

**A DANGEROUS GUESSING GAME
DISGUISED AS ENLIGHTENED POLICY:
UNITED STATES LAW OF WAR
OBLIGATIONS DURING MILITARY
OPERATIONS OTHER THAN WAR**

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I. Introduction

Imagine it is the year 2010. United States military forces are invited to the tiny island state of Andar to help quell an insurgency and restore peace and democracy. Acting unilaterally and following a bilateral security agreement, U.S. forces deploy to Andar and immediately commence patrolling in and around the capital city of Tamir.

During the third night of patrols, a firefight erupts on the outskirts of Tamir pitting U.S. forces against the insurgents. The skirmish results in one U.S. soldier being killed and three more wounded. United States forces capture ten heavily armed insurgents wearing distinctive rebel uniforms. After receiving advice from his staff judge advocate, the U.S. commander transfers all of the insurgents to local law enforcement authorities. Once in the hands of the Andarians, the government indicts the insurgents under the criminal laws of Andar.

Less than thirty days later, a local court tries and convicts the insurgents for murder and other terrorist acts stemming from the incident with the U.S. forces. Ten days later, after denial of a direct appeal to the president of Andar for clemency, all ten rebels are publicly executed by firing squad in the capital city. United States forces attend, but do not participate in, the execution.

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II. The Issues

This article answers four primary questions. First, is it possible that current U.S. policy regarding application of the law of war to Military Operations Other Than War will ripen into customary international law binding on the United States? Second, if the U.S. law of war policy has attained the status of customary international law, what is the significance for the United States? Third, are there any shortcomings in current U.S. policy regarding applying the law of war to Military Operations Other Than War? Fourth, should any changes be made to current U.S. policy that applies the law of war to Military Operations Other Than War?

Although, concededly, the introduction depicts a highly provocative and improbable scenario, it is merely intended to illustrate a single point: the law of war² plays a profound role in regulating military conduct during Military Operations Other Than War.³ This is not surprising considering that the law of war was originally designed to apply to international armed

2. Also referred to as the law of armed conflict or humanitarian law. See Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 295 (1995).

The Hague and Geneva Conventions embody the laws of war, referred to as the *jus in bello*. The Hague Conventions are a series of treaties concluded at the Hague in 1907, which primarily regulate the behavior of belligerents in war and neutrality, whereas the Geneva Conventions are a series of treaties concluded in Geneva between 1864 and 1949, which concern the victims of armed conflict. In 1977 two Protocols to the 1949 Geneva Conventions, which further developed the protection of victims in international armed conflicts and expanded protections to victims of non-international armed conflict, were opened for signature, but were not as universally accepted.

Id.

One military commentator noted that the core body of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter *Convention on Prisoners of War*]; Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 2 n.4 (1996). For a concise history of the development of the law of war from Richard Coeur de Lion to the Lieber Code, see Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 4.

conflict, not internal insurgencies, civil wars, peacekeeping operations, or humanitarian missions.⁴

This article examines the U.S. policy of applying the law of war to Military Operations Other Than War. To facilitate the examination, the article first discusses the meaning and continuing importance of customary international law. In particular, it focuses on both the potential consequences of states making unilateral resolutions and the renewed vitality of customary international law in the development of the law of war. Next, the article addresses the U.S. law of war policy in Military Operations Other Than War. After examining U.S. policy, the article turns to recent U.S. practice in Military Operations Other Than War, ranging from Operation Urgent Fury in Grenada to Operation Joint Endeavor in the former Yugoslavia. The article then analyzes the significance of these different operations and explains their interrelationship.

3. The Joint Chiefs of Staff define Military Operations Other Than War as “[o]perations that encompass the use of military capabilities across the range of military operations short of war. These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after war.” THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP’T OF DEFENSE DICTIONARY OF MILITARY & ASSOCIATED TERMS 265 (23 Mar. 1994). The purposes of Military Operations Other Than War are to “promote national security and protect national interests.” THE JOINT CHIEFS OF STAFF, JOINT PUB. 1, JOINT WARFARE OF THE ARMED FORCES OF THE UNITED STATES, v (10 Jan. 1995). 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.” U.S. DEP’T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-0 (14 June 1993).

4. Article 2 common to all four Geneva Conventions of 1949 states that the Conventions apply to “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties . . . (and) to all cases of partial or total occupation . . .” This is the test for determining when the entire body of the law of war becomes applicable to a conflict. See *Prosecutor v. Tadic*, case No. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996) (analyzing the applicability of the law of war to the conflict in the former Yugoslavia). Conversely, Common Article 3 to the Geneva Conventions is the only article of the Conventions that applies, as a matter of law, during noninternational armed conflicts. Essentially, Article 3 proscribes humane treatment for all noncombatants and obligates the collection of the wounded and sick. In addition, it prohibits violence to life and limb, murder, mutilation, cruel treatment and torture, the taking of hostages, outrages on personal dignity, and summary executions during internal armed conflicts.

III. Customary International Law

A. Traditional View of Customary International Law

1. *International Approach*

States create customary international law by following a general and consistent practice, which is motivated by the conviction that international law requires that conduct.⁵ To form customary international law, states must meet a two-prong test.⁶ The first prong is an act or actual practice of states. The second prong is the belief by states that they are acting under a legal obligation, also known as *opinio juris*.⁷

State practice is the most concrete element of customary international law.⁸ To become binding, the practice must be consistent, settled, constant, and uniform, but need not be universal.⁹ Accordingly, there is no precise

5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES §102(2) (1987); see, e.g., Statute of International Court of Justice, art. 38(1)(b) (defining international custom “as evidenced of a general principle accepted as law”); Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20) (explaining that for customary international law to form, the Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the states in question, and that the usage is the expression of a right appertaining to the state and a duty incumbent in the state). See generally A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971) (explaining the development and scope of customary international law).

6. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 536 (1993). Noting:

Customary international law is the product of state practice and *opinio juris*. A norm of international law is established if states act in conformity with it and the international community accepts that norm as obligatory under law. This development may take some time or it may happen quickly. States, acting through their officials, participate in the evolution of this law by their behavior and by conceptualizing their behavior as obligated under international law. Some maintain that individual states must accept the norm as law. But clearly acceptance is required only by the international community and not by all individual states.

Id.

7. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, §102 cmt. c, at 25 (“For a practice to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*).”) See Leslie Deak, *Customary International Labor Laws and their Applicability in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT’L L. 1, 9 (1994) (explaining that *opinio juris* is the element that transforms a simple practice or custom into public international law).

formula to indicate how widespread a practice must be before it evolves into customary international law. It should, however, reflect wide acceptance among the states involved in the relevant activity.¹⁰ In some instances, a practice followed by a few states can create a rule of customary international law, if there is no practice that conflicts with the rule.¹¹

The key to understanding how customary international law is formed lies in the distinction between the concepts of “custom” and “usage.”¹² As a term of art, “custom” requires a clear and continuous habit of doing certain acts under the conviction that they are obligatory under international law (*opinio juris*).¹³ In contrast, “usage” refers to a habit of doing certain acts without a conviction that the conduct is required under international law.¹⁴ A practice initially followed by states as a matter of courtesy, habit, or policy may evolve into international law when the states generally come to believe that they are legally obligated to comply with it.¹⁵ Determining when state practice has ripened into binding customary international law has never been easy to objectively quantify.¹⁶ Rather, the developmental process depends on subjective interpretations of the facts and motives of state officials.¹⁷

8. Deak, *supra* note 7, at 6. See also Michael Akehurst, *Custom As A Source of International Law*, 47 BRIT. Y.B. INT'L L. 18 (1977).

