from an American perspective, the responsibilities of the President to keep the country safe?

Besides, as already mentioned, rank and file Americans strongly support the drone campaign.<sup>65</sup> And media reports indicate it is effective. According to one article, material reportedly obtained from Osama Bin Laden’s lair in Pakistan showed “frustration with the CIA [Central Intelligence Agency] drone campaign” because al-Qaeda operatives were “getting killed faster than they could be replaced.”<sup>66</sup> More recently, another media report said that Bin Laden warned followers of “the importance of the exit from Waziristan,” apparently because of the drone operations, as he implored his followers to “[c]hoose distant locations to which to move [...] away from aircraft photography and bombardment.”<sup>67</sup> Thus, the U.S. is unlikely to welcome any proposals that might complicate or even compromise the legal basis for using the capability that, in the U.S. view, has so debilitated the principal cause of civilian deaths from terrorism since 9/11. Of course, clarification as to the status of non-state actors would seem to be useful for the U.S. given the nature of the conflicts in which it has been engaged in recent years. However, in light of the experience with the Interpretive Guidance issued by the International Committee of the Red Cross (ICRC) about the status of civilians who directly participate in hostilities, there is little to suggest that the U.S. would benefit substantively from any international effort.<sup>68</sup>

As Professor Robert Chesney of the University of Texas notes, that guidance argues “that members of organized

<sup>59</sup> A.D. Sofaer, *The Rationale for the United States Decision*, in: *American Journal of International Law* 82 (1988).

<sup>60</sup> United Nations Assistance Mission, *Annual Report on the Protection of Civilians in Armed Conflict in Afghanistan for 2011, February 2012*, [http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20POC%202011%20Report\\_Final\\_Feb%202012.pdf](http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20POC%202011%20Report_Final_Feb%202012.pdf) (19 March 2012), p. 1.

<sup>61</sup> *Id.*, p. 4.

<sup>62</sup> See Survey, *supra* note 34.

<sup>63</sup> See, H. Koh, *supra* note 20; E. Holder, *supra* note 1; J.O. Brennan (Assistant to the President for Homeland Security and Counterterrorism), Remarks of John O. Brennan: “Strengthening our Security by Adhering to our Values and Laws”, *The White House*, 17 September 2011, <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-obrennan-strengthening-our-security-adhering-our-values-an> (18 March 2012); and J. Johnson (Department of Defense General Counsel), *National security law, lawyers and lawyering in the Obama Administration*, Yale Law School, <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/> (18 March 2012).

<sup>64</sup> J. Goldsmith, *Fire When Ready*, in: *Foreign Policy*, 19 March 2012, [http://www.foreignpolicy.com/articles/2012/03/19/fire\\_when\\_ready](http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready) (20 March 2012).

<sup>65</sup> See *supra* note 51, and accompanying text.

<sup>66</sup> G. Miller, *Bin Laden document trove reveals strain on al-Qaeda*, in: *The Washington Post*, 1 July 2012, [http://www.washingtonpost.com/national-security/bin-laden-document-trove-reveals-strain-on-al-qaeda/2011/07/01/AGdj0GuH\\_story.html](http://www.washingtonpost.com/national-security/bin-laden-document-trove-reveals-strain-on-al-qaeda/2011/07/01/AGdj0GuH_story.html) (19 March 2012).

<sup>67</sup> D. Ignatius, *A Lion in Winter*, in: *The Washington Post*, 18 March 2012, [http://www.washingtonpost.com/opinions/osama-bin-laden-a-lion-in-winter/2012/03/18/gIQADmAKLS\\_story.html](http://www.washingtonpost.com/opinions/osama-bin-laden-a-lion-in-winter/2012/03/18/gIQADmAKLS_story.html) (19 March 2012).

