

**DEFINING A WAR CRIME:
DOES THE DEPARTMENT OF DEFENSE LAW OF WAR
MANUAL COMPLY WITH THE ROME STATUTE?**

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ABSTRACT

The U.S. Department of Defense has published and revised a Law of War Manual that sheds light on the thinking of the Department's lawyers on the laws of war. This topic is of particular interest in the context of the ongoing debate on whether the Defense Department's views on the laws of war differ from analyses emerging from the International Crimi-

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nal Court. This Article considers whether conduct that is permissible under the Law of War Manual could constitute a crime under the International Criminal Court's Rome Statute by analyzing six topics: (i) classes of persons in light of the principle of distinction; (ii) the principle of proportionality and precautions in attacks; (iii) lawful weaponry; (iv) detention; (v) treatment of prisoners of war; and (vi) unlawful deportation or transfer.

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INTRODUCTION

This Article analyzes potential points of divergence between the war crimes provisions of the Rome Statute of the International Criminal Court (Rome Statute)¹ and the Law of War Manual of the Department of Defense (DoD Manual or Manual).² Specifically, this Article considers whether certain conduct that is permissible under the Manual could constitute a crime under the Rome Statute. The Article is organized around six topics where potential conflicts were found or appear possible at first review:³ (i) classes of persons in light of the principle of distinction; (ii) the principle of proportionality and precautions in attacks; (iii) lawful weaponry; (iv) detention; (v) treatment of prisoners of war; and (vi) unlawful deportation or transfer.

Each of these topics could be the subject of a lengthy analysis unto itself. For brevity and clarity, this Article attempts to draw out some of the key points of contention and similarities, sometimes at a high level, which may not capture the full complexity and nuance of each subject area.

This Article’s general conclusions with respect to the abovementioned topics are as follows:

In some instances, provisions of the DoD Manual appear to diverge from the Rome Statute and many of the points of possible conflict rest on matters of interpretation of shared core principles that underpin both documents. Specifically, the differences suggest the possibility of some actions permitted under the DoD Man-

1. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

2. U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL (updated Dec. 2016) [hereinafter DoD Manual].

3. We do not discuss the Crime of Aggression for which the DoD Manual notes: “The United States has expressed the view that the definition of the act of aggression in the Kampala amendments to the Rome Statute does not reflect customary international law.” *Id.* § 1.11.3.1. We also do not discuss potential differences in the context of criminal procedure, defenses to charges, or command responsibility.

ual potentially amounting to violations under the Rome Statute. It should be noted, however, that a violation of a provision of the Rome Statute is not sufficient to create a case before the International Criminal Court (ICC) because the ICC also requires the establishment of jurisdiction and a determination of the gravity of the violation.

The six topics considered in this Article are as follows:

Regarding *distinction*, the DoD Manual and the Rome Statute contain similar principles that require distinguishing between combatants and civilians in military operations. However, the DoD Manual potentially diverges from the Rome Statute in some significant aspects. Two such examples of divergence are the DoD Manual's reluctance to recognize the principle that, in cases of doubt, an individual should be recognized as a civilian, and the Manual's potentially more expansive interpretation of *direct participation* in hostilities.

Regarding *proportionality*, the December 2016 revisions to the DoD Manual vastly improved the Manual's original discussion of "assumption of risk" of persons who are in close proximity to military operations by clarifying language that previously appeared to exclude categories of civilians from the proportionality analysis. The revised Manual explicitly states that these civilians must be included in the proportionality analysis. However, there remains language in the Manual that implies protected persons such as civilians working near military objectives need not be factored into the calculation to determine whether the expected harm is "excessive." On this point, there is a risk that the DoD Manual's obligation can be weakened to such a point where it diverges from the ICC's approach to the analysis.

Regarding *weaponry*, the Manual's position on acceptable bullets and riot control agents places it in tension, if not in direct conflict, with the Rome Statute. This is because the Rome Statute can be fairly understood to denote a strict prohibition on the use of expanding bullets. Knowingly ordering the use of expanding bullets in a manner that appears permissible under the Manual could constitute a crime under the Rome Statute. There is also a debate on whether riot control agents such as tear gas and pepper spray that are permitted in certain circumstances under the DoD Manual would be covered by the prohibition on "poisonous and gaseous weapons" under the Rome Statute.

Regarding *detention*, the duration of detention permitted under the DoD Manual may conflict with the Rome Statute depending on

the DoD's definition of "cessation of conflict" and categorization of the conditions that justify the prolonging of detentions.

Regarding *treatment of prisoners of war* and *unlawful deportation and transfer*, although there is limited case law and commentary, the DoD Manual appears to be generally consistent with the Rome Statute.

A. *Background: The DoD Manual*

The DoD Manual reflects the views of the U.S. Department of Defense (DoD) only; it does not have inter-agency approval. This means that the sections of the Manual discussed in this Article do not necessarily reflect the views of the U.S. government as a whole.⁴

The Manual was a multi-year effort by military and civilian lawyers from across the DoD to develop a department-wide resource for military commanders, legal practitioners, and other military and civilian personnel on the international law principles governing armed conflict.⁵ In particular, the Manual is intended to be a guide for personnel responsible for implementing the law of war and executing military operations.⁶

The Manual was first released in 2015 and amended, incorporating comments from the public, in 2016. The DoD has expressed continued willingness to engage with members of the public and update the Manual, as needed.⁷

According to the authors of the DoD Manual, the scope of action potentially permissible under the Manual reflects minimum legal standards and is not necessarily reflective of DoD practice. The Manual includes an explanation regarding the benefits of compliance with treaties, even those to which the United States is not party, as good policy that reflects past and present U.S. practice:

DoD practice has often been to act consistently with a treaty rule, even if that rule might not apply as a matter of treaty law. First, it may be appropriate to act consistently with the terms of a treaty (even as applied in dealings with a non-Party to a treaty) because the general principles of the treaty have been determined to be declaratory of customary international law. In such

4. DoD Manual, *supra* note 2, preface v–vi.

5. See Press Release, U.S. Dep't of Defense, *DoD Announces Update to the DoD Law of War Manual* (June 22, 2016), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/852738/dod-announces-update-to-the-dod-law-of-war-manual/> [<https://perma.cc/F6JE-D62P>].

6. *Id.*

7. *Id.*

cases, practice that is consistent with the treaty's terms with regard to a particular matter likewise would be in compliance with applicable customary international law.

