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WILLIAM BANKS

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Introduction Shaping a Global Legal Framework for Counterinsurgency: Placing Postmodern War in Context

William Banks*

CICERO IS CREDITED with saying “*silent enim leges inter arma*”—in times of war the laws fall silent.¹ Cicero was correct, literally, but even in biblical times, when war was a quotidian occurrence, informal guidelines limited armed combat. Early Roman military codes recognized criminal offenses. Egypt agreed with neighboring states on standards for treating prisoners, and the Hindu Code from around 200 B.C. forbade some kinds of weapons.² Throughout human history, however, the law has been reactive, catching up episodically to provide legal guidelines based on lessons learned from the last war. Admittedly, the processes and institutions of lawmaking, whether international or national, are deliberative, prone to political sideshows that often derail the substantive agenda, and beset by procedural roadblocks. Yet law can and should embody our noblest objectives and serve to inspire the people to further its normative aims—in this instance, serving humanitarian goals of protecting civilians from the ravages of war.

There remains great skepticism that law matters in regulating warfare. Clausewitz opined that the laws of war are “almost imperceptible and hardly worth mentioning,”³ and his dismissive attitude continues to have considerable resonance with those who use force with impunity around the globe. Still, states and their armies developed battlefield codes over time, and a customary law of war based on state practice emerged alongside the codes. By the mid-nineteenth century, the first significant U.S. code was written by

Francis Lieber for the eventually victorious Union forces. Lieber's *Instructions for the Government of Armies of the United States in the Field* (1863) essentially codified what was then the customary law of war for soldiers fighting on the battlefield.⁴ The success of the Lieber Code is demonstrated by its adoption in similar forms in several countries in Europe, Russia, and Argentina. Around the same time, a first Geneva Convention was adopted in Geneva in 1864, providing ten articles of protection concerning care of the wounded. Twelve nations signed the Convention, and the United States joined the Convention in 1882. Meanwhile, the 1868 St. Petersburg Declaration Renouncing the Use in War of Certain Explosive Projectiles became the first multilateral treaty banning a particular weapon.

World wars and myriad other military conflicts large and small occurred throughout the twentieth century. In keeping with the pattern, however, the legal regimes for limiting the use of force on the battlefields—the Hague and Geneva Conventions and their Protocols, some specific multilateral treaties, and emerging customary law—continued to lag behind changes in armed conflict. To be sure, many significant advances in the laws of war, or what has come to be called international humanitarian law (IHL), were achieved over the last century, based on the understanding that wars are fought by states against other states, or in a minority of circumstances, by a revolutionary or insurgent group against a state.

By the turn of this century, some observers began to recognize, as did General Sir Rupert Smith, that instead of a “linear process” where “peace is understood to be an absence of war... we are in a world of constant confrontation.” In today's wars, Smith opined, civilians “are part of the terrain of your battlefield... [and] war is directed against non-combatants.”⁵ Speaking in 2006, General Smith took note of the most recent half-decade, and he presciently predicted the nature of future wars.

I. MODERNIZING IHL FOR POSTMODERN WAR

The September 11 attacks spurred the United States and its allies toward an extraordinary decade of military actions against al Qaeda, the Taliban, and then Saddam Hussein and his Iraqi regime. What the George W. Bush administration called the “Global War on Terror” routed the Taliban in Afghanistan and then attacked al Qaeda and Taliban terrorists in the Afghan/Pakistani border areas. The Iraq war was launched by the United States in 2003, despite the unwillingness of the U.N. Security Council to authorize military action. Before long, what began as a counterterrorist operation in Afghanistan and a conventional invasion in Iraq changed, dramatically.

Over the next few years, insurgencies flared in both countries, in different ways and from uniquely local circumstances, but both enmeshed in urban areas and local populations. Similarly, nonstate terrorist groups were carrying out attacks in the Middle East. In 2006, Hezbollah launched cross-border raids from Lebanon and fired rockets into Israel, killed civilians, and kidnapped Israeli soldiers. When the Israel Defense Forces (IDF)

countered and attempted to root out and neutralize the Hezbollah fighters, attacks against them in civilian neighborhoods and in urban areas brought widespread criticism from human rights groups and the International Committee of the Red Cross (ICRC). These conflicts brought renewed attention to asymmetric warfare—where conventionally weaker nonstate enemies fight the stronger foe in ways that neutralize the conventional strengths and exploit apparent weaknesses—such as the willingness to engage in unlawful attacks with prohibited means, knowing that the dominant state will abide by the laws of war and not reciprocate.

This volume presents a series of insights from an interdisciplinary initiative at Syracuse University's Institute for National Security and Counterterrorism (INSCT), a research institute jointly sponsored by the Maxwell School of Citizenship and Public Affairs and the College of Law at Syracuse University, in partnership with the International Institute for Counter-Terrorism (ICT) at the Interdisciplinary Center (IDC) in Herzliya, Israel. Beginning in 2007, scholars, government experts, and practitioners from humanitarian, military, and other nongovernmental organizations (NGOs) have been working collaboratively to debate whether the post-9/11 security environment and the challenges posed by asymmetric conflicts require adaptations to the traditional laws and customs of war. The fruits of this dialogue have so far been encapsulated in our first book: *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare*, published in 2011 by Columbia University Press. This book, our second, addresses future warfare, particular counterinsurgency (COIN) and its variants, and considers whether a more forward-looking legal framework might provide useful normative guidance for this era of post-modern warfare.

In using the term “postmodern,” I embrace John Kiszely's characterization of postmodern as warfare that is not new, but different—involving “challenges that are not primarily overcome with the tools of modernity: more advanced technology, firepower, lethality, speed, stealth, digitization, logistics, network-centric warfare or hi-tech ‘shock and awe.’”⁶ Postmodern warfare is anything but linear, and the distinction between war and peace is not clear. Enemies are not easily identifiable, and their identity may change frequently. Victory is achieved not only on the battlefield but also by winning public support, and the battlefield itself is not so much a military one as political, based on a battle of ideas and the support of the local population. At the same time, how the postmodern war is fought—the humanitarian quality of its campaigns—is crucially important in winning the local population. Modern labels are insufficient and sometimes plainly wrong—peacekeeping, peace enforcement, counterrevolutionary operations, and humanitarian operations. Even COIN has come to represent “a kaleidoscope of different types of operation, remarkably resistant to neatness in delineation.”⁷

Modern IHL does little to accommodate the asymmetric form. After the horrors of World War II, the nations of the world agreed that the Common Articles codified in the revised 1949 Geneva Conventions constituted the exclusive threshold criteria for triggering IHL. Under Geneva, there are two kinds of wars: interstate (or international) armed

conflicts and intrastate (or internal, noninternational) armed conflicts. The former invoke the full panoply of the laws of war, which in turn regulate the conduct of war (through the principles of distinction, proportionality, and military necessity); the latter do not trigger all the regulations for the conduct of war but provide limited humanitarian protections for civilians and those captured or detained. Over time, state practices and customary law have extended some of the IHL principles to irregular warfare.

The Geneva provisions mostly fail to anticipate wars involving nonstate actors, first, by providing a regulatory scheme designed for wars between states, except for minimal protections for those involved in noninternational armed conflicts that may include nonstate belligerents. Second, the Geneva criteria for earning the status of a lawful combatant are defined on the model of the state soldier. Requirements include a responsible command structure, wearing a fixed insignia recognizable at a distance, carrying arms openly, and conducting operations in accord with international humanitarian law. Only persons meeting these criteria gain full prisoner of war (POW) protections under the Conventions. It is virtually impossible for nonstate actors to meet these criteria and, thus, to become lawful combatants under humanitarian law. Because humanitarian law includes a "combatant privilege," a form of legal immunity for acts that would be criminal if performed during peacetime, nonstate actors may neither engage in lawful combat nor be its deliberate target. Although there are clearly downside risks to conferring combatant status on nonstate insurgents, the either/or orientation of the Geneva Conventions leaves little room for consideration of the dynamic qualities of asymmetric war.

As a further illustration of the state-centric nature of IHL, to invoke IHL and its humanitarian provisions, there must be an armed conflict within the meaning of the Geneva Conventions—that is, either an international (between two or more states) or noninternational (civil war or insurgency) armed conflict. Although the Conventions do not define armed conflict, knowing whether the threshold requirement has been met has not been especially difficult to apply in state versus state conflicts. What constitutes armed conflict—the use of armed forces by opposing regular armed forces—is fairly clear. If the armed conflict threshold is not met, then the humanitarian bulwark of the Geneva Conventions may not apply.

Determining the existence of a noninternational (or internal) armed conflict has, by contrast, not been easy. Many violent internal conflicts are civil disturbances that are amenable to and may be managed locally by domestic law and its arrangements. The ICRC maintains that only if an internal conflict involves several criteria—identification of parties, protracted hostile acts, minimum level of organization of armed forces, for instance—do the laws of war clearly apply.⁸ Yet the U.S. Supreme Court decided in 2006 that the U.S. conflict with al Qaeda is a noninternational armed conflict, at least for the purposes of affording fair trial procedures to detainees accused of war crimes. In a similar vein, the U.S. government treats its ongoing conflict with al Qaeda, the Taliban, and associated forces as an armed conflict subject to IHL principles.⁹ However, IHL is not generally applicable to a war against "terrorism," since there is no state enemy; nor is it

necessarily applicable to a conflict that involves a state and a transnational terrorist network, if interventions do not meet the initial armed conflict threshold requirements. At the same time, many asymmetric conflicts are not "wars" either as defined under IHL—there is no state versus state or internal conflict. In these cases, the IHL threshold criteria present definitional conundrums in addition to practical limitations.

Facing a postmodern set of insurgencies, states have been compromised in setting strategies and choosing tactics in part because of the shortcomings in the legal structure to govern these conflicts. While the legal regime for countering terrorists has its own set of limitations and unanswered questions, countering insurgencies reminded the United States and its allies that kinetic warfare has limited utility in counterinsurgency. COIN is one variety of asymmetric warfare; the insurgent is taking advantage of the weaknesses of the stronger foe. Based on so-called "soft power" and a win-the-population objective, COIN includes armed conflict and warfare, but its elements require careful calibration and refinement of issues not traditionally at the center of IHL, including modifications of the principles of distinction and proportionality.

In addition to its blending and mixing of kinetic warfare and soft-power operations, COIN takes place in a variety of conflict situations. Depending on the setting, COIN occurs:

- where there is/is not an armed conflict of an international/noninternational nature;
- where human rights law (HRL) applies in the absence of or as an addition to IHL;
- in the face of customary or treaty-based principles of international law; and
- alongside domestic laws of the nation managing the COIN operation, which may or may not have incorporated international laws as part of the domestic law.

Although actual operations continue to evolve in COIN as it is practiced around the globe, scholars and practitioners have not critically and carefully examined the legal bases for COIN. In COIN operations, IHL, HRL, international law, and domestic laws do not provide adequate legal and policy guidance for a variety of reasons, some of them to be explored in this book. Meanwhile, in the absence of a legal framework that effectively regulates COIN, commanders and legal advisers have promulgated various operational rules that supply rough guidance for soldiers.

As a result, in the context of COIN strategy, operational rules have become more protective of civilians than the law. The authors of the chapters that follow will explore these overarching questions:

- 1) Is it prudent to reshape the overlapping and converging legal paradigms that conceivably apply in COIN and related forms of postmodern warfare into a discrete legal framework? Are the convergences damaging and, if so, how may the damage be minimized, avoided, or repaired? Do the overlaps threaten

the integrity of any one legal framework, and, if so, how may the threat be managed?

- 2) If operational rules exceed legal requirements in favor of a quest for legitimacy in a particular theater of operations, what are the implications to these operations of the loss of legal control over postmodern war? To the extent that the rules for COIN or other forms of postmodern war are fashioned by nonstate entities (such as nongovernmental organizations or private contractors) do states risk losing sovereign control over the postmodern battlefields for which they are held responsible? If so, what are the implications?

Reflecting the realities of postmodern warfare, COIN operations have been characterized as a subset of what the U.S. military refers to as stability operations. In addition to COIN, stability operations include providing humanitarian disaster relief, peace-time support to other nations, peace building and peace enforcement, counterterrorism operations, counterdrug operations, noncombatant evacuation operations, mass atrocity responses, and postconflict reconstruction operations. Despite recently promulgated and revised military doctrine in the United States, the law of COIN remains undefined.

Just as the use of the term “war” became problematic when wars were basically outlawed after World War II, the use of “armed conflict” to modernize the legal language has not helped set the parameters for COIN or other forms of postmodern war. Sometimes COIN goes on where there is “armed conflict” (“armed force between states or protracted armed violence between governmental authorities and organized armed groups”) and sometimes where there is not a conflict as IHL defines it.¹⁰ Where there is not an armed conflict, does human rights law control the battle space instead? Are the operations a part of policing, using law enforcement methods only? If law enforcement and military operations against insurgents go on at the same time, what is their interface? In 2009, in one of his occasional guidance memoranda to the NATO International Security Assistance Force (ISAF) and U.S. forces in Afghanistan, General David Petraeus admonished the force simultaneously to “pursue the enemy relentlessly,” while living “among the people,” to “fight hard” and “be a good guest,” and to “hold what we secure” while we “live our values.”¹¹ Imagine the brigade Judge Advocate General (JAG) officers fashioning their operational orders based on that guidance memorandum. What legal doctrine applies? Imagine the enlisted infantry private reading the Petraeus memo. What is his takeaway?

Throughout modern history it has been understood that insurgencies are not defeated on the battlefield, not exclusively anyway. COIN works only when the local population supports it. As practiced now in Afghanistan, COIN imposes operational restrictions on what military personnel may do in their COIN operations that go well beyond what IHL permits or requires. Instead of the traditional doctrine of proportionality—where only “excessive” harm to civilians is forbidden in relation to the military gain—COIN doctrine disfavors any harm to civilians. Similarly, the principle of distinction—requiring

military forces to target only those who can be identified as combatants or civilians taking an active part in hostilities—is ratcheted up in the Afghan COIN operation to the extent that no forces were “declared hostile” in the operational environment, requiring fresh determination of combatant status at each confrontation.¹²

As the evolution of the operational controls in U.S. COIN operation in Afghanistan demonstrates, COIN is not a strategy, but a set of tactics that operate as means to some strategic end, undefined in the case of Afghanistan. President Obama stressed early on that the aim of the war in Afghanistan was counterterrorism, “to disrupt, dismantle and defeat al Qaeda.” General Stanley A. McChrystal echoed the counterterrorism objectives in the summer of 2009, just before his removal. The political context in which this COIN operation goes on is complex, dynamic, and not always clear. In Afghanistan, the political context for COIN is perhaps the most important part—it would be possible to defeat the Taliban and other insurgents there and still lose the war.

II. OUR COLLECTIVE THESIS

A basic premise of our book is that we live in an era of postmodern warfare. If modern war was interstate and typically large scale between professional state armies, postmodern warfare discounts the value of overwhelming force, traditional battlefield tactics, and even technological advances, and substitutes equally lethal, smaller scale, urban-based “war among the people.”¹³ Postmodern war can be just as significant strategically as modern war, and its effects on a political order just as profound. Insurgents, after all, reject the existing political order.¹⁴

Law and strategy, like law and tactics, are necessarily connected. Law imposes limits on operations, but legal authority is also necessary to enable the use of force in any kind of war. Positive legal authority is precisely what gives war its legitimacy. Legal legitimacy is as central to postmodern war as any form of war, and we argue that the legal framework that has evolved for modern warfare is not sufficient for legitimizing postmodern war.

The postmodern iterations of COIN have many of the same characteristics as Western responses generally to asymmetric warfare challenges since 9/11—operations are sometimes effective, sometimes not; they evolve and improve, but they lack a strategic purpose and normative legitimacy. The outdated legal framework for conventional armed conflicts has compromised our settling on strategy and its core normative elements. As a result, for example, at the same time that the U.S. military attempts to negotiate with the Taliban, the State Department shows its human rights orientation and looks askance at negotiating with any group that disfavors education for girls and widened roles in society for women.¹⁵

There are gaps, lacunae, and needs for clarification in deciding what law applies in postmodern warfare.¹⁶ Postmodern warfare will necessarily include components of policing and law enforcement, tasks and methods not conventionally part of military training or orientation. Even if these obstacles are overcome, performing military operations against

insurgents at the same time as policing the population involve complex judgments and actions and careful attention to the legal parameters of the actions.

The tendencies to improvise and do what works practically permeate COIN, for good reason. The *U.S. Army Field Manual*, FM 3-24 (*Counterinsurgency Manual*), published in 2006 and updated regularly since then, became an especially high-profile document, and its "win-the-population" mantra dominated COIN in Afghanistan, after cutting its operational teeth in Iraq.¹⁷ Taking lessons from the history of COIN successes and failures, including the U.S. adaptations in the Philippines, British success in Malaya, French failures and successes in Algeria, U.S. failures in Vietnam, and Sri Lanka's eventual defeat of the Tamil Tiger insurgency, modern U.S. COIN doctrine owes its doctrinal heritage to the cumulative lessons learned and from several classical and contemporary theorists, including David Galula, whose *Counterinsurgency Warfare*, based on his experiences as a French Army officer who fought in Algeria, has had considerable influence.¹⁸

Now, more than a half-decade since the publication of the *Counterinsurgency Manual* 4, the popularity of COIN ascended after apparent successes in Iraq and then descended after confronting the challenges of the Afghan/Pakistani insurgency. COIN arguably has failed in Afghanistan for lack of a strategy. The objectives of taking down al Qaeda and preventing their return is a counterterrorism plan based on building a stable state in Afghanistan. But the COIN precepts of securing the population, building governance institutions, and developing legitimacy of the local government are themselves not tied to an overarching strategy and have not been prioritized in the Afghan campaign.¹⁹ As the Afghan war drags on and its costs mount, COIN has been treated like a fad. Still, dismissing COIN in Iraq and Afghanistan as having outlived its usefulness is shortsighted, at least as concerns the lessons that COIN can provide for the legal shortcomings of waging postmodern war. Even if the current unpopularity of the COIN operation in Afghanistan leads to abandoning the term, we should build the legal framework and continue to utilize the COIN tools when appropriate in future conflicts. Change the language, perhaps, but develop and maintain the legal framework. This volume serves as an opportunity to step back from the day-to-day and reflect on the challenges of shaping a legal framework for COIN and other forms of postmodern asymmetric warfare.²⁰

We should also work toward a legal framework for COIN because COIN will likely continue to have value in postmodern conflicts. Rapid changes in insurgencies—including external support, virtual audiences, and global objectives—continue to shape the future of COIN.²¹ There is no one-size-fits-all COIN manual, and flexibility and adaptability are likely essential to successes in fighting the postmodern wars, whatever they are called.²² COIN is capable of nuance, works under unified command, and requires civilian intelligence support. COIN can isolate insurgents from the population, use minimum levels of force necessary to achieve established objectives, and assure legitimacy of the COIN effort among the local population. History shows that COIN has value when conventional military tactics are not sufficient to achieve security objectives.

Future wars will be irregular, whether COIN or counterterrorism or something else. They will be a blend, a complex mix that will continue to change over time. COIN can provide principles and standards, sufficiently supported by law that will be useful when our soldiers are asked to stabilize a conflict zone or intervene in mass atrocities in the future. The main thesis of the volume thus should be broadly construed. Whether labeled as COIN or some other form of postmodern warfare, existing legal frameworks are not sufficiently nuanced or nimble enough to accommodate postmodern conflict forms. COIN is the emblematic case study for the authors of this book because COIN illustrates the insufficiencies of the conventional modern IHL legal regime and provides a broad context to engage the legal parameters of today's operational challenges, including peacekeeping and postconflict reconstruction, for example. We also believe that strengthening the foundational legal framework for conducting irregular postmodern warfare is an essential step in establishing normative principles that will go a long way in aiding in the development of strategic justification for postmodern wars.

III. DEFINITIONS

According to the U.S. Department of Defense, COIN is a subset of "stability operations" defined as "military and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions." The goal of stability operations is "to provide the local populace with security, restore essential services, and meet humanitarian needs."²³ The Defense Department defines counterinsurgency as "comprehensive civilian and military efforts taken to defeat an insurgency and to address any core grievances."²⁴ An insurgency is "the organized use of subversion and violence by a group or movement that seeks to overthrow or force change of a governing authority."²⁵ Insurgencies are distinct from traditional war in important ways. First, insurgencies are by their nature asymmetric. Insurgents lack the resources in military, political, and economic means and governance infrastructure that the COIN operations enjoy. Yet insurgents' lack of infrastructure and governance responsibility means that they may fight anywhere and everywhere, at any time. The battle is not about particular territory. Moreover, insurgents are not seeking to defeat the government militarily. Often the struggle is over who governs, not who fights best.²⁶

Second, one of the most basic objectives in COIN is to establish an effective rule of law in host-nation institutions. Although based in law, the rebuilding of local institutions occurs not by lawyers, but by military personnel and contractors, in part through forceful suppression of insurgents. Building host-nation institutions according to law is, of course, part of developing the legitimacy of the local government, a critical ingredient for success in COIN. Thus, complying with law in postmodern/COIN military operations is integral to the success of the operation both to defeat an insurgency and establish the foundation for long-term stability.²⁷

The next section of this introduction briefly places our thesis in historical context. Insurgencies have occurred throughout human history, of course, and so has COIN. Lessons from both inform postmodern COIN, though we believe that the inadequate legal framework for COIN in today's conflicts presents novel challenges for the United States and the international community. Today's insurgents may have global impact, in part because of ease of access to media and communications and the 24/7 news cycle. In addition, cyberspace itself has become a battle space, where asymmetric warfare proliferates. At the same time, the United States is only one of many states that have outsourced significant security functions to private companies, and those contractors are not accountable directly to the laws that bind state soldiers.

IV. COIN IN HISTORICAL AND DOCTRINAL CONTEXT

The term "counterinsurgency" (COIN) was invented during the response to the wars of national liberation from the end of World War II through the 1970s. Theorists as diverse as Mao Zedong, Che Guevara, David Galula, and Bernard Fall influenced this classical COIN theory.²⁸ Classical COIN presumes an insurgency challenging a functioning, albeit usually weakened, state. The COIN force supports the state and thus defeats the insurgency. COIN operations in Thailand, Colombia, and Sri Lanka generally followed the classical model. Even before the postmodern era, however, insurgencies developed after state failure sought not to challenge or replace a state, but to further destabilize a region or gain some control over ungoverned spaces. Examples include Chechnya, Somalia, and East Timor.²⁹ In Afghanistan, of course, the insurgency existed before the modern government was in place.

Postmodern insurgencies may be reactive. Rather than starting a revolutionary war, insurgents may simply resist the revolutionary change brought by outside forces. Consider Waziristan—where in addition to al Qaeda and Taliban fighters, the United States and its allies fight against local tribesmen who fight to preserve their traditional control over the area.³⁰ Countering this kind of postmodern insurgency requires separating local fighters from the outside insurgents and dealing with the transnational effects of globalized conflict, including their electronically generated worldwide audience.

Postmodern insurgencies are characterized in part by the impact of modern communications.³¹ The battlefield may be dramatized and brought to life almost anywhere, in short order, for a worldwide audience. What would have been modest tactical operations in the past can now have strategic and almost immediate impact. Public perception of compliance with law, for example, will continue to have significant impacts on COIN and its postmodern variants, but postmodern communications make the legal environment subject to lawfare manipulation (discussed below) and to unpredictable change.