<sup>68</sup> N. Melzer, *Interpretive Guidance on the Notions of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, February 2009, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (18 March 2012).

armed groups (OAG) who perform a continuous combat function (CCF) in a [non-international armed conflict] are not civilians and may be targeted in a manner comparable to that of a combatant, not just when engaging in specific acts of direct participation.”<sup>69</sup> Chesney speculates (but admits he does not have confirmation) that the U.S. government may interpret “category of targetable fighters in a fashion that is broader than the ICRC’s CCF test.”<sup>70</sup>

What is known is that the Interpretive Guidance has proven to be highly controversial. The exact delineations of the controversy are beyond the scope of this essay, but Professor Michael Schmitt, a retired U.S. Air Force officer, offers a critique of the Guidance that resonates with this writer and other Americans.<sup>71</sup> He sees international humanitarian law as seeking to “infuse the violence of war with humanitarian considerations.” In doing so, however, he says it “must remain sensitive to the interest of states in conducting warfare efficiently, for no state likely to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk.”<sup>72</sup>

According to Schmitt, the “very delicate balance between two principles: military necessity and humanity undergirds virtually all rules of IHL and must be borne in mind in any effort to elucidate them.”<sup>73</sup> Schmitt then contends that: “It is in this regard that the Interpretive Guidance falters. Although it represents an important and valuable contribution to understanding the complex notion of direct participation in hostilities, on repeated occasions its interpretations skew the balance towards humanity. Unfortunately, such deviations from the generally accepted balance will likely cause states, which are ultimately responsible for application and enforcement of the law, to view the Interpretive Guidance skeptically.”<sup>74</sup>

Considering that the U.S. is a nation that “finds itself on the battlefield” with relative frequency, it is troubling that the ICRC, the non-governmental organisation most influential in the development of ILOAC, seems to be unbalancing the necessary symbiosis in this critical area. Its interpretations could provide U.S. authorities with a strong rationale against engaging in any process that might further memorialise analyses with the potential, in the U.S. view, to disrupt the proper understanding of international law, including ILOAC. Other reasons argue against the U.S. becoming interested in new ILOAC rules, even where clarification might be helpful. For example, one might think cyberwar would be a fertile area for new ILOAC regulations. Many countries (not just the U.S.) are grappling with the many technical and policy issues associated with cyber incidents, not the least of which are the thorny legal issues. In particular, the question of what constitutes a prohibited use of force under the United Nations Charter,<sup>75</sup> or as it is more commonly captioned, ‘what constitutes an act of war’ in the cyber domain, is a frequent query. A closely related and recurrent issue is what kind of cyber activity would constitute an ‘armed attack’ within the meaning of the self-defense provisions of Article 51 of the Charter.<sup>76</sup>

However, the divergence of views about the nature and scope of cyberwar militate against any reasonable hope of achieving an ILOAC-level agreement in the foreseeable future. Journalist Tom Gjelten observes that “[d]ifferent ideas of the

cyber danger around the world illustrate that countries vary in the way they perceive their own vulnerabilities.”<sup>77</sup> He also goes on to warn: “While peace accords and disarmament agreements are attractive, however, democracies have reason to proceed cautiously in this area, precisely because of differences in the way cyber ‘attacks’ are being defined in international forums. Russia, which for more than a decade has been promoting a global cyber arms control agreement, would like to criminalize what Soviet diplomats once called “ideological aggression”, and China and allied governments, especially in the Middle East and Africa, share this view.”<sup>78</sup> At least two reasons exist for a lack of optimism about a global cyber agreement. First, as Gjelten implies, such an agreement could be used by some non-democratic states to crush dissent, a result that the U.S. would doubtless disfavour. In fact, a senior State Department official said that China and Russia “seek to justify the establishment of sovereign government control over internet resources and over freedom of expression in order to maintain the security of their state.”<sup>79</sup>

Secondly, Gjelten argues that with respect to the U.S. armed forces, “no other military has such an advanced offensive capability for cyber war.”<sup>80</sup> Consequently, he says, under “a comprehensive cyber arms limitation agreement, the United States would presumably have to accept deep constraints on its use of cyber weapons and techniques.”<sup>81</sup> Plainly, there is little incentive for America to accept such constraints, especially if such restrictions would also operate to suppress free speech in non-democratic states.

