INTERNATIONAL LAW STUDIES
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The DoD *Law of War Manual* and its Critics: Some Observations

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92 INT'L L. STUD. 85 (2016)

Volume 92 2016

Published by the Stockton Center for the Study of International Law

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I. INTRODUCTION

When the Department of Defense (DoD) issued its *Law of War Manual* in June of 2015[1]—an effort decades in the making—it is clear that it anticipated criticism. For an organization not especially disposed to be humble about its accomplishments, it made a surprising invitation in the text for "comments and suggestions."[2] Several experts (and other pundits) have taken up

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The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

1. U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ¶ 1.1.1 (2015) [hereinafter DOD MANUAL].

2. *Id.* at vi.

that offer, and have done so publically. Indeed, two major national/international security law-focused blogs, *Just Security*[3] and *Lawfare*,[4] created sections within their websites devoted to the *Manual*.

Many observers had been concerned about what the final product might look like. Hays Parks, the now-retired Marine and long-time DoD lawyer whom most experts consider to be his generation's dean of law of war specialists, shepherded the project for almost three quarters of its two-decade development, and had expected it to be fielded sometime in 2010.[5] However, progress on the *Manual* was abruptly halted that year when the Department of Defense decided to re-engage the inter-agency process, reportedly in deference to some political appointees in the Obama Administration who "aggressively sought changes in the DoD Manual to conform to their political philosophies or legal arguments in detainee litigation."[6] This led to fears by Parks and others that the final document would be mired in politics and reflect incorrect interpretations of the law that could "endanger the lives of [U.S.] fighting men and women."[7]

Those fears appear to have been largely avoided in the *Manual*, notwithstanding other criticisms that have arisen. The purpose of this article is to examine some of those critiques, and to offer, where appropriate, counters to those assessments, as well as suggestions as to how the *Manual* might be improved. Although this article does not purport to be a comprehensive examination of every aspect of the *Manual* or, for that matter, a response to every criticism that has been lodged against it, I nevertheless conclude that on balance the *Manual* provides an excellent, comprehensive and much-needed statement of the U.S. Department of Defense's view of

3. *A Reader's Guide to Our Mini-Forum on DOD's New Law of War Manual*, JUST SECURITY (Aug. 12, 2015), https://www.justsecurity.org/25371/readers-guide-mini-forum-dods-law-war-Manual/.

4. *2015 Defense Department Law of War Manual, By Chapter*, LAWFARE, https://www.lawfareblog.com/2015-defense-department-law-war-manual-chapter (last visited Nov. 2, 2015).

5. Hays Parks, National Security Law in Practice: The Department of Defense Law of War Manual, Speech to the American Bar Association Standing Committee on Law and National Security (Nov. 18, 2010), http://jnslp.com/wp-content/uploads/2010/11/aba-speech-11082010-final-as-given.pdf.

6. Edwin Williamson & Hays Parks, *Where Is the Law of War Manual?*, THE WEEKLY STANDARD (July 22, 2013), http://www.weeklystandard.com/articles/where-law-war-Manual_739267.html.

7. *Id.*

the *lex lata* of the law of war.[8] Consequently, with a few exceptions, what follows is generally a defense of the *Manual* pertaining to several issues that have proven to be contentious.

II. HUMAN SHIELDS

One of the most energetic and derisive of the *Manual*'s early critics is Professor Adil Ahmad Haque of Rutgers University (Newark) School of Law.[9] Just weeks after its release, he alleged on the *Just Security* blog that based on his reading of the text, the DoD "apparently thinks that it may lawfully kill an unlimited number of civilians forced to serve as involuntary human shields in order to achieve even a trivial military advantage."[10]

I responded by arguing a number of points, beginning by dismissing Haque's interpretation of what he thinks the *Manual* asserts.[11] What the *Manual* actually says about human shields is to repeatedly make the point that using them is prohibited by international law. It reflects the indisputable axiom that "civilians must not be used as shields or as hostages."[12] It further makes it clear that civilians, including human shields, must not be made the object of an attack.[13]

Importantly, contrary to what Haque's post suggests, the *Manual* does *not* exempt the U.S. military from the affirmative duty "to take feasible precautions to reduce the risk of harm to the civilian population and other protected persons and objects" and to incorporate such precautions "when planning and conducting" attacks.[14] More specifically, the *Manual* insists that "wanton disregard for civilian casualties or harm to other protected persons and objects is clearly prohibited."[15]

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8. See, however, notes 151 and 152, *infra*, and accompanying text (arguing that the *Manual*, by its own terms, does not necessarily speak for the entire U.S. government).

9. Faculty Profile: Professor Adil Ahmad Haque, RUTGERS LAW SCHOOL, http://www.law.rutgers.edu/ (last visited Jan. 26, 2016).

10. Adil Ahmad Haque, *The Defense Department's Indefensible Position on Killing Human Shields*, JUST SECURITY (June 22, 2015), https://www.justsecurity.org/24077/human-shields-law-war-Manual/.

11. Charles J. Dunlap, Jr., *Human Shields and the DOD Law of War Manual: Can't We Improve the Debate?*, JUST SECURITY (June 25, 2015), https://www.justsecurity.org/24199/human-shields-dod-law-war-Manual-cant-improve-debate/. This section is largely taken from that blogpost.

12. *See, e.g.*, DOD MANUAL, *supra* note 1, ¶¶ 2.5.3.3, 5.16.3, 10.5.1.4, 11.6.1.

13. *Id.* ¶ 5.3.2.

14. *Id.* ¶ 5.3.3.

15. *Id.* ¶ 5.3.3.2.

The *Manual* does recognize that "in some cases, a party to a conflict may attempt to use the presence or movement of the civilian population or individual civilians in order to shield military objectives from seizure or attack."[16] It counsels however—*and this is critical*—that when "enemy persons engage in such behavior, commanders should continue to seek to discriminate in conducting attacks and to take feasible precautions to reduce the risk of harm to the civilian population and civilian objects"[17]

Regarding, human shields in particular, the *Manual* states:

> Harm to Human Shields. Use of human shields violates the rule that civilians may not be used to shield, favor, or impede military operations. The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, *provided that the attacker takes feasible precautions in conducting its attack*.
>
> If the proportionality rule were interpreted to permit the use of human shields to prohibit attacks, *such an interpretation would perversely encourage the use of human shields* and allow violations by the defending force to increase the legal obligations on the attacking force.[18]

So Haque's overstated accusation is *legally* deficient as there are plenty of precautions aimed at protecting civilians memorialized in the *Manual*'s text. I also suggested that regardless of where one might stand on the *Manual*, should we not all be concerned that nowhere in his legal analysis does Haque even mention "feasible precautions" despite it being embedded (repeatedly) in the *Manual* as a legal requirement? I asked, rhetorically, is that not a pretty significant omission? And, of course, it is.

Haque dismisses DoD's common-sense view that allowing unscrupulous defenders to succeed in deterring attacks through the use of human shields would "perversely encourage the use of human shields." He contends that:

> [A]ttacking combatants despite the presence of involuntary shields will not make those combatants any worse off than they would have been without those shields. On the contrary, if defending forces expect addi-

16. *Id.* ¶ 5.5.4.
17. *Id.* (emphasis added).
18. *Id.* ¶ 5.12.3.3 (emphasis added).

> tional (say, political) benefits and no additional costs from using involuntary shields then killing these involuntary shields will not deter their use.[19]

If you accept this logic, then you are buying into the idea that *even if targets come to accept that they will not be protected from attack by surrounding themselves with human shields*, they will nevertheless continue to burden themselves by acquiring, guarding, feeding, housing and otherwise supporting human shields. Moreover, they will do so even though the very presence of human shields increases their "footprint" (and therefore their chances of being detected by a variety of surveillance capabilities), diminishes their own reputation for fearlessness, risks strategic "backfire,"[20] hardens public opinion against them[21] and can put them in conflict with religious beliefs.[22] In truth, there are *considerable* costs to keeping human shields, especially under circumstances where they would not, in fact, actually constitute a shield.

Nevertheless, Haque speculates that targets still would perceive that they could "expect" additional "political" benefits from keeping human shields, presumably from propagandizing those who might be killed in strikes. This is wrong for two reasons: one, thanks to advances in technology, targets can no longer assume that simply being close to civilians will mean that civilians will die in an attack (consider that even though terrorists targeted in drone operations have tried to do just that, civilian casualties from drone strikes are actually rare these days[23]); and, secondly, even when hostages are killed in attacks (as was the case in 2015), public support for such strikes remains strong despite concerns among the populace that the attacks could endanger the lives of innocent Americans.[24]

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19. Haque, *The Defense Department's Indefensible Position*, *supra* note 10.

20. Rod Norland, *ISIS Tactics Questioned as Hostages Dwindle*, NEW YORK TIMES (Feb. 1, 2015), http://www.nytimes.com/2015/02/02/world/middleeast/isis-tactics-questioned-as-hostages-dwindle.html?_r=2.

21. Molly Guinness, *Hostage Taking Has Paid in the Past—But it Has Won ISIS Nothing*, THE SPECTATOR (Sept. 14, 2014), http://blogs.new.spectator.co.uk/2014/09/hostage-taking-has-paid-in-the-past-but-it-has-won-isis-nothing/.