Much of postmodern COIN takes place in urban areas, where the insurgent hides among the civilian population. Military engagements are short and fleeting, and innocent bystanders are omnipresent. Insurgents use propaganda to scare the population and

fuel resistance to COIN forces. If COIN forces attempt to segregate the population from insurgents, they are criticized for disrupting neighborhoods and for their unlawful actions. The success of a postmodern COIN campaign is thus at least as dependent on popular support, inside and beyond the battlefield to a larger area of influence.

The point of departure for postmodern COIN is the *U.S. Army/Marine Corps Counterinsurgency Field Manual (Counterinsurgency Manual)* and its companion, the *U.S. Army Stability Operations Field Manual*,³² published in 2006 in the midst of the wars in Iraq and Afghanistan. Both of these insurgencies previously would have been labeled as noninternational armed conflicts (NIACs) in IHL terms. As IHL experts know, however, there is little legal doctrine that governs NIAC, at least not in the form of agreed upon internationally enforceable norms. Although the U.S. Army/Marine Corps had internal doctrine for various forms of nontraditional warfare developed in modern times—operations other than war (OOTW), peacekeeping, peace enforcement, low-intensity conflict—the COIN Manual broke new ground in recognizing the uniqueness of each insurgency, noting the patterns that likely occur in postmodern insurgencies, and expressly downplaying the use of military force. The Manual states that COIN takes place "in a complex civilian environment . . . [where the] war, is in large part a war of ideas, the battle largely for one of perception."³³

The postmodern environment is murky, no doubt. The COIN Manual refers to the "mosaic war" of COIN. In other words, doctrine shifts, as does the legal framework. The Manual suggests, for example, that force protection, one of the mainstays of modern doctrine and consonant with IHL, may make the force less secure; that "soft power" may be more effective than traditional weapons; that overwhelming force may be less effective and more risks to the force may need to be accepted.³⁴

Postmodern COIN is a strikingly different approach than the modern kill-or-capture approach to warfare.³⁵ The objective is to win the population. Some insurgents will have to be killed or captured, but the focus of COIN is on building support for the local government. Nor is COIN focused only on military operations. It includes various reconstruction tasks, in support of winning the population. As the COIN Manual states, COIN operations focus on the security of the population; ensuring essential services; establishing governance structures; developing the economy and infrastructure; and communicating with the people.³⁶ Of course, ensuring civil security may require combat operations against insurgents, but those maneuvers, typically fought in close quarters inside an urban area, must avoid harming the population that the COIN force is trying to win over.

V. SHAPING A LEGAL FRAMEWORK

Until recently, law was only marginally involved in serious discussions of COIN theory and practice. Classical counterintelligence theory focused on tactics and the contexts in which COIN is pursued. The background law was IHL, embellished in some

circumstances by customary international law and domestic laws of states engaged in COIN operations. Particularly over the last decade, however, legal concerns with COIN and irregular warfare with nonstate entities generally have manifested themselves in two distinct ways. First, adversaries have used traditional IHL constraints as a tactical weapon against COIN forces—"lawfare"—where alleged shortcomings in states' obligations to comply with legal limits on the use of military force are showcased by adversaries to weaken the COIN operations. Others have asserted that COIN forces violate IHL in their operations, and similarly use the supposed violations as lawfare. Second, considerable attention has been paid in debating the legal contours for postmodern warfare to the choice of a legal framework for military operations—is it criminal law or international human rights law, treating insurgents or terrorists as criminals, subject to arrest, prosecution, and imprisonment? Or is it IHL, where the insurgents or terrorists are combatants, amenable to targeting, subject only to the *jus en bello* principles of distinction, proportionality, and military necessity?

The authors of this volume believe that lawfare is an inevitable tactic in postmodern warfare and that the best response to it is to create and embrace a workable legal framework for COIN and other forms of postmodern war. Lawfare cannot be removed from the global lens on military operations against insurgents, but its effectiveness can be blunted significantly by adapting IHL and other laws to better fit the circumstances of postmodern war. Regarding the supposed choice between criminal law enforcement and IHL to govern the conduct of postmodern warfare, we reject the either/or dichotomy altogether. Instead, the authors offer a range of alternative configurations for how law might be tempered, adjusted, reshaped, and even created anew to provide a coherent and practically useful framework for COIN and other postmodern warfare. At the same time, COIN embraces criminal law processes as integral to defeating insurgents or other irregular fighters. Arrest, detention, and prosecution are always preferred over targeting and the kill/capture option. Indeed, building the host state criminal law institutions is a complement to the use of criminal law in defeating the insurgency and an adjunct to building the legitimacy of the government. When the use of lethal force is required in postmodern warfare, compliance with law harmonizes with the government's legitimacy and distinguishes the COIN forces from the insurgents.

The chapters in this book will show that in important respects, a COIN or other postmodern military operation confronts operational pitfalls that will benefit from rethinking traditional IHL doctrine. Consider targeting. Under IHL, the combatant's privilege leaves civilians harmed as a result of targeting with no protection and no legal recourse. In COIN, it is important to consider whether a military operation will create more insurgents by virtue of its being conducted than it will eliminate if carried out. COIN operators must simultaneously defeat an insurgency while protecting the civilian population and avoid furthering the insurgent cause. The IHL principle of distinction requires considering whether a target may be struck in view of the presence of civilian bystanders, but it does not take into account the broader context of the targeting decision. The sort

of cost/benefit calculation that goes on in COIN operations is not part of IHL. One approach may be to leave IHL as it is, with its binary focus, to govern all uses of military force during armed conflict. The COIN trade-offs could be left to operational guidance, or policy. In our view, COIN and other forms of postmodern warfare will be more successful and more legitimate in the eyes of the affected populations if the requirements are memorialized in law.

A second example of an IHL standard in need of framing for postmodern warfare explored in this book is the principle of proportionality. Protocol I of the Geneva Conventions forbids indiscriminate attacks, defined as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."³⁷ Focusing on "military advantage" may be an insufficient marker in postmodern warfare. In insurgencies, those in noncombat roles may be as integral to the success of the insurgents' cause as the fighters. Those who provide shelter, cook food, deliver messages, and the like create for the COIN force a dilemma, where the need to separate insurgents from the population requires dealing with civilians using military force. Is a civilian Internet service provider (ISP) or radio station that spreads the insurgents' propaganda directly participating in hostilities under IHL? Probably not. Are its personnel subject to targeting in COIN? To arrest and detention? What discretion should the COIN force have in making such determinations? To what extent should the chance that targeting or arresting the ISP or radio station owner will inflame the insurgency factor into making the operational decisions in COIN?

The realities of postmodern warfare have already been noted by the United States. The COIN Manual explains that "in COIN operations, [military] advantage is best calculated not in terms of how many insurgents are killed or detained, ... [instead] the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape."³⁸ Moreover, COIN operations "that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency's appeal—especially if the populace perceives a lack of discrimination in their use."³⁹ The COIN Manual focuses on the identity of the individual insurgent, the future potential harm that insurgent may cause, and attempts to measure those subjective factors against potential civilian losses, including civilian support for the insurgency. Such fine calibration is not found in traditional IHL. Postmodern warfare may demand that self-interest on the part of COIN operators may be influenced by humanitarian concerns. In the context of COIN, as Sarah Sewell has written, "killing the civilian is no longer just collateral damage. ... Civilian casualties tangibly undermine the counterinsurgent's goals."⁴⁰

The U.S. COIN Manual states that "an operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents."⁴¹ United States forces may thus be obligated to assume greater risk in order to minimize loss of civilian lives. The COIN proportionality principle may thus be stricter than in

IHL, and postmodern warfare calls for a vigorous effort to flesh out just what the evolving standards for proportionality or its replacement look like.

The trend in postmodern warfare in the last decade has been for these adaptations to traditional IHL to take the form of operational law, or policy add-ons to IHL. Indeed, operational law has outpaced treaty-based legal developments and case law. It is not surprising that commanders in the field and their legal advisers would be the first to come to grips with the need for a reshaped legal paradigm in combating postmodern warfare. Nor has it been unhealthy for the reshaping to take the form of operational law standards. Going forward, however, nation states should assume full accountability for reshaping the framework for conducting postmodern warfare and adopt a new set of principles and guidelines, through states' political processes and at their highest levels. Fortunately, as the authors of this volume demonstrate, the reshaping does not involve the rejection of IHL or criminal law, or their counterterrorism doctrines. The new standards harmonize with the old, embellish them for new settings, and such reshaping may emanate from domestic and/or international institutions and processes.

VI. LOOKING AHEAD

Postmodern warfare will be with us for the foreseeable future, in one form or another. The fact that COIN in Afghanistan has lost its luster, and that the United States and other Western states are presently disinclined to invest in protracted conflicts abroad does nothing to blunt the inevitability of continuing insurgencies, ethnic and religious conflicts, wars over energy and other natural resources, and the need for military support in humanitarian responses. The contexts will vary, and the legal framework for postmodern wars will also be contingent on context. Yet the agreement in principle to a framework for COIN and other forms of postmodern war will be an important step for those seeking to protect innocents during wartime.⁴²

A. Roadmap for the Book

The four parts of our book that follow offer a range of legal and policy perspectives on the problems of COIN in particular and irregular warfare in general as twenty-first-century asymmetric warfare continues to evolve. The contributors offer analyses and prescriptions that are complementary in some instances and widely divergent in others. Their work is unified by the excellent scholarship and lucid insights.

Part I highlights a recent trend in irregular warfare—the tendency for the regulatory paradigms in armed conflict to converge, particularly IHL and HRL. In Chapter 1, Daphné Richemond-Barak assesses the role of the U.N. Human Rights Council in addressing violations of HRL, its original mandate, and IHL, an adopted task. Richemond-Barak worries that convergence of HRL and IHL in this instance could lead to misapplications of IHL and dilution of the respect shown to the Human Rights Council for its mandated HRL work. In Chapter 2, Evan Criddle looks closely at the potential for

convergence of IHL and HRL in COIN, focusing on the traditional IHL principle of proportionality. Criddle develops and applies a relational theory of *lex specialis* to distinguish when IHL or HRL doctrines should apply to set the parameters for what is proportionate in COIN.

Two former U.S. Army JAGs frame the thesis in Part II—that COIN operations afford an opportunity to reunify IHL. Eric Jensen argues in Chapter 3 that the traditional IHL dichotomy between international and noninternational armed conflict causes confusion and, at times, a failure to apply core IHL protections to armed conflict. Jensen would apply the full range of IHL principles to all forceful activities by state sovereign forces. In Chapter 4, Geoffrey Corn accepts the noninternational armed conflict categorization as a starting place for his examination of who may be targeted in unconventional conflicts with nonstate actors. Corn criticizes an ICRC study on civilians directly participating in hostilities and the study's application of a continuous combat function test to identify civilians that may be targeted. Corn argues that the better point of departure is to treat all noninternational armed conflicts as involving hostilities between opposing armed groups whose members are military objectives.

Part III focuses on the tensions that exist between protecting civilians and risking harm to the state force in COIN and other forms of irregular warfare. In Chapter 5, Peter Margulies takes a fresh look at the supposed duty to risk state forces when, for example, a state chooses to use air power to minimize risk to its own troops. Reviewing IHL and military ethics, Margulies argues against those who assert that a state has a categorical duty to risk its forces even when IHL would not so require according to the principle of proportionality. Alternatively, Margulies maintains that traditional IHL principles may be most fair to civilians and soldiers and that duties to the state that exceed IHL requirements may blunt the decisiveness commanders need. In Chapter 6, Chris Jenks focuses on the ongoing COIN operation in Afghanistan and explores the allocation of risk between the military force and the Afghan civilian population. Jenks prompts further discussion of whether the U.S. COIN doctrine emphasis on risk tolerance by the force works as theorized in practice. Gregory McNeal also examines civilian casualty mitigation in U.S. COIN operations in Chapter 7. He evaluates U.S. practice and theoretical and practical lessons learned while placing the concerns about mitigating civilian losses in their larger geopolitical context.

Finally, Part IV addresses an assortment of new legal and policy problems that arise on unconventional battlefields. In Chapter 8, Boaz Ganor revisits the IHL problems that accompany conflicts with nonstate actors. He points out that the protections for civilians under IHL are exploited by insurgents and terrorists, where military commanders may thus be compromised in conducting their operations. In response, Ganor proposes a new international legal framework, "multidimensional warfare," where he defines four categories of actors involved in warfare, each of which has a different status in the conflict. In Chapter 9, Robert Chesney offers a compelling case study of the 2011 targeted killing by the United States of Anwar al-Awlaki in Yemen. Chesney puts aside

the IHL, HRL, and U.S. constitutional questions associated with the Awlaki operation and focuses instead on the U.N. Charter and its rules governing the use of armed force in international affairs. Chesney concludes that consent by the Yemeni government or Article 51 of the U.N. Charter provided adequate authority for the United States to target Awlaki. In Chapter 10, Corri Zoli explores the Gaza flotilla incident in 2010 to further illustrate the ways in which asymmetric warfare challenges traditional IHL. Zoli explores the politicization of the incident, and she shows how the legal and policy shortcomings of postmodern warfare are especially attenuated when conflicts take place in a maritime environment.

War remains a complex political phenomenon, and wars will include conventional and postmodern challenges in an ever-changing environment. Postmodern wars will likely continue to be “wars amongst the people,” as described in the COIN Manual. Rather than leaving the legal rules of the game for military officials to set as they choose in each future conflict, policy makers, scholars, and practitioners should work to shape a legal framework for COIN and other forms of postmodern warfare, based on careful reflection, lessons learned, and strategic considerations. The law should be out ahead of the evolution of postmodern warfare, because the legal framework can itself generate the norms for the conflict. Law can shape strategy, and can provide guidance to the armed forces that will be sorely needed in these challenging conflict environments. We believe that the contributions in this volume will illuminate the role of law in the wars of the future.

Converging Paradigms in Contemporary Armed Conflict: Framing Problems of COIN