<sup>69</sup> R. Chesney, Is DPH the Relevant Standard in Pakistan? An Important Element in the Debate Missing from BIJ’s Report, in: Lawfare (blog), 6 February 2012, <http://www.lawfareblog.com/2012/02/is-dph-the-relevant-standard-in-pakistan-an-important-element-in-the-debate-missing-from-bijs-report/> (18 March 2012).

<sup>70</sup> *Ibid.*

<sup>71</sup> M.N. Schmitt, The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, in: Harvard Journal of National Security Law, 5 May 2010, <http://harvardnsj.org/2010/05/the-interpretive-guidance-on-the-notion-of-direct-participation-in-hostilities-a-critical-analysis/> (18 March 2012).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Charter of the United Nations and Statute of the International Court of Justice, 1945, <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>. Article 2 (4) of the Charter demands that nations “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”

<sup>76</sup> Art. 51, UN Charter, *supra* note 75, p. 10. Article 51 of the Charter says that nothing in the Charter shall “impair the inherent right of individual or collective self-defense if an armed attack occurs” against a UN member.

<sup>77</sup> T. Gjelten, Shadow Wars: Debating Cyber ‘Disarmament’, in: World Affairs Journal, November/December 2010, <http://www.worldaffairsjournal.org/articles/2010-NovDec/full-Gjelten-ND-2010.html>.

<sup>78</sup> *Ibid.*

<sup>79</sup> G. Smith, State Department Official Accuses Russia And China Of Seeking Greater Internet Control, in: Huffington Post, 27 November 2011, [http://www.huffingtonpost.com/2011/09/27/russia-china-internet-control\\_n\\_984223.html](http://www.huffingtonpost.com/2011/09/27/russia-china-internet-control_n_984223.html) (18 March 2012).

<sup>80</sup> T. Gjelten, *supra* note 77.

<sup>81</sup> *Ibid.*

Space is yet another area that would seem ripe for more extensive ILOAC treatment. Again, however, the U.S. is arguably the premier space-faring nation, so it is not clear how a new agreement could avoid putting legal fetters on a U.S. capability already extant, and in which it enjoys an asymmetric advantage over potential foes. Nevertheless, the U.S. does see the value in collaboration, and has recently joined with the European Union and other nations to develop a voluntary International Code of Conduct for Outer Space Activities.<sup>82</sup> This could be an important first step.

According to the U.S. State Department, the agreement will be “focused on the use of voluntary and pragmatic transparency and confidence-building measures to help prevent mishaps, misperceptions, and mistrust in space.”<sup>83</sup> At the same time, the Department insists that the administration “is committed to ensuring that an International Code enhances national security and maintains the United States’ inherent right of individual and collective self-defense, a fundamental part of international law” and adds an important caveat that syncs with the long-standing U.S. view: the “United States would only subscribe to such a Code of Conduct if it protects and enhances the national and economic security of the United States, our allies, and our friends.”<sup>84</sup>

While not truly an ILOAC agreement, and obviously one that lacks the enforceability of the Geneva Conventions, the Code does represent the kind of agreement that is achievable in an area of growing importance, and one with significant security implications. The references to “maintain[ing] the United States’ inherent right of individual and collective self-defense,” as well as the statement that U.S. subscription to the Code is conditioned on its actually “enhancing” U.S. security (as opposed to merely maintaining or even memorialising the *status quo*) appears to be instructive as to what predicates are necessary for American involvement in proposals for new ILOAC rules.

## 5. Concluding Observations

This essay may paint a discouraging picture for those who believe that additional ILOAC rules may ameliorate the impact of war on civilians. It would seem that American support for such proposals is uncertain at best, and that the U.S. is largely satisfied with its interpretations of existing law. There does not appear to be a strong counter-narrative that would encourage optimism about a change in this status quo. New rules may not, however, be the only way to further minimise civilian suffering in conflict. The greater availability and wider use of precision munitions is an example of a development that may operate as effectively to protect civilians as new ILOAC rules, and would be something that the U.S. could support. Polls show that Americans – 80% in fact – very strongly support the idea of increasing the “accuracy of weapons to reduce unintended casualties.”<sup>85</sup>