In addition, it may be important to act consistently with the terms of the treaty because the treaty represents "modern international public opinion" as to how military operations should be conducted. Other policy considerations, including efficacious training standards or close relations with coalition partners, may lead to a policy decision that DoD practice should be consistent with a particular law of war treaty rule, even if that rule does not apply to U.S. forces as a matter of law.⁸

B. *Background: The International Criminal Court*

The ICC entered into force in 2002 and investigates and tries individuals charged with atrocity crimes of concern to the international community: genocide, war crimes, and crimes against humanity.⁹ The ICC has jurisdiction in situations where the alleged perpetrator is a national of a State Party, where the crime was committed in the territory of a State Party, or in situations where the U.N. Security Council has referred a case to the ICC.¹⁰ Thus, it is possible that the ICC could have jurisdiction over nationals of States not party to the Rome Statute. For this reason, although the United States is not a party to the Rome Statute, the United States has expressed concern at the possibility that U.S. nationals could become the subject of investigations.¹¹

Once jurisdiction has been established, there are further requirements that must be met before the ICC may proceed. The ICC is guided by the principle of complementarity, which means that the ICC can only pursue an investigation where the national legal systems are unable or unwilling to carry out investigations or prosecutions.¹² The Rome Statute also requires a gravity threshold for case admissibility—the Court has "jurisdiction in respect to war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."¹³ It is thus important to note that a single incident may be a war crime under

8. DoD Manual, *supra* note 2, § 3.1.1.1.

9. Rome Statute, *supra* note 1, arts. 5–8; Public Affairs Unit, International Criminal Court, *Understanding the International Criminal Court*, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> [<https://perma.cc/RN9G-EGCD>].

10. Rome Statute, *supra* note 1, arts. 4(2), 12, 13.

11. William J. Clinton, Presidential Statement on the Rome Treaty on the International Criminal Court, 2000 PUB. PAPERS 2816 (Dec. 31, 2000); *see also* DoD Manual, *supra* note 2, § 18.20.3.1.

12. Rome Statute, *supra* note 1, art. 17.

13. Rome Statute, *supra* note 1, art. 8(1).

the Rome Statute but may not meet the gravity threshold for an ICC investigation.

C. *Interpretive Methodologies*

This Article applies interpretive methodologies that are widely accepted in the field of international law for interpreting the Rome Statute and U.S. legal approaches to statutory interpretation for U.S. sources.

The standard approach for interpreting treaties is set forth in the Vienna Convention on the Law of Treaties (VCLT). Treaty interpretation involves making a good-faith assessment of the “ordinary meaning” of the treaty terms in context, in light of the “object and purpose” of the treaty.¹⁴ To confirm the meaning of a treaty, recourse may be had to “supplementary means of interpretation,” including the preparatory work (*travaux préparatoires*) of the treaty.¹⁵ Such supplementary means may only be used to “determine” the meaning of a phrase if the interpretation resulting from the standard method leaves the meaning “ambiguous or obscure” or leads to a result that is “manifestly absurd or unreasonable.”¹⁶

For the Rome Statute specifically, this Article focuses primarily on the text of the Rome Statute, Elements of Crimes, its Rules of Procedure and Evidence, and broader legislative history. Article 21 explains that the Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

In areas where further information would be appropriate or helpful, this Article considers additional treaties and principles of international laws of armed conflict such as Protocol Additional I

14. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

15. *Id.* art. 32.

16. *Id.*

and II to the Geneva Conventions of 12 August 1949, the Protection of Victims of International Armed Conflicts (API), and Non-International Armed Conflicts (APII).¹⁷ This Article also looks to decisions of the ICC, international criminal tribunals, the International Court of Justice (ICJ), and other international jurisprudence to help guide in the understanding of the Rome Statute as applied in practice.

For the interpretation of the DoD Manual and the U.S. statutes, this Article looks first to the ordinary or plain meaning of the text.¹⁸ When the text is ambiguous, this Article considers internal consistency, context, purpose, and case law interpretation of the relevant sections that may guide in the understanding of the language.¹⁹

I. CLASSES OF PERSONS: DISTINCTION

This Section considers how the Rome Statute and the DoD Manual classify combatants and civilians in both international armed conflicts and non-international armed conflicts.

A. *The Distinction Principle*

Since the eighteenth century, distinction has been, and continues to be fundamental to the law of armed conflict; it is often described as “the foundation on which the codification of the laws and customs of war rests.”²⁰ The principle is that parties to an armed conflict must distinguish between combatants and civilians

17. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API] (the United States signed Additional Protocol I in 1997 but has not ratified it); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Preamble, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter APII].

18. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–99 (2003).

19. See generally WILLIAM N. ESKRIDGE ET AL., LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819–20, 830, 833, 920–21, 937–38 (3d ed. 2001).

20. JEAN PICTET ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 598 (1989); Christopher Greenwood, *The Law of War (International Humanitarian Law)*, in INTERNATIONAL LAW 783, 787–95 (Oxford University Press 2d ed. 2006).

with only the former qualifying as legitimate military targets.²¹ Further, captured or imprisoned combatants are designated prisoner of war (POW) status which entitles them to certain protections such as the protections against being criminally tried before domestic courts for acts that are lawful under international humanitarian law.²² By contrast, although civilians cannot be targeted unless they directly participate in hostilities, they generally are not entitled to POW status and the related protections from domestic prosecution.

The principle of distinction can be found in the Rome Statute sections that define war crimes to include intentionally direct attacks against civilians and civilian objects.²³ Article 48 of API provides additional detail on this principle by stating that parties to a conflict “shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Although the United States is not a signatory to API, the principle of distinction is a central doctrine of international humanitarian law.²⁴ The DoD Manual devotes significant attention to the principle of distinction, recognizing that the law of war principles that distinguish between civilians and combatants has “greatly mitigated the evils of war.”²⁵

1. Definitions of Civilian and Combatant

The Rome Statute does not define “civilian” or “combatant.” The war crimes listed in Article 8(2) (a) and 8(2) (c), relate to grave

21. See API, *supra* note 17; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 78–79 (July 8) (“States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets [T]hese fundamental rules . . . constitute intransgressible principles of international customary law”); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 208 (Dec. 19) (considering evidence of indiscriminate shelling over 6 days, the killing of over 760 civilians, and the destruction of schools, religious and public buildings and looting of homes, the Court found sufficient evidence to support the allegation of failure to distinguish between combatants and noncombatants.)

22. See Geneva Convention III, *supra* note 17, arts. 4, 82.

23. See Rome Statute, *supra* note 1, arts. 8(2)(b)(i)–(iii), (xxiv), (e)(i), (ii).

24. JONATHAN CROWE & KYLIE WESTON SCHEUBER, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 71 (2013) (the principle was first set out in the Preamble to the St. Petersburg Declaration and was subsequently recognized in the Hague Regulations and restated in both API and AP II. It was described by the International Court of Justice in the *Nuclear Weapons* case as one of “intransgressible principles of international customary law.”).