22. *Taking Hostages and Killing Them is Un-Islamic*, ISLAM 101, http://www.islam101.com/terror/hostages.htm (last visited Jan. 15, 2016).

23. William Saletan, *Don't Blame Drones*, SLATE (Apr. 24, 2015), http://www.slate.com/articles/news_and_politics/foreigners/2015/04/u_s_drone_strikes_civilian_casualties_would_be_much_higher_without_them.1.html.

24. *Public Continues to Back U.S. Drone Attacks*, PEW RESEARCH CENTER: U.S. POLITICS & POLICY (May 28, 2015), http://www.people-press.org/2015/05/28/public-continues-to-back-u-s-drone-attacks/.

In his responses to my critique, Haque argues that I have a "utilitarian argument" as to the importance of avoiding incentivizing an enemy to use human shields.[25] Not so, except perhaps to say I see great utility in not allowing the law of war (LoW) to incentivize activities that put civilians at risk. In my view one of the underlying purposes of the LoW is, as the *Manual* puts it, "protecting combatants, noncombatants, and civilians from unnecessary suffering,"[26] and it should be interpreted towards that end. I disagree with Haque's conclusion that the LoW mandates allowing a belligerent unimpeded use of human shields, subject only to some theoretical after-the-fact accountability for war crimes.

In fact, I believe it is not improper for an attacker to consider the protection of civilians as well as the importance of maintaining adherence to the LoW as part of the "definite military advantage sought" in conducting a proportionality analysis.[27] Along this line, the *Manual* notes that the Final Report of the Persian Gulf War concluded that military advantage "is not restricted to tactical gains, but is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait."[28]

Acting to preserve the LoW operates broadly as a strategy not just as a philosophical good, but also a very practical way to deny the enemy the ability to *effectively use human shields as a method of warfare in its military operations.* Doing so offers a definite military advantage to the attacker—not to mention civilians—over the longer term. Importantly, as the *Manual* makes clear, international law does *not* require that the "advantage" be "immedi-

25. Adil Ahmad Haque, *Human Shields and Proportionality: A Reply to Charlie Dunlap*, JUST SECURITY (June 26, 2015), https://www.justsecurity.org/24233/human-shields-reply-charlie-dunlap/.

26. *See, e.g.*, DOD MANUAL, *supra* note 1, ¶¶ 2.5.3.3, 5.16.3, 10.5.1.4, 11.6.1.

27. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 57(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol 1].

28. DOD MANUAL, *supra* note 1, ¶ 5.7.7.3 n.170.

ate,"[29] and that advantage is "not restricted to immediate tactical gains, but may be assessed in the full context of the war strategy."[30]

We can never forget that voluntary and involuntary human shields undermine the fundamental law of war principle of distinction and the protection of innocent civilians. The real issue is what works best to protect civilians? Here is where the *Manual* could be clearer. It would be better to explicitly point out that, as described above, when an attack is designed at least in part to deny an adversary the military advantage of using human shield as a method of warfare, that end constitutes a powerful *strategic* military advantage for the attacker to seek and is, therefore, quite significant in determine what might be feasible in the protection of civilians.

Subsequent to this colloquy, two more notable posts appeared on the *Just Security* blog about human shields. The first, with the very intriguing title *Human Shields: Weapon of the Strong*, is co-authored by Professor Neve Gordon, a political scientist at Ben-Gurion University, and Brown University anthropologist, Professor Nicola Perugini.[31] In their essay they bring an extraordinarily useful interdisciplinary voice to the dialogue by critiquing both Haque and me by contending that we "both treat human shielding as an ahistorical phenomenon and therefore fail to address a much more fundamental question: Why does the *Law of War Manual* suddenly include clauses dealing with human shields?"

They argue that "human shielding is not a new phenomenon" and go on to propose an answer to their own question by saying:

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29. *Id.*, ¶ 5.7.7.3 (citing J. Fred Buzhardt, DoD General Counsel, Letter to Senator Edward Kennedy, Sept. 22, 1972, *reprinted in* 67 AMERICAN JOURNAL OF INTERNATIONAL LAW 122, 124 (1973)) ("Turning to the deficiencies in the Resolutions of the Institut de Droit International, and with the foregoing in view, it cannot be said that Paragraph 2, which refers to legal restraints that there must be an 'immediate' military advantage, reflects the law of armed conflict that has been adopted in the practices of States.").

30. *Id.*, ¶ 5.7.7.3. (footnote omitted) (citing CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT ON TO CONGRESS 613 (1982) ("'Military advantage' is not restricted to tactical gains, but is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait.)"). *See also* WILLIAM H. BOOTHBY, THE LAW OF TARGETING 189 n.70 (discussing the statement made by the UK in ratifying Additional Protocol I to the Geneva Conventions); IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 64 (2009).

31. Neve Gordon & Nicola Perugini, *Human Shields: Weapon of the Strong*, JUST SECURITY (Oct. 22, 2015), https://www.justsecurity.org/27005/human-shields-weapon-strong/.

> Our counterintuitive hypothesis is that human shields are not only being deployed as a weapon of the weak against high tech states (the underlying assumption of both Haque and Dunlap), but that the legal phrase "human shield" has also been mobilized by strong states to legitimize the increasing deaths of civilians on the battlefield.[32]

Gordon and Perugini, who sponsored a workshop on this subject,[33] are certainly correct in that human shields have been used in the past. Yet frequency of a particular issue does matter when military manuals are being written. With respect to human shields, Professor Michael Schmitt in his work on the subject says the phenomenon is "endemic in contemporary conflict,"[34] but also cites a quote from Jean Pictet's 1958 commentaries on the Geneva Conventions, which said at that time that such instances were "fortunately rare."[35] Something rare in the past would logically and understandably be treated more extensively when it becomes "endemic" simply as a matter of military practicality as opposed to any nefarious reasons.

Regardless, military professionals and others who would use the *Manual* would likely not be surprised as to why it addresses the phenomenon in more detail than did previous documents. Previous use of human shields just did not prove to be the deterrent to attack that they have become today (this is likely why the instances were, in Pictet's assessment, "rare"). Why the change? The truly unprecedented sensitivity to *any* civilian casualties that we see in current operations simply did not exist in earlier eras. And that sensitivity is not, particularly, because of new legal impediments, *per se*, but because of *policy* restraints much beyond what the LoW requires.

As I have discussed in *War on the Rocks*, the Obama Administration created—and publicized—policy standards for the use of force in counterterrorism operation outside of what it calls "areas of active hostilities" that demand not just a determination (as international law would have it) that the expected casualties not be "excessive" in relation to the anticipated military advantage, but rather a "near certainty" that *no* civilian casualties will

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32. *Id.*

33. The workshop, entitled "The Politics of Human Shielding" took place at Brown University (RI) on November 17, 2015.

34. Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 38 ISRAEL YEARBOOK ON HUMAN RIGHTS 17, 18 (2008).

35. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 208 (Jean Pictet ed., 1958).

occur.[36] I observed in that essay that while human shields were "a serious violation of international law," this was "hardly an impediment to al-Qaeda, especially if violating it might ensure policy-induced protection against airstrikes or other uses of force."[37] Though the Administration said in the fall of 2014 that the restrictive policies would not apply to operations against the Islamic State in Iraq and Syria (ISIS), it appears that equally limiting standards have nevertheless been in place.[38]

Predictably, given the openly announced standards, today's adversaries have concluded that using human shields will "work" because they assume—for understandable reasons—that the human shields will protect them from attack, or if they are attacked, to give them a propaganda windfall. As a Syrian activist recently put it, ISIS "uses civilians as human shields to claim that the U.S.-led coalition is targeting innocent people during the strikes."[39]

ISIS's use of human shields is an expression of a version of what I call "lawfare," whereby a party to a conflict creates the *perception* of illegality in order to serve a belligerent purpose.[40] In other words, as opposed to Gor-

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36. Charles Dunlap, *Civilian Casualties, Drones, Airstrikes and the Perils of Policy*, WAR ON THE ROCKS (May 11, 2015), http://warontherocks.com/2015/05/civilian-casualties-drones-airstrikes-and-the-perils-of-policy/ (citing Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, White House, May 23, 2013, https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism).

37. *Id.*

38. *See* Michael Isikoff, *White House Exempts Syria Airstrikes from Tight Standards on Civilian Deaths*, YAHOO NEWS (Sept. 30, 2014), http://news.yahoo.com/white-house-exempts-syria-airstrikes-from-tight-standards-on-civilian-deaths-183724795.html. However, recent news reports indicate that very tight standards are, in fact, being applied:

> A senior American official said every air strike, whether conducted by a fighter jet or unmanned aerial vehicle, night or day, must be cleared by an American general officer. In order to strike a building it has to be determined that it is "sole use ISIS," meaning there must be certainty that the enemy is not co-mingling there with civilians. "We aim for zero collateral damage," said one young officer in the CJOC.

Justin Fishel, Martha Raddatz & Luis Martinez, *Inside the US Command Center at the Front Lines of ISIS Fight*, ABC NEWS (Nov. 19, 2015), http://abcnews.go.com/International/inside-us-command-center-front-lines-isis-fight/story?id=35315658.