State practice means any act or statement by a state from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* (such as general Assembly resolutions), national laws, national judgments and omissions. Customary international law can also be created by the practice of international organizations and (in theory, at least) by the practice of individuals.

Id.

9. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 433 (1983); see generally Gihl, *The Legal Character and Sources of International Law*, 1 SCAN. STUD. L. 51, 76-77 (1957) (explaining that not every state practice constitutes custom).

10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, at 25.

11. Akehurst, *supra* note 8, at 18 (arguing to require otherwise would make the creation of new customary international law an intolerably difficult process).

12. I L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE (PEACE), 26 (H. Lauterpacht ed., 8th ed. 1955).

13. *Id.*

14. *Id.*

2. American Judicial Treatment of Customary International Law

The United States Constitution does not expressly recognize customary international law as a source of domestic law.¹⁸ As early as 1815, however, the United States Supreme Court acknowledged that the law of nations was a “great source” of law.¹⁹ In 1900, the Supreme Court unequivocally pronounced that “international law is part of our law.”²⁰

To determine the scope of customary international law, the Supreme Court looked to the customs and usages of civilized nations as evidenced by the works of jurists and commentators.²¹ In *Filartiga v. Pena-Irala*,²² the Second Circuit interpreted these earlier Supreme Court decisions to mean that federal courts must analyze international law “not as it was in 1789, but as it has evolved and exists among the nations of the world

15. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, at 25. See OPPENHEIM, *supra* note 12, at 27.

As usages have a tendency to become custom, the question presents itself, at what time does a usage turn into custom? This question is one of fact, not of theory. All that theory can say is this: Whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law.

Id.

16. Charney, *supra* note 6, at 545 (explaining that proof of *opinio juris* and state practice has never been objectively evident).

17. *Id.* But see M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 25 (6th ed. 1987).

The main evidence of customary law is to be found in the actual practice of states, and a rough idea of a state’s practice can be gathered from published material—from newspaper reports of actions taken by states, and from statements made by government spokesmen [sic] to Parliament, to the press, at international conferences and at meetings of international organizations; and also from a state’s law and judicial decisions, because the legislature and the judiciary form part of a state just as much as the executive does.

Id.

18. The Supremacy Clause of the Constitution, however, does recognize that “all Treaties . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art VI, § 2.

today.”²³ Thus, under U.S. jurisprudence, customary international law is ever-changing.

19. *Thirty Hogshead of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815). In delivering the opinion, Chief Justice Marshall wrote:

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by the series of judicial decisions. The decisions of the courts of every country, so far as they are founded on a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Id.

20. *The Paquete Habana*, 175 U.S. 677 (1900). This case arose from the challenge to the U.S. seizure of a Spanish fishing vessel during the Spanish-American War on the grounds that customary international law prohibited the seizure. In deciding the case, the Supreme Court squarely addressed the issue of the relationship between customary international law and U.S. domestic law. *Id.*

21. *Id.* (“Such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”); *see also* *United States v. Smith*, 18 U.S. 153 (5 Wheat.) 153, 161-162 (1820) (explaining that the crime of piracy under the law of nations may be ascertained by consulting the works of jurists, or by the general usage and practice of nations, or by judicial decisions); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (holding that under the Alien Tort Claims Act, federal courts find norms of contemporary international law by consulting works of jurists writing professedly on public law, by general usage and practice of nations, or by judicial decisions recognizing and enforcing that law).

22. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). This case involved a wrongful death action resulting from acts of deliberate torture. All of the parties to the suit were citizens of the Republic of Paraguay and yet brought suit in the Federal District Court for the Eastern District of New York under the Alien Tort Statute. On appeal, the Second Circuit held that the Alien Tort Statute provided federal jurisdiction over the matter because the alleged torturer was found and served with process by an alien within the borders of the United States. The court further held that deliberate torture perpetrated under the color of official authority violated universally accepted norms of international law.

23. *Id.* at 881.

3. *Emerging Trends In The Development of Customary International Law*

a. *Unilateral Acts Of States*

A state's unilateral act may create, change, or modify customary international law.²⁴ The Permanent Court of International Justice [hereinafter World Court] first recognized this principle in the *Eastern Greenland* case.²⁵ The case involved a dispute between the Royal Danish government and the Royal Norwegian government concerning the legal status of certain territories in Eastern Greenland.²⁶ The dispute arose after the Norwegian foreign minister repeatedly told his Danish counterpart that Norway would not contest Denmark on the question of Denmark's sovereignty over Greenland.²⁷ At no time, however, did the Norwegian official declare that Norway was acting under any perceived legal obligation to refrain from occupying Greenland.

The issue before the court was whether the statements made by the Norwegian official created an obligation binding under international law that Norway must honor.²⁸ Notwithstanding the absence of an expression of *opinio juris* by the Norwegian minister, the court concluded that his statements created a legally binding obligation on the Norwegian government.²⁹ Consequently, Norway was estopped³⁰ from acting contrary to its declared intent of acquiescing in Danish sovereignty over Greenland.³¹ The *Eastern Greenland* case of 1933 is significant to the U.S. law of war policy of 1998. The decision demonstrates that an international court might enforce a state's official pronouncements, even if the state did not intend to reflect *opinio juris*.

24. W.E. HOLDER & G.A. BRENNAN, *THE INTERNATIONAL LEGAL SYSTEM (CASES AND MATERIALS WITH EMPHASIS ON THE AUSTRALIAN PERSPECTIVE)* 85 (1972). This also seems to be a viable theory of international law development for the United States. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES*, at 25 (1987) (discussing how a practice initially followed by states as a matter of courtesy may become law).

25. *Legal Status of Eastern Greenland (Nor. v. Den.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (June 18). See generally Oscar Svarlien, *The Eastern Greenland Case In Historical Perspective* 1-74 (1964).

26. See *Legal Status of Greenland*, 1933 P.C.I.J. at 23.

27. *Id.* at 73. Known as the Ihlen Declaration of 1919, the statement read in part, "I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question." *Id.* Later that year, the Norwegian Minister of Affairs reiterated his country's position on Greenland in a dispatch to the Danish Minister by stating, "it was a pleasure to [sic] Norway to recognize Danish sovereignty over Greenland." *Id.*

28. *Id.* at 70-72.

Over forty years later, the International Court of Justice renewed the significance of unilateral acts by states in *Nuclear Tests*.³² That case involved a dispute between the government of New Zealand and the French government concerning the legality of atmospheric nuclear tests conducted by France in the South Pacific.³³ New Zealand asked the court to hold that French officials' statements about the halting of nuclear testing in the South Pacific prohibited France, under international law, from resuming nuclear testing.³⁴ The court remarked:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the decla-

29. *Id.* at 73. It is important to note that this conclusion was *not* based on a theory that the Norwegian statements, although not acknowledged as *opinio juris*, nonetheless served as evidence of that factor. According to the court: "It follows that, as a result of the undertaking involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland." *Id.* See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 384 (June 27). This case involved a dispute between the United States and Nicaragua concerning U.S. support for the *Contras* against the Nicaraguan government. In a lengthy opinion, the World Court condemned the U.S. support for the *Contras* on numerous grounds, including the U.S. breach of its obligation under customary international law not to intervene in the affairs of another state. In an often ignored part of the opinion, the court ruled against Nicaragua on an issue related to the unilateral acts doctrine. Specifically, the court held that the Junta government of Nicaragua created a binding unilateral obligation under international law by promising to implement the Fundamental Statute and Organic Law and implement its *Programme* immediately after it was installed as the government of Nicaragua. Although this was not a central part of the decision, it nevertheless demonstrates that an international tribunal will enforce official pronouncements by a state, even absent *opinio juris*.