25. DoD Manual, *supra* note 2, § 4.2.1.

breaches of the Geneva Conventions of August 12, 1949 and the war crimes listed in Article 8(2)(b) and (e) relate to other serious violations of the laws and customs applicable in international armed conflict “within the established framework of international law.”²⁶

International humanitarian law defines “civilian” by a process of exclusion—that is, a civilian is generally regarded to be any person who is not a combatant. For example, API defines a “civilian” as follows:

[A]ny person who does not belong to one of the categories of persons referred to in [the Prisoner of War section] of Geneva Convention III 1949 and in [the armed forces definition in] Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.²⁷

The ICC Pre-Trial Chamber has cited API Article 43, *inter alia*, in stating that “according to the well-established principle of international humanitarian law, [the term ‘civilians’ or ‘civilian population’] comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants.”²⁸ Therefore, under API, civilians are all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.²⁹ As noted by the International Commit-

26. See OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 323 (2008); PETER ROWE, THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 219 (2004); see also Rome Statute of the International Criminal Court, Declarations and Reservations: United Kingdom of Great Britain and Northern Ireland, at 6 (Oct. 4, 2001), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> [<https://perma.cc/R256-SR68>] (“The United Kingdom understands the term ‘the established framework of international law,’ used in article 8 (2) (b) and (e), to include customary international law as established by State practice and *opinio juris*. In that context the United Kingdom confirms and draws to the attention of the Court its views as expressed, *inter alia*, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Conventions.”). Articles 8(2)(a) and 8(2)(c), relate to crimes within international armed conflict, Articles 8(2)(b) and (e) relate crimes within armed conflicts not of an international character, and Article 8(2)(d) is an explanatory paragraph for 8(2)(c), clarifying that Article 8(2)(d) does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature.

27. API, *supra* note 17, art. 50(1).

28. Prosecutor v. Bemba Gombo, Pre-Trial Chamber II, ICC-01/05-01/08, Decision on Confirmation of Charges, ¶¶ 76, 78 (June 15, 2009) (internal quotations omitted).

29. Although not expressly referred to as a *levée en masse*, the concept is enshrined in Article 4(A)(6) of Geneva Convention III: “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.” Geneva Convention III, *supra* note 17, art. 4(A)(6).

tee of the Red Cross (ICRC) in its Interpretive Guidance on the Notion of Direct Participation in Hostilities, although international humanitarian law prior to the introduction of API did not expressly define civilians, the concept has been negatively delimited by the exclusive definitions of armed forces and the *levée en masse*. Every person involved in, or affected by, the conduct of hostilities has traditionally been considered to fall into one these three categories.³⁰

The DoD Manual states that “civilian” has a variety of meanings in the law of war but the Manual “generally” adopts a definition that means “a member of the civilian population, *i.e.*, a person who is neither part of nor associated with an armed force or group, nor engaging in hostilities.”³¹ The negative nature of this definition of civilian renders essential an examination of the definition of “armed forces” and “combatant”³² for a meaningful comparison of the two terms under international humanitarian law and the DoD Manual.

It is important to note that Article 43(1) of API introduced a relatively broad concept of “armed forces”:

[A]ll organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

This broad interpretation of “armed forces” in API contrasts with that of the Hague Regulations and Geneva Convention III, which set out four requirements for recognition as “armed forces”: the relevant group or individual must (i) “be commanded by a person responsible for subordinates”; (ii) “have a fixed distinctive sign recognizable at a distance”; (iii) “carry their arms openly”; and (iv) “conduct their operations in accordance with the laws and customs of war.”³³ Article 43 of API therefore removes the express require-

30. NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 21 (Int'l Comm. of the Red Cross 2009).

31. DoD Manual, *supra* note 2, § 4.8.1.5.

32. “Combatant” is often used interchangeably with “armed forces.” Under Article 43(2) of API, for example, “members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of Geneva Convention III) are combatants.” API, *supra* note 17, art. 43(2).

33. Hague Convention of 1899, art. 1, July 29, 1899, 32 Stat. 1803; Hague Convention of 1907, art. I, Oct. 18, 1907, 36 Stat. 2277; Geneva Convention III, *supra* note 17, art. 4(A)(s)(a)–(d); *see also* MELZER, *supra* note 30.

ments that combatants clearly distinguish themselves from civilians.³⁴

The ICRC has noted, however, that the more restrictive requirements under the Hague Regulations and Geneva Convention III only constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and POW status, and has argued that the elements outlined in the Hague Regulations and Geneva Convention III are not constitutive elements of “armed forces.”³⁵ According to this view, “all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party” even under the Hague Regulations and Geneva Convention III.³⁶

The DoD Manual disagrees and expressly refutes API’s more expansive definition of combatant on the basis that it would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.³⁷ This narrower interpretation of armed forces may result in certain non-state armed forces being treated as civilians taking a direct part in hostilities and therefore being entitled neither to the civilian’s immunity against attack nor the combatant’s immunity from prosecution for lawful acts of war.

Diverging definitions of combatant in API and the DoD Manual may indicate a similar divergence between the Rome Statute and the DoD Manual. To date, it appears that the ICC has not explicitly addressed whether it adopts API’s definition that removes the requirement for combatants to clearly distinguish themselves from civilians. The ICC has cited to Geneva Convention III, API, and APII to “assist in the [Court’s] definition of civilians.”³⁸ However, Pre-Trial Chamber I in the *Lubanga* case stated that the Hague Regulations form part of customary international law and require militia “that are not part of an army to fulfill the following conditions: be commanded by a person responsible for his subordinates; have

34. CHRISTOPHER FORD & AMICHAH COHEN, *RETHINKING THE LAW OF ARMED CONFLICT IN AN AGE OF TERRORISM* 2–5 (2012).

35. INT’L COMM. OF THE RED CROSS, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, <https://casebook.icrc.org/case-study/icrc-interpretive-guidance-notion-direct-participation-hostilities> [<https://perma.cc/4YSX-U5Z8>].

36. MELZER, *supra* note 30.

37. DoD Manual, *supra* note 2, § 4.6.1.2 (citing Ronald Reagan, *Letter of Transmittal*, Jan. 29, 1987, Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, Concluded at Geneva on June 10, 1977).

38. Prosecutor v. Bemba Gombo, Trial Chamber III, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 93 (Mar. 21, 2016).

a fixed distinctive emblem recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war.”³⁹ Thus, although there is an explicit disagreement between the DoD Manual and API regarding the definition of civilian and combatant, the potential difference between the DoD Manual and the approach of the ICC appears to be narrower. As case law develops, this divergence may become more significant. At this time, it seems unlikely that the DoD Manual’s determination of civilian or combatant status would be held to violate the provisions of the Rome Statute.

2. Doubt as to Civilian Status of an Individual

The Rome Statute does not directly address whether or not there is a legal presumption of civilian status where there is doubt in whether an individual should be classified as a civilian or combatant. However, in several cases, judges at the ICC have cited Article 50(1) of API and asserted that the term civilian “applies to anyone who is not a combatant, and in case of doubt, the person shall be considered to be a civilian.”⁴⁰

In addition, the ICTY has explicitly adopted Article 50(1) of API holding that “[a] person shall be considered to be a civilian for as long as there is a doubt as to his or her real status The Trial Chamber understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.”⁴¹

The DoD Manual asserts that Article 50(1) of API does not reflect customary international law:

Under customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases. Attacks, however, may not be directed against civilians or civilian objects based on merely hypothetical or speculative con-

39. Prosecutor v. Lubanga Dyilo, Pre-Trial Chamber I, ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 271–74 (Jan. 29, 2007).

40. Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on Confirmation of Charges, ¶ 148 (Dec. 16, 2011) (citing API, *supra* note 17, art. 50(1)); *see also* Prosecutor v. Kunarac, IT-96-23 & IT-96-23/1-A, Trial Judgment, ¶ 426 (Feb. 22, 2001) (citing API, *supra* note 17 and noting “[i]ndividually, a person shall be considered to be a civilian for as long as there is a doubt as to his or her status”).

41. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶ 50–51, Int’l Crim. Trib. for the Former Yugoslavia (Dec. 5, 2003).

siderations regarding their possible current status as a military objective.⁴²

Critics have argued that the DoD Manual should acknowledge, or clarify, that there is a legal presumption of civilian status in a situation where there is little or no reason to think that a person is an enemy combatant (or a civilian taking a direct part in hostilities), where the preponderance of evidence points to civilian status, or where the officer is not fairly confident that the person is a lawful target.⁴³ The ICRC recognizes that this is a “complex and difficult” issue and notes that a number of states have expressed reservations about the military ramifications of a strict interpretation of the rule, stating that “a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack.”⁴⁴

The DoD Manual’s statement that there is no legal presumption of civilian status appears to contrast with generally accepted international law on this point, which, at the very least, acknowledges a legal presumption of civilian status even if the scope remains unclear. DoD practice, on the other hand, appears to abide by the legal presumption of civilian status.⁴⁵

It is important to note that this presumption of civilian status applies to those making targeting decisions in armed conflict. In the context of establishing criminal responsibility before the ICC, the burden is on the prosecutor to prove the status of the victim as a civilian taking no active part in hostilities in order to establish individual criminal responsibility under the Rome Statute.⁴⁶ To

42. DoD Manual, *supra* note 2, § 5.4.3.2. Interestingly, in situations where it is unclear whether a *detainee* is a civilian or not, Section 4.4.2 of the DoD Manual does appear to adopt a presumption of civilian status, stating that “that person should be afforded the protections of POW status until their status has been determined by a competent tribunal.”

43. Marty Lederman, *Troubling proportionality and rule-of-distinction provisions in the Law of War Manual*, JUST SECURITY (Jun. 27, 2016), <https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/> [<https://perma.cc/4GPN-WY7L>].

44. INT’L COMM. OF THE RED CROSS, *Rule 6: Civilians’ Loss of Protection from Attack*, CUSTOMARY INT’L HUMAN. L. DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6 [<https://perma.cc/C79F-7DMF>] (noting that “[i]n the case of non-international armed conflicts, the issue of doubt has hardly been addressed in State practice, even though a clear rule on this subject would be desirable as it would enhance the protection of the civilian population against attack”).

45. See Oona Hathaway, Marty Lederman & Michael Schmitt, *Two Lingering Concerns About the Forthcoming Law of War Manual Amendments*, JUST SECURITY (Nov. 30, 2016), <https://www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments/> [<https://perma.cc/SVN6-2NFJ>].

46. Prosecutor v. Bemba Gombo, Trial Chamber III, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 94 (Mar. 21, 2016).

meet this burden, judges at the ICC have noted that they would consider the specific facts of each situation, “including the location of the murders, whether the victims were carrying weapons, and the clothing, age, and gender of the victims.”⁴⁷

3. Direct Participation in Hostilities

The Rome Statute criminalizes attacks on civilians, but only so long as such civilians are “not taking direct part in hostilities.”⁴⁸ Similarly, API and APII include the principle that civilians are protected from the effects of military operations “unless and for such time as they take part in hostilities.”⁴⁹ ICC Pre-Trial Chamber I noted that “neither treaty law nor customary law expressly define what constitutes direct participation in hostilities.”⁵⁰ Judges at the ICC have hence looked to the Commentary to Article 13 of APII, which states that direct participation “implies that there is sufficient causal relationship between the act of participation and its immediate consequences.”⁵¹ The consequences being “hostilities” which are defined as “‘acts of war’ that by their nature or purpose struck at the personnel and ‘matériel’ of enemy armed forces.”⁵² Citing the International Criminal Tribunal for the former Yugoslavia in the *Strugar* case, the ICC considered that direct participation in hostilities might include “bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of belligerent, and transporting weapons in proximity to combat operations.”⁵³ With these factors under consideration, the majority held that determination of whether a

47. *Id.*

48. Rome Statute, *supra* note 1, art. 8(2)(b)(i).

49. API, *supra* note 17, art. 51(3); APII, *supra* note 17, art. 13(3) (which applies in cases of non-international armed conflict).

50. Prosecutor v Abu Garda, Pre-Trial Chamber I, ICC-02/05-02/09-243, Decision on the Confirmation of Charges, ¶ 80 (Feb. 8, 2010); *see also* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶ 790 (Mar. 7, 2014) (noting that the Rome Statute, “treaty law and customary law do not define direct participation in hostilities. [Trial Chamber II] observes, however, that the Commentary on article 13(3) of Protocol II defines it as ‘acts of war that by their nature or purpose str[rike] at the personnel and *matériel* of enemy armed forces’” (quoting INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1453 (Yves Sandoz et al. eds., 1986)).

51. *Id.* (internal quotations omitted).

52. *Id.*

53. *Id.* ¶ 81 (citing Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgment, ¶ 177 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008)).

person is directly participating in hostilities must be carried out on a case-by-case basis and that civilian protection does not cease if protected persons only use armed force in exercise of their right to self-defense.⁵⁴

Taking a different approach, the DoD Manual distinguishes between “lawful combatants” and “unlawful combatants,” also referred to as “unprivileged belligerents.”⁵⁵ Unprivileged belligerent status is generally understood to include those persons who would otherwise have qualified as lawful combatants but have forfeited the privileges associated with such status by engaging in certain activities such as spying or sabotage.⁵⁶ The DoD Manual provides examples of “lawful combatants” and “unprivileged belligerents” to explain the distinction. According to the Manual, three classes of persons qualify as “Lawful Combatants”:⁵⁷

- members of the armed forces of a State that is a party to a conflict, aside from certain categories of medical and religious personnel;
- under certain conditions, members of militia or volunteer corps that are not part of the armed forces of a State, but belong to a State; and
- inhabitants of an area who participate in a kind of popular uprising to defend against foreign invaders, known as *levée en masse*.

The Manual classifies “Unprivileged Belligerents” in two categories, depending on the presence of State authorization:

- persons who have initially qualified as combatants (*i.e.*, by falling into one of the three categories mentioned above), but who have acted so as to forfeit the privileges of combatant status by engaging in spying or sabotage;
- persons who never met the qualifications to be entitled to the privileges of combatant status, but who have, by engaging in hostilities, incurred the corresponding liabilities of combatant status (*i.e.*, forfeited one or more of the protections of civilian status).