Unfortunately, this method of achieving the same purpose as that desired by many advocates of additional ILOAC rules – the protection of civilians – may not be acceptable to America’s allies, including those in NATO. Precision munitions are costly, and procuring them at a time of budgetary austerity can be contentious. Yet inadequate inventories also can be costly in terms of human lives if they are not available when

needed. Recall that during the Libya operation it was reported that military leaders of the six NATO nations that provided combat aircraft “openly complain[ed] that they are running out of smart bombs” because procurement of them had been limited by budget cuts.<sup>86</sup>

Clearly, NATO countries – which, on average, spend only 1.7% of their gross domestic product (GDP) on defense<sup>87</sup> – do not give defense spending the priority that the U.S. does, even though the accuracy of expensive American weaponry may protect civilians in wartime at least as much as ILOAC does. This seeming uneven sharing of the burden is having an effect on the American perspective. In stinging 2010 speech former Secretary of Defense Robert Gates said: “The blunt reality is that there will be dwindling appetite and patience in the U.S. Congress – and in the American body politic writ large – to expend increasingly precious funds on behalf of nations that are apparently unwilling to devote the necessary resources or make the necessary changes to be serious and capable partners in their own defense. Nations apparently [are] willing and eager for American taxpayers to assume the growing security burden left by reductions in European defense budgets.”<sup>88</sup>

Many might understandably consider these to be hard – and to an extent, unfair – words to direct towards friends and allies, but they do suggest an important reason why it is unlikely that Americans would evince a particular interest in new ILOAC regulations. Americans, who spend 4.8% of GDP on defense,<sup>89</sup> are not likely to be disposed to embrace in the near term any new ILOAC regulations – even emanating from friendly countries – absent evidence of an equal willingness, as Secretary Gates says, to devote the necessary resources or make the necessary changes to be serious and capable partners in their own defense.

To reiterate, Americans do strongly support international law, and especially ILOAC. They take their obligations under applicable law very seriously, and recognise that there are areas where clarifications of ILOAC might be helpful. That said, they are quite wary of new agreements or rules,

<sup>82</sup> H.R. Clinton, International Code of Conduct for Outer Space Activities, U.S. Department of State, 17 January 2012, <http://www.state.gov/secretary/rm/2012/01/180969.htm> (18 March 2012).

<sup>83</sup> U.S. Department of State, An International Code of Conduct for Outer Space Activities: Strengthening Long-Term Sustainability, Stability, Safety, and Security in Space, 17 January 2012, <http://www.state.gov/documents/organization/181208.pdf> (18 March 2012).

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Smart Bomb Shortage in Libya, in: Strategy Page, 19 April 2011, <http://www.strategypage.com/htm/w/htairw/20110419.aspx> (18 March 2012).

<sup>87</sup> T. Shanker/E. Schmitt, Seeing Limits to ‘New’ Kind of War in Libya, in: The New York Times, 21 October 2011, <http://www.nytimes.com/2011/10/22/world/africa/nato-war-in-libya-shows-united-states-was-vital-to-toppling-qaddafi.html> (18 March 2012).

<sup>88</sup> R.M. Gates, Remarks by Secretary Gates at the Security and Defense Agenda, Brussels, Belgium, U.S. Department of Defense, 10 June 2011, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4839> (19 March 2012).

<sup>89</sup> Military Expenditures (% of GDP), World Bank, 2012, <http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS> (18 March 2012).



and especially those that may, in practice, serve more as a restraint on U.S. actions than on those who the U.S. opposes and who violate existing ILOAC regulations with regularity. In 1988 Abraham Sofaer (while still the U.S. Department of State legal advisor) observed that: “The approval of the United States should never be taken for granted, especially when an agreement deals with national security, the conduct of military operations and the protection of victims of war.”<sup>90</sup> In this writer’s opinion, these words are as relevant in analysing the American mindset today as they were when

uttered a quarter-century ago. While the U.S. would no doubt be open to discussing ILOAC proposals, those who may want to propose them would be well-served by cultivating a keen appreciation of the American perspective, even if that perspective is not fully shared by America’s closest friends and most treasured allies.



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<sup>90</sup> A.D. Sofaer, *supra* note 69, p. 787.