30. Under the unilateral acts doctrine of international law, the term "estoppel" retains its ordinary contract law meaning, namely that a party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly. BLACK'S LAW DICTIONARY 494 (5th ed. 1979).

31. 1 SCHWARZENBERGER, INTERNATIONAL LAW 553 (3d ed. 1957) ("The typical minimum effect of unilateral acts is to create an estoppel. It prevents the subject of international law, to which the unilateral act is imputed, from acting contrary to its declared intent.").

32. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20).

33. *Id.* at 461.

34. *Id.* at 460.

ration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.³⁵

The *Nuclear Tests* case significantly affects the consequences of unilateral acts by states. First, and most importantly, the court underscored the potential legal dangers for states that issue unilateral declarations and then subsequently repudiate them. The court stressed that one of the basic governing principles of legal obligations is good faith.³⁶ As such, “interested states may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.”³⁷ Second, for a unilateral statement to have legal effect, the statement does not need to be addressed to a particular state, or be manifestly accepted by any other states.³⁸ Third, the court created a critical distinction between France’s subjective intent in issuing its unilateral declaration and the actual contents of the declaration. In doing so, the court presumed that France intended its unilateral declaration to be binding. The judges presumed this after they closely scrutinized the actual nature, limits, and terms of the unilateral statement and whether the statement was publicly expressed.³⁹

As in *Eastern Greenland*,⁴⁰ the absence of any expression of *opinio juris* by French diplomats did not nullify the French obligation to honor its official declarations to cease nuclear testing. Instead, the court only required that France intended *itself* to be bound by its pledge to cease nuclear testing, even if France did not believe that international law required it.⁴¹

Consequently, in the aftermath of the *Eastern Greenland* and the *Nuclear Tests* cases, a state must be extremely cautious when issuing any

35. *Id.* at 472. *But see* Alfred P. Rubin, *The International Legal Effects Of Unilateral Declarations*, 71 AM. J. INT’L L. 27 (1977). In his article, Professor Rubin is highly critical of the *Nuclear Tests* case primarily on the grounds there was insufficient evidence to conclude that France intended to be bound as a matter of international law. In summary, Professor Rubin chastises the court for creating a “new rule of international law saddling a state with apparently nonrevocable treaty-like commitments *erga omnes*, arising out of public unilateral declarations with a presumed intention to be bound and nothing more.”

36. *See Nuclear Tests*, 1974 I.C.J. at 472.

37. *Id.* at 473.

38. *Id.* at 474.

39. *Id.* at 475.

40. *See supra* notes 25-31 and accompanying text.

41. *See Nuclear Tests*, 1974 I.C.J. at 472-73.

unilateral statement, because international law may later presume that the state intended the statement to be binding. This is a critical development in international law because a state may *unintentionally* create binding international legal obligations on itself.

b. The Renewed Vitality of Customary Law in the Development of the Law of War

The International Court of Justice's recent Appeal's Chamber opinion in *Prosecutor v. Tadic*,⁴² profoundly altered the role that customary international law plays in developing the law of war. The opinion marked a fundamental change in the concept of state sovereignty over internal matters.⁴³ The *Tadic* decision resulted from a defense motion for an interlocutory appeal on the question of jurisdiction.⁴⁴ At its heart, the *Tadic* decision purports to begin stripping away the traditional distinction between international and internal armed conflicts. This quote exemplifies the mood of the court:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of law and as a protection for those who trample underfoot the most elementary rights of humanity.⁴⁵

Before *Tadic*, it was well settled that the only treaty rules that apply in all noninternational armed conflicts were those set forth in Article 3 common to the four Geneva Conventions of 1949 and, to some extent, Geneva Protocol II of 1977.⁴⁶ In *Tadic*, the court concluded that these protections for civilians were grossly insufficient and did not reflect current

42. *Prosecutor v. Tadic*, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996).

43. Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L. L. 238 (1996).

44. The defense jurisdiction motion was made to the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. *Id.*

45. *Tadic*, 35 I.L.M. at 32.

46. Symposium, *Application of Humanitarian Law in Noninternational Armed Conflicts*, 85 AM. SOC'Y INT'L. L. 94 (1991) (including participants from academic institutions, the International Committee of the Red Cross, the United States Department of State, and the United States Department of Defense (DOD)) [hereinafter Symposium].

customary international law. In the court's words, "a [s]tate-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned."⁴⁷ Consequently, the court determined that certain customary rules of warfare apply in internal armed conflicts, a conclusion that far exceeds the scope of Common Article 3 and Geneva Protocol II.⁴⁸

The opinion of the court is noteworthy, if not revolutionary, because the court applied internal conflict rules originally developed to apply only during international conflicts. The court, however, used the vehicle of customary international law to extend the rules to civil wars and other internal conflicts.⁴⁹

Although the *Tadic* decision dramatically expanded customary international law rules that govern internal armed conflict, the court stopped short of extending all the principles of the law of war to internal conflicts.⁵⁰ Instead, the court ruled that only some of the rules and principles governing international armed conflicts have gradually been extended to apply in internal conflicts.⁵¹ In addition, the court further limited its holding by extending only "the general essence" of the rules from international to internal armed conflict.⁵² Specifically, the court rejected transferring the detailed regulations of international armed conflict to internal war.⁵³

To determine what rules and principles of international armed conflict have extended (via customary international law) to internal war, the court instructs that states should rely primarily on official state pronouncements, military manuals, and judicial decisions, *not on actual state practice*.⁵⁴

47. *Tadic*, 35 I.L.M. at 54.

48. *Id.* at 67. The court enumerated these rules to include the protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflict and ban of certain methods of conducting hostilities.

49. Meron, *supra* note 43, at 244.

50. *Tadic*, 35 I.L.M. at 67.

51. *Id.*

52. *Id.*

53. *Id.* ("[T]his extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.").

54. *Id.* at 55 (emphasis added).

The court concluded that using the actual behavior of troops in the field is not practical and is subject to misinformation.⁵⁵ The court, therefore, cites the *German Military Manual of 1992*⁵⁶ as evidence that the general principles of international armed conflict also apply during internal armed conflicts.⁵⁷

The court's reliance on the *German Military Manual* profoundly affects the United States in two ways. First, the language of the *German Military Manual* is strikingly similar to the language of the U.S. law of war policy.⁵⁸ This is important because an international tribunal may someday rely on the U.S. law of war policy as evidence of the customary laws of war. Second, neither the German nor the U.S. declarations refer to a legal requirement to apply the law of war to noninternational conflicts. On the contrary, both are couched as "policy" statements, not legal obligations. This is important because the *Tadic* decision has seemingly made this a distinction without a meaningful difference. In fact, the decision suggests that a state can no longer avoid creating customary international law by simply categorizing a state practice as a "policy" rather than a legal obligation. Put another way, a state-manufactured label is insignificant compared with the actual practice of a state.

IV. The United States and the Law of War During Noninternational Armed Conflict

A. United States Policy

In 1956, the United States Army codified its position that unwritten or customary law of war is binding on all nations and that all U.S. forces must strictly observe it.⁵⁹ In 1979, the Department of Defense issued its

55. *Id.*

56. "Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." HUMANTARES VOLKERRECHT IN BEWAFFNETEN KONFLIKTEN - HANDBUCH. Aug. 1992, DSK AV207320065, para. 211 *in fine*; unofficial translation. Accord U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 Jul. 1979) (although the United States Department of Defense law of war policy is virtually identical to the German policy cited by the tribunal, there is no indication that the tribunal considered the United States policy, nor explanation for not doing so).

57. *Tadic*, 35 I.L.M. at 64.

58. See *infra* text accompanying notes 66-68.

59. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 7(c) (18 July 1956).

Law of War Program, the primary purpose of which was to ensure that all U.S. forces observed and enforced the law of war.⁶⁰ To achieve this aim, the *Law of War Program* established mandatory law of war training and instruction for all military personnel commensurate with their duties and responsibilities.⁶¹ In addition, it created a reporting mechanism for alleged violations of the law of war.⁶²

For purposes of this analysis, the significant provision of the *Law of War Program* is the following: “The Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, *however such conflicts are characterized*.”⁶³ With language closely resembling the *German Military Manual of 1992*,⁶⁴ the directive clearly envisions applying the law of war to internal, as well as international, armed conflicts. The *Law of War Program*, however, failed to define the meaning of the phrase “the law of war.”

Subsequent regulations employed and expanded the *Law of War Program*. For example, in 1994, the Chairman of the Joint Chiefs of Staff (CJCS) published the *Standing Rules of Engagement for U.S. Forces*, which discuss the applicability of the law of war during armed conflict.⁶⁵ Most importantly, the Chairman specifically applied the *Law of War Program* with the issuance of a CJCS Instruction in 1996.⁶⁶ The first clause of the applicable paragraph of the Instruction mirrors the language of the original *Law of War Program* and governs situations involving armed conflict. It reads: “The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized”⁶⁷ This clause did not advance the original *Law of War Program* because it too failed to define the phrase “the law of war.” Consequently, the issue is whether the phrase “the law of war” encompasses the internationally recognized body of law known as the law of war or something less extensive.

60. U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). The impetus for the program was the American experience during the Vietnam War. The purpose of the policy was to assign responsibilities within the DOD for a program to ensure compliance with the law of war.

61. *Id.*

62. *Id.*

63. *Id.* (emphasis added).

64. See *supra* text accompanying note 56.

The second clause of the CJCS Instruction, however, fails to resolve even more questions than the first clause. The second clause governs Military Operations Other Than War. It reads: “[U]nless otherwise directed by competent authorities, [the Armed Forces of the United States] will apply law of war *principles* during all operations that are categorized as Military Operations Other Than War.”⁶⁸ Again, U.S. forces are instructed to apply an undefined source of law. This results from the failure to define what is meant by the principles of the law of war.

As drafted, the second clause alone could have multiple interpretations, ranging from minimal (only the targeting principles derived from the Hague tradition)⁶⁹ to expansive (including not only the Hague tradition, but also principles derived from the Geneva tradition). For example, is each provision of the four Geneva Conventions a principle of the law of

65. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994). When U.S. forces are operating with multinational forces:

U.S. forces will always comply with the Law of Armed Conflict. However, not all situations involving the use of force are armed conflicts under international law. Those approving operational rules of engagement must determine if the internationally recognized Law of Armed Conflict applies. In those circumstances when armed conflict, under international law, does not exist, Law of Armed Conflict principles may nevertheless be applied as a matter of national policy. If armed conflict occurs, the actions of U.S. forces will be governed by both the Law of Armed Conflict and rules of engagement.

Id.

See also U.S. DEP’T OF DEFENSE, DIR. 2310.1, DOD PROGRAM FOR ENEMY PRISONERS OF WAR AND OTHER DETAINEES (18 Aug. 1994). The Directive states that DOD policy is:

[T]he U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions . . . and shall be given the necessary training to ensure they have knowledge of their obligations under the Geneva Conventions . . . before an assignment to a foreign area where capture or detention of enemy personnel is possible.

Id.

66. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

67. *Id.*

68. *Id.*

69. *See, e.g.*, INTERNATIONAL AND OPERATION LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 7-3 (1997) (discussing “principles” of the law of war).

war? Furthermore, the clause fails to specify which “competent authorities” are authorized to circumvent law of war principles during Military Operations Other Than War. For example, is a competent authority the Secretary of Defense, a service secretary, a commander-in-chief, a joint task force commander, a brigade commander, or a battalion commander? Put bluntly, the entire clause is so vague that it is almost devoid of any meaning whatsoever.⁷⁰

Regrettably, this policy statement of the Chairman of the Joint Chiefs of Staff codifies the most recent authority of the United States position on applying the law of war during noninternational armed conflicts and Military Operations Other Than War. At its core, the policy is fundamentally flawed because it fails to specify what part of the law of war applies during noninternational armed conflicts and which law of war principles apply during Military Operations Other Than War. For a military commander in the field, resolving these questions carries tremendous import.

B. Recent United States Practice

During the past two decades, the U.S. government has frequently deployed its armed forces in non-international armed conflicts and Military Operations Other Than War. Such operations include Grenada, Panama, Somalia, Haiti, and the former Yugoslavia. During each of these missions, U.S. commanders and their judge advocates faced difficult issues applying the law of war. For example, during Operation Urgent Fury in Grenada in 1983, judge advocates were uncertain if they should classify captured personnel as prisoners of war, detainees, or refugees.⁷¹

On 20 December 1989 during Operation Just Cause, U.S. military forces landed in Panama in the largest military combat operation since Vietnam.⁷² For purposes of applying the law of war, U.S. officials viewed the operation as a hybrid international-internal armed conflict.⁷³ Accord-

70. It is plausible to argue that such a vague policy provides commanders with a degree of flexibility that would otherwise be lacking by adding definition to the meaning of “principles.” This flexibility, however, is always inherent in any “policy based” dictate, even if it is detailed and defined.

71. Memorandum, Headquarters XVIII Airborne Corps and Fort Bragg, AEZA-JA, to Department of the Army, subject: Operation Urgent Fury (After Action Report and Lessons Learned) (15 Dec. 1983) (on file with author) (explaining that because the staff judge advocate was not informed of the legal basis for the operation in Grenada in a timely manner, providing accurate and complete legal advice was hampered).

ingly, as in Grenada, judge advocates deployed to Panama during the operation wrestled with detainee and prisoner of war issues.⁷⁴

In Panama, U.S. forces detained more than 4100 people during the first few days of the operation.⁷⁵ The U.S. Army afforded all detainees the rights and protections of the Geneva Conventions until their precise status was determined following an Article 5 tribunal.⁷⁶ Accordingly, U.S. forces fed detainees and provided them medical care on a nondiscriminatory basis.⁷⁷ In fact, U.S. medivac helicopters carried wounded Panamanian Defense Force members and U.S. soldiers on the same aircraft and provided each with comparable medical care.⁷⁸

Unlike the operations in Grenada and Panama, Operation Restore Hope in Somalia, commencing in 1992, was unique because there was no sovereign nation to call for, or object to, the military intervention.⁷⁹ Somalia was a country not only in chaos but also anarchy.⁸⁰ There was no local law or government at any level.⁸¹ United States Central Command determined that Operation Restore Hope would be a humanitarian operation and not an "armed conflict" under international law.⁸² As such, the legal status

72. Major John Embry Parkerson, Jr., *United States Compliance With Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991).

73. *Id.* at 139.

International armed conflict considerations determined how the United States forces conducted the actual hostilities, invoking the full application of the 'law of the Hague' and its proportionality principles. These principles are firmly part of United States military doctrine and enter into the planning and execution in any armed conflict in which the United States forces participate, whether international or internal. United States treatment of protected Panamanians under the 'law of Geneva,' however, illustrated the inherent difficulties in making the clear characterizations that are necessary for satisfactory application of that body of law in an armed conflict like the Panama operation.

Id.

74. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION JUST CAUSE (26-17 Feb. 1990) [hereinafter JUST CAUSE AAR].

75. *Id.* Detainees included members of the Panamanian Defense Force, Dignity Battalions, "and assorted criminals and crazies." *Id.*

76. *Id.* Convention on Prisoners of War, *supra* note 2, art. 5. An Article 5 Tribunal is a law of war procedure to determine the legal status of captured persons.

77. JUST CAUSE AAR, *supra* note 74.

78. *Id.*

79. F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS 29 (Winter 1993-94).

and responsibilities of the United Nation (UN) forces derived from UN Security Council resolutions.⁸³

Somalia was also unique in that the operation began as a seemingly simple emergency-relief mission but transformed into an aggressive peace enforcement mission.⁸⁴ This left the operation in a “twilight zone” between peace and war.⁸⁵ Consequently, determining what international law, if any, applied in Somalia was complex.⁸⁶ Such a determination, however, was critical because UN forces apprehended a large number of Somalis during the first few weeks of the operation.⁸⁷ The issue arose as to their legal status under international law. Typically, detainees were disarmed, questioned, and quickly released.⁸⁸ In the end, because of limited resources, UN forces only continued to apprehend civilians who attacked or threatened the UN force.⁸⁹

Operation Provide Comfort began on 7 April 1991 with the mission of providing humanitarian relief to displaced Kurdish persons near the Turkish-Iraqi border.⁹⁰ As in Somalia, Operation Provide Comfort was termed a humanitarian, not a military, operation. As such, the law of war

80. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION RESTORE HOPE, 5 DECEMBER 1992-1995, MAY 1993, 3 (30 Mar. 1995) [hereinafter RESTORE HOPE AAR].

81. *Id.*

82. Lorenz, *supra* note 79, at 29.

83. *Id.*

84. Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 155 (1994).

85. *Id.*

86. *Id.*

[A] clear demarcation between a state of peace and one of war no longer exists, if it ever did . . . and in the shadows of the intervening no-man's land, there may be little or no international law specifically applicable. The distinction is more than theoretical: In the murky business of fighting war as peacekeepers, understanding the rules is half the battle.

Id.

See also RESTORE HOPE AAR, *supra* note 80, at 3 (“As an independent state, Somalia had not been ‘invaded’ nor were there, arguably, belligerents. Save for Common Article 3 applicability to the various armed clans, the Geneva Conventions, as a matter of policy as well as international law could not apply.”).

87. Lorenz, *supra* note 79, at 35.

88. *Id.*

89. *Id.*

did not strictly apply;⁹¹ however, the first of the eleven enumerated rules of engagement for the operation read: “All military operations will be conducted in accordance with the Law of War.”⁹² Because the entire operation was classified as a humanitarian operation, it is puzzling why the first rule of engagement mentioned the law of war and military operations.

A possible explanation may be the confusion caused by the flawed U.S. law of war policy,⁹³ and commanders and judge advocates implementing it in the field. For example, at the outset of operations, several Iraqi soldiers “surrendered” to U.S. forces and asked to be taken into refugee camps.⁹⁴ U.S. forces did not know how to react.⁹⁵ Unsure if the Geneva Conventions applied to the situation, the Americans provided the Iraqi soldiers with food, water, and medical assistance, but gave them no shelter.⁹⁶ The American view was that as long as the mission remained humanitarian in nature, the United States lacked the authority to take prisoners of war; Iraqi soldiers were not entitled to prisoner of war status.⁹⁷

During 1994 and 1995, U.S. forces deployed to Haiti in another Military Operation Other Than War, Operation Uphold Democracy. Thousands of U.S. soldiers were present, and thousands of civilians and noncombatants in Haiti were displaced. Politicians and scholars, however, have argued that the law of war did not strictly apply to the deployment because it was permissive and did not involve international armed conflict.⁹⁸

90. Memorandum for Colonel Richardson, subject: After Action Report on Operation Provide Comfort (14 June 1991) (on file with author) [hereinafter Provide Comfort Memo].

91. *Id.*

92. *Id.* By way of comparison, the Joint Task Force Rules of Engagement in Somalia make no mention of the law of war. In fact, the rules remind the soldiers that “the United States is not at war.” *Id.*

93. See *supra* notes 63-68 and accompanying text.

94. Provide Comfort Memo, *supra* note 90.

95. *Id.* (“Concerns were that we couldn’t accept surrender of soldiers because we weren’t at war, we couldn’t put the soldiers in the camps because we couldn’t guarantee their safety, and we didn’t have the resources to build separate camps for them.”).

96. *Id.* Although a SECRET JCS message dated 281622Z April 1991 authorized the taking of enemy prisoners of war in “extraordinary circumstances,” no such circumstances arose during Operation Provide Comfort and no prisoners of war were taken by U.S. forces. Iraqi soldiers encountered in the exclusion zone were disarmed and briefly detained for hand over to the Iraqi representative through the military coordination center.

97. Memorandum from Colonel Quentin Richardson, to Deputy Commanding General, subject: DCG Note re: CIB release on Iraqi Soldiers Receiving “Refugee Status” (10 May 1991) (on file with author).

Nevertheless, within seventy-two hours of the United States' arrival in the country, the issue of the legal status of "captured" Haitians and the need for a facility to house detained persons became apparent.⁹⁹ United States forces elected to treat potentially hostile detained persons during the operation "as if they were prisoners of war."¹⁰⁰ In addition, American judge advocates decided to model detention procedures on Haitian law.¹⁰¹ From the American perspective, this was done as a matter of policy rather than as a legal obligation.¹⁰²

Judge advocates in Haiti, however, were left to decide what it meant to treat a person as if they were a prisoner of war.¹⁰³ For example, must they provide a monthly pay schedule for each prisoner in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War?¹⁰⁴ As judge advocates learned in Haiti, many of the provisions of the Geneva Conventions did not neatly translate from their intended context of war into a Military Operation Other Than War.¹⁰⁵

98. Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78-82 (1995).

The agreement of September 18, 1994, negotiated in Port-au-Prince between President Jimmy Carter and General Raoul Cedras, and its acceptance by the Aristide government, led to the consent-based, nonviolent, hostilities-free entry of U.S. forces and their peaceful deployment. In such circumstances, the Geneva Conventions on the Protection of Victims of War of August 12, 1949, are not, strictly speaking applicable.

Id.

99. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION UPHOLD DEMOCRACY, 1994-1995, 62 (11 Dec. 1995) [hereinafter UPHOLD DEMOCRACY AAR]

100. *Id.* at 54.

101. OFFICE OF THE STAFF JUDGE ADVOCATE, 10TH MOUNTAIN DIVISION (LIGHT INFANTRY), AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION UPHOLD DEMOCRACY, 29 JULY 1994-13 JANUARY 1995, 9 (undated). American forces provided a judge advocate hearing officer after 72 hours of detention to discuss the facts and circumstances regarding detention with detainees, to review their case files, as well as to provide input into the determination by the multinational force commander on continued detention.

Id.

102. UPHOLD DEMOCRACY AAR, *supra* note 99, at 54.

103. *Id.* ("Still, the details of this policy raised very practicable issues for judge advocates, military police, and soldiers in the intelligence community who dealt with the several hundred persons who were detained at some point in the operations.")

104. Convention on Prisoners of War, *supra* note 2, art. 60.

105. UPHOLD DEMOCRACY AAR, *supra* note 99, at 54.

Commencing in 1995, U.S. forces deployed to the former Yugoslavia in Operation Joint Endeavor. The mission called for international military and civilian efforts to restore peace and democracy to a region that had suffered nearly five years of bitter conflict.¹⁰⁶ Several provisions of the legal annex to the Operational Plan (OPLAN) for Operation Joint Endeavor referred to the law of war.¹⁰⁷

First, the OPLAN required all commanders to exert “every effort” to ensure that persons subject to their authority knew and complied with the law of war.¹⁰⁸ On occasion, U.S. commanders took this a step further and attempted to obtain law of war compliance from the factional forces themselves.¹⁰⁹

Second, the OPLAN directed that persons involuntarily taken into custody by the UN implementation forces (IFOR) would be classified as “detained persons.”¹¹⁰ The IFOR categorized detained persons as either civilians or factional personnel.¹¹¹ Captured civilians, even those suspected of having committed criminal acts against IFOR personnel or property, were turned over to “appropriate” civilian authorities.¹¹² Conversely, detained factional personnel involved in hostile acts against IFOR personnel or property were accorded a “standard of care equal to that which would be accorded to Prisoners of War.”¹¹³

106. OPERATION JOINT ENDEAVOR REAR DETACHMENT AFTER ACTION REPORT, OFFICE OF THE STAFF JUDGE ADVOCATE, 1ST ARMORED DIVISION, SEPTEMBER 1995- DECEMBER 1996 1 (on file with author) [hereinafter JOINT ENDEAVOR AAR].

107. Message, 281600B Nov 95, Office of the Staff Judge Advocate, Task Force Eagle, subject: Legal Annex to the Operation Iron Endeavor OPLAN (Unclassified) (28 Nov. 1995) (on file with author) [hereinafter Joint Endeavor OPLAN].

108. *Id.* para. 3(e)(1)(a).

109. For example, the U.S. Commander of Task Force Eagle sent a letter to the Acting Commander, East Bosnia Corps, Army of Republika Srpska, complaining of two separate incidents involving the misuse of the protected Red Cross symbol by his soldiers. The terse letter concluded, “[R]equest your immediate investigation into this incident, and await your plan to educate leaders and soldiers on obeying their requirements under the General Framework Agreement for Peace and International law.” Letter from Major General William L. Nash, U.S. Army, to Major General Budimir Gavric, Army of Republika Srpska (undated) (on file with author).

110. Joint Endeavor OPLAN, *supra* note 107, para. 3(e)(1)(c).

111. *Id.* para. 3(e)(1)(c)(1)-(2).

112. *Id.* The OPLAN advised that generally civilians should not be detained longer than 72 hours.

113. *Id.* This provision did not preclude a commander from determining a detained factional person to be an actual prisoner of war in appropriate cases.

Third, the OPLAN acknowledged that the law of war did not apply to the operation because that body of international law normally only applies to international armed conflicts.¹¹⁴ Nevertheless, the OPLAN mandated that all U.S. forces must comply with the law of war throughout the operation.¹¹⁵

From operations in Grenada to the former Yugoslavia, U.S. commanders and judge advocates grappled with complex issues of whether the law of war applied during Military Operations Other Than War. If nothing else, these operations illustrate that the questions of applying the law of war vastly outnumbered the answers provided by the U.S. law of war policy.

Although each of the aforementioned operations was varied and unique, a common law of war legacy has emerged in their aftermath. First, although most of the missions did not involve traditional international armed conflict in the Geneva Convention sense, the U.S. policy, nonetheless, was to affirm that its forces would always comply with the law of war. Second, although U.S. policy mandated adherence to the law of war at all times in every conflict, there was never any attempt to clarify or to define the scope of the policy and its mandate. For example, did every provision of the Geneva Conventions and Hague rules apply during all the operations? In the alternative, did only some provisions apply while others did not? If the latter, how was a commander or a judge advocate to know the difference? Of the dilemmas caused by this lack of definition, the legal status of “captured” persons during the operations posed the most difficult challenge to the judge advocates in the field and was never adequately resolved.

V. Discussion and Analysis of the United States Law of War Policy

A. Customary International Law Has Already Emerged

In two ways, the U.S. policy to apply the law of war during all armed conflicts and the principles of the law of war to all Military Operations Other Than War has already ripened into customary international law. First, by issuing the law of war policy and implementing the Chairman of

114. *Id.* para. 3(f)(1).

115. *Id.* This includes the use of force, treatment of detained persons, and violations of the peace treaty.

the Joint Chiefs of Staff Instruction,¹¹⁶ the United States has created customary international law by making a “unilateral resolution” on the subject.¹¹⁷ As such, the United States is estopped from acting contrary to its stated policy¹¹⁸ and enjoined by the fundamental legal principle of good faith.¹¹⁹ These are the clear legacies of the World Court’s opinions in *Eastern Greenland*¹²⁰ and *Nuclear Tests*.¹²¹ This conclusion is further buttressed by the legacies of the *Tadic* decision. The U.S. law of war policy derives from the highest reaches of the military, it is published in official military references, and it is required training for all members of the U.S. armed forces.¹²²

Second, by acting with a general and consistent practice under the belief that it is legally obligated to do so, the United States has arguably also created a customary international law standard that applies to operations other than war.¹²³ From Operation Urgent Fury in Grenada to Operation Joint Endeavor in the former Yugoslavia, the United States has consistently attempted to adhere to the law of war, albeit with mixed degrees of success.¹²⁴ Because the United States is the major military power today and plays a dominant role in operations other than war, the practice of the United States is tremendously significant to forming customary international law.¹²⁵

Some may argue that even if the United States has generated the type of consistent practice required to form customary international law, the second element of *opinio juris* is lacking. Buttressing this argument may be the motivation for the United States to repeatedly categorize its reason for complying with the law of war during all operations as a *policy* decision, not a legal obligation. Therefore, by definition, customary international law cannot be created because *opinio juris* is lacking.¹²⁶ Before the *Tadic* decision,¹²⁷ this would have been a persuasive argument. The *Tadic* decision,¹²⁸ however, emphasized the importance of official pronouncements of state and military manuals to the formation of customary international law.¹²⁹ In particular, the International Court of Justice relied on the

116. See *supra* note 66 and accompanying text.

117. See *supra* notes 24-31 and accompanying text.

118. See *supra* note 30 and accompanying text.

119. See *supra* notes 34-35 and accompanying text.

120. See *supra* notes 25-31 and accompanying text.

121. See *supra* notes 36-37 and accompanying text.

122. See *supra* notes 55-56 and accompanying text.

123. See *supra* notes 5-6 and accompanying text.

124. See *supra* notes 71-114 and accompanying text.

language from the *German Military Manual of 1992* as evidence of custom to justify extending some of the principles of war from international armed conflict to internal conflict.¹³⁰ It seems reasonable to conclude that a future international tribunal may adopt a similar approach and use the U.S. law of war policy as evidence of customary international law.¹³¹

Since the *Tadic* decision,¹³² the United States can no longer pick and choose how and when it will apply the law of war during operations by couching the decision as “policy.” Today, even “policy” may unwittingly create *opinio juris* because *opinio juris* can be inferred from the acts or omissions of states.¹³³ As a noted scholar remarked, proof of *opinio juris* will likely be determined based on subjectively interpreting the facts and motives of state officials, not on objective evidence.¹³⁴ Considering the

125. MALCOLM N. SHAW, *INTERNATIONAL LAW* 7 (3d ed. 1991) (“It is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance”); see Meron, *supra* note 43, at 249.

A broader question, however, concerns the degree of weight to be assigned to the practice of various states in the formation of the international customary law of war. I find it difficult to accept the view, sometimes advanced, that all states, whatever their geographical situation, military power and interests, inter alia, have an equal role in this regard The practice and opinion of Switzerland, for example, as a neutral state, surely have more to teach us about assessment of customary neutrality law than the practice of states that are not committed to the policy of neutrality and have not engaged in pertinent national practice. The practice of “specially affected states”—such as nuclear powers, other major military powers, and occupying and occupied states—which have a track record of statements, practice and policy, remains particularly telling. I do not mean to denigrate state equality, but simply to recognize the greater involvement of some states in the development of the law of war, not only through operational practice but through policies expressed, for example, in the military manuals.

Id.

See also Deak, *supra* note 7, at 8 (“The character of the State participating in the act considerably influences the persuasiveness of the customary international law argument.”).

126. See *supra* notes 5-6 and accompanying text.

127. See *supra* note 42.

128. *Id.*

129. See *supra* notes 54-55 and accompanying text.

130. See *supra* notes 56-57 and accompanying text.

131. See Turley, *supra* note 84, at 172 (“Although they are not statements of binding international law, military regulations and guidelines can significantly affect the evolution of that law.”).

132. See *supra* note 42.

cryptic and mysterious nature of *opinio juris*, it is unwise for the United States to feel secure in its apparent belief that it is not legally obligated to comply with its own law of war policy.¹³⁵ Even military lawyers within the U.S. Army recognize that the conduct of U.S. forces during military operations “may be regarded as evidence of what the law is at some later date.”¹³⁶

B. The Significance of the Law of War Policy as Customary International Law

If the U.S. law of war policy has ripened into customary international law as argued above, the effects on future Military Operations Other Than War could be far reaching. No longer would it be lawful for the United States to comply “to the greatest extent feasible” with the law of war in Military Operations Other Than War.¹³⁷ On the contrary, the United States would have a legal duty under international law to *fully* comply with the law of war during all armed conflicts and law of war principles during Military Operations Other Than War.

The fictional Andarian scenario discussed in the introduction to this article underscores the pivotal distinction between customary international law and policy. The former creates a legal obligation whereas the latter does not. From a traditional international law perspective, the U.S. commander’s decision to transfer custody of the captured insurgents to the Andar government for prosecution appears to be legally sound. On its face, the operation in Andar is not an “international armed conflict” within the meaning of Common Article 2 of the Geneva Conventions.¹³⁸ Thus,

133. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, §102 cmt. c, at 25 (1987) (“Explicit evidence of a sense of legal obligation (e.g. by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.”).

134. See *supra* note 16 and accompanying text.

135. See Deak, *supra* note 7, at 10 (“*Opinio juris* embodies the essence of customary international law. It is recognizable once it has fully ripened, but deciphering exactly what ingredients are necessary to complete the process remains cryptic.”).

136. INTERNATIONAL AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, OPERATIONAL LAW DESKBOOK 2-25 (1997).

137. INTERNATIONAL AND OPERATION LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 13-2 (1997) (explaining that because Military Operations Other Than War do not fit well into any specific category of either public international law or the traditional law of war, military lawyers must turn to *DOD Directive 5100.77* for guidance).

138. See *supra* note 4 and accompanying text.

only the protections of the Geneva Conventions would apply to this situation. If, however, the U.S. law of war policy reflected customary international law, the legal analysis would be dramatically different.

To illustrate, Article 46 of the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 prohibits a detaining power from transferring a prisoner of war into a “less favourable” situation.¹³⁹ Under the U.S. law of war policy, Article 46 would apply during any armed conflict and apply during any Military Operation Other Than War if the article was deemed a principle of the law of war. Assuming Article 46 applied in Andar, the insurgents, in the hands of the Americans, would enjoy the protections of prisoner of war status, including immunity for their war-like acts.¹⁴⁰ Whereas, in the hands of the Andarians, the insurgents could be treated as common criminals subject to domestic criminal law and possible execution if adjudged by a legitimate tribunal. Certainly, the Andarian treatment must be viewed as less favorable to the insurgents than the American treatment.

For the insurgents, the issue of whether the law of war applies in Andar is not academic—it may be the difference between life and death. Similarly, American commanders must be concerned with the status and treatment of captured persons because they always desire reciprocal treatment for captured American servicemen. It seems axiomatic that if an army treats captured members of its adversary humanely, its adversary is more likely to do the same. Therefore, whether certain provisions of the traditional law of war reflect customary international law applicable during all operations can have profound consequences.

139. Convention on Prisoners of War, *supra* note 2, art. 46 (“The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred.”); *id.* art. 12 (“Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.”).

140. *Id.* The Convention on Prisoners of War has the effect of granting prisoners of war immunity from criminal prosecution for war-like acts. This is one of the major reasons why it is critical to know if the Geneva Conventions apply during an operation.

C. Shortcomings of the United States Law of War Policy

Regardless of whether the United States law of war policy reflects customary international law, the policy itself is fundamentally flawed.¹⁴¹ According to the *CJCOS Instruction 5810.01*, U.S. forces will apply law of war *principles* during all Military Operations Other Than War.¹⁴² The fundamental problem is that neither the Army, nor the Department of Defense, nor the Joint Chiefs of Staff have defined precisely what are the law of war principles to which the policy refers. By failing to define applicable law of war principles, the policy is inherently crippled by ambiguity.

Some cynics may argue that the drafters' likely motive in the first place was to create a policy so vague that the military could do no wrong and never be held accountable for not complying with law of war principles.¹⁴³ Close examination, however, reveals that by failing to clarify its policy, the U.S. military is inadvertently undercutting its own credibility as a leader in developing the law of war.

141. See Turley, *supra* note 84, at 148 (“[M]ilitary regulations are silent on when an engagement reaches the level of an armed conflict or what demarcates the point at which the laws of armed conflict apply—distinctions that become critically important when dealing with peacekeeping and related operations.”)

142. See *supra* note 68 and accompanying text.

143. See, e.g., Symposium, *supra* note 46, at 90.

I believe that accepting and now maintaining the international/noninternational distinction is a serious policy error which should be rectified. The distinction is an anachronism in the law of armed conflict as much as the metaphysical line between international concern and domestic jurisdiction is in international human rights. The major consequences of the international/noninternational distinction is that it insulates the bulk of armed conflict from the reach of the law of armed conflict. It permits the majority of states that have become parties to the Geneva Conventions, to the Additional Protocols, and who pay lip service to the law of armed conflict in general, to avoid the real obligations which that regime imports, for most of the signatories do not contemplate engaging in “international” conflicts. By creating the noninternational category, signatories have reserved for themselves immunity from the regime they have purported to create for others.

Id.

D. The United States Law of War Policy—The Overdue Next Step

The time has come for the United States to officially announce which law of war principles contained within the core body of international law of war apply to all U.S. military operations, however the operations are characterized.¹⁴⁴ Commanders and judge advocates need to know. For example, when faced with treatment of prisoners of war, a commander needs to know if he is required to quarter them in conditions as favorable as his own soldiers,¹⁴⁵ to provide them at least monthly medical inspections,¹⁴⁶ to pay them “fair” financial compensation for labor,¹⁴⁷ to permit them to send and receive letters and cards,¹⁴⁸ and so on. In short, the commander needs to know if these or any other provisions of the Geneva Conventions constitute law of war principles within the meaning of U.S. policy.

Similar issues arise under every law of war treaty. Failure to define which specific provisions of the law of war it believes are binding during all operations is tantamount to the United States shirking its responsibilities as the leading nation engaged in Military Operations Other Than War. This failure may ultimately undermine United States legitimacy as a leader of customary international law development in this area.

E. Advantages and Disadvantages of Reformation

From an American perspective, the greatest advantage to reforming the U.S. law of war policy is renewed simplicity in military operations. Since the Nuremberg trials of the late 1940s, the international law regulating military operations became more complex. The United States response to this complexity has not kept pace. The United States can correct this if it unequivocally announces that during all future armed conflicts its forces will comply fully with all provisions of the Geneva and Hague Conventions. In addition, the United States should enumerate the precise principles of the law of war that it will always apply during Military Operations Other Than War. By doing so, American commanders, judge advocates,

144. See Turley, *supra* note 84, at 170 (arguing that the military should take the lead in developing and proposing recommendations for the improvement of the laws of war).

145. Convention of Prisoners of War, *supra* note 2, art. 25.

146. *Id.* art. 31.

147. *Id.* art. 62.

148. *Id.* art. 72.

and service members will know with certainty what is expected of them in future operations.

Another benefit to the United States that may result from law of war reform is an increased likelihood of reciprocity of treatment from adversaries in future operations. By announcing a new policy and following it in practice, the United States will put tremendous pressure on future adversaries and allies to follow a similar course. Even if an adversary flagrantly disregards the law of war, the United States will gain a benefit in the media and, perhaps, garner favorable world opinion.

From a global perspective, a reformation of the U.S. law of war policy could have two important consequences. First, U.S. actions may cause other nations to adopt similar law of war policies. If this occurs, creating customary international law that pertains to the laws of war could be markedly expedited. Second, any reform in the laws of war will almost certainly boost humanitarian protections for the victims of war.¹⁴⁹

Although reforming the U.S. law of war policy will move the United States in the right direction, the process is not without some risks. First, there is a legitimate danger that if the customary law of war is changed too quickly and these changes are based on superficial assumptions and sweeping generalizations; the law may ultimately become devalued and weakened.¹⁵⁰ Such a result occurs because “[t]he test for the advancement of humanitarian norms lies in their acceptability.”¹⁵¹ Put another way, if the United States recklessly attempts sweeping changes to its law of war policy, the efforts may backfire due to lack of international support and recognition. Because the creation of customary international law requires international cooperation, the United States must act as a consensus builder to achieve its ends.

From an American perspective, a second possible danger with reforming the law of war is the fear that an international tribunal may someday judge whether the United States complied with the law. On this issue, the U.S. position appears to be absolute. An American accused of a law of war violation should only be tried by a U.S. court and never an inter-

149. *But see* Morris, *supra* note 2, at 13 n.89 (explaining the danger that if the laws of war are changed by people who do not practice warfare, the rules may lose credibility with the soldiers who must implement them—in turn, this may ultimately result in more suffering for the victims of war).

150. Meron, *supra* note 43, at 247.

151. *Id.*

national tribunal.¹⁵² Rational or not, the fear of an international tribunal presiding over the fate of an American service member is probably the greatest impediment against reforming the U.S. law of war policy. Some argue that it is precisely this fear that currently explains why the United States is advocating a curb on the jurisdiction of the proposed permanent international criminal court at The Hague.¹⁵³

VI. Conclusion

The view that the United States has already shaped customary international law in applying the law of war to nontraditional military operations is factually supportable; however, the shaping is far from complete. At a minimum, it appears settled that some principles from the law of war apply during all conflicts. The supporting evidence for this conclusion is a fair reading of the *Tadic* decision¹⁵⁴ coupled with the policy and practice of the United States over the past twenty years. Many view this extension

152. See John M. Goshko, *U.S. Proposes Limit on Global Court*, WASH. POST, Mar. 26, 1998, at A29.

[T]he U.S. position is driven largely by heavy pressure from the Defense Department and its supporters in Congress. Pentagon chiefs vividly remember when foes of U.S. policy in Vietnam during the 1960s and 1970s and Central America in the 1980s called for prosecution of American officials and servicemen as war criminals. They now fear that without very stringent and specific safeguards, an international court could be used by present-day adversaries such as Iraq or Libya to make similar charges.

Id.

See also Adrian Karatnycky, *This Court Should Not Be Called to Session*, WASH. POST, Apr. 6, 1998, at A25.

The proposed International Criminal court also could have jurisdiction over loosely defined 'war crimes,' including attacks against nonmilitary targets. United States officials worry that American peacekeepers could be brought up on charges if their operations result in civilian casualties. The U.S. military could be investigated at the behest of such rogue states as Libya or Iraq, against whom the United States has been involved in hostilities that have resulted in the loss of civilian life.

Id.

153. *Id.*

154. See *supra* notes 42-58 and accompanying text.

of law of war principles from international armed conflict to internal conflicts as a positive development in international law.¹⁵⁵

What is troubling, however, is the lack of clarity and precision in determining which specific law of war principles apply during all conflicts.¹⁵⁶ Even with the *Tadic* decision's enunciating some of the fundamental principles of the laws of war,¹⁵⁷ military commanders and judge advocates are not certain what international law specifically requires in each case. A quick review of the operations from Grenada to the former Yugoslavia bears this out.¹⁵⁸ Precision and clarity is demanded in this field, but instead ambiguity largely remains.

To fill the vacuum in the law, the U.S. military should take the lead in shaping customary international law in the area of the laws of war. As others have noted, the military is best suited and, therefore, ought to play a leading role in this regard.¹⁵⁹ Not only does the military have the necessary tools to do so, namely in the form of military manuals and official statements, but, moreover, it is the military that will ultimately be governed by the law of war. Thus, the military is in the best position to balance the utility of a particular rule against its practical effect on an operation. Until the United States specifically enumerates the fundamental principles of the laws of war which govern during all operations, commanders and judge advocates will continue to play a dangerous guessing game with the law.

155. See, e.g., Symposium, *supra* note 46, at 85.

Obviously, there are many different conflicts. But the terms 'international' and 'noninternational' conflict import a bipartite universe that authorizes only two reference points on the spectrum of factual possibilities. The terms are based on a policy decision that some conflicts-non-international law ones-will be insulated from the plenary application of the law of armed conflict-even though such conflicts may be more violent, extensive and consumptive of life and value than other 'international' ones. The terms are, in effect, a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation.

Id.

156. See Turley, *supra* note 84, at 11 ("As is often true, history-in this case, the not-so-ancient history of the Vietnam War offers important rationales for why the international law involved in any operation must be crystal clear.").

157. See *supra* note 48.

158. See *supra* notes 71-114 and accompanying text.

159. See Turley, *supra* note 84, at 14.