54. *Id.* ¶ 83.

55. DoD Manual, *supra* note 2, §§ 4.2, 4.3.

56. See INT'L COMM. OF THE RED CROSS, *Glossary: Unprivileged Belligerent*, <https://casebook.icrc.org/glossary/unprivileged-belligerent> [<https://perma.cc/YEB3-B2ZY>]; see also *Ex parte Quirin*, 317 U.S. 1, 35 (1942) (holding that certain German soldiers were unlawful combatants because they “pass[ed] surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts”).

57. DoD Manual, *supra* note 2, §§ 4.3.3, 4.3.4.

Thus, the DoD Manual defines unprivileged belligerent status to include civilians who have engaged directly in hostilities and as a result lose their civilian status and associated privileges.⁵⁸

The DoD Manual notes that its references to Article 51(3) of API “does not mean that the United States has adopted the direct participation in hostilities rule that is expressed in Article 51 of API”⁵⁹ although it “supports the customary principle on which” it is based.⁶⁰ Instead, the DoD Manual expands the “direct participation in hostilities” test to include civilians who “effectively and substantially *contribute* to an adversary’s *ability* to conduct or sustain combat operations.”⁶¹ This definition could extend to include those who have financed armed conflict, enemy gun manufacturers and suppliers, weapons scientists, and workers in munitions factories, none of whom are generally regarded under international law to be directly participating in hostilities.⁶² This reading of *contributing* to the ability to sustain combat appears broader than the examples accepted by the ICC of transporting weapons *in proximity* to combat operations.

The DoD Manual also states that another relevant consideration in deciding whether an action constitutes direct participation in hostilities is the “military significance of the activity to the party’s war effort such as . . . whether the act is of comparable or greater value to a party’s war effort than acts that are commonly regarded as taking a direct part in hostilities.”⁶³ Critics argue that this terminology recalls the older concept of “quasi-combatants,” a category where today “near agreement” does not exist.⁶⁴ Although the

58. DoD Manual, *supra* note 2, §§ 4.3.1, 4.3.4.

59. DoD Manual, *supra* note 2, § 5.8.1.

60. DoD Manual, *supra* note 2, § 5.8.1.2.

61. DoD Manual, *supra* note 2, § 5.8.3 (emphasis added); see also Jordan J. Paust, *Errors and Misconceptions in the 2015 DoD Law of War Manual*, 26 MINN. J. INT’L L. 303, 330 (2017) (internal citations omitted).

62. Paust, *supra* note 61, at 331; see also Marco Sassòli, *Combatants*, OXF. PUB. INT’L L. 19 (2015), <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e272> [<https://perma.cc/8L5N-L9MN>].

63. DoD Manual, *supra* note 2, § 5.8.3.

64. Sassòli, *supra* note 62. The term “quasi-combatant” generally refers to individuals that are targetable and detainable like lawful combatants without the benefits of combatant status. Historically, prior to the Geneva Conventions and the focus on “direct participation in hostilities,” the quasi-combatant concept emerged in the context of the status of armament and munitions workers whose workplace constituted legitimate military targets but who did not fall within the definition of “combatant” or “non-combatant” in the Hague Regulations. See also James W. Garner, *Proposed Rules for the Regulation of Aerial Warfare*, 18 AM. J. INT’L L. 56, 68 (1924). Critics argue that:

No appeal to moral principle, no plea to take account of the humanitarian purpose of Article 57 API is necessary to show that the Protocol has once and for all

scope of the DoD Manual's understanding of "direct participation in hostilities" is disputed,⁶⁵ it appears to be more expansive than the way in which judges of the ICC would understand it.

4. Non-International Armed Conflict

The principle of distinction and the prohibition on targeting civilians also applies to Non-International Armed Conflict (NIAC)—conflicts between a State and a non-State actor, or between non-State actors.⁶⁶ Generally, as in International Armed Conflict (IAC), all persons who are not combatants are considered civilians in NIAC. The extent to which IAC distinction principles apply to NIAC is complex and controversial and a great deal could be written on this issue. This Part, however, has been kept short because the Rome Statute does not specifically address the issue and the judges of the ICC have not yet weighed in on it directly.⁶⁷

laid to rest the idea of the 'quasi-combatant.' The dichotomy between civilians and combatants as exhaustive and mutually exclusive categories is the core structuring principle of contemporary [international humanitarian law].

And so, arguably, the creation of "quasi-combatant" status in the DoD Manual undermines this principle. Janina Dill, *The DoD Law of War Manual and the False Appeal of Differentiating Types of Civilians*, JUST SECURITY (Dec. 1, 2016), <https://www.justsecurity.org/35068/dod-law-war-manual-false-appeal-differentiating-types-civilians/> [https://perma.cc/R7EN-GAWK].

65. Compare Ryan Santicola, *War-Sustaining Activities and Direct Participation in the DoD Law of War Manual*, JUST SECURITY (Dec. 15, 2015), <https://www.justsecurity.org/28339/war-sustaining-activities-direct-participation-dod-law-war-manual/> [https://perma.cc/SP7R-SK5K], with Butch Bracknell, *Warnings to Civilians Directly Participating in Hostilities: Legal Imperative or Ethics-based Policy?*, LAWFARE (Nov. 29, 2015), <https://www.lawfareblog.com/warnings-civilians-directly-participating-hostilities-legal-imperative-or-ethics-based-policy> [https://perma.cc/S275-3YX9] (considering the use of leaflets by the United States to warn truck drivers transporting oil for ISIL of an impending attack and debating whether such a warning is required under the DoD Manual).

66. INT'L COMM. OF THE RED CROSS, *Rule 1: The Principle of Distinction between Civilians and Combatants*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_ru_rule1 [https://perma.cc/9YT3-AM98]. See e.g., APII, *supra* note 17, art. 13 (providing that "[t]he civilian population shall enjoy general protection against the dangers arising from military operations The civilian population as such, as well as individual civilians, shall not be the object of attack.").

67. In the *Lubanga* case, the ICC Trial Chamber issued a decision that discussed the differences between NIAC and IAC. The decision, which focused on crimes relating to use of child soldiers, holds that the Rome Statute provisions defining use of child soldier crimes in both NIAC and IAC are sufficiently similar that ICC judges may draw from IAC interpretations in the NIAC context. Prosecutor v Thomas Lubanga Dyilo, Trial Chamber, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, ¶¶ 523–42, 568–71 (Mar. 14, 2012); *aff'd* Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-3121, AC Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction, ¶ 276 (Dec. 1, 2014).

