

“Snipers in the Minaret—What Is the Rule?”

The Law of War and the Protection of Cultural Property: A Complex Equation

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On 2 January 2005, the *Washington Post* ran an article entitled “For U.S. Soldiers, A Frustrating and Fulfilling Mission.”¹ That article included a photograph with the following caption: “U.S. Army snipers took over the top of this nearly 1,200 year-old spiral minaret at a Samarra mosque after the streets below became the scene of frequent attacks by insurgents in the restless city.”² The article also stated that:

Soldiers occupy this vantage point 24 hours a day, working in pairs for 12 hours at a time. An intersection below had become the scene of almost incessant attacks, and American commanders decided that placing snipers with .50-caliber rifles and powerful scopes in this circle of stone 10 feet in diameter, 180 feet above the ground, could deter insurgents.³

The characterization of this operational vantage point as a 1,200 year old minaret or mosque clearly raises concerns that this object falls within the category of cultural property. Assuming this minaret does in fact satisfy the definition of protected cultural property, was its use as a vantage point improper? The initial answer appears to be “no.” In fact, the use may very well have been permissible. The equation that must be used to reach that answer is complex, and reflects the challenge of the source, scope, and effect of law of war-related proscriptions in the current operational environment. The purpose of this article is to use this incident to illustrate several of the legal issues related to determining the appropriate “rule of decision” for the employment of means and methods of warfare within the context of current combat operations.

The Legal Equation

The minaret incident highlights a number of operational law issues, almost all of which transcend analysis of this specific issue. These issues include the impact of the status of the conflict on the analysis of applicable rules of decision; the impact of Department of Defense (DOD) policy⁴ related to the law of war on the same issue; domestic legal principles related to the applicability of treaty obligations;⁵ and ultimately, the specific law of war rules related to the use of religious and cultural property for military purposes.⁶ Each of these issues is addressed below.

Impact of Conflict Status on Legal Analysis

Perhaps the most complex issue related to analysis of this situation is determining the applicable law of war obligations. Resolution of this issue requires determining whether the conduct occurred during the course of an armed conflict within the

¹ Josh White, *For U.S. Soldiers, A Frustrating and Fulfilling Mission*, WASH. POST, Jan. 2, 2005, at A12.

² *Id.*

³ *Id.*

⁴ See U.S. DEP’T OF DEFENSE, DIR. 5100.77, DoD LAW OF WAR PROGRAM (8 Dec. 1998) [hereinafter DOD DIR. 5100.77]; see also CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM (25 Mar. 2002) [hereinafter CJCS INSTR. 5810.01B].

⁵ See generally THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 301-26 (2005) [hereinafter THE RESTATEMENT].

⁶ See generally U. S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) [hereinafter FM 27-10]; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 215 [hereinafter the Cultural Property Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted*, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY].

meaning of international law, and if so, the nature of that conflict.⁷ These determinations will dictate whether, as a matter of law, the law of war is applicable to the situation, and if so, what provision of that law provides the relevant rule of decision.⁸

The question of whether military operations in Iraq qualify as an armed conflict under international law, and if so, whether that armed conflict is an international armed conflict has become far more complex since the establishment of the interim government of Iraq on 28 June 2004.⁹ Before that date, there was a general consensus that military operations in Iraq qualified as an international armed conflict consistent with the standard reflected in Common Article 2 of the Geneva Conventions,¹⁰ either as a result of conflict or belligerent occupation. The initial phases of *Operation Iraqi Freedom* clearly involved hostilities between the armed forces of the United States and Iraq. A period of belligerent occupation followed the conclusion of major combat operations. During these phases, the full range of law of war provisions applied to the conduct of military operations by U.S. forces.¹¹

The establishment of the interim Iraqi government marked a restoration of Iraqi sovereign authority and a termination of belligerent occupation.¹² While this shift in authority had minimal impact on the nature of the operations conducted by U.S. and multi-national forces in Iraq, it did, arguably, result in removing military operations in Iraq from the rubric of international armed conflict.¹³ Although U.S. and multi-national forces continued (and continue) to conduct combat operations in Iraq, these operations were not directed against the armed forces of Iraq, or even against militia groups or volunteer groups forming a part of those armed forces.¹⁴ Instead, they were, and remain, directed against armed dissident groups opposed to both the presence of Coalition forces in Iraq and the Iraqi government. In addition, the transfer of sovereignty back to an Iraqi government ostensibly terminated, from a formal legal perspective, the period of belligerent occupation, even though U.S. and Coalition forces continued to perform many of the military functions associated with that occupation.¹⁵ No matter how similar the tasks and missions may be to those conducted during belligerent occupation, the restoration of Iraqi sovereignty, and the absence of conflict between the armed forces of Iraq and Coalition forces, are the decisive factors in analyzing the nature of the conflict in Iraq.¹⁶

⁷ See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 14-16 (2004); see also GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 242 (1994).

⁸ *Id.*

⁹ See Iraqi Interim Government, *Path to Democracy*, at <http://www.iraqigovernment.org/pathdemo.htm> (last visited Feb. 25, 2005) [hereinafter Iraqi Interim Government].

¹⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, August 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]; see also FM 27-10, *supra* note 6, at 9 (“As the customary law of war applies to cases of international armed *conflict* and to forcible occupation of enemy territory generally as well as to declared war in its strict sense, a declaration of war is not an essential condition of the application of this body of law.”) (emphasis added).

¹¹ See GWS, *supra* note 10, at art. 2; GPW, *supra* note 10, at art. 2; GC, *supra* note 10, at art. 2; see also DINSTEIN, *supra* note 7, at 14-16.

¹² See Iraqi Interim Government, *supra* note 9.

¹³ The *sine quo non* of an international armed conflict is a dispute between two States, or a State and a recognized belligerent entity with all the indicia of statehood. See COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean S. Pictet ed., 1960) [hereinafter GPW COMMENTARY] (“Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2”). Once sovereignty was assumed by a government with which the United States had no “dispute,” this requirement became a factual impossibility.

¹⁴ Because the new governing authority for Iraq was not opposed to U.S. operations, elements opposing U.S. forces were not considered to have been operating under the authority of the State of Iraq.

¹⁵ The internationally accepted definition of occupation requires territory to be placed under the functional control of a *hostile* armed force. See FM 27-10, *supra* note 6, paras. 351-353. Thus, once sovereignty over Iraq was passed to the interim government—a government supporting the continued presence of U.S. and coalition forces—U.S. and coalition forces were no longer considered “hostile” to the State of Iraq.

¹⁶ See *id.* paras. 351-61 (discussing the existence, maintenance, and termination of belligerent occupation).

If the conclusion that the situation in Iraq no longer qualifies as an international armed conflict is valid,¹⁷ it leads to the question of whether an armed conflict continues in Iraq, and if so, whether it qualifies for any law of war regulation. It seems logically and factually justified to conclude that armed conflict, within the meaning of international law, continues in Iraq. The regular armed forces of Iraq, the United States, and multi-national forces continue to conduct large scale military operations against highly organized, armed dissident groups. This situation appears to fall within the rubric of a conflict not of an international character to which Common Article 3 of the Geneva Conventions refers, which reflects the customary international law standard for triggering the law of war applicable to such conflicts.¹⁸ Reference to the ICRC commentary to the Geneva Conventions supports this conclusion:

“Cases of armed conflict.” What is meant by “armed conflict not of an international character”? The expression is so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry . . . these different conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list drawn from the various amendments discussed; they are as follows:

(1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

. . .

Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? We do not subscribe to this view. *We think, on the contrary, that the scope of application of the Article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed . . .* Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ on either side engaged in ‘hostilities’ -- conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.¹⁹

The situation in Iraq, however, includes certain characteristics that were not contemplated at the time Common Article 3 was developed, and arguably not even when the Protocol II’s triggering standard for internal armed conflict was developed.²⁰ Specifically, the participation in the ongoing conflict of members of international terrorist groups, ostensibly devoted not to any change of government in Iraq, but simply to killing Coalition forces and destabilizing Iraq, renders analysis of the nature of the conflict extremely difficult. This difficulty is exacerbated by the links between these groups and transnational terrorist organizations such as al Qaeda.²¹ Further complicating the analysis is the United States’ characterization of the fight against terrorism as a “Global War,”²² invoking the inherent right of self-defense reflected in Article 51 of the Charter of the United

¹⁷ Whether continued resistance by armed groups formerly associated with an enemy government after a friendly government assumes control of a nation, through a process considered legitimate by the international community (unlike the imposition of a “puppet” regime) results in a continuation of the period of international armed conflict is a novel issue, and is not addressed in either the relevant law of war treaties or International Committee of the Red Cross (ICRC) commentaries thereto. It is, however, relatively well accepted that different types of armed conflicts can exist in the same territory during the same timeframe. See DINSTEIN, *supra* note 7, at 15; see also Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996). Ultimately, the question of whether an international armed conflict continues in Iraq, and at what point it terminates, is a question of fact which must be resolved by the parties to the conflict.

¹⁸ See generally GPW COMMENTARY, *supra* note 13, at 61; Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1 (Winter, 2003) (analyzing the meaning of Common Article 3 and non-international armed conflict within the context of the Global War on Terror).

¹⁹ GPW COMMENTARY, *supra* note 13, at 35-37 (emphasis added).

²⁰ See PROTOCOL COMMENTARY, *supra* note 6, at 1347-56.

²¹ Dexter Filkins, *Wanted Rebel Vows Loyalty to bin Laden*, *Web Sites Say*, N.Y. TIMES, Oct. 18, 2004, at A6; Walter Pincus, *Zarqawi Is Said to Swear Allegiance to Bin Laden*, WASH. POST, Oct. 19, 2004, at A16.

²² Following the attacks of 9/11, Congress passed a resolution authorizing the use of military force in the war against terrorist organizations. That Resolution states in part:

Nations²³—a right normally associated with conflict between sovereign states.²⁴ These unusual aspects of the conflict in Iraq point to two potentially divergent conclusions: that the terrorist nature of the enemy removes the conflict from the realm of law of war regulation altogether; or that the international character of the same terrorist organizations, and the U.S. war against them, place military operations into the category of international armed conflict.

From a policy perspective, there is no indication that the original U.S. characterization of operations in Iraq as falling into the category of international armed conflict has been “downgraded.” In addition, as will be discussed below, application of DOD policy related to the law of war renders this issue somewhat irrelevant due to the requirement to treat all armed conflicts as “international” for the purpose of law of war applicability.²⁵ Nonetheless, as was noted in such a pointed manner by the United States District Court for the Southern District of Florida in *United States v. Noriega*,²⁶ policy established by the executive branch is always subject to modification, whereas law is not, and therefore determining binding legal standards is never truly obviated by a policy-based application of those standards.²⁷

The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). There is no geographic limitation to this authorization, which uses language normally associated with congressional authorizations traditionally regarded as “functional equivalents” to a declaration of war. See generally Major Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 212-15 (1998).

²³ See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); see also S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

²⁴ See Oscar Schachter, *Self Defense and the Rule of Law*, 83 AM. J. INT’L L. 259 (Apr. 1989).

²⁵ See *infra* notes 30-34 and accompanying text.

²⁶ 808 F. Supp. 791 (1992).

²⁷ *Id.* at 794.

The government has thus far obviated the need for a formal determination of General Noriega’s status. On a number of occasions as the case developed, counsel for the government advised that General Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention. At no time was it agreed that he was, in fact, a prisoner of war.

The government’s position provides no assurances that the government will not at some point in the future decide that Noriega is not a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. Because of the issues presented in connection with the General’s further confinement and treatment, it seems appropriate -- even necessary -- to address the issue of Defendant’s status. Articles 2, 4, and 5 of Geneva III establish the standard for determining who is a POW. Must this determination await some kind of formal complaint by Defendant or a lawsuit presented on his behalf? In view of the issues presently raised by Defendant, the Court thinks not.

Id. (footnotes omitted).

In the opinion of this author, the conflict against Al Qaeda is simply an armed conflict, regulated by what might be regarded as original fundamental principles of the law of war. This theory is based on the belief that the historic trigger for basic law of war principles was the international legal analogue of what was traditionally characterized as war, which was simply “armed conflict.” See GPW COMMENTARY, *supra* note 13, at 19-23. In the opinion of this author, as a matter of historical custom, when armed forces engaged in such armed conflict, they carried with them the fundamental principles of the law of war, both permissive and restrictive. As a result, they invoked the principle of military necessity, providing authority to take all measures not forbidden by international law necessary to achieve the prompt submission of their opponents; and they were constrained by the basic principle of humanity, as understood in historical context.

This “basic principle” concept was clearly strained during the years between the first and second World Wars. During this period, brutal internal conflicts in Spain, Russia, and China challenged the customary expectation that forces engaged in armed conflict would conduct themselves in accordance with basic principles of the law of war. This perceived failure of international law to provide effective regulation for non-international armed conflicts was the primary motivation underlying the creation of Common Article 3. GPW COMMENTARY, *supra* note 13, at 28-35. It is somewhat misleading, however, to suggest that Common Article 3 was “necessary” to ensure compliance with basic principles during such conflicts. Common Article 3 might instead be legitimately viewed as a fail-safe to provide the international community a basis to demand compliance with such principles when armed forces refuse to comply with the customary standards of conduct related to any military operation involving the use of force.

Indeed, even Common Article 2 appears to have been a response to a failure of the traditional expectation that armed forces engaged in “war” between states would acknowledge applicability of the law of war. The rejection of “war” as a trigger for the law of war in favor of “armed conflict” was an attempt to prevent what might best be described as “bad faith avoidance” of compliance with the customary standards related to the *jus in bello*. The qualifier of “international” was, as indicated in the ICRC Commentary, an effort to emphasize that specific provisions of the Geneva Conventions were triggered by armed conflicts conducted under state authority. See GPW COMMENTARY, *supra* note 13, at 22 (emphasizing that the obligations triggered by Article 2 were focused on inter-state relations). As that same commentary indicates, however, it is the “armed conflict” nature of military operations that distinguish them—and the law that regulates them—from law enforcement activities. See GPW COMMENTARY, *supra* note 13, at 36.

It is clear that the global war on terror (GWOT) has strained traditional application of the Common Article 2 and Common Article 3 triggers for law of war application. Perhaps, however, these articles have been misinterpreted as the exclusive triggers for law of war application. While they clearly serve as triggers for application of the treaty provisions of the treaties they relate to, these provisions might be better understood as a layer of regulation augmenting

the fundamental principles of the law of war triggered by *any* armed conflict. In short, whenever an armed force engages in conflict operations, fundamental principles of military necessity and humanity are triggered by those operations. When such operations also satisfy the criteria of Common Article 2, these principles become augmented by the provisions of the conventions triggered by such a conflict. With regard to the trigger of Common Article 3, operations falling within the traditional definition of internal armed conflict would unquestionably be regulated by the substance of that article. The basic principles reflected in Common Article 3, however, are redundant with the basic principles of humanity triggered by any armed conflict, and therefore the substantive effect of such a conclusion would be *de minimis*. In contrast, however, failure to satisfy the Common Article 3 trigger—even when armed forces were engaged in conflict operations (such as operations conducted against non-state actors operating outside the territory of the state targeting those actors)—would not undermine application of the same basic principles.

It is interesting to consider the relationship of this theory with the traditional policy of the United States regarding the law of war. It has been the longstanding policy of the DOD to treat *any* armed conflict as the trigger for application of the law of war. See DOD DIR. 5100.77, *supra* note 4; see also Major Timothy E. Bullman, *A Dangerous Guessing Game Disguised as an Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152 (1999) (analyzing the potential that the U.S. law of war policy could be asserted as evidence of a customary norm of international law). This policy has been the foundation for law of war application during every phase of the GWOT, and reflects the basic proposition that armed conflict equals application of basic principles of the law of war, no matter how that conflict is characterized. Perhaps this “policy” is actually a reflection of an underlying norm of customary international law.

From a pragmatic perspective, in order to emphasize the unique nature of the armed conflict ongoing against trans-national terrorist organizations, and distinguish it from the traditionally acknowledged categories of “international” armed conflict and “internal” armed conflict—it might be useful to adopt the characterization of “trans-national armed conflict.” It is important to emphasize that with the “armed conflict” theory outlined above, this “trans national” qualifier is more a reflection of the nature of the operations and not essential for triggering basic law of war principles. It is the armed conflict nature of the operations that results in application of these basic principles. Nonetheless, characterizing the GWOT as a “trans-national” armed conflict seems justified by a careful analysis of the underlying humanitarian rationale of Common Article 3, the history of armed conflicts since 1949, and the fundamental purpose of the law of armed conflict.

For purposes of determining the scope of regulation, such conflicts fall, as a matter of customary international law, within the category of conflicts regulated by the principles reflected in Common Article 3. This does not, however, reflect a purely internal nature of such trans-national armed conflicts. Instead, the application of the “armed conflict” triggering criteria emphasized in the ICRC Commentary to Common Article 3 is relevant exclusively to determining the scope of law of war regulation, because it reflects a recognition that the nature of such conflicts falls outside the accepted definition of an international armed conflict for purposes of determining the scope and extent of law of war regulations, as such conflicts require a dispute between two entities satisfying the accepted criteria for statehood. See GPW COMMENTARY, *supra* note 13, at 23.

In determining the validity of this category of armed conflicts, it is critical to note that the source of this “triggering” standard for the baseline principle of humane treatment (and, by inference, military necessity) that should apply to *any* armed conflict (dispute requiring the intervention of armed forces), as reflected in Common Article 3 to the four Geneva Conventions, does not use the phrase “internal armed conflict.” Instead, Common Article 3 imposes upon the parties to a “conflict not of an international character,” an obligation to treat all persons not participating or no longer participating in the conflict humanely. Common Article 3 reads as follows: “*In the case of armed conflict not of an international character . . .*” See GWS, GWS Sea, GPW, and GC, *supra* note 10, art. 3 (emphasis added).

Virtually every non-international armed conflict that has occurred during the later half of the twentieth century involved trans-national characteristics—ranging from the use of adjacent territories for safe-haven to the receipt of active logistics, training, and command and control support obtained from neighboring states. Indeed, even the Spanish Civil War of 1936 to 1939, which served as a major motivation for the development of Common Article 3, involved substantial trans-national aspects in the form of arm, equip, train, and even voluntary participation programs executed by Germany and Italy (on behalf of the Nationalists) and the Soviet Union (on behalf of the Republicans). See Lieutenant Colonel Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109 (Dec. 2000) (analyzing the impact of the Spanish Civil War on the development of Common Article 3). Additionally, in the two seminal international tribunal cases analyzing the relationship between internal and international armed conflicts, the issue of external involvement and sponsorship was addressed and determined not to transform these conflicts from non-international to international. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. REP. 14 (June 27); see also *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996). This historical context and jurisprudence is relevant because it demonstrates that the concept of non-international armed conflict has always involved a *de facto* trans-national character, even though that character has not been sufficient to transform such conflicts into international armed conflicts).

As a result, and due to the expanding nature of such operations within the broader context of the GWOT, it is essential to carefully assess the customary meaning of the term “conflicts not of an international character” for purpose of determining applicable provisions of the law of war. In so doing, the following considerations are useful: the interpretive guidance provided by the ICRC Commentary; the humanitarian rationale underlying application of baseline standards to military operations not involving two opposing state entities; and U.S. practice with regard to the scope of Common Article 3.

The GPW Commentary notes that there is no objective set of criteria for determining the existence of an armed conflict not of an international character. The Commentary, however, states:

Speaking *generally*, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities* – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.

See GPW COMMENTARY, *supra* note 13, at 35.

This excerpt from the Commentary clearly refers to what is traditionally regarded as “internal” armed conflicts. This reference, however, need not be treated as dispositive. It is reasonable to consider this quotation as a reflection of the historical context in which the provision was drafted, which is also manifested by the suggestion that Common Article 3 would only apply when “the party in revolt has an organized military force under responsible command, operating within a determinate territory, and has the means of respecting the GC.” *Id.* at 37. The actual provision it seeks to explain is written in much broader terms, a practice not uncommon with provisions of multi-lateral treaties, often intended to provide interpretive flexibility. What seems clear from the ICRC Commentary is that the drafters were attempting to respond to the need to ensure some international legal regulation of activities that rose to the level of “armed conflicts,” even if such conflicts did not take on a “international” character, while mitigating fears that Common Article 3 would be applied to internal events that did not rise to the level of conflicts, thereby serving as an unjustified basis for intrusion into state sovereignty. *Id.* at 36. The plain

meaning of the term “not of an international character,” and the object and purpose of this treaty provision, should, in accordance with customary international law, guide its interpretation. *Id.* at 35-37.

There is absolutely no indication that the drafters of Common Article 3 considered conflicts between the regular armed forces of a state and a trans-national non-state actor entity. In this regard, however, it is useful to consider what is often regarded as the most effective “interpretive aid” provided by the ICRC Commentary: that the line between an internal disturbance immune from international regulation and a conflict requiring international regulation is crossed when “the legal government is obliged to resort to the regular military forces to combat the party in revolt.” *Id.* at 36. This interpretive aid indicates that the nature of the military activities, and not the locale, is most instructive on the applicability of international regulation to any given military operation. This focus seems to transcend operations that were historically considered purely “internal,” and provides a logical analytical justification for determining when the limited law of war regulation associated with Common Article 3 should be applied to military operations.

There is also no doubt that Common Article 3 was motivated by a perceived need to interject some limited humanitarian regulation into the realm of “internal” conflicts. *Id.* at 38-41. It is improper to conclude, however, that because the contextual motivation for this monumental development in the regulation of armed conflict was “internal” conflicts, the fundamental goal of ensuring a baseline of humanitarian regulation of armed conflict falling somewhere below the threshold of Common Article 2 should be restricted to conflicts totally confined to the internal territory of a nation state. Instead, it was the desire to inject law of war application to any situation rising above the threshold of domestic law enforcement activity and into the realm of military armed conflict that justifies the recognition of the trans-national armed conflict standard.

It is clear from a review of the ICRC Commentary that the desire to interject some limited humanitarian regulation into a realm of activities historically shielded from international regulation served as the motivating drive behind inclusion of Common Article 3 into the four Conventions. Indeed, it was the almost “self evident” legitimacy of requiring such limited humanitarian respect in such conflicts that served as the logical basis for the international regulation of events solely within the sphere of state sovereignty. In this respect, Common Article 3 can be regarded as somewhat of an extension of the principle that absent applicable treaty provisions, individuals effected by conflict remain under the protection of the principles of humanity. This principle is reflected in the “Martens” Clause,” which was first included in the Preamble of the Hague Convention of 1899 and has been replicated in subsequent law of war treaties and statutes.

[I]n cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

See Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, pmb., 36 Stat. 2277, T.S. 539 [hereinafter Hague IV], reprinted in U.S. DEP’T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE, (Dec. 1956). The “Martens Clause” took its name from Fyodor Martens, the Russian diplomat responsible for first proposing the language during the first World Peace Conference in The Hague in 1899.

The continuing validity of this clause in the analysis of protections applicable during armed conflicts was most recently confirmed by the International Court of Justice in the advisory opinion on the legality of the threat or use of nuclear weapons. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8); see also Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT’L REV. OF THE RED CROSS 125-34 (1997). It would therefore appear consistent with this history to embrace a scope of application that focused on the nature of the activities, and the derivative need to provide for some limited international regulation when operations rise to the level of military conflict, and not the locale of the opposition group, in determining whether to classify an operation as a “common article 3 conflict.”

United States practice with regard to the scope of Common Article 3 also tends to support a broad application of this baseline standard of conflict regulation. On 29 January 1987, President Reagan transmitted Protocol II to the Senate for its advice and consent. With certain declarations, reservations, and understandings, he recommended its ratification. Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protections of Victims of Non International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987) [hereinafter Letter of Transmittal]).

The purpose of Protocol II was to supplement, without altering the field of applicability, Common Article 3 for the protection of victims of conflicts not of an international character. See Protocol II, *supra* note 6, at art. 1. The ICRC United States position regarding the scope provision of Protocol II reflects support for a broad application of these protections, and by implication, an expanded definition of what qualifies as such a conflict:

The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerilla operations over a wide area. We are therefore recommending that the U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts) which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence).

See Letter of Transmittal *supra*.

While this language refers to “traditionally defined” non-international armed conflicts, it also clearly represents U.S. opposition to narrowly defining the scope of Common Article 3 and Protocol II, with a clear intent to exclude only “non-conflict” internal matters from this scope of coverage. This position seems logical considering the quasi trans-national nature of many “internal” armed conflicts that occurred during this period (e.g., Vietnam, Afghanistan, Nicaragua, El Salvador). Defining what constitutes a “traditional” non-international armed conflict today differs substantially from how that term would have been defined in 1986. The emergence of trans-national, highly organized and well equipped groups espousing a goal of waging “war” against democratic nations is primarily a post Cold War phenomenon. While conflict with such groups was obviously not the object of United States concern at the time this position was asserted, the pragmatic nature of the U.S. policy reflected in this position supports expanding the definition of “traditional” to encompass such hostile groups.

In summary, military operations conducted by the United States against non-state trans-national terrorist elements are simply “armed conflicts.” Accordingly, such operations trigger the basic principles of military necessity (and the customary standards of means and methods applicable to non-international armed conflicts) and humanity (the principles reflected in Common Article 3 and GP II) as a matter of customary international law.

One aspect of military operations in Iraq seems undeniable—the U.S. and multi-national forces are engaged in an “armed conflict” of some character. Whether international, internal, or hybrid such as trans-national, the undeniable “armed conflict” aspect of these operations require analysis of not only the applicability of the law of war as a matter of law, but also as a matter of policy through the conduit of the *DOD Law of War Program*.²⁸

Impact of DOD Policy on Legal Analysis

Any analysis of applicable rules related to the conduct of military operations by U.S. forces in Iraq requires analysis of DOD policy—specifically the DOD policy related to compliance with the law of war established in *DOD Directive 5100.77*.²⁹ The simple policy mandate of that directive—that the armed forces of the United States will comply with the law of war during all conflicts, no matter how those conflicts are characterized³⁰—is directly applicable to military operations in Iraq. Indeed, it was the almost inevitable uncertainty related to determining the legal character of such armed conflicts that motivated a policy mandate requiring full compliance with the law of war during any armed conflict as the default standard for the armed forces of the United States.³¹

As is often the case with “simple” mandates, the devil is in the details. Whether this truism is applicable to this policy mandate has been the subject of substantial debate within the community of operational law specialists. In this situation, however, this basic mandate would purport to obviate the need to determine whether the conflict in Iraq qualified as “international,” “internal,” or some hybrid category such as “trans national.” Instead, the policy would require U.S. forces to treat all operations as if they were being conducted during the course of an international armed conflict, and accordingly, comply with all rules derived from the law of war considered by the United States applicable to such conflicts.³²

Because unlike legal mandates, policy is more easily subject to authorized deviation, a legitimate question related to this policy is whether deviation is ever justified, and if so, what level of authority is empowered to authorize such deviation. While the Chairman, Joint Chiefs of Staff (CJCS) implementing instruction expressly allows for “competent authority” to authorize deviation from the required application of law of war “principles” during non-conflict operations,³³ there is no analogous deviation provision during armed conflicts. Thus, it would appear that no commander is empowered to authorize deviation from compliance with the entire body of the law of war, even during a conflict not triggering such broad application as a matter of law. While it seems logical to conclude that the CJCS, as the proponent of the policy mandate, or any higher competent command, retain the authority to direct or authorize deviation from this broad mandate, it seems improper to derive an “implied” authority for subordinate commands to do so.

Analyzing Applicability of Law of War Treaties

Whether applicable as a matter of law, or as a matter of policy, a determination of which provisions of the law of war are considered binding by the United States is still required. In relation to the specific issue raised by the use of the minaret, this determination requires an understanding of the distinction between treaties ratified by the United States, and treaties signed by the United States, but pending ratification. This distinction is the result of the disparate status of the two primary treaties

Pragmatically, these armed conflicts are best characterized as trans-national armed conflicts, a characterization that reflects the global nature of such operations.

²⁸ DOD DIR. 5100.77, *supra* note 4.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Lieutenant Colonel Paul E. Kantwill & Major Sean M. Watts, *Effects-Based Lawyering: Legal Consequences of the United States’ Response to 9/11*, 28 *FORDHAM INT’L L.J.* (Feb. 2005).

³² It is not uncommon for practitioners to assert that this policy mandate requires compliance with only the “principles and spirit” of the law of war. The plain language of the directive, however, renders this position patently erroneous. While following the principles and spirit of the law of war is without doubt required during all military operations, any operation that is considered by the United States to fall within the rubric of “armed conflict” triggers application of the law of war as if such application was required as a matter of law. DOD DIR. 5100.77, *supra* note 4, para. 5.3.1. The forthcoming revision to this directive will not in any way alter this conclusion, and will in fact elevate the requirement to comply with the law of war during all armed conflicts from a service component responsibility to an explicit statement of DOD policy. See U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (revised version pending publication).

³³ CJCS INSTR. 5810.01B, *supra* note 4, para. 4.a.

addressing the use of cultural property: Hague IV and Annexed Regulations,³⁴ and the Convention for the Protection of Cultural Property in the Event of Armed Conflict.³⁵ While the United States is a party to Hague IV (the provisions of which are generally regarded as customary international law), the United States has signed, but never ratified, the Cultural Property Convention.

Having been ratified by the United States, after receiving the requisite advice and consent of the Senate, Hague IV falls within the scope of the Supremacy Clause of the Constitution,³⁶ and therefore must be regarded as the “supreme law of the land.” While U.S. jurisprudence related to the law of treaties does allow for a later in time statutory contradiction to this treaty,³⁷ no such statute exists, and indeed, every statutory and policy reference to the subject matter of the law of war has confirmed the binding nature of this treaty.³⁸ (The customary international law status of the provisions of this treaty provide an additional basis for concluding the United States is bound to them).

In contrast to the Hague IV, the Cultural Property Convention falls into an authoritative “twilight zone” under traditional doctrines of the relationship between U.S. and international law. The Cultural Property Convention was signed by the United States on 14 May 1954.³⁹ It was not, however, transmitted to the Senate for advice and consent until January 1999,⁴⁰ and as of this date, advice and consent has not been granted. Thus, this treaty is signed by the United States, but is not ratified. Therefore, as a matter of domestic law, the treaty does not fall under the auspices of the Supremacy Clause, and as a matter of international law, the United States is not a party to the treaty.⁴¹

A signed treaty that is pending advice and consent and subsequent ratification for a long time period is not uncommon in United States treaty practice,⁴² nor among other states in the community of nations.⁴³ As a result, customary international law has developed a doctrine to address the question of the force and effect of treaties pending ratification.⁴⁴ This doctrine is reflected in Article 18 of the Vienna Convention on the Law of Treaties,⁴⁵ which, ironically, is a treaty that itself has been signed by the United States, but not yet ratified.⁴⁶ Known as the “object and purpose” rule, this principle of customary international law imposes an obligation on states that have expressed intent to be bound to a treaty through signature to refrain from any activity that might defeat the “object and purpose” of that treaty for the period of time ratification is pending.⁴⁷

This “Article 18” obligation is terminated only when a signatory state has taken appropriate steps to demonstrate a clear intention not to become a party to the treaty.⁴⁸ This is normally understood as requiring some action at the international level,

³⁴ See Hague Convention IV, *supra* note 27, at art. 22.

³⁵ Cultural Property Convention, *supra* note 6.

³⁶ U.S. CONST. art. VI.

³⁷ See THE RESTATEMENT, *supra* note 5, § 115.

³⁸ See, e.g., FM 27-10, *supra* note 6; U.S. DEP'T OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 5-10 (1997) (rev. A).

³⁹ See Letter of Transmittal from President William Clinton, to the Senate for Ratification of the Hague Convention for the Protection of Cultural Property in the Event of Armed conflict (The Convention) and for Accession, the Hague Protocol, Concluded on May 14, 1954, and Entered Into Force on August 7, 1956 with Accompanying Report from the Department of State on the Convention and the Hague Protocol, S. Treaty Doc. No. 106 - 1, 106th Cong., 1st Sess., at III (1999) [hereinafter Cultural Property Letter of Transmittal].

⁴⁰ *Id.*

⁴¹ See generally THE RESTATEMENT, *supra* note 5, §§ 301-26.

⁴² See *Treaties and Other International Agreements: The Role of the United States Senate*, S. Prt. 106-71, 106th Cong. (2d Sess. 2001) [hereinafter *Treaties and the Senate*].

⁴³ For example, the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was signed by the United States in 1925, but not ratified until 1975.

⁴⁴ See THE RESTATEMENT, *supra* note 5, §§ 301-26.

⁴⁵ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, UN Doc. A/CONF.39/27 (1969), *reprinted in* 63 A.J.I.L. 875 (1969), 8 I.L.M. 679 (1969).

⁴⁶ *Treaties and the Senate*, *supra* note 42, at 23-4.

⁴⁷ *Id.* at 116-21.

⁴⁸ *Id.*

such as submitting a formal diplomatic note to the treaty depository.⁴⁹ The United States has taken no action to manifest its intent not to become a party to the Cultural Property Convention. On the contrary, as recently as 1999, the President reinforced the executive branch's desire that the United States become a party to this treaty.⁵⁰ As a result, customary international law would appear to require the United States to refrain from activities that defeat the "object and purpose" of that treaty.

Rules Applicable to This Incident⁵¹

Pursuant to DOD policy, the armed forces of the United States must comply with the law of war in Iraq regardless of the actual characterization of the conflict as "international" or "non-international." In order to execute this obligation, however, the *prima facie* issue of what the United States considers to be the applicable rules of the law of war triggered by the policy mandate of the DOD Law of War Program must be resolved.⁵² There is no dispute that the provisions of Hague IV, which operate to protect cultural and religious property through Article 27, fall within this category of applicable rules. The Hague IV requires the following:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.⁵³

While this provision reflects a general goal of protecting religious and cultural objects, it does not expressly prohibit the use of such objects for military purposes. Furthermore, the "as far as possible" caveat suggests a "military necessity" exception to this general prohibition. There is simply nothing in Hague IV that, through the conduit of the DOD Law of War Program, categorically prohibits the method in which this minaret was used.

Hague IV does include an apparently absolute prohibition on the use of religious property during belligerent occupation.

Art. 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.⁵⁴

⁴⁹ This principle of international law is also presumptively applicable to the two Additional Protocols to the Geneva Conventions. See Protocol I, *supra* note 6; Protocol II, *supra* note 6. Both treaties were signed by the United States, and neither has been ratified. United States signature created a *prima facie* presumption that the object and purpose rule is applicable to those treaties. It is true that with regard to Protocol I, the Executive Branch informed the Senate that it did not intend to submit the treaty for advice and consent because it was considered "fatally flawed." See Letter of Transmittal, *supra* note 27. While this might appear to satisfy the requirement to demonstrate U.S. intent not to become a party to the treaty, the purely domestic nature of this action renders such a conclusion questionable. Release from this obligation would appear to require some international declaration of similar content, although it is plausible that the cumulative effect of the Letter of Transmittal, the passage of time since signature, and other evidence that the U.S. does not consider itself bound to this treaty (military manuals and an absence to any reference to provisions of Protocol I in ICRC U.S. policies related to military operations), sufficiently demonstrate U.S. intent not to become a party to this treaty. See *Treaties and the Senate*, *supra* note 42, at 113-14. It is also possible that the Senate might question the constitutionality of carrying out treaty obligations pursuant to this rule of international law prior to the treaty receiving the requisite constitutional advice and consent from the Senate. In such a situation, domestic validity of compliance is enhanced proportionally to the degree to which the subject matter is associated with the President's Article II authority. Such association seems extremely close with regard to a treaty regulating the conduct of military operations. In contrast, Protocol II has been submitted by the Executive Branch for advice and consent, with subsequent requests by the Executive Branch for the Senate to complete this action. Thus, unlike Protocol I, there appears to be little doubt that the United States remains obligated under the object and purpose rule *vis à vis* Protocol II.

⁵⁰ See Cultural Property Letter of Transmittal, *supra* note 39, at III.

⁵¹ See generally *Protection of Cultural Property During Expeditionary Operations Other Than War*, TJAGSA Practice Note: International and Operational Law Note, ARMY LAW., Mar. 1999, at 25; see also Captain Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277 (1997).

⁵² A policy mandate to comply with the "law of war" during all conflicts, no matter how characterized, necessitates by implication a requirement to ascertain those law of war obligations considered by the United States to be binding as a matter of law.

⁵³ Hague IV, *supra* note 27, art. 30.

⁵⁴ *Id.* at art. 56.

Article 56, however, is not dispositive to the issue presented herein. First, it is located in the occupation section of Hague IV. This rule must be interpreted within the context of rules developed at the beginning of the last century for control and temporary administration of enemy territory during belligerent occupation. Within this context, it is reasonable to presume that this rule was based on an expectation that the occupation would be generally unopposed, a situation clearly distinguishable from that in Iraq. Second, and far more significant, this rule must be considered within the context of subsequent treaty provisions developed for the specific purpose of protecting cultural property during armed conflict. As will be explained below, these rules did not adopt a distinct framework for such protection during belligerent occupation. In fact, the Geneva Convention for the Treatment of Civilians in Time of War of 1949,⁵⁵ the most comprehensive source of authority for the conduct of belligerent occupation, does not include any provision mandating special protection for religious property, but instead applies to such religious property the general prohibition against the destruction of property in occupied territory, *absent imperative military necessity*.⁵⁶ These later in time treaty provisions, some of which specifically address the issue of the treatment of religious property of cultural heritage, should be interpreted as controlling even if they purport to contradict the unqualified prohibition of the Hague IV.⁵⁷

Reference to the provisions of these other law of war treaties does appear to provide a more precise rule of decision, although the “implied” military necessity exception noted above continues to have analytical impact. Article 4 of the Cultural Property Convention imposes the following obligation on the parties to a conflict:

[r]espect cultural property⁵⁸ situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.⁵⁹

This obligation, however, is qualified by the subsequent section, which provides that “[T]he obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.”⁶⁰ Thus, use of cultural property as an observation position appears consistent with the principles reflected in the Cultural Property Convention if such use is the only feasible means available for the commander to achieve a valid military objective. Certainly, the protection of friendly forces or the local population from threats posed by dissident or hostile elements during a period of occupation qualify as such a purpose. In the opinion of this author, the key consideration in analyzing the permissibility of such use would be the legitimacy of the conclusion that no other feasible alternate was available to achieve the important military objective.⁶¹

With regard to this imperative military necessity qualifier, it is critical to distinguish the protection afforded cultural property as defined in Article 1 of the Cultural Property Convention from property granted the status of “special protection” in accordance with Article 8 of that Convention. Pursuant to Article 9 of the Convention, military use of property granted “special protection,” or military use of surrounding areas, is prohibited with no military necessity exception.⁶² Reference to

⁵⁵ See GC, *supra* note 10.

⁵⁶ *Id.* at art. 54.

⁵⁷ Hague IV, *supra* note 27.

⁵⁸ Cultural property is defined in the Convention as follows:

Article 1. For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

Cultural Property Convention, *supra* note 6, art. 1.

⁵⁹ *Id.* art. 4(1).

⁶⁰ *Id.* art. 4(2).

⁶¹ See *id.*

⁶² *Id.* art. 9.

this article often mistakenly leads to the conclusion that cultural property, as defined in Article 1 of the Convention, is absolutely immune from military use. While, as noted above, such use should only be made under conditions of imperative military necessity, the unqualified immunity provided by Article 9 is applicable only to property designated with “special protection” as defined in Article 8 of the Convention.⁶³ As of the date of this article, only the Vatican has been so designated.⁶⁴

The constraint against military use of religious property of cultural heritage is more categorical in Protocols I and II to the Geneva Conventions. Article 53 of Protocol I (applicable to international armed conflict) prohibits use in support of the military effort of all “places of worship which constitute the cultural or spiritual heritage of the people.”⁶⁵ Article 16 of Protocol II (applicable to non-international armed conflict) reflects an analogous prohibition.⁶⁶ Both of these articles, however, begin with the following introductory language: “[W]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments”.⁶⁷ According to the International Committee of the Red Cross Commentary to this article:

The protection laid down in this article is accorded “without prejudice” to the provisions of other relevant international instruments. From the beginning of the discussions regarding Article 53 it was agreed that there was no need to revise the existing rules on the subject, but that the protection and respect for cultural objects should be confirmed. It was therefore necessary to state at the beginning of the article that it did not modify the relevant existing instruments. *For example, this means that in case of a contradiction between this article and a rule of the 1954 Convention the latter is applicable*, though of course only insofar as the Parties concerned are bound by that Convention. If one of the Parties is not bound by the Convention, Article 53 applies. Moreover, Article 53 applies even if all the Parties concerned are bound by another international instrument insofar as it supplements the rules of that instrument.⁶⁸

Thus, while neither Protocol I nor II expressly provide for an imperative military necessity exception to the prohibition against the use of cultural property in support of the military effort, if the application of such an exception is appropriate in

⁶³ According to Article 8:

Granting of Special Protection

Art. 8. 1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

(a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

(b) are not used for military purposes.

2. A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

3. A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the centre.

4. The guarding of cultural property mentioned in paragraph 1 above by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order, shall not be deemed to be used for military purposes.

5. If any cultural property mentioned in paragraph 1 of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom. In that event, such diversion shall be prepared in time of peace.

6. Special protection is granted to cultural property by its entry in the "International Register of Cultural Property under Special Protection". This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention.

Id. art. 8.

⁶⁴ Interview with Mr. W. Hays Parks, Department of Defense Office of General Counsel, in Washington, D.C. (May 19, 2004).

⁶⁵ Protocol I, *supra* note 6, art. 53.

⁶⁶ Protocol II, *supra* note 6, art. 16.

⁶⁷ Protocol I, *supra* note 6, art. 53.

⁶⁸ See PROTOCOL COMMENTARY, *supra* note 6, at 640 (emphasis added).

accordance with the provisions of the Cultural Property Convention, the authority of that treaty would trump the unqualified prohibition reflected in the Protocols. Recall also that the United States is not a party to either Protocol I or II.⁶⁹

The principles reflected in the provisions of the Cultural Property Convention seem most relevant for analysis of the use of this property based on both the subject of the treaty and the fact that the United States has signed this treaty and appears to remain committed to ratification. This treaty, by its terms, applies to both international and non-international armed conflict, and is implicated by the “object and purpose” rule reflected in Article 18 of the Vienna Convention.⁷⁰ There is no clear definition of the scope and extent of this “Article 18” obligation, although it is generally accepted that it certainly does not require full treaty compliance. Instead, a good faith assessment of the activity in question must be engaged in to determine if such activity appears to be a flagrant derogation from the essence of the treaty, thereby defeating the basic purpose of that treaty.⁷¹ As noted above, reconciling the use of the minaret in this situation with the principles reflected in the Cultural Property Convention requires a precise understanding of the distinction between generally protected cultural property and specially protected cultural property. The use of the minaret in this situation was presumptively based on a determination of imperative military necessity. If this presumption is valid, there is no reason to conclude that the use violated the object and purpose of the treaty, and in fact the use would have been consistent with the obligations imposed by the treaty had it been binding at the time. However, if the presumption is invalid—if some feasible alternate to the use of the minaret had been available to the commander—it is difficult to reconcile the unnecessary transformation of the minaret into a valid and highly significant military objective for an opponent as being consistent with the fundamental purpose of the Cultural Property Convention.⁷²

As with many provisions of law of war treaties that have not been ratified by the United States, legal advisors are often called upon to assess whether the provision was at the time of drafting, or subsequently evolved into, customary international law. In such a situation, the United States is bound to comply not with the particular article of the treaty, but with the principle reflected in that article.⁷³ Whether the collective effect of these treaty provisions justifies a conclusion that the general obligation to refrain from military use of cultural property—subject to an imperative military necessity exception—amounts to a customary international law norm is subject to debate.

A comprehensive discussion of the relationship between treaty law and customary international law is beyond the scope of this article. Suffice to say that it is a well accepted principle of international law that the provision of a treaty can create a new obligation that subsequently “ripens” into a customary obligation; or codify a pre-existing customary obligation. For example, according to various sources, the most oft cited of which is the “Matheson” statement,⁷⁴ at the time Protocol I was drafted the United States regarded many of the articles as either a reflection of existing customary international law

⁶⁹ Int’l Comm. of the Red Cross, *States Party to the Main Treaties* (June 15, 2005), at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) [hereinafter Listing of States party] (listing States party to Protocol I and Protocol II).

⁷⁰ *See id.*

⁷¹ *See* Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 465 (1970).

⁷² *See* Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT’L L. 211 (Fall, 2003); *see also* TJAGSA Practice Note: International and Operational Law Note, *Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW., Mar. 1999, at 25.

⁷³ According to *FM 27-10*:

4. Sources

The law of war is derived from two principle sources:

- a. *Lawmaking Treaties (or Conventions)*, such as the Hague and Geneva Conventions.
- b. *Custom*: Although some of the law of war has not been incorporated in any treaty or convention which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.

See FM 27-10, *supra* note 6, para. 4.

⁷⁴ *See* Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 425 (1987).

obligations, or positive developments in the law of war.⁷⁵ Subsequent practice also suggests that some articles of Protocol I may have ripened into customary international law.⁷⁶

There is no explicit United States position on whether the rules related to the military use of cultural property reflected in the treaties analyzed above fall into the category of customary international law, either as a reflection of a customary obligation that existed at the time they were drafted, or as a positive development in the law of war that has subsequently ripened into a customary obligation. There is ample implied support, however, for such a conclusion. First, as noted above, the Cultural Property Convention was signed by the United States, and remains the subject of executive branch ratification efforts. Second, there is no indication that the United States included Article 53 of Protocol I among those articles of Protocol I considered so fatally flawed that they required rejection of the entire Protocol.⁷⁷ Third, and perhaps of most significant, the basic concept of an extremely proscribed military use of cultural property is reflected not only in the Cultural Property Convention, but also in Protocol II⁷⁸—a treaty signed by the United States and also subject to executive branch ratification efforts.⁷⁹ Furthermore, both these treaties expressly extend this principle into the realm of non-international armed conflict, supporting the conclusion that it is considered a fundamental norm of the law of war.

Thus, either through operation of the “object and purpose” rule as it relates to the Cultural Property Convention, or through the conclusion that Article 53 of Protocol I related to the use of cultural property for military purposes reflects a principle of customary international law, the extremely limited justification for the military use of cultural property appears to fall under the auspices of the “comply with the law of war” mandate of *DOD Directive 5100.77*. Accordingly, regardless of the characterization of the conflict in Iraq, such use would be improper absent imperative military necessity. Furthermore, there is a strong argument to support the conclusion that regardless of the characterization of the conflict in Iraq, this prohibition is applicable as a matter of international law. The combination of the Cultural Property Convention and the effort to reinforce the protection of cultural property reflected in Protocol’s I and II provide substantial indication that this prohibition is applicable in both international and internal conflict as a customary international law principle applicable to all conflicts.

Conclusion

Assuming, *arguendo*, that the minaret used by U.S. forces in the referenced article fell within the definition of cultural property, the use was permissible based only on a determination of imperative military necessity. While use of the vantage point offered by such a structure was undoubtedly intended to enhance the effectiveness of the operation, the prohibition against the military use of cultural property absent such a justification does not allow for a general military necessity based exception. Instead, the concept of imperative necessity suggests that no other feasible alternative be available for achieving what is presumptively an important military objective. This prohibition has arguably attained customary international law status, and at a minimum, appears to be binding on U.S. forces through either operation of the object and purpose rule derived from the international law of treaties, or through operation of *DOD Directive 5100.77*

As noted above, however, this article was not intended to simply address the question of whether use of this minaret was or was not consistent with the law of war. Instead, this reported incident was relied upon to illustrate the variety of considerations associated with such an issue. In so doing, it is hoped that this article will contribute to the ability of judge advocates to address similar issues during future operations.

⁷⁵ *Id.*

⁷⁶ See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996); see also Hans-Peter Gasser, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: An Appeal for Ratification by the United States*, 81 AM. J. INT’L L. 912 (Oct. 1987).

⁷⁷ See Letter of Transmittal, *supra* note 27.

⁷⁸ See *supra* note 6.

⁷⁹ See *supra* notes 34-42, and accompanying text.