39. Sarbaz Yousef, *ISIS Uses Iraqi Civilians as Human Shields, Dozens Killed in U.S.-led Strike Near Kirkuk*, ARA NEWS (June 2015), http://aranews.net/2015/06/isis-uses-iraqi-civilians-as-human-shields-dozens-killed-in-u-s-led-strike-near-kirkuk/.

40. Charles J. Dunlap, Jr., *Lawfare*, *in* NATIONAL SECURITY LAW & POLICY 823 (John Norton Moore, Guy B. Roberts & Robert F. Turner, eds., 3d ed. 2015).

don and Perugini's interpretation of the discussion in the *Manual*, the use of human shields at various times in the past simply never developed into the reliably effective military tactic that needed to be addressed as it does today. The fact is that such abuse of civilians did not necessarily deter attackers in earlier eras, and the employers of human shields were vulnerable to having their own people treated similarly. It rarely worked then; it often works now.

Furthermore, the pervasiveness of twenty-first century information technologies simply did not exist in previous wars. Belligerents lacked the technical means to rapidly and effectively exploit the deaths of the human shields as easily as they can today. That reality, combined with the fact that in earlier eras human shields did not deter most attacks, can readily explain why human shields were not discussed as they are in the new *Manual*. Personally, I have *never* heard *anyone*—let alone a military professional—suggest anything remotely along the "legitimize civilian deaths" lines as Gordon and Perugini hypothesize.

This raises a further issue with Gordon's and Perugini's hypothesis: the complete absence of *any* evidence that indicates any sort of *norm* is arising demonstrating that the so called "strong States" have "mobilized" the human shields phenomenon to "legitimize the increasing deaths of civilians on the battlefield." That said, Gordon and Perugini may be extrapolating from their view of Israel's operations in Gaza to a supposition about "strong States" more generally.[41]

At the risk of oversimplification, my sense is that Gordon and Perugini have concluded that Israel has essentially declared the entire area of Gaza as one where *all* civilians are being actively used as human shields. This characterization, they seem to contend, has allowed Israel not only to declare all civilian deaths as result of Israeli attacks the responsibility of the Hamas defenders for illegally using human shields, but also to permit Israel to relieve itself of the targeting precautions—to include any proportionality analysis—that the LoW would otherwise require in most circumstances. I do not read the DoD Manual as endorsing such a broad interpretation of human shielding, but I gather Gordon and Perugini do.

41. *See, e.g.*, Neve Gordon & Nicola Perugini, *On "Human Shielding" in Gaza*, AL JAZEERA (July 18, 2014), http://www.aljazeera.com/indepth/opinion/2014/07/human-shielding-gaza-201417154428830848.html.

To be clear, I am not necessarily agreeing with what seems to be their interpretation of Israel's use of force in Gaza,[42] but if accurate, Israeli actions would be hard to square with the law. Rather, I believe that even if true, Israel's actions are not themselves enough to establish an *international* norm vis-à-vis human shields. Personally, I view much of the legal aspects of the Israeli-Palestinian situation as *sui generis*, and of limited LoW application beyond its rather specific and unique circumstances.

In any event, the United States has instituted policies—as wrong-headed (albeit well-intended) as they may be—that are plainly just the opposite—that is, aimed at the quixotic goal of a "near certainty" of zero civilian deaths, not any "legitimization" of them. These overly restrictive policies—expressed in rules of engagement—have actually inhibited the application of force against, for example ISIS, that would otherwise be permitted by international law.[43]

Moreover, it has *always* been the case since 9/11 that the vast majority of civilian casualties have *not* been caused by "strong States." To the contrary, it is adversaries whose disregard for international law typically goes beyond merely the unlawful use of human shields that are overwhelmingly responsible. For example, in its August 2015 report about civilian deaths in Afghanistan, the UN "documented a 78 per cent increase in civilian casualties attributed to Anti-Government Elements from complex and suicide attacks and a 57 per cent increase in civilian casualties from targeted kill-

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42. I find Schmitt's analysis of Israeli targeting approaches generally more persuasive. *See, e.g.*, Michael Schmitt, *The Relationship Between Context and Proportionality: A Reply to Cohen and Shany*, JUST SECURITY (May 11, 2015), https://www.justsecurity.org/22948/response-cohen-shany/.

43. *See, e.g.*, John Hayward, *Impossible Rules of Engagement: "Zero Civilian Casualties" in ISIS Battle*, BREITBART (June 24, 2015). In addition, consider:

> In Iraq and Syria today, the US operates under a zero civilian casualty standard that far exceed the standards of international law. That policy is backfiring—it is extending the time to secure military objectives; allows more time for the Islamic State to commit atrocities; more radical Islamists to emerge out of Syria; and it yields the Islamic State the equivalent of an air defense capability they do not have to pay for, equip, or man to employ. Moreover, this excessive caution is sparking a crisis in confidence that has invited further violence emboldening others to take action not aligned with US interests. Russian intervention in Syria is an obvious example, and the attacks in Paris are the most recent manifestation of a timid and feckless coalition strategy.

David A. Deptula, *We Can't Stop the Islamic State with a "Desert Drizzle,"* USA TODAY (Nov. 15, 2015), http://www.usatoday.com/story/opinion/2015/11/15/we-cant-stop-islamic-state-desert-drizzle-column/75777004/.

ings."[44] The UN also "attributed 94 per cent of all civilian casualties from targeted killings to Anti-Government Elements."[45]

The facts are glaringly inapposite of Gordon's and Perugini's contentions, and just do not support the idea that the United States as a "strong State" is responsible for "increasing deaths of civilians on the battlefield."[46] Indeed, as grim as the statistics are, they serve as an empirical counterpoint to any supposed American effort at "legitimization" of civilian causalities. Indeed, it is evidence that the view of human shields as reflected in the *Manual* is not interpreted or used by U.S. forces to accomplish the nefarious end Gordon and Perugini allege, notwithstanding whatever may be the case with the Israelis.

The second of the new postings on this topic was by Haque himself.[47] While he applauded Gordon and Perugini's essay, he went on to speculate that the current *Manual* approach to human shields is somehow sourced in a 1990 law review article authored by Hays Parks, the renowned LoW expert I mentioned above.[48] Suffice to say, absent explicit evidence linking him to the *Manual's* construct, I would not conclude that Parks—who retired from the government in 2010 and who has declined to read the *Manual*—had anything to do with drafting this section of it (even assuming Haque is correct in his analysis of the Parks article).[49] As I have pointed out elsewhere,[50] the language to which he objects comes from a 1991 State Department response to the International Committee of the Red Cross

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44. To be clear, of the total civilian deaths, 70 percent were caused by anti-government elements, 16 percent by pro-government forces, 10 percent unattributed and 4 percent other. *See* UN Assistance Mission to Afghanistan & UN Office of the High Commissioner for Human Rights, Afghanistan Mid-Year Report 2015: Protection of Civilians in Armed Conflict, 3 (Aug. 2015), http://www.ohchr.org/Documents/Countries/AF/UNAMA_Protection_of_Civilians_in_Armed_Conflict_Midyear_Report_2015.docx.

45. *Id.* at 8.

46. Gordon & Perugini, *supra* note 31.

47. Adil Ahmad Haque, *Human Shields in the DOD Manual: A New Mistake or an Old One?*, JUST SECURITY (Oct. 29, 2015), https://www.justsecurity.org/27173/human-shields-dod-manual-mistake-one/.

48. *Id.* The article to which Haque refers is W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1 (1990).

49. Parks' article is cited elsewhere in the *Manual*. I would not conclude that the current construct is his invention. S*ee* DOD MANUAL, *supra* note 1, ¶ 15.5.4 n.85.

50. Charles J. Dunlap, Jr., *Let's Balance the Argument About the DOD Law of War Manual and Targeting*, JUST SECURITY (July 10, 2015), https://www.justsecurity.org/24542/lets-balance-argument-dod-law-war-Manual-targeting/.

(ICRC). Unless Parks or the *Manual* drafters state otherwise, Haque's contention remains in the realm of imagination.

Haque also claims that the *Manual*'s "position" is that "civilians forced to serve as human shields can never render an attack unlawfully disproportionate, no matter how great the expected harm to those civilians or how small the anticipated military advantage."[51] Yet nowhere does he cite any text that actually states this alleged "position." More importantly, it diametrically conflicts with the *Manual*'s many statements requiring attackers—including where human shields are involved—to use all feasible precautions to prevent harm to civilians.[52]

Allow me to clarify my construct for the *Manual*'s view of human shields that considers the proportionality analysis certainly differently than Haque, but perhaps even differently that the *Manual* drafters. Briefly, I suggest that where the object of an attack is the *military force* employing human shields, and the military necessity[53] for doing so rests not so much on the desire to halt the use of human shields because it is an inhuman and illegal action, *per se*, but rather because the use of human shields has become in a given conflict a regularized, explicit and effective *method of warfare* for a particular enemy, the calculus necessarily changes, and perhaps even dramatically so.[54]

Consequently, the proportionality analysis as to what might be excessive in order to achieve that specific anticipated *military* advantage (that is, halting the enemy's use of a tactic that may have shown real success in discouraging the use of force against them), would fit within that extant mandate of the *Manual* to do everything "feasible" to avoid harm to human shields. Put another way, given the *military* purpose involved, the proportionality calculation could be quite different as to what it may take to end the *military* utility of using human shields—as well as what would be "feasible" under those circumstances to protect them.[55] In short, the assessment

51. Haque, *Human Shields in the DOD Manual*, *supra* note 47.

52. *See, e.g.*, DOD MANUAL, *supra* note 1, ¶ 5.12.3.3.

53. Regarding "military necessity," see generally Francoise Hampson, *Military Necessity*, CRIMES OF WAR, http://www.crimesofwar.org/a-z-guide/military-necessity/ (last visited Jan. 15, 2016).

54. *Cf.* Boothby, *supra* note 30, at 137 ("[T]he proportionality assessment must still be undertaken in cases where there are involuntary human shields in the vicinity of intended target of the attack, the better view is that the increased numbers of expected civilian casualties will not necessarily be excessive given the deliberate placing of civilians there.") (citations omitted).

55. *Id.*

must necessarily take into account the atypical circumstance where the use of civilians as human shields intensifies into a significant *military* advantage for an unscrupulous defender. If the utility of human shields—and the consequent risk to civilians—is to be blunted, it needs to be unambiguously established *militarily* that the use of human shields will not, in fact, prevent an attack on any forces employing them.

This approach is related to the concept of reprisal, but not conterminous with it. Obviously, it does not involve—or permit—targeting human shields directly, but it also does not depend upon determining whether the human shields are truly voluntary or not—something that may be a practical impossibility, especially with respect to aerial attacks. Causing an adversary to abandon this method of warfare can produce a concrete and direct military advantage that also serves to protect civilians who might otherwise be employed as human shields were the tactic allowed to be effective.

There are, however, much more orthodox explanations for the *Manual*'s approach, and that is the time-honored norm of international law that there are certain categories of persons—munitions workers for example—whose proximity to an otherwise legitimate target is "understood not to prohibit attacks under the proportionality rule." [56] Specifically, the *Manual* restates the long-standing U.S. view that a "party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, provided that the attacker takes feasible precautions in conducting its attack."[57]

Understandably, one might want to distinguish (as this writer would like to do) between voluntary and involuntary human shields, but the chaos of battlefield reality is such that delineations among civilians are not any more feasible to make than would be the case with voluntary/involuntary munitions workers. It is also important to recall with respect to voluntariness, the LoW—as Butch Bracknell recently noted—makes no exception for non-volunteers conscripted into a belligerent's armed forces. They are subject to targeting under the LoW simply because of their status, even if it could be conclusively shown that their military service is involuntary.[58]

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56. DOD MANUAL, *supra* note 1, ¶ 5.12.3.2.

57. *Id.*, ¶ 5.12.3.3.

58. Butch Bracknell, *Warnings to Civilians Directly Participating in Hostilities: Legal Imperative or Ethics-based Policy?*, LAWFARE (Nov. 29, 2015), https://www.lawfareblog.com/warnings-civilians-directly-participating-hostilities-legal-imperative-or-ethics-based-policy. Bracknell does indicate that there may be human rights issues with the use of involuntary conscripts.

Still, under the LoW does an *involuntary* civilian human shield have distinct individual rights independent of the behavior of belligerents? No, that is simply not how the *lex specialis* of the LoW works as it mainly concerns *parties* to a conflict, not the private rights of individuals. Even if the LoW was somehow rejiggered to be individual human rights-centric, it is not clear that the apparently preferred outcome of Haque, Gordon and Perugini for human shields would result. One would also have to consider the individual human rights of combatants to live, not to mention the rights of civilians who would be imperiled by the continued unrestrained use of human shields.

Moreover, critics seem to want a LoW rule that would, in effect, permit a clever and unprincipled adversary *with access to enough human shields* to create a legal "fortress" around all or a significant part of his critical military capability where virtually any attack would be legally prohibited. To reward a belligerent for flaunting the LoW in that way is flatly contrary to the principle of international law expressed in the axiom *ex injuria non jus oritur* or "legal rights should not be understood to result from the commission of wrongful acts."

This does not mean, as Gordon and Perugini seem to fear, that the entire battlespace can be transformed into an area where the normal proportionality rules and other precautions do not apply irrespective of the actual location of specific military capabilities. Rather, it is to simply make the point that proliferate use of illegal human shields in a militarily significant way cannot be allowed to create a force of legally protected military objects that cannot be otherwise effectively struck. In this context, the "feasibility" determination would take into account how militarily important and effective the enemy's use of human shields has become. If their use is sporadic, and the impact is only minimal in a particular situation, the "feasibility" requirement may markedly limit an attack or even bar it altogether.

This axiom is particularly relevant here because the critics do not offer any option for militaries confronted with the systematized use of human shields as a method of war except to expect them to accept whatever setbacks and even defeats that the illicit tactic can produce. This illegality is different from many other violations of the LoW such as, for example, the infliction of unnecessary suffering on combatants or even the targeting of civilians because it is aimed at achieving a definite and concrete military advantage, that is, the protection of military objects, via an illicit method.

International law recognizes that States will not accept tactical or, especially, *strategic* defeat because of some legal construct that allows a lawbreaker to use with impunity a criminal means to achieve victory over them.

More generally, the law understands that at the end of the day, even uniquely unpalatable and undesired actions may nevertheless be required. A form of this concept, I would argue, underlays the International Court of Justice's opinion in the *Nuclear Weapons* case wherein the Court spent considerable time decrying the weapons but finally concluded that they could not say their use, as horrific as it might be, would be illegal under extreme circumstances.[59]

Of course, this is not to imply that the use of human shields would typically engage the exigencies of nuclear weapons use, but it does illustrate the importance of international law—and especially the LoW—remaining workable and sensible to law-abiding nations. A good example is how the 1936 London Charter[60] regarding submarine warfare proved impractical in combat, and has been subsequently interpreted (not without some controversy) in a way that honorable nations are not disadvantaged.[61] Given that the law has proven almost totally impotent in restraining today's adversaries who routinely violate LoW in exquisitely barbaric ways, we should be very sensitive to—and resistant of—any reading of the LoW that seems to result in privileging such lawbreakers *because of their lawbreaking*. To do so would invite the unravelling of the LoW regime if States conclude it produces such anomalous—and dangerous—results.

There is no doubt that human shields represent a devilishly complicated issue with no perfect answers. In many, or most, cases a commander would not, for policy reasons, conduct an attack where human shields of any type exist. But the *Manual* principally aims not to make fact-dependent policy decisions, but rather to describe what existing law permits.

We already live in a world where the worst belligerents exhibit a stunning contempt for the LoW, and the *Manual*—very wisely in my judgment—avoids incentivizing their use of human shields, something that would be the inevitable result of the adoption of Haque's view, as well as

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59. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 105 (July 8).

60. Procès-Verbal: Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930, Nov. 6, 1936, 173 L.N.T.S. 353, 3 Bevans 298, *reprinted in* 31 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 137 (1939).

61. *See* J. Ashley Roach, *Legal Aspects of Modern Submarine Warfare*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 379–80 (2002).

that of Gordon and Perugini. It is imperative that the LoW not be allowed to be manipulated by criminals so as to give *de facto* immunity to their military objectives. Such a situation would leave the fate of civilians to monsters whose very use of human shields clearly illustrates their gross indifference to human life.

III. PRECAUTIONS IN ATTACK

Professor Haque and I also clashed over his critique of the *Manual*'s admittedly unartful reading of Article 57(3) of Additional Protocol 1 of the Geneva Conventions (AP I) (to which the United States is not a party).[62] It deals with precautions commanders must take before attacking in order to avoid unnecessary harm to civilians. According to Haque, this *Manual* provision, which he seems to understand as a total rejection of the essence of Article 57(3), is "both legally and morally unsustainable."[63] His interpretation is one that the ICRC does not seem to share, but more about that in a minute.

In my response, entitled *Let's Balance the Argument about the DOD Law of War Manual and Targeting*,[64] I began by inviting readers to look at the provision of the Additional Protocol so they may make their own judgment. The text of Article 57(3) provides:

> *When a choice is possible* between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.[65]

Here is what the *Manual* says about that provision:

> AP I provides that "[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." The United States has

62. Protocol I*, supra* note 27, art. 57(3).

63. Adil Ahmed Haque, *The Defense Department Stands Alone on Target Selection*, JUST SECURITY (June 29, 2015), https://www.justsecurity.org/24264/dod-stands-alone-target-selection/.

64. Dunlap, *Let's Balance the Argument*, *supra* note 50. This section is largely taken from that post.

65. Protocol I, *supra* note 27, art. 57(3) (emphasis added).

> expressed the view that *this rule is not a requirement of customary international law*.[66]

With respect to the last sentence, the *Manual* provides a footnote that says in substance:

> Paragraph 4B(4) contains the language of Article 57(3) of Protocol I, and is not a part of customary law. The provision applies "when a choice is possible . . . ;" it is not mandatory. An attacker may comply with it if it is possible to do so, *subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination.*[67]

Haque considers this citation to be a mere "Army statement" (perhaps because of a misleading footnote in the ICRC customary law study[68]), but it is actually from the *Digest of United States Practice in International Law 1991–1999*.[69] According to the State Department, the Digest is intended to "provide the public with a historical record of the views and practice of the Government of the United States in public and private international law."[70] This particular extract is from a January 11, 1991 telegram sent in response to a December 1990 memo that the ICRC distributed (to nations who might participate in the then pending Gulf war conflict) about the applicability of what the ICRC terms "International Humanitarian Law."

In short, the position Haque criticizes is not a recent invention of DoD or the Army, but rather has been the view of the U.S. government for almost twenty-five years. Equally importantly, consider how the ICRC interprets the U.S. position in its study of customary international law:

> Interpretation
> The United States has emphasized that *the obligation* to select an objective the attack on which may be expected to cause the least danger to civilian

66. DOD MANUAL, *supra* note 1, ¶ 5.11.5 (emphasis added).

67. *Id.*, ¶ 5.11.5 n.303 (emphasis added).

68. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 67 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL Study].

69. U.S. Comments on the International Committee of the Red Cross's Memorandum on the Applicability of International Humanitarian Law in the Gulf Region, Jan. 11, 1991, *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1991–1999, 2057, 2064 (Sally J. Cummins & David P. Stewart eds., 2005), http://www.state.gov/documents/organization/139394.pdf.

70. *Digest of United States Practice in International Law*, U.S. DEPARTMENT OF STATE, http://www.state.gov/s/l/c8183.htm (last visited Jan. 12, 2016).

> lives and to civilian objects *is not an absolute obligation, as it only applies* "*when a choice is possible*" and thus "an attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination."[71]

In other words, the ICRC does *not* relate the U.S. view as a wholesale rejection of the "obligation" but says that the view is merely an *interpretation* explicating the precise circumstances in which it applies, that is, "when a choice is possible." While the United States had—and continues to have—many objections to the ICRC study,[72] this particular rendition of the U.S. view has not drawn complaints from the U.S. government.

You be the judge, but I do not think that the U.S. common-sense interpretation is "legally and morally unsustainable," and my bet is that others would agree. In fact, this may be why it has not generated much in the way of criticism over the years. The interpretation reflects, I would suggest, a keen understanding of the realities of war and hard experience in the importance of clarity about something that could easily be misunderstood (as it seems, Haque has done).

However, what may be a bona fide criticism of the *Manual* is that the ICRC interpretation may be a clearer and better explanation of the U.S. position, and ought to be considered for adoption in the next iteration of the *Manual*.

IV. MORALITY, HONOR, AND THE COLLAPSE OF RECIPROCITY[73]

As can already be seen, part of my sparring with Professor Haque over human shields and targeting drifted into my objection to his characterization of various *Manual* provisions as "morally unintelligible," and to the charge that the assessments of the *Manual*'s drafters had "no obvious basis" in "morality."[74] I saw these remarks as *ad hominem* attacks on those who

71. CIHL Study, *supra* note 68, at 67 (emphasis added).

72. John B. Bellinger, III & William J. Haynes, *A US Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 INTERNATIONAL REVIEW OF THE RED CROSS 433 (2007), https://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf.

73. This section is taken mainly from the author's post, Charles J. Dunlap, Jr., *Honor, Morality, and the DOD Law of War Manual*, JUST SECURITY (Oct. 26, 2015), https://www.justsecurity.org/27094/honor-morality-dod-law-war-manual/.

74. *See* Haque, *The Defense Department's Indefensible Position*, *supra* note 10.

take a different view as to how to accomplish what seems to be the same end sought by Haque: the protection of civilians.[75]

Haque countered by insisting that "nowhere in [his] post [does he] question the *character* of the *DoD Manual*'s *authors*. [He says that he is] sure that they are fine people. Instead, [he] question[s] the *soundness* of the *DoD Manual*'s *position*."[76] When I answered by saying that you could not separate an attack on the morality of a position, from an attack on the author of it,[77] he responded with a number of contentions, including the view that "[i]f morality were subjective—an expression of each individual's emotions or preferences—then, indeed, all moral disagreement would be an exchange of personal attacks. However, morality is not subjective but objective, not an expression of how we feel but a reflection of how things are."[78]

Still, Haque's reference to morality is a worthy concern, and one in which I do find some of common ground with him when evaluated in a slightly different context. Regarding that context, consider the implications of what Creighton Professor Sean Watts calls a "significant recalibration" of law of war principles in the *Manual*, and one that "signals a return to very broad, generally applicable legal principles in a truer sense."[79] Specifically, Watts is assessing the fact that while there have been several different listings of such principles over the years, the *Manual* settles upon "[t]hree interdependent principles—*military necessity*, *humanity*, and *honor*—[as providing] the foundation for other law of war principles, such as *proportionality* and *distinction*, and most of the treaty and customary rules of the law of war."[80]

To Watts, the inclusion of "humanity" is "perhaps its most drastic adjustment to existing doctrine."[81] He considers that the *Manual*'s "notion of humanity abandons recent refinements of that concept in favor of a more general approach." But what he finds "most surprising" is the *Manual*'s "revival of the principle of honor" (which he uses, as the *Manual* does, in-

75. Dunlap, *Human Shields and the DOD Law of War Manual*, *supra* note 11.

76. Haque, *Human Shields and Proportionality*, *supra* note 25.

77. Dunlap, *Let's Balance the Argument*, *supra* note 50.

78. Adil Ahmad Haque, *DOD is Still Wrong about Target Selection and Civilians*, JUST SECURITY (July 15, 2015), https://www.justsecurity.org/24671/dod-wrong-target-selection-civilians/.

79. Sean Watts, *The DOD Law of War Manual's Return to Principles*, JUST SECURITY (June 30, 2015), https://www.justsecurity.org/24270/dod-law-war-manuals-return-principles.

80. DOD MANUAL, *supra* note 1, ¶ 2.1.

81. Watts, *supra* note 79.

terchangeably with chivalry).[82] Watts says the *Manual* "sketches honor in exceedingly broad terms and applies it to an extensive range of battlefield conduct," but questions the "practical utility of the principle."[83]

Professor Rachel VanLandingham has a harsher assessment saying she has a "visceral negative reaction" to the *Manual*'s "emphasis on honor and chivalry."[84] In her mind they are "outdated, chauvinistic, and frankly distasteful concepts."[85] She also thinks that chivalry "connotes chauvinism, elitism, and the inhumanity of the Crusades," adding that "codes of honor" signal "the assumed white, western, Christian superiority of the [era of the Crusades]."[86]

While some elements of chivalry may have indeed had chauvinistic connotations, *modern* concepts of battlefield honor can and do draw from a broader and deeper moral source that underpins the law of war. Professor Terry Gill of the University of Amsterdam and the Netherlands Defence Academy relates:

> Chivalry and martial honour have long been regarded as essential components of warrior ethics and military tradition. They are reflected in most cultures in one way or another, ranging from Western warrior tradition dating back to classic antiquity and medieval chivalry, to the various warrior codes of the ancient and medieval Near East, India, China and Japan. They also were practiced in various forms by many other cultures outside the arc of Eurasian/Mediterranean civilisation, including Native Americans and warrior peoples in Africa and the Pacific.[87]

Michael Ignatieff makes a similar point it his classic book *The Warrior's Honor: Ethnic War and the Modern Conscience* where he notes that modern law of war conventions "drew upon a deeper moral source—the codes of a warrior's honor."[88] Ignatieff explains that

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82. *Id.*

83. *Id.*

84. Rachel Vanlandingham, *The Law of War is Not about Chivalry*, JUST SECURITY (July 20, 2015), https://www.justsecurity.org/24773/laws-war-chivalry/.

85. *Id.*

86. *Id.*

87. Terry Gill, *Chivalry: A Principle of the Law of Armed Conflict?*, *in* ARMED CONFLICT AND INTERNATIONAL LAW: IN SEARCH OF THE HUMAN FACE 35 (Mariëlle Matthee, Brigit Toebes & Marcel Brus eds., 2013) (citations omitted).

88. Michael Ignatieff, THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE 116–17 (1998).

> Warrior's honor was both a code of belonging and an ethic of responsibility. Wherever the art of war was practiced, warriors distinguished between combatants and noncombatants, legitimate and illegitimate targets, moral and immoral weaponry, civilized and barbarous usage in the treatment of prisoners and of the wounded. Such codes may have been honored as often in the breach as in the observance, but without them war is not war—it is no more than slaughter.[89]

Contrary to Watt's bemusement about the inclusion of honor/chivalry in the *Manual*, and VanLandinghams's apparent revulsion of it, I find real wisdom in what the *Manual*'s drafters have done. My reasoning is that doing so might help address the vacuum occasioned by the near disappearance of what was once a key supporting pillar of the law of war—reciprocity—from the kinds of conflicts in which military forces find themselves these days. Indeed, Watts and Vanlandingham both allude to today's phenomenon of belligerents who make it part of their way of fighting to flaunt non-adherence to the law of war. Witness ISIS's horrific burning of a captive Jordanian pilot,[90] and even more appalling, the crucifixion of children and their burial of them alive.[91]

The increasing irrelevance in practical terms of the concept of reciprocity should be of no small concern to advocates of the rule of law in war. Professor Ken Anderson of American University warned not long ago that "[o]bligation without reciprocity risks breakdown [of the rules of war] even faster where one side is pressed to protect the civilians of both sides put at risk because that's how the other side deliberately wages war, not merely from indifference to them."[92] What is more, Anderson ominously predicts that in such circumstances:

> A system of formal reciprocity in the rules of war (each side has the same formal obligations), but *also* independence of obligation to the rules of war (each side's obligation is independent of what the other side does, in-

89. *Id.* at 117.