Overall, the same issues raised in IAC arise for NIAC, although possibly to a lesser degree in some areas as APII does not, in contrast to other international humanitarian law instruments concerning IACs, contain an explicit presumption in favor of civilian status.⁶⁸ It appears likely, however, that “the general rule of civilian protection applies” where there is “doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities” and the same principle applies in situations of doubt as to whether a person is a member of an organized armed group of a party to a conflict.⁶⁹

The DoD Manual specifically notes the lack of any “increase[d] . . . legal obligation on the attacking party to discriminate in conducting attacks against the enemy” in cases where there may be difficulties in identifying combatants, and, in particular, where “State armed forces—though obliged to discriminate—are not required to take additional protective measures to compensate for such tactics [adopted by non-State armed groups that may make discriminating more difficult, for example, by seeking to blend into the civilian population].”⁷⁰

At a general level, the DoD Manual agrees that the principle of distinction applies equally to a situation of NIAC.⁷¹ Nevertheless, as discussed in the context of IACs, the DoD Manual likely takes a broader range of activity within the definition of who may be directly participating in hostilities.⁷² The DoD Manual also adopts a more stringent requirement in terms of disassociation or renunciation of membership of a non-State armed group, stating that: “[t]he onus is on the person having belonged to the armed group to demonstrate clearly and affirmatively to the opposing forces that he or she will no longer participate in the activities of the group.”⁷³

B. *Protection of Journalists*

There are no specific provisions related to journalists in the Rome Statute. Nevertheless, journalists would be considered protected persons through their status as civilians and non-combatants. Targeting journalists, depending on the context, may

68. Compare APII, *supra* note 17, art. 13 (discussing “[p]rotection of the civilian population” generally) with API, *supra* note 17, art. 50(1) (noting that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian”).

69. MELZER, *supra* note 30, at 75.

70. DoD Manual, *supra* note 2, § 17.5.1.

71. DoD Manual, *supra* note 2, § 17.5.1.

72. DoD Manual, *supra* note 2, §§ 5.7.3.2, 5.8.3, 5.9.2.

73. DoD Manual, *supra* note 2, § 5.7.3.3.

therefore constitute a war crime or crime against humanity under the Rome Statute, as the targeting of any other civilian would.

Article 79 of API specifically provides for the protection of journalists and states that journalists are classified as civilians “provided that they take no action adversely affecting their status as civilians.”⁷⁴ Article 4(A)(4) of Geneva Convention III affords additional protection to “war correspondents,” which covers persons who accompany armed forces without actually being members of such forces provided they have authorization to do so.⁷⁵ Not only is this special category of journalists entitled to all of the rights granted to civilians, but, in case of capture, they are also entitled to POW status and treatment (*i.e.*, the protections afforded by Geneva Convention III).⁷⁶ The DoD Manual, citing Article 79 of API, sets out similar language, with an example of what may qualify as a loss of civilian status:

[C]ivilian journalists and journalists authorized to accompany the armed forces should not take any action adversely affecting their status as civilians if they wish to retain protection as a civilian. For example, relaying target coordinates with the specific purpose of directing an artillery strike against opposing forces would constitute taking a direct part in hostilities that would forfeit protection from being made the object of attack.⁷⁷

74. If a journalist directly engaged in hostilities, she would forfeit the immunity she enjoys as a civilian for the duration of that direct participation. *See generally* CLAUDE PILLOUD ET AL., *Commentary on the Additional Protocols: of 8 June 1997 to the Geneva Conventions of 12 August 1949* 992 (Yves Sandoz et al. eds., 1987); INT'L COMM. OF THE RED CROSS, *Customary International Humanitarian Law Database, Rule 34: Journalists*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule34 [<https://perma.cc/Z8R5-7KGT>] (Although API does not contain any provision relating to journalists in non-international armed conflicts, their immunity against attack applies equally to such non-international conflicts, being based as it is on the protections afforded to civilians. This has been borne out in practice and has been confirmed by, for example, the Council of Europe.)

75. Note that both API and Geneva Convention III provide that journalists shall have State issued identity cards to clarify the individual's status as journalist. Article 79 (3) of API states:

They may obtain an identity card . . . which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

API, *supra* note 17, art. 79(3). And, Article 4(A)(4) of Geneva Convention III states: “provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.” Geneva Convention III, *supra* note 17, art. 4(A)(4).

76. Geneva Convention III, *supra* note 17, art. 4(A)(4).

77. DoD Manual, *supra* note 2, § 4.24.2.1; *see also*, Dupuis, Martin P., et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. INT'L L. REV. 415, 428 (1987) (citing remarks of Michael J.

An earlier draft of the DoD Manual received criticism for its provisions on journalists that appeared to liken journalists to belligerents or spies, which could be read to conflate journalism with the “unprivileged belligerent” status, resulting in journalists’ loss of civilian protections.⁷⁸ Following this criticism, the revised DoD Manual makes it clear that journalists are to be treated as civilians and that the general rights, duties, and liabilities applicable to civilians are equally applicable to journalists.⁷⁹ The revised draft also removed language that called for journalists to seek permission from “relevant authorities” for their work “to avoid being mistaken for spies”⁸⁰ and reflected the fact that war correspondents are entitled to POW status if they fall into enemy hands.⁸¹ Nevertheless, the DoD Manual continues to assert that journalists may forfeit their civilian status if they are members of a non-State armed group and carry out propaganda “or other media activities” or relay target information to armed forces with the intent of directing an artillery strike.⁸²

The redrafted DoD Manual now generally reflects international humanitarian law that “journalists engaged in dangerous professional missions in areas of armed conflict” shall be protected from attack “provided that they take no action affecting their status as civilians.”⁸³ As noted in the previous Part, however, the DoD Manual’s interpretation of the factors that amount to direct participation in hostilities are controversial and may not accord with the general position under international humanitarian law.

C. *The Concept of “Human Shields”*

Article 8.2(b)(xxiii) of the Rome Statute classifies the use of human shields as a war crime: “Utilizing the presence of a civilian or other protected person to render certain points, areas or mili-

Matheson Deputy Legal Adviser of the U.S. Dep’t of State (stating that the United States “also support[s] the principle that journalists be protected as civilians under the [1949 Geneva] Conventions, provided they take no action adversely affecting such status”).

78. Yeganeh Torbati, *Pentagon Revises Law of War Manual after Criticism of Press Treatment*, REUTERS (July 22, 2016), <http://www.reuters.com/article/us-usa-military-press-idUSKCN1020C5> [<https://perma.cc/QW5K-YJNE>].

79. DoD Manual, *supra* note 2, § 4.24.1.

80. Torbati, *supra* note 78.

81. DoD Manual, *supra* note 2, § 4.24.1.

82. DoD Manual, *supra* note 2, §§ 4.24.1.2, 4.24.2.1.

83. API, *supra* note 17, art. 79.

tary forces immune from military operations.”⁸⁴ Similarly, the DoD Manual states the following:

Parties to a conflict may not use the presence or movement of protected persons or objects: (1) to attempt to make certain points or areas immune from seizure or attack; (2) to shield military objectives from attack; or (3) otherwise to shield or favor one's own military operations or to impede the adversary's military operations.⁸⁵

Human shields may arise in a number of contexts that are prohibited under international law and the DoD Manual including the use of medical units⁸⁶ and prisoners of war⁸⁷ as human shields. Neither the DoD Manual, the Rome Statute, the Geneva Convention, nor the APs mention that the attempt to use a human shield with the intention of rendering an area immune from military operations need be successful in forestalling an attack to constitute a crime. This common understanding makes sense because human shields impede military action at the expense of civilians, often regardless of the outcome. For example, one military force may choose not to attack and lose the potential military advantage, whereas another military force may choose to proceed with the attack and the inhumane images of their actions may then be used to the tactical advantage of those employing the human shields.⁸⁸

84. Specific intent is an element of the crime: “The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.” Rep. of the Preparatory Comm'n for the Int'l Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2, at 36 (2000) [hereinafter Elements of Crimes] (quoting Article 8(2)(b)(xxiii)). The use of human shields is also prohibited by virtue of Geneva Convention II, Geneva Convention IV, and API. See Geneva Convention II, *supra* note 17, art. 23; Geneva Convention IV, *supra* note 17, art. 28; API, *supra* note 17, art. 37(1), 50(3), 51(8).

85. DoD Manual, *supra* note 2, § 5.16.

86. Rome Statute, *supra* note 1, arts. 8(2)(b)(xxiv), (e)(ii); DoD Manual, *supra* note 2, §§ 5.6.2, 5.7.2, 6.16.1. Compare DoD Manual, *supra* note 2, §7.10.3 (“Loss of Protection of Military Medical Units and Facilities From Being Made the Object of Attack. The protection from being made the object of attack, to which fixed establishments and mobile medical units of the Medical Service are entitled, shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy”) with INT'L COMM. OF THE RED CROSS, *Customary International Humanitarian Law Database, Rule 29: Medical Transports*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule29 [<https://perma.cc/CFU8-VYG4>] (“Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.”).

87. Geneva Convention III, *supra* note 17, art. 23(1) prohibits the use of POWs as human shields (stating “[n]o prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations”).

88. See Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 38 ISR. Y.B. ON HUM. RTS. 17, 22 (2009).

Both the Rome Statute and the DoD Manual note the overlap between hostage situations and the use of human shields. First, the Rome Statute defines the taking of hostages as a war crime in Article 8.2 (a) (viii) and also prohibits the use of human shields in Article 8.2(b)(xxiii), with Article 8.2(b)(xxiii) offering a general prohibition on the use of “a civilian or other protected person to render certain points, areas or military forces immune from military operations.”⁸⁹ The term “protected persons” is therefore interpreted as including hostages. Second, the DoD Manual similarly asserts that hostage-taking is prohibited by international law and that “civilians must not be used as shields or as hostages.”⁹⁰ Section 5.16.3 specifically states: “This prohibition [of taking hostages] is also understood to include the prohibition against using hostages as human shields.”⁹¹

Article 50.3 of API sets out that a party remains bound by its obligations under the principle of distinction even when it enters into combat with another party that is using civilians as a human shield, noting that: “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”⁹² Furthermore, Article 51.8 of API provides that: “[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians.”⁹³ As such, if a party to a conflict uses civilians to surround a military objective, the human shield remains subject to the law of war protections against harming civilians when an attack is carried out.

Similarly, the DoD Manual prohibits the use of human shields as a general principle: it includes a section that declares “Refrain From the Misuse of Protected Persons and Objects to Shield Military Objectives.”⁹⁴ The revised DoD Manual states the following:

89. Rome Statute, *supra* note 1, art. 8.2(b)(xxiii).

90. DoD Manual, *supra* note 2, § 5.2.2; *see also* DoD Manual, *supra* note 2, § 10.5.1.4 (“The taking of hostages is prohibited and therefore it is important that any consideration of human shields is seen within a broader framework.”).

91. *Id.* § 5.16.3.

92. API, *supra* note 17, art. 50.3.

93. API, *supra* note 17, art. 51.8.

94. DoD Manual, *supra* note 2, § 2.5.3.3 (“Parties to a conflict must refrain from the misuse of civilians and other protected persons and objects to shield their own military objectives. For example, it is prohibited to take hostages or otherwise to endanger deliberately protected persons or objects for the purpose of deterring enemy military operations. Misusing protected persons and objects to shield military objectives also offends *honor*

Use of Human Shields by Defenders Does Not Relieve Attackers of Duties in Conducting Attacks: Violations by the adversary of the prohibition on using protected persons and objects to shield, favor, or impede military operations do not relieve those conducting attacks from their obligation to seek to discriminate between lawful and unlawful objects of attack. However, such violations by the adversary may impair the attacking force's ability to discriminate and increase the risk of harm to protected persons and objects.⁹⁵

Under international law, human shields have sometimes been classified as voluntary when civilians shield military objectives of their own free will, involuntary when civilians are forced or coerced into acting as human shields, or unknowing when civilians who have not actively volunteered or been coerced into acting as human shields are, by virtue of their proximity to a military objective, acting as human shields to achieve that military objective.⁹⁶ There was notable criticism of the DoD Manual's initial approach to factoring "voluntary human shields" into the proportionality analysis.⁹⁷ Following this criticism, the DoD amended its discussion of the concept of voluntary human shields, for example:

Enemy Use of Human Shields: Adversary use of human shields can present complex moral, ethical, legal and policy considerations If civilians are being used as human shields, provided they are not taking a direct part in hostilities, they must be considered as civilians in determining whether a planned attack would be excessive, and feasible precautions must be taken to reduce the risk of harm to them. However, the enemy use of voluntary human shields may be considered as a factor in assessing the legality of an attack. Based on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities.⁹⁸

The DoD Manual does not clarify the situations where acting as a voluntary human shield is the equivalent of offering direct participation in hostilities. Instead, the DoD Manual refers to commen-

because it constitutes a breach of trust with the enemy and thus undermines respect for the law of war.”).

95. DoD Manual, *supra* note 2, § 5.16.4.

96. See INT'L COMM. OF THE RED CROSS, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 35; see also MELZER, *supra* note 30 at 869–71; Adil Ahmed Haque, *Human Shields*, in THE OXFORD HANDBOOK OF ETHICS AND WAR (Oxford University Press, 2016); Michael Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292 (2009).

97. See *infra* Section II.A(3).

98. DoD Manual, *supra* note 2, § 5.12.3.4.

tary regarding the general definition of direct hostilities, which does not include reference to the context of human shields.⁹⁹

An ICRC study adopts the position “[w]here civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities.”¹⁰⁰ However, the ICRC study also notes that the deliberate engagement of a civilian as a human shield by a civilian does not mean that they lose their protection from direct attack, recognizing that, “nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives.”¹⁰¹ This appears to be in line with the DoD Manual’s overall approach.

D. *Summary of Distinction Analysis*

The Rome Statute and the DoD Manual are rooted in similar core principles of distinction and protection under international law. Nevertheless, the DoD Manual diverges from the Rome Statute and international law in some significant aspects, which includes the DoD Manual’s reluctance to recognize the principle that an individual should be recognized as a civilian in cases of doubt as well as its more expansive test regarding what constitutes direct participation in hostilities. This leaves open the possibility that actions permitted by the DoD Manual might violate the Rome Statute. However, in practice, the DoD appears to hold itself to a more stringent standard. For example, in the investigation into the 2015 airstrike of the Médecins Sans Frontières hospital in Kunduz, the DoD stated that until the Trauma Center was con-

99. DoD Manual, *supra* note 2, § 5.8.3 (“at a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy. Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations Whether an act by a civilian constitutes taking a direct part in hostilities is likely to depend highly on the context, such as the weapon systems or methods of warfare employed by the civilian’s side in the conflict.”). See also DoD Manual, *supra* note 2, § 5.8.3.1 for examples of taking a direct part in hostilities. It should also be noted that the United States has not accepted the ICRC’s interpretative guidance on direct participation in hostilities; DoD Manual, *supra* note 2 § 4.26.

100. See also MELZER, *supra* note 30, at 56–57.

101. See also MELZER, *supra* note 30, at 63–64.

firmed as a lawful target, “it should have been presumed to be a civilian compound.”¹⁰²

II. PROPORTIONALITY AND PRECAUTIONS

This Part discusses the provisions of the Rome Statute and the DoD Manual that address proportionality—the principle under international humanitarian law that the harm caused to civilians or civilian property must be proportional and not excessive in relation to the military advantage anticipated by an attack on a military objective. Specifically, the DoD’s revisions promulgated on December 13, 2016 (the December 2016 Revised Manual or the Revised Manual) focused largely on proportionality and, although introducing some new questions, made notable improvements to provisions that appeared to undermine the principle of proportionality.

The language defining proportionality in the Rome Statute and the DoD Manual is similar. The Rome Statute defines proportionality as:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly* excessive in relation to the *concrete and direct overall* military advantage anticipated.¹⁰³

The DoD Manual defines proportionality as:

[T]he principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive . . . this principle creates obligations to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the *concrete and direct* military advantage anticipated to be gained and to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.¹⁰⁴

The Rome Statute intentionally deviated from API in requiring excessiveness to be “clear” to emphasize that a value judgment within reasonable margin of appreciation should not be criminal-

102. DEP’T OF DEFENSE, INVESTIGATION REPORT OF THE AIRSTRIKE ON THE MEDECINS SANS FRONTIERES [DOCTORS WITHOUT BORDERS] TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON 3 OCTOBER 2015, at 91 (Nov. 15, 2015).

103. Rome Statute, *supra* note 1, art. 8(2)(b)(iv) (emphasis added).

104. DoD Manual, *supra* note 2, § 2.4 (emphasis added).

ized by the ICC reviewing it in hindsight.¹⁰⁵ On this point, the DoD Manual and the Rome Statute do not conflict.

Although the DoD Manual states that “[c]itation to a particular source should not be interpreted to mean that the cited source represents an official DoD position, or to be an endorsement of the source in its entirety,”¹⁰⁶ the DoD Manual’s footnotes contain some potentially misleading language regarding the definition of proportionality. For example, there is a new footnote to Section 5.10.2.3 regarding the “variation in how reasonable persons would apply the principle of proportionality in a given circumstance.”¹⁰⁷ The footnote cites an observation from a study conducted by Professor Dill: “Commanders suggest that, proportionality judgments, in reality, often boil down to asking ‘can the estimated collateral damage be further reduced, through timing, choice of weapons or angle of attack.’ If the answer is no, the principle is considered to be fulfilled.”¹⁰⁸ As Professor Dill has stated elsewhere, this statement of the commanders’ view is “not sufficient to make an attack proportionate under international humanitarian law” and is also likely insufficient under the Rome Statute.¹⁰⁹ Although the Manual may be merely stating a view of how proportionality is misunderstood in practice, the current formulation makes it unclear whether the Manual endorses the view as an appropriate test for proportionality. For example, consider a situation of a highly populated civilian area where the estimated collateral damage cannot be reduced by choice of weapon and in which a small amount of military protectionist gear is stored. An attack on this area will cause large-scale civilian harm for very little military advantage and is unlikely to satisfy the principle of proportionality.

A. Assumption of Risk

Previous versions of the DoD Manual indicated that civilians in or proximate to military objectives need not be counted in a proportionality analysis.¹¹⁰ The December 2016 Revised Manual has

105. See ROY S. K. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS AND RESULTS* 148 (1999).

106. DoD Manual, *supra* note 2, § 1.2.2.1.

107. DoD Manual, *supra* note 2, § 5.10.2.3 n.312.

108. DoD Manual, *supra* note 2, § 5.10.2.3 n.312.

109. Janina Dill, *2016 Joint Series on International Law And Armed Conflict: Janina Dill On Assessing Proportionality*, INTERCROSS BLOG (Oct. 11, 2016), <http://intercrossblog.icrc.org/blog/r19aesa7v1kylcc5a4hbcwvfx8imus> [<https://perma.cc/P953-RFAL>].

110. Even prior to the December 2016 revised manual there were indications that this was not DoD policy. Lt. Col. Valerie Henderson, speaking in August of last year, made the following statement:

eliminated the passages which implied that certain protected persons “accepted the risk” due to proximity to military target and did not need to be taken into account in a proportionality analysis. The Manual now states expressly that anyone determining whether a planned attack would cause excessive civilian casualties “must consider” such civilians.¹¹¹ Nonetheless, the revised DoD Manual appears to apply the proportionality principle with weakened force to some categories of *protected* individuals—both military and civilian—as described in the examples below.

1. Protected Military Personnel

The December 2016 Revised Manual retains the language that protected *military* personnel (*i.e.*, medical, religious, sick and wounded prisoners) do not need to be taken into account in a proportionality analysis.¹¹² The Revised Manual states that although protected military are protected by the “proportionality principle,” commanders need not take account of the expected harm to such persons in the “excessiveness” calculus:

The prohibition on attacks expected to cause excessive incidental harm . . . generally does not require consideration of military personnel and objects, even if they may not be made the object of attack, such as military medical personnel, the military wounded and sick, and military medical facilities Nonetheless, feasible precautions must be taken to reduce the risk of harm to military personnel and objects that are protected from being made the object of attack. For example, in the context of a deliberate, planned bombardment of a military objective near an identifiable military hospital, it may be feasible to take precautions to reduce the risk of harming the military hospital, and such precautions must be taken.¹¹³

We acknowledge that the statement that such persons ‘assume the risk’ could be understood to mean that harm to such persons is not taken into account. This is not what we meant. [Assumption of the risk] does not extend to any sort of ‘carve-out’ from being subject to a proportionality analysis.

See Charles Savage, