



Soldiers assigned to 1<sup>st</sup> Squadron, 152<sup>nd</sup> Cavalry Regiment, 76<sup>th</sup> Infantry Brigade Combat Team, 38<sup>th</sup> Infantry Division, Indiana Army National Guard, engage in Military Operations in Urban Terrain drill at Lešt military training center, Slovakia, November 10, 2019 (U.S. Air National Guard/Jonathan W. Padish)

# Fog of Warfare

## Broadening U.S. Military Use-of-Force Training for Security Cooperation

By Patrick Paterson

The United States uses its Armed Forces almost exclusively overseas, normally as part of a coalition operation but also for noncombat operations such as disaster relief and

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security assistance. In overseas operations where an armed conflict is occurring, use-of-force rules are governed by the Geneva Conventions and other law of armed conflict (LOAC) treaties. However, in over 80 percent of countries in the world today, violence is being caused not by conventional state-on-state armed conflicts but rather by criminal activity—which is often as intense and violent as conventional conflicts between nations.<sup>1</sup> In these

conditions, LOAC does not apply; there is no *armed conflict* per the legal definition of the term. However, these low-intensity conflicts can be so violent that the militaries in many countries have been called to support police efforts. When U.S. military forces provide security assistance to partner nations in these circumstances, they are operating in a gray area that requires legal and operational knowledge of both military and police tactics.

This dichotomy—U.S. forces adhering to LOAC while international partners follow criminal law and human rights law—creates operational and legal difficulties during U.S. security assistance efforts, a multibillion-dollar program to train and equip U.S. military partners. Hence, when U.S. forces conduct training with other military forces, American forces might be working off one legal framework while partners are governed by another set of rules, ones that are much more restrictive regarding the use of force. Moreover, if U.S. personnel train allied forces on the laws of war in lieu of more restrictive criminal law techniques, those forces might then use inappropriate tactics, which could result in instances of excessive force or human rights violations.

This article examines the nature of contemporary conflicts from two perspectives: the legal references that guide operations and the rules on the use of force. It describes the key differences between military and police tactics on the use of force. These contrasts are particularly important for security assistance efforts that U.S. forces conduct with dozens of partner nations each year. For legal and operational alignment with its partners, the United States should broaden its doctrine and revise its policy on the use of force during security cooperation activities to include police tactics governed by criminal and human rights law.

### **Contemporary Warfare: Drifting Away from Conventional Conflict**

Since the end of the Cold War, the nature of conflicts has changed dramatically. State-on-state wars are rare.<sup>2</sup> As of mid-2020, fewer than a dozen countries (out of nearly 200 worldwide) were in a conflict with another nation. In about two dozen other countries, government security forces are combating organized armed groups.<sup>3</sup> In these cases, the levels of intensity and organization of these groups have crossed an operational threshold and permit government forces to use military firepower against them, according to international humanitarian law in the 1948 Geneva Conventions and 1977 Additional Protocols.

However, most countries have contemporary security challenges that fall below the threshold of an armed conflict and into the category of internal disturbances. The confrontations might be riots, violent crime waves, or gang and cartel violence that occur within the country's borders. Fighting internal to a state—such as violent drug cartels in Mexico, election violence in Kenya, dangerous gangs in El Salvador, or terrorists in France—could involve the military because of the number, violence, and armament of the adversary.<sup>4</sup> But these disputes do not reach a level of violence and organization common in armed conflicts and, therefore, are guided by law enforcement rules and human rights law, not the laws of war. Military forces conducting law enforcement are expected to use police tactics and procedures.

The Western Hemisphere is a good example of how security forces have had to adjust their use-of-force doctrine for contemporary conflicts. Of the nearly three dozen nations that make up Latin America and the Caribbean (to include Mexico), only one—Colombia—is fighting an armed conflict. Nearly all the other nations in the region, though, have had to deploy their militaries internally to support—or, in some cases, supplant—their police forces because of high levels of violence and crime.

Using military forces against armed criminal elements represents the gray zone of contemporary conflict, a blurred battlefield with significant operational and legal challenges. Under these circumstances, modern warfare is more like police work than encounters between military forces.<sup>5</sup> The opponents often consist of irregular forces that blend into the population rather than a conventional force that is easily distinguishable from civilians, such as wearing identifying insignia and openly carrying arms.<sup>6</sup> In many cases, the adversary is a group of well-armed criminals who use violence to profit from their illicit activities. Frequently, individuals in the community participate in the criminal economy to make money (as lookouts, informants, drug lab workers, and drivers, for example) but are not armed and should not be considered a direct threat to security forces.

At the same time, because of the proliferation of small arms in many countries, legitimate members of the community might be armed for self-protection or as part of a neighborhood watch organization or a local militia. In other words, an individual with a weapon should not automatically be considered a threat. In these cases, it is difficult to determine who is an armed criminal and who is a member of local law enforcement. Additionally, in contemporary low-intensity conflicts, the frontlines of the battlefield are constantly shifting and often indistinguishable, blurring the lines between the combatants and noncombatants. In urban settings, military firepower (such as artillery, mortars, heavy weapons, and air support) presents serious risk to the civilian population, and its use might be restricted by military leaders, elevating the danger for security forces. For these reasons, contemporary security operations require a mix of law enforcement skills very different from conventional military training. Domestic law enforcement operations require a vast amount of discretion, diplomacy, and discipline. Lethal force should be considered the recourse of last resort.<sup>7</sup>

### **Differences Between Military and Police Doctrine on the Use of Force**

LOAC and criminal law share several similarities. The right to life is paramount in both cases. Civilians are expected to be protected, property damage should be minimized, torture or cruel treatment is prohibited, prisoners and detainees have certain rights, and medical aid should be rendered to victims immediately. Fundamentally, both fields of law protect the rights of human beings and their property.

There are also significant differences between LOAC and criminal law. Militaries use overwhelming firepower to crush the fighting spirit or warfighting capacity of an opposing force. LOAC rules are much more permissive regarding the use of force. One scholar describes LOAC as a “predilection for violence.”<sup>8</sup> Or, as the International

Committee of the Red Cross puts it, the “conduct of hostilities paradigm tolerates more incidental loss of life than the law enforcement paradigm.”<sup>9</sup> In contrast, under criminal law, use-of-force rules are much more restrictive.

Under LOAC rules, once an opponent is declared an enemy combatant, he or she could be targeted immediately until considered *hors de combat*.<sup>10</sup> There is no requirement to capture or arrest, neither is there a requirement for escalation of force tactics. Lethal force could be used as a first resort. Captured or disabled enemies, however, are entitled to certain protections and rights. They must be treated humanely, given medical

attention if required, and held in safe and sanitary conditions, among other requirements. But they are not necessarily entitled to due process, a speedy trial, or legal representation. They are normally detained until the end of the conflict, when they are repatriated.

In contrast, under criminal law, the suspect could be targeted only if he or she is posing a significant threat of death or serious injury. Lethal force should be considered the last resort, and only a “clear and imminent threat” justifies deadly force. Law enforcement officers are required to attempt to detain the suspect before using lethal force—that is, capture, not kill. If circumstances

permit, police officers are obliged to give a clear warning of their intent to use force with sufficient time for the warning to be observed before resorting to lethal force. Police should also use escalation of force tactics and crisis intervention techniques before resorting to more aggressive actions. According to criminal and human rights law, detained suspects are entitled to certain civil and political rights: due process, to be informed of their rights, the right to counsel or a lawyer, the right to a fair trial, and presumption of innocence, among others. They cannot be held arbitrarily or for an excessive amount of time without trial.<sup>11</sup>



Romanian and Ukrainian special forces and U.S. Army Green Berets conduct close quarters battle training during U.S. Special Operations Command Europe's annual exercise Trojan Footprint 21, in Romania, May 6, 2021 (Courtesy Roxana Davidovits)

**Table 1. Typology of Conflicts Worldwide (2018)**

| Type                        | International Armed Conflict   | Non-International Armed Conflict                             | Other Situations of Violence   |
|-----------------------------|--|--|--|
| Description                 | State on State conflict  | State vs. Organized Armed Group, a form of internal conflict | Internal disturbance that does not rise to the level of armed conflict |
| Currently Active?           | 7 involving 11 countries plus coalition of 14 nations fighting vs. Syria | 51 in 23 countries   | Approximately 165 countries  |
| Percentage of All Countries | ~ 5%   | ~ 12%  | ~ 83%  |

Sources: Annyssa Bellal, *The War Report: Armed Conflicts in 2018* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2019); Stockholm International Peace Research Institute (SIPRI), *SIPRI Yearbook: Armaments, Disarmament and International Security* (Stockholm: SIPRI, 2019).

However, few militaries understand the differences between the two fields of law or how to distinguish between them operationally. One senior U.S. military legal expert describes partner-nation legal knowledge as “woefully inadequate.”<sup>12</sup> As a result, most foreign military forces are unprepared for the new nature of contemporary warfare. And since nearly all the military forces of U.S. foreign partners are operating internally to their country, they are required to apply human rights standards to protect the citizens of that country. It is critical that U.S. Servicemembers who frequently train and interact with U.S. allies understand the legal and tactical differences between the types of contemporary conflict.

Many countries may prefer that their armed forces use LOAC tactics to combat violent criminal groups. The military firepower provides an immense advantage to their security forces. However, the legal parameters require them to fight within the law enforcement paradigm. Combining the two fields of law as a hybrid doctrine is complicated. Governments in many countries have struggled to retrain their militaries and find a balance between military firepower and discretionary police tactics.

### U.S. Government Policy on the LOAC and Human Rights

The U.S. military operates in a fundamentally different way than most other countries. U.S. Armed Forces are legally prohibited from operating internally to the United States, except in extraordinary crises. U.S. military forces nearly always operate on foreign soil and prefer to rely nearly exclusively on LOAC

rules. At the same time, alliances and security cooperation efforts with partner nations are national priorities, ones that provide strategic advantages over potential adversaries. Three interrelated legal ideas account for how the U.S. military operates: complementarity, *lex specialis*, and extraterritoriality.

**Complementarity.** The first legal concept that explains U.S. use-of-force rules is *complementarity*. This term refers to the redundancy of protections for civilians that exists in both the LOAC and human rights law. Current U.S. policy contends that LOAC provides adequate human rights protection, so there is no need to apply both. According to U.S. policy, “compliance with the law of armed conflict will ensure compliance with human rights law.”<sup>13</sup> To some degree, that is accurate. A few prohibited actions exist within both LOAC and human rights law: torture, slavery, rape, depriving right to life, and discrimination, for example. However, the two fields of law also have significant differences, for example regarding targeting, use of lethal force, escalation of force tactics, and detention operations, that are much more restrictive under the law enforcement paradigm compared with under the armed conflict paradigm.

**Lex Specialis.** The second legal concept to understand is *lex specialis*: “the more specific rule overrides the more general rule.”<sup>14</sup> The Geneva Conventions and Additional Protocols contain an immense number of safeguards—nearly 400 provisions—for the protection of combatants, noncombatants, prisoners, and the wounded, among many other subjects. Under this concept and closely

related to extraterritoriality, the United States considers that any foreign military operations outside of its own territory involve only LOAC, not human rights law. While there are some areas of overlap, the LOAC and human rights law are separate and distinct bodies of law, according to U.S. military doctrine; one wholly replaces the other.<sup>15</sup> In fact, Department of Defense (DOD) policy states that “all members of the DOD comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”<sup>16</sup> Applying the laws of armed conflict during combat makes sense, but why would the same laws be applied, as DOD policy states, in “all other military operations,” if an armed conflict does not exist and the tensions can be resolved using police tactics?<sup>17</sup> Additionally, if armed Soldiers are forbidden on the streets of the United States because such actions represent an undue threat to civil and political liberties (per the Posse Comitatus Act), why would similar behavior be considered acceptable in other countries?

Until recently, *lex specialis* has been a widely accepted legal practice. However, with the evolution of conflict, the idea that LOAC could provide sufficient protection for human rights has come into question.<sup>18</sup> As several senior LOAC scholars acknowledge, “there is increasing overlap of human rights law and the law of armed conflict, particularly in non-international armed conflict.”<sup>19</sup> Under conditions on today’s blurred battlefields in which civilians and combatants blend, LOAC and human rights laws can no longer be distinctly and effectively separated.



U.S. Marine Raiders land outside small village during Military Operations in Urban Terrain rehearsals at Bright Star 21, September 11, 2021, in Mohamed Naguib Military Base, Egypt (U.S. Army/Dean Gannon)

Recent U.S. policy decisions on these issues indicate that changes are afoot. Several new legal precedents contend that human rights treaties continue to apply during armed conflicts and that, consequently, U.S. forces should consider both LOAC and human rights considerations simultaneously. The 2018 Judge Advocate General *Operational Law Handbook* states that “where LOAC is silent or its guidance inadequate, specific provisions of applicable human rights law may supplement or possibly even displace . . . the LOAC in a particular situation.”<sup>20</sup> In addition, the new *Commander’s Handbook on the Law of Land Warfare*, which was published jointly by the U.S.

Army and Marine Corps in August 2019 to replace the outdated 1956 *Law of Land Warfare Manual*, acknowledges that human rights continue to apply during armed conflict and that *lex specialis* may have limits in its applicability. The *Handbook* states, “a situation of armed conflict does not automatically suspend nor does LOAC automatically displace the application of all international human rights obligations.”<sup>21</sup>

*Extraterritoriality.* The third legal component of U.S. doctrine refers to the idea that military forces operating in other countries have obligations under human rights law in the territory that they occupy and in which they have

assumed de facto control of basic government functions. *Human rights are the protections citizens of a country have against their own government.* In that sense, according to U.S. policy, human rights are the responsibility of the local government, not of U.S. forces working overseas—unless the United States has explicitly assumed responsibility for the civil and political rights of that country.<sup>22</sup>

The U.S. position on extraterritoriality differs from that of the United Nations and many other countries that have ratified the International Covenant on Civil and Political Rights (ICCPR). The United States contends that the ICCPR does not oblige it to provide civil and political

**Table 2. Principal Differences Between LOAC and Human Rights Law**

| Issue   | Law of Armed Conflict  | Human Rights Law  |
|---|--|---|
| <b>Applicability</b>                          | Applies in international conflicts between nations or non-international internal conflicts against organized armed groups.                             | Applies in times of war or peace. Addresses the universal rights of citizens in their countries.  |
| <b>Participants*</b>                          | Combatants, belligerents, insurgents, noncombatants, and civilians.  | Fighters, criminals, and civilians.   |
| <b>Principal References</b>                   | Geneva Conventions I–IV (1949) and Additional Protocols (1977).  | Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights; and International Covenant on Economic, Social and Cultural Rights. |
| <b>Institutional Oversight and Management</b> | International Committee of the Red Cross.  | United Nations, particularly the Office of the High Commissioner of Human Rights.   |
| <b>Main Issues</b>                            | Rights of combatants, noncombatants, wounded, prisoners, etc. More recent treaties include the use of chemicals, mines, biological, and laser weapons. | Political and economic rights, rights of women, children and people with disabilities, slavery, forced labor, racism, torture, and enforced disappearances.             |
| <b>Principles Regarding the Use of Force</b>  | Discrimination, humanity, necessity, proportionality, and precaution.  | Legality, accountability, necessity, and proportionality.   |
| <b>Violations</b>                             | Gross violations of LOAC are “war crimes.” “Crimes against humanity” and genocide can also occur during war.   | Gross violations of human rights are “crimes against humanity” and can occur during times of war or peace.  |

\* In non-international armed conflicts, members of organized armed groups are not considered combatants and do not have combatant privileges.

guarantees to the citizens of an occupied nation because a state’s obligations under the ICCPR extend only to persons within its territory and subject to its jurisdiction.<sup>23</sup>

If, for the sake of academic discussion, LOAC does not provide sufficient protections of individuals’ human rights, then a military force operating in another country should be obliged to ensure its forces understand the distinctions between the laws of war and human rights law. In many ways, this makes sense. As one scholar put it, human rights laws cannot be dismissed so casually “as to allow a State party to perpetrate violations of [human rights] on the territory of another State, which it could not perpetrate on its own territory.”<sup>24</sup> The U.S. perspective on extraterritoriality is beginning to change. In 2014, the United States acknowledged that the Convention on Torture—one of the principal human rights treaties—continued to apply in times of armed conflict and could not be superseded by LOAC.<sup>25</sup>

### Rules on the Use of Force for U.S. Noncombat Operations

Broadening U.S. military training to include police tactics and operationalizing human rights would also have benefits for U.S. forces on noncombat assignments.<sup>26</sup> In addition to the overseas

deployments for combat operations, the United States frequently deploys forces for a variety of other military missions, including natural disaster responses and security cooperation efforts with partner nations.<sup>27</sup> Since 2001, an estimated 36 percent of U.S. deployments have been for noncombat events such as humanitarian assistance and disaster relief (HADR), noncombatant evacuation operations (NEO), or peacekeeping operations.<sup>28</sup> Under these conditions, sometimes called military operations other than war, there is no armed conflict; therefore, by definition, LOAC does not apply.<sup>29</sup>

For example, the United States conducted HADR missions in the southeastern Philippines in December 2012 following Typhoon Bopha; in Ukraine in August 2013 to assist with the investigation of downed Malaysian airliner MH17; again in the Philippines in November 2013 following Typhoon Haiyan, in Senegal and Liberia in 2014 in response to the Ebola crisis, in Haiti in October 2017 in the aftermath of Hurricane Matthew, in Peru in March 2017 in the wake of devastating floods, and in Dominica in September 2017 to evacuate American citizens after Hurricane Maria nearly completely destroyed the island.<sup>30</sup>

Since 2001, the United States has also conducted NEO to extract U.S.

Embassy personnel and their families from danger—in Côte d’Ivoire in September 2002, from Liberia and Mauritania in June 2003, from Haiti in February 2004, from Lebanon in 2006, and from South Sudan in 2016.<sup>31</sup> In addition to HADR and NEO deployments, U.S. forces have conducted a number of other noncombat missions, such as anti-poacher assistance to the Tanzanian Wildlife Management Authority in May 2018, water well construction in Caribbean nations, airlift assistance to Burundi, and a search-and-rescue mission to Uruguay. Hundreds of U.S. forces also deployed for training and to build partner capacity to Poland, Latvia, Romania, Ukraine, and other Eastern European nations as part of Operation *Atlantic Resolve*, designed to reassure Northern Atlantic Treaty Organization members considering Russian interferences.<sup>32</sup>

None of these operations involved an armed conflict, but little guidance on police tactics or criminal law was provided to deploying U.S. forces. In the absence of forcewide guidance, some military units developed their own internal doctrine to guide their forces. The rules on the use of force in these cases fall into criminal law as guided by human rights law. U.S. forces should be trained on police tactics and discretionary use-of-force rules rather than the “firepower-friendly”



U.S. Army paratroopers with 1<sup>st</sup> Battalion, 503<sup>rd</sup> Parachute Infantry Regiment, 173<sup>rd</sup> Airborne Brigade Combat Team, prepare to load onto C-130 Hercules aircraft at Lviv International Airport prior to multinational airborne jump alongside Polish paratroopers and Ukrainian paratroopers from 15<sup>th</sup> Battalion, 95<sup>th</sup> Air Assault Brigade, as part of Rapid Trident 2021, at International Peacekeeping Security Centre near Yavoriv, Ukraine, September 25, 2021 (U.S. Army/Hayden Hallman)

doctrine that applies during a conventional armed conflict. Sending U.S. forces into operations prepared for violent encounters when none exists could set dangerous expectations.

### Conclusion

The U.S. military is well trained in the law of armed conflict; however, most forces—particularly those assigned to security cooperation efforts with foreign partners—have little to no formal training in criminal law enforcement or human rights law. Military police and National Guard units are the exceptions. However, DOD regulations and manuals provide little guidance on criminal law or human rights law for most U.S. military general purpose forces.<sup>33</sup> As a result, few in the Armed Forces understand the differences among

LOAC, criminal, and human rights law or how to operationalize human rights for contemporary conflicts. When training and advising partner-nation forces, these legal gray areas place U.S. military units in a tenuous position; they may be tactically unprepared to advise partners on operations that fall below conventional armed conflicts.<sup>34</sup>

In partner nations that have assigned military personnel to law enforcement duties, Soldiers need extensive retraining to learn to fight an enemy that is mixed among the civilian population—situations that require a large amount of discipline, discretion, and caution. Soldiers without the proper training or education may commit operational errors that jeopardize their legitimacy among this population. For military forces unprepared for these types of operations and not equipped

with nonlethal weapons, there are few options between shouting and shooting. A young Soldier handed a rifle without training on escalation of force tactics or deescalation techniques may resort to lethal force too quickly when other effective nonlethal tactics are viable options.

As General H.R. McMaster writes, “Soldiers trained exclusively for conventional combat operations may be predisposed toward responding with all available firepower upon contact with the enemy. Such a reaction might result in the unnecessary loss of innocent life and run counter to the overall aim of operations.”<sup>35</sup> The Soldiers’ weaponry may also be inappropriate for the circumstances; a military rifle fires a higher velocity round, has much more energy, and can cause much more harm to civilians compared with standard police arms.

For these reasons, U.S. Servicemembers who frequently deploy to provide tactical training to military forces in other countries must understand the evolving nature of conflict and the rules on the use of force in contemporary warfare.

DOD should reexamine its doctrine considering the changing nature of conflict, the increased prevalence of noninternational armed conflicts, and the need to be legally and doctrinally aligned with its allies and partner nations. From the perspective of U.S. security cooperation programs, the requirement for an updated use-of-force doctrine is even more urgent because the United States frequently provides training and equipment to partners who operate in the law enforcement paradigm, not the conduct-of-hostilities paradigm. JFQ

## Notes

<sup>1</sup> Annyssa Bellal, *The War Report: Armed Conflicts in 2018* (Geneva: The Geneva Academy of International Humanitarian Law and Human Rights, April 2019), available at <<https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf>>; Stockholm International Peace Research Institute (SIPRI), *SIPRI Yearbook 2021: Armaments, Disarmament and International Security* (Oxford: Oxford University Press, 2021).

<sup>2</sup> See, for example, Bellal, *The War Report*; SIPRI, *SIPRI Yearbook 2021*.

<sup>3</sup> According to the Geneva Conventions, the two requirements of organized armed groups (OAG) in a non-international armed conflict are that the group's actions have reached "a minimum level of intensity and duration" and that the armed group "is organized and has the capacity to engage in military operations." Additional Protocol II sets an even higher threshold to be declared an OAG. It requires that the group be under a responsible command and exercise such control over a territory as to enable it to carry out sustained and concerted military operations. See *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?* Opinion Paper (Geneva: International Committee of the Red Cross [ICRC], March 2008), 1.

<sup>4</sup> The ICRC refers to these internal disturbances as "other situations of violence." See the helpful ICRC document *Characteristics of Armed Conflicts & Other Situations of Violence* (Geneva: ICRC, October 2017), available at <[https://www.icrc.org/en/download/file/67234/handout\\_3\\_-](https://www.icrc.org/en/download/file/67234/handout_3_-)

characteristics\_of\_armed\_conflicts\_other\_situations\_of\_violence.pdf>.

<sup>5</sup> See Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (London: Penguin Books, 2006), 16–17.

<sup>6</sup> A 2017 study ordered by the Chairman of the Joint Chiefs of Staff (CJCS) and managed by the Institute for National Strategy Studies at the National Defense University concluded that one of the principal causes for civilian casualties—despite significant operational effort to avoid harm to civilians—was the difficulty in identifying irregular forces in contemporary conflicts. See Patrick Paterson, *The Blurred Battlefield: The Perplexing Conflation of Humanitarian and Criminal Law in Contemporary Conflicts* (MacDill Air Force Base, FL: JSOU Press, 2021), 72–73, available at <[https://jsou.libguides.com/ld.php?content\\_id=60453868](https://jsou.libguides.com/ld.php?content_id=60453868)>.

<sup>7</sup> See Patrick Paterson, *Training Surrogate Forces in International Humanitarian Law: Lessons from Peru, Colombia, El Salvador, and Iraq* (MacDill Air Force Base, FL: JSOU Press, 2016), available at <[https://jsou.libguides.com/ld.php?content\\_id=24773901](https://jsou.libguides.com/ld.php?content_id=24773901)>.

<sup>8</sup> Naz K. Modirzadeh, "Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance," *Harvard National Security Journal* 5, no. 1 (2014), 236.

<sup>9</sup> *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, Expert Meeting Report (Geneva: ICRC, November 2013), 2.

<sup>10</sup> The definition of when an armed conflict occurs is simple: An (international) *armed conflict* exists when "one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of the confrontation." If no armed conflict exists, then LOAC rules do not apply, and the crisis falls into the category of internal disturbances that are governed by criminal law and human rights law under the law enforcement paradigm. See ICRC, *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?* and *The Manual on the Law of Non-International Armed Conflict, with Commentary* (Sanremo, Italy: International Institute of Humanitarian Law [IIHL], 2006).

<sup>11</sup> Portions of this summary are drawn from *To Serve and To Protect: Human Rights and Humanitarian Law for Police and Security Forces* (Geneva: ICRC, March 2014); United Nations (UN) General Assembly Resolution 34/169, *Code of Conduct for Law Enforcement Officials*, A/RES/34/169 (December 17, 1979), available at <<https://www.ohchr.org/Documents/ProfessionalInterest/codeofconduct.pdf>>; UN, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, available at <<https://www.ohchr.org/Documents/ProfessionalInterest/firearms.pdf>>; *Guiding Principles on Use of Force*

(Washington, DC: Police Executive Research Forum, 2016); *Seattle Police Department Manual*, NCJ Number 65002, March 1974, available at <<https://www.ojp.gov/pdffiles1/Digitization/65002NCJRS.pdf>>; and a number of other U.S. police manuals on the use of force.

<sup>12</sup> Senior U.S. military legal expert, phone interview with author, August 23, 2019.

<sup>13</sup> For an explanation of the complementarity policy in official Department of Defense (DOD) manuals, see Naval Warfare Publication 1-14M, *The Commander's Handbook on the Law of Naval Operations* (Norfolk, VA: Headquarters Department of the Navy, August 2017), 5-8. See also Army Field Manual (FM) 6-27/Marine Corps Tactical Publication 11-10C, *The Commander's Handbook on the Law of Land Warfare* (Washington, DC: Headquarters Department of the Army, September 2019), 1-26.

<sup>14</sup> *Lex specialis* signifies that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. In other words, "the rule that is more specifically directed toward the action receives priority because it takes better account of the particular features of the context in which the law is to be applied, thus creating a more equitable result and better reflecting the intent of the authorities that have made the law." See *Department of Defense Law of War Manual* (Washington, DC: DOD, updated December 2016), para. 1.3.2.1, "The Law of War as the *Lex Specialis* Governing Armed Conflict," 9.

<sup>15</sup> See Dustin Kouba, ed., *Operational Law Handbook* (Charlottesville, VA: National Security Law Department, 2018), chap. 3, sec. V.A.1, 51.

<sup>16</sup> See DOD Directive 2311.01E, *DOD Law of War Program* (Washington, DC: DOD, May 9, 2006), para. 4.1. See also Human Rights Committee, "Observations of the United States of America on the Human Rights Committee's Draft General Comment 35: Article 9," June 10, 2014, para. 20, available at <<https://www.justsecurity.org/wp-content/uploads/2015/01/US-UN-HRC-GC-35.pdf>>. See also *Department of Defense Law of War Manual*, 9n13 and para. 17.2.1.3 (1018).

<sup>17</sup> DOD Directive 2311.01E, para. 4.1.

<sup>18</sup> During the International Court of Justice 1996 advisory opinion on the "Legality of the Threat or Use of Nuclear Weapons," the Court declared that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war."

<sup>19</sup> IIHL, *Manual on the Law of Non-International Armed Conflict*, 15.

<sup>20</sup> *Operational Law Handbook*, chap. 3, sec. V.A.3, 52.

<sup>21</sup> See FM 6-27/MCTP 11-10C, para. 1-119, 1-26. To be clear, this is not a change to DOD policy regarding *lex specialis*, but it does represent an important acknowledgment that human rights continue to apply in situations of

armed conflict.

<sup>22</sup> There is extensive literature on legal rules for military forces acting as occupation forces. For more information, see Laurie R. Blank and Gregory P. Noone, “The Law of Belligerent Occupation,” in *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* (New York: Wolters Kluwer Law and Business, 2013).

<sup>23</sup> See *Operational Law Handbook*, chap. 3, sect. II.D, 48–50.

<sup>24</sup> Dietrich Schindler, “Human Rights and Humanitarian Law: Interrelationships of the Laws,” *American University Law Review* 31 (1981–1982), 935, 941–942; Michael J. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation,” *The American Journal of International Law* 99, no. 1 (January 2005), 119–120.

<sup>25</sup> Kenneth Watkin, *Fighting on the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (New York: Oxford University Press, 2016), 149–150.

<sup>26</sup> This would require a change to current DOD policy, which is to apply LOAC to “all military operations.”

<sup>27</sup> For an informative infographic of U.S. military deployments, see Stephanie Savell, “Where We Fight: U.S. Counterterror War Locations,” *Costs of War* project (Providence, RI: Watson Institute for International and Public Affairs, January 2019), available at <<https://watson.brown.edu/costsofwar/papers/2019/where-we-fight-us-counterterror-war-locations-2017-2018>>.

<sup>28</sup> Joint Publication 3-0, *Joint Operations* (Washington, DC: The Joint Staff, September 17, 2006), identifies three major categories of military operations: major operations and campaigns; crisis response and limited contingency operations; and military engagement, security cooperation, and deterrence. The publication (V-2) also identifies 16 other types of operations. The author is indebted to William J. Perry Center Research Assistant Ana Cardona for collecting and assembling this information. Approximately 58 percent of U.S. deployments (measured by number of events, not number of personnel) involve counterterror operations or conventional conflicts such as those in Iraq, Afghanistan, Syria, Kosovo, and Bosnia-Herzegovina. For example, the United States had about 160,000 troops in Iraq at the war’s peak in 2005; 99,000 in Afghanistan in 2011, of which 83,000 worked under the International Security Assistance Force; 5,500 in Kosovo in 2001 working under the Kosovo Force; and 3,800 in 2001 in Bosnia-Herzegovina working for the Stabilization Force. Since 2001, U.S. forces—especially special operations forces—have conducted counterterror operations in Iraq, Afghanistan, Syria, Yemen, the Philippines, and Niger, among other nations.

All information on U.S. military deployments is drawn from Barbara Salazar Torreon and Sofia Plagakis, *Instances of Use of United States Armed Forces Abroad, 1798–2018*, R42738 (Washington, DC: Congressional Research Service, December 28, 2018).

<sup>29</sup> The U.S. Army defines *operations other than war* as “military activities during peacetime and conflict that do not necessarily involve armed clashes between two organized forces.” See FM 100-5, *Operations* (Washington, DC: Headquarters Department of the Army, June 14, 1993). The term *military operations other than war* was discontinued by Joint Publication 3-0, *Joint Operations* (Washington, DC: The Joint Staff, September 17, 2006).

<sup>30</sup> Between 1990 and 2000, the U.S. military responded to 61 humanitarian assistance and disaster response events. See the helpful list in Frank N. Schubert, *Other Than War: The American Military Experience and Operations in the Post-Cold War Decade* (Washington, DC: Joint History Office, 2013), 31–32.

<sup>31</sup> See the list of 18 noncombat evacuations conducted during the 1990s in *ibid.*, 33–34.

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

<sup>33</sup> The standing rules for the use of force (SRUF) may be the closest example of guidance for U.S. Servicemembers conducting domestic law enforcement operations. Added to the most recent version of the standing rules of engagement (SROE) (CJCS Instruction 3121.01B, *Standing Rules for the Use of Force for U.S. Forces*, released June 13, 2005), the SRUF provide guidance for U.S. military personnel conducting domestic operations, particularly in Defense Support for Civil Authorities or homeland defense missions. Most of the SROE/SRUF are classified secret, but the *Domestic Operational Law: 2021 Handbook for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations, 2021) has a helpful description of the rules for the use of force for Federal forces in chap. 10, “Rules for the Use of Force (RUF) for Federal Forces,” 212.

<sup>34</sup> To see what training U.S. special operations forces provide to dozens of partnership forces each year, see *Foreign Military Training Joint Report to Congress* (Washington, DC: Department of State and DOD, various).

<sup>35</sup> H.R. McMaster, “Moral, Ethical, and Psychological Preparation of Soldiers and Units for Combat,” *Naval War College Review* 64, no. 1 (2011), 14–15.

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