90. *ISIS Video Shows Captured Jordanian Pilot Being Burned Alive*, REUTERS (Feb. 3, 2014), http://www.haaretz.com/news/middle-east/1.640631.

91. Stephanie Nebehay, *Islamic State Selling, Crucifying, Burying Children Alive in Iraq—UN*, REUTERS (Feb. 4, 2015), http://in.reuters.com/article/2015/02/04/mideast-crisis-children-idINKBN0L828E20150204.

92. Kenneth Anderson, *Laurie Blank on Proportionality in the International Law of Targeting*, THE VOLOKH CONSPIRACY (July 31, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/31/laurie-blank-on-proportionality-in-the-international-law-of-targeting/.

> cluding if the other side violates the rules) over time is likely either to rupture in crisis or else simply have less and less purchase as universal rules.[93]

Although the *Manual* still talks gamely of reciprocity,[94] it is doubtful that many American troops battling today's depraved foes expect to be treated by them as international law would require. How then do commanders and their lawyers rationalize lawful behavior to the troops? Can fear of punishment alone do the job? Maybe in some cases, but reinforcing the idea of honor and chivalry, which implicitly call upon the individual to do the right thing even when the enemy is not, can be an important motivator in modern war.

I believe that this is how Haque's insistent reference to morality, which I see as involving honor and chivalry, can best be productively operationalized. Although I continue to disagree with how he expresses it at times, his underlying concept (as I interpret it anyway) that morality "matters" is more than just a philosophical good, but also a practical necessity if we are to expect the troops to adhere to the law under circumstances of extreme stress in the face of an adversary who cruelly mocks the most basic principles of the law of war.

Translating morality, *qua* morality, into more secular references to honor and chivalry may be a way to broadly and effectively access the warfighter's psychology that one wishes to animate towards law of war compliance.

V. JOURNALISTS

Whatever consternation was produced by any other part of the *Manual*, nothing resulted in more outcry from the Fourth Estate than its references to journalists, and to the possibility that circumstances exist where they might be considered spies or belligerents. In a breathless editorial—*The Pentagon's Dangerous Views on the Wartime Press—The New York Times* typified criticism by claiming that the *Manual* would make the work of journalists "more dangerous, cumbersome and subject to censorship," demanding that its provisions relating to the "treatment of journalists covering armed conflicts . . . should be repealed immediately."[95]

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93. *Id.*

94. *See, e.g.*, DOD MANUAL, *supra* note 1, ¶ 3.6.

95. Editorial, *The Pentagon's Dangerous Views on the Wartime Press*, NEW YORK TIMES (Aug. 10, 2015), http://www.nytimes.com/2015/08/10/opinion/the-pentagons-dangerous-views-on-the-wartime-press.html?_r=0. *See also DoD's Law of War Manual Allows Jour-*

While the Pentagon[96] offered a strong defense of this part of the *Manual*, as did others,[97] I found the *Times*' deeply-flawed and at times nonsensical editorial to unintentionally demonstrate why the public has so little confidence in newspapers these days, particularly when compared to its confidence in the military.[98] Indeed, Americans' trust in the media generally remains at "historical lows."[99] Though the *Times* itself seems to struggle with why this may be,[100] the truth is that this editorial is an example of why people rightly are skeptical of the media's ability to get things right.

In this instance, the *Manual* lays out the various legal statuses that might attach to journalists by saying: "[i]n general, journalists are civilians. However, journalists may be members of the armed forces, persons authorized to accompany the armed forces, or unprivileged belligerents."[101] It emphasizes that journalists "are regarded as civilians; *i.e.*, journalism does not constitute taking a direct part in hostilities such that such a person would be deprived of protection from being made the object of attack."[102] However,

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nalists to be Held as "Unprivileged Belligerents," FOX NEWS (Aug. 26, 2015), http://www.foxnews.com/us/2015/08/26/dod-law-war-manual-allows-journalists-to-be-held-as-unprivileged-belligerents/; Rowan Scarborough, *New Pentagon Manual Declares Journalists can be Enemy Combatants*, THE WASHINGTON TIMES (June 21, 2015), http://www.washingtontimes.com/news/2015/jun/21/military-manual-declares-war-on-spies-propagandist/?page=all; Ernesto Londono, *Will the Pentagon Change its Manual on the Law of War?*, NEW YORK TIMES (Aug. 18, 2015), http://takingnote.blogs.nytimes.com/2015/08/18/will-the-pentagon-change-its-manual-on-the-law-of-war/?_r=0; Michael Cochrane, *New U.S. Law of War Manual has Media Up in Arms*, WORLD: DAILY DISPATCHES (Aug. 31, 2015), http://www.worldmag.com/2015/08/new_u_s_law_of_war_manual_has_media_up_in_arms; Christophe Deloire, *US Department of Defense Must Revise the Law of War Manual*, REPORTERS WITHOUT BORDERS (Aug. 11, 2015), http://en.rsf.org/united-states-us-department-of-defense-must-11-08-2015,48216.html.

96. *The Law of War Manual: The Pentagon Responds*, AL JAZEERA (Aug. 29, 2015), http://www.aljazeera.com/programmes/listeningpost/2015/08/law-war-manual-pentagon-responds-150829095950357.html.

97. Alex Loomis, *The New York Times is Confused About the Law of War Manual*, LAWFARE (Aug. 12, 2015), https://www.lawfareblog.com/new-york-times-confused-about-law-war-manual.

98. *Confidence in Institutions*, GALLUP (June 2–7, 2015), http://www.gallup.com/poll/1597/confidence-institutions.aspx.

99. *Americans' Trust in Media Remains at Historical Low*, GALLUP (Sept. 28, 2015), http://www.gallup.com/poll/185927/americans-trust-media-remains-historical-low.aspx.

100. *Why Has Trust in the News Media Declined?*, NEW YORK TIMES (Nov. 12, 2015), http://www.nytimes.com/roomfordebate/2015/11/11/why-has-trust-in-the-news-media-declined.

101. DOD MANUAL, *supra* note 1, ¶ 4.24.

102. *Id.*, ¶ 4.24.2.

it also acknowledges the inarguable truth that there are times when even journalists can lose their protection. Specifically, the *Manual* points out that:

> Journalists and Spying. Reporting on military operations can be very similar to collecting intelligence or even spying. A journalist who acts as a spy may be subject to security measures and punished if captured. To avoid being mistaken for spies, journalists should act openly and with the permission of relevant authorities. Presenting identification documents, such as the identification card issued to authorized war correspondents or other appropriate identification, may help journalists avoid being mistaken as spies.[103]

As I pointed out in an op-ed, *The New York Times, Dangerously Uninformed, vs. the Military*,[104] the *Times* is apparently unaware that the *Manual* does little more than lay out what the Geneva Conventions and other legal authorities have provided for decades. For example, the *Times*' editors decry the fact that the *Manual* notes that when journalists relay to adversaries "information of immediate use in combat operations," such real-time and direct support of enemy warfighting efforts might jeopardize the protected status journalists normally enjoy.[105] This is nothing new. The International Committee of the Red Cross (ICRC) makes clear that journalists are protected like other civilians,[106] but not "for such time as they take a direct part in hostilities"—language which is itself taken directly from the 1977 Protocol I to the Geneva Conventions.[107]

So what would constitute direct participation for a journalist? The *Times* ridicules the *Manual* for having what it calls a "vaguely-worded standard" in this regard.[108] Actually, the ICRC itself uses "transmitting tactical targeting

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103. *Id.*, ¶ 4.24.4.

104. Charles J. Dunlap, Jr., *The New York Times, Dangerously Uninformed, vs. the Military*, THE HILL (Aug. 13, 2015), http://thehill.com/blogs/pundits-blog/defense/251007-the-new-york-times-dangerously-uninformed-vs-the-military. Much of this section is taken from the op-ed in *The Hill*.

105. *The Pentagon's Dangerous Views on the Wartime Press*, *supra* note 95.

106. Robin Geiss, *How does International Humanitarian Law Protect Journalists in Armed-Conflict Situations?*, INTERNATIONAL COMMITTEE OF THE RED CROSS (July 27, 2010), https://www.icrc.org/eng/resources/documents/interview/protection-journalists-interview-270710.htm.

107. Protocol I, *supra* note 27, art. 51(3).

108. *The Pentagon's Dangerous Views on the Wartime Press*, *supra* note 95.

intelligence for a specific attack" as one example of direct participation.[109] Put another way, the *Manual*'s illustration virtually mirrors the substance of the ICRC's assessment—something the *Times* could have easily discovered if they had exercised a modicum of due diligence.

One has to wonder whether anyone (other than the *Times*' editors) really believes that journalists have some kind of unfettered right to broadcast to ISIS militants or whomever might be listening that, for example, a clandestine military operation to rescue human shields is about to get underway?

The *Times* also obviously resents that anyone would even suggest that a journalist might be involved in spying. In truth, it is hardly a news flash[110] that spies have long used the "journalist" sobriquet as a cover.[111] In fact, in reporting the death in 2013 of Austin Goodrich, a former CBS reporter-cum-spy, the *Times* itself admits that he was "far from the only journalist doubling as a secret agent" in the 1950s and 1960s.[112] Is the *Times* really so naive to think that in today's world where adversaries are willing to bury children alive,[113] they would be squeamish about using journalists as secret agents?

It is not hard to figure out why journalists could be effective spies. After all, international law defines spying as "when [someone] acting clandestinely or on false pretenses . . . obtains or endeavors to obtain information in the zone of operations of a belligerent . . . with the intention of communicating it to the hostile party."[114] Is not a journalist someone who "obtains or endeavors to obtain information in the zone of operations"? For its part, the American Press Institute (API) defines journalism as "the activity of gathering, assessing, creating, and presenting news and infor-

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109. *Direct Participation in Hostilities: Questions & Answers*, INTERNATIONAL COMMITTEE OF THE RED CROSS (June 2, 2009), https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm.

110. RICHARD A. BEST, JR., CONG. RESEARCH SERV., RL33715, COVERT ACTION: AN EFFECTIVE INSTRUMENT OF U.S. FOREIGN POLICY? (1996).

111. Murray Seeger, *Spies and Journalists: Taking a Look at Their Intersections*, NIEMAN REPORTS (Sept. 11, 2009), http://niemanreports.org/articles/spies-and-journalists-taking-a-look-at-their-intersections/.

112. Bruce Weber, *Austin Goodrich, Spy Who Posed as Journalist, Dies at 87*, NEW YORK TIMES, July 15, 2015, at A15.

113. Stephanie Nebehay, *supra* note 91.

114. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, art. 29, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

mation."[115] One need not be a military expert to realize that the API definition reflects much the same skill set as that of a military intelligence officer. In short, the *Manual*'s concern about journalists is hardly unreasonable.

The ICRC understands that it is a real possibility that a journalist might actually be an intelligence operative, and simply insists that a journalist so suspected must not be subject to arbitrary detention, and must be given a fair trial.[116] The *Manual* is, of course, fully supportive of such humane treatment.

In addition, the *Times*' editorial reveals a blissful ignorance about the impact of modern technologies on battlefield reporting. A new study by the Royal Danish Defense College regarding the "weaponization of social media" gives examples as to how today's press reporting is being exploited by terrorist organizations in combat:

> Internet (live streamed news reports on web-TV) and social network media (e.g., Journalists tweeting from crisis areas) [are] also being used by non-state actors without sophisticated Intelligence Surveillance and Reconnaissance (ISR) assets to conduct Bomb Damage Assessment (BDA) of, e.g., their rocket attacks.[117]

In other words, even the most well-meaning journalist might be inadvertently aiding the enemy. This illustrates that, yes, there are instances where it is necessary to temporarily restrain reporting—even by bona fide journalists. This is completely legal, and not just under international law: The U.S. Supreme Court has *never* found that the First Amendment entitles journalists or anyone else to communicate to the enemy real-time information it can readily use to fight U.S. troops.[118]

Why? The court has held that it is "obvious and unarguable" that "no governmental interest is more compelling than the security of the Nation."[119] Indeed, in the 2010 case of *Holder v. Humanitarian Law Project*, the court upheld as consistent with the First Amendment the actual *criminaliza-*

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115. *What is Journalism?*, AMERICAN PRESS INSTITUTE, http://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/ (last visited Nov. 9, 2015).

116. CIHL Study, *supra* note 68, at 118.

117. Thomas Elkjer Nissen, #THEWEAPONIZATIONOFSOCIALMEDIA: @CHARACTERISTICS_OF_CONTEMPORARY_CONFLICTS 83–84 (2015), http://www.fak.dk/publikationer/Documents/The%20Weaponization%20of%20Social%20Media.pdf.

118. William A. Wilcox, Jr., *Security Reviews of Media Reports on Military Operations: A Response to Professor Lee*, THE ARMY LAWYER, Nov. 2004, at 10.

119. Haig v. Agee, 453 U.S. 280 (1981).

tion of the conveyance of relatively benign and unclassified legal information to designated terrorist organizations.[120]

The *Times* also arrogates to itself the right to declare who is or is not a journalist. When a Pentagon official raised the example of the assassination of the Afghan military commander Ahmad Shah Massoud in September 2001 by assassins who posed as television journalists, the *Times* editors scoffed that "[t]hey were not, in fact, journalists."[121] In the real world, however, determining who is or is not a journalist is not an easy thing, especially given that anyone with access to a social media can describe him or herself as a "citizen journalist."[122] These are, we are told, private individuals who "do essentially what professional reporters do."[123]

Accordingly, although the *Times* objects mightily to a journalist accreditation process, should any "citizen journalist" with a Twitter account be allowed to traipse around a battlefield transmitting whatever sensitive military activity interests him or her? Furthermore, is not some vetting appropriate in light of the Massoud incident? Again, even a cursory examination of Additional Protocol I clearly shows that it contemplates that it will be a government—not the *Times* or any newspaper—that "attests" to a person's "status as a journalist."[124]

I concluded my op-ed by observing that the United States needs a fully informed, robust and courageous media, particularly during wartime. And it needs reporters on the battlefield who are willing to accurately represent the facts to the public. The press, however, cannot deem itself above the Constitution or the international law to which America has bound itself. Nor can it be insensitive to the needs of those this country sends in harms' way. Denigrating the military simply because its *Manual* reflects the law as it exists is a formula for the further loss of confidence of the American people in their newspapers and other journalistic endeavors.

120. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

121. *The Pentagon's Dangerous Views on the Wartime Press*, *supra* note 95.

122. Tony Rogers, *What Is Citizen Journalism?*, ABOUT.COM, http://journalism.about.com/od/citizenjournalism/a/whatiscitizen.htm (last visited Nov. 9, 2015).

123. *Id.*

124. Protocol I, *supra* note 27, art. 79(3).

VI. CYBER

One of the most interesting sections of the *Manual* (and not the first time about which this writer is commenting[125]) is Chapter 16 on *Cyber Operations*. What is remarkable is not so much anything dramatically new in the text, but rather that it was included at all. For many years, almost everything about cyber, other than that which related to purely defensive cyber matters, was classified; indeed, the Pentagon's joint doctrine was only declassified in 2014.[126] What discussion of the U.S. view of law in this area that existed in official venues was mainly based on a long-available 1999 U.S. Department of Defense General Counsel (GC) memorandum,[127] and the ground-breaking 2012 speech by Harold Koh, then legal advisor to the U.S. State Department.[128]

The *Manual*'s chapter on cyber operations hews to the earlier DoD memo and the Koh speech in virtually all particulars. Controversy may exist, however, in at least two areas. Specifically, the *Manual* diverges a bit from what many scholars believe is the proverbial "gold" standard, the highly respected *Tallinn Manual* (which it does not even cite). An effort of international experts, under the auspices of NATO's Cooperative Cyber Defence Centre of Excellence, the *Tallinn Manual* attempts to capture and interpret the extant international law applicable to cyber.[129]

To be sure, the *Manual* and the *Tallinn Manual* are in accord in many respects,[130] but the two documents part ways on the issue of the degree of

125. Charlie Dunlap, *Cyber Operations and the New Defense Department Law of War Manual: Initial Impressions*, LAWFARE (June 15, 2015), https://www.lawfareblog.com/cyber-operations-and-new-defense-department-law-war-Manual-initial-impressions. Much of this section of the article is taken from this blog post.

126. Jared Serbu, *DoD Declassifies its Long-Awaited Joint Doctrine for Cyberspace Operations*, FEDERAL NEWS RADIO (Oct. 27, 2014), http://federalnewsradio.com/defense/2014/10/dod-declassifies-its-long-awaited-joint-doctrine-for-cyberspace-operations/.

127. U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE GENERAL COUNSEL, AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS (2d ed. 1999) *reprinted in* 76 INTERNATIONAL LAW STUDIES 460 (2002).

128. Harold Hongju Koh, Legal Advisor of the U.S. Dep't of State, International Law in Cyberspace, Address to the USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012), http://www.state.gov/s/l/releases/remarks/197924.htm.

129. THE TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL].

130. *See* Michael N. Schmitt, *International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed*, 54 HARVARD JOURNAL OF INTERNATIONAL LAW ONLINE 13 (2012), http://www.harvardilj.org/wp-content/uploads/2012/12/HILJ-Online_54_Schmitt.pdf.

force that is necessary to trigger the right of self-defense under Article 51 of the UN Charter.[131] The *Tallinn Manual* takes the view of most international law scholars that the prohibition on the "use of force," found in Article 2(4) of the Charter,[132] is different from what might constitute an "armed attack" under Article 51. The *Manual*, however, takes the position—as reflected in the Koh speech—"that the inherent right of self-defense potentially applies against *any* illegal use of force."[133]

In addition, while traditionally an "armed attack" necessarily involved some degree of violence and destruction, the *Manual* suggests that this may not always be the case. Specifically, it uses as an example of a cyber operation that would "cripple a military's logistics systems, and thus its ability to conduct and sustain military operations" as an incident that might be "considered a use of force under *jus ad bellum*."[134] Other scholars, like Schmitt, also seem to be acknowledging that significant cyber events may have an effect so severe that States will consider them the equivalent of an armed attack even in the absence of direct, physical destruction as is the case with more traditional weaponry, even though the boundaries may not be clear.[135] Schmitt says that "[s]hutting down the national economy is probably an act of war, but short of that, we're not certain."[136]

Despite having been published since June of 2015, many pundits seem unaware of this chapter of the *Manual*. For example, in September of 2015, an op-ed appeared asserting that in cyber a "new battlefield has emerged

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131. Charter of the United Nations, art. 51, Jun. 26, 1945, 59 Stat. 1031. Article 51 provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

132. *Id.*, art. 2(4). That article provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

133. DOD MANUAL, *supra* note 1, ¶¶ 1.11.5.2, 16.3.3.1.

134. *Id.*, ¶ 16.3.1 (citations omitted).

135. Ryan Fairchild, *When Can a Hacker Start a War*, PACIFIC STANDARD MAGAZINE (Feb. 6, 2015), http://www.psmag.com/nature-and-technology/when-cyber-attack-constitutes-act-of-war (quoting Michael Schmitt).

136. *Id.*

that has anonymous combatants, civilian targets *and no established rules*."[137] Actually, as both the *Manual* and the *Tallinn Manual* make clear, there are rules, but ascertaining the facts by which to apply those rules can be difficult in the cyber arena. Still, as Schmitt concedes, circumstances can arise where the legal answers are not yet clear.[138] This is especially true regarding hostile cyber incidents below the threshold of "force," so we can expect further developments in future editions of the *Manual*.[139]

Even more significant is a letter from several congressmen to the State Department insisting that "[n]ow is the time for the international community to seriously respond again with a binding set of international rules for cyberwarfare: an E-Neva Convention."[140]

Perhaps the issue is that although the *Manual* sketches out the DoD's view of the law, it does not provide a "cookbook" setting out the legal status for every possible cyber incident. As Admiral Rogers pointed out in recent testimony, the DoD is still "still working [its] way through" what constitutes an "act of war" in a given situation.[141] That is understandable, but even if the *Manual* never becomes a cookbook (as it never should be), it should be amended as more detailed guidance becomes available. In this respect, the *Manual* is more of a beginning, than a finished state of the U.S. view of the law of cyber operations.

VII. CONCLUSION

This short article by no means examined all of the *Manual*'s critiques, let alone all the thoughtful dialogue it engendered. For example, Army Reserve Major Patrick Walsh's examination of the *Manual* led him to make an

137. Daniel Reidel, *New Rules Needed for Digital War*, FEDERAL TIMES (Aug. 11, 2015), http://www.federaltimes.com/story/government/solutions-ideas/2015/08/11/new-rules-needed-digital-war/31461251/.

138. Fairchild, *supra* note 135 (quoting Michael Schmitt).

139. Outside the Manual process, a "Tallinn 2.0" effort is underway to address this area of cyber operations. *See, e.g.*, Ashley Deeks, *Tallinn 2.0 and a Chinese View on the Tallinn Process*, LAWFARE (May 31, 2015), https://www.lawfareblog.com/tallinn-20-and-chinese-view-tallinn-process.

140. Cory Bennett, *Congress Steps Up Push for Global Cyber Laws*, THE HILL (Nov. 9, 2015), http://thehill.com/policy/cybersecurity/259557-capitol-hill-steps-up-push-for-global-cyberspace-laws. The "E-Neva Convention" reference is supposed to be an allusion to the Geneva Conventions.

141. John Grady, *Defense Officials Tell Congress Rules of Cyber Warfare Far From Settled*, USNI NEWS (Sept. 30, 2015), http://news.usni.org/2015/09/30/defense-officials-tell-congress-rules-of-cyber-warfare-far-from-settled.

interesting call to correct what he terms as a "major flaw" in the Uniform Code of Military Justice as he believes it has "no provision for command responsibility."[142] I am not sure I agree with him as Articles 18 and 21 of the Code do provide for courts-martial jurisdiction for violations of the "law of war," which would include offenses related to command responsibility.[143]

Professor Jordan Paust points out that the Supreme Court has on more than one occasion concluded that Congress has included, in language very similar to that of the current Code, the authority to try offenses arising under the law of war.[144] Accordingly, I think that with innovative charging, an appropriate law of war crime based on command responsibility can be pursued within the existing parameters of the Code.

Another interesting critique comes from the highly-respected law of war expert Professor Geoffrey Corn.[145] Corn found it "perplexing" that the *Manual* did not elevate the LoW obligation "to take all feasible precautions to mitigate the risk to civilians" from a "mere rule" to "a fundamental principle" of the LoW. Candidly, it is not perplexing to me because while the *Manual* has shown some fresh thinking regarding precautions to be taken during attacks,[146] it is still essentially a *lex lata*, as opposed to a *lex feranda*, document. His proposal is just not reflective of the vast majority of interpretations of the LoW's fundamental principles.[147] More specifically, it is hard to see how it might affect the actual practice of the LoW, except perhaps to obscure the point that it is "excessive" civilian casualties that the LoW focuses upon. In fact, in the current war against ISIS, credible reports

142. Patrick Walsh, *The DOD Law of War Manual and Command Responsibility: Is it Time for a "Necessary and Reasonable" Change to the UCMJ?*, JUST SECURITY (Aug. 19, 2015), https://www.justsecurity.org/25488/dod-law-war-manual-command-responsibility-time-necessary-reasonable-change-ucmj/.

143. Uniform Code of Military Justice, arts. 18, 21 (codified at 10 U.S.C. §§ 818, 821).

144. E-mail from Jordan Paust, Mike and Teresa Baker Law Center Professor of International Law at the Law Center of the University of Houston, to Charles J. Dunlap, Jr., Professor of the Practice of Law, Duke University School of Law (Oct. 16, 2015) (on file with the author). *See also* Jordan Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEXAS LAW REVIEW 6, 10–28 (1971).

145. Geoffrey S. Corn, *Precautions to Minimize Civilian Harm are a Fundamental Principle of the Law of War*, JUST SECURITY (July 8, 2015), https://www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war/.

146. *See supra*, sec. III.

147. *See, e.g.*, Gary D. Solis, THE LAW OF ARMED CONFLICT ch. 7 (2010) (defining the core principles of the law of armed conflict as distinction, military necessity, unnecessary suffering and proportionality).

about unwarranted caution about civilian casualties (that is, beyond what the LoW requires) "is sparking a crisis in confidence that has invited further violence emboldening others to take action not aligned with U.S. interests."[148]

Nevertheless, these essays and others are the sort of thought-provoking dialogue one hopes the *Manual* will produce. They suggest that the *Manual* will likely become something of a "living" document. As already noted, by its own terms it solicits feedback, and explicitly preserves the idea that the views it contains will evolve.[149] As new weapons, new strategies and new adversaries emerge, we can—and should—expect to see just such an evolution. After all, as the Nuremberg Tribunal observed, the "law is not static, but by continual adaption follows the needs of a changing world."[150]

Still, it remains to be seen the degree to which the *Manual* influences the development of the law of war. Professor Eric Jensen of Brigham Young Law School expresses concern that the *Manual* officially bills itself as merely providing "information on the law of war to DOD personnel responsible for implementing the law of war and executing military operations," instead of aggrandizing for itself a more directive mantle of definitive guidance.[151] He also seems displeased that the *Manual* states that it "does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole" as this may undermine its value as *opinio juris*.[152]

While Jensen's criticisms are thoughtful and important, I think that the language that concerns him is simply bureaucratic conventions required to end the lengthy interagency coordination process that reportedly stalled the *Manual*'s publication for so long.[153] I would expect that the *Manual* will rather quickly become considered the definitive statement of the United States on the LoW. Because the United States has so much practical experience in warfighting, and especially in the complex conflicts of the twenty-

148. Deptula, *supra* note 43.

149. DOD MANUAL, *supra* note 1, ¶ 1.1.1 ("This manual does not, however, preclude the Department from subsequently changing its interpretation of the law.").

150. 1 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 221 (1947), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

151. Eric Jenson, *Law of War Manual: Information or Authoritative Guidance?*, JUST SECURITY (July 1, 2015), https://www.justsecurity.org/24332/law-war-manual-information-authoritative-guidance/.

152. *Id.* (citing DOD MANUAL, *supra* note 1, ¶ 1.1.1).

153. *See supra* notes 5, 6 and accompanying text.

first century, I would be surprised if other nations do not also find it to be the most influential document of its genre.

Allow me to close by paraphrasing what I said about another law of war manual[154] because I believe it to be equally (or more) applicable here:

> [E]fforts like the drafting of the [DoD] Manual are but one part of the overall preparation for lawful, ethical combat. The [DoD] Manual can be instrumental not just to protecting the lives of innocent civilians, or even to defending the perquisites of states, per se. It can also help to provide a degree of confidence, if not comfort, to those who are asked by their nation to perform the most difficult of tasks under the most demanding of circumstances. For this, if nothing else, the enormous effort that produced the [DoD] Manual finds its justification.[155]

154. The Program on Humanitarian and Conflict Research at Harvard University, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2013).

155. Charles J. Dunlap, Jr., *Law of War Manuals and the Warfighting Perspective*, 47(2) TEXAS INTERNATIONAL LAW JOURNAL 276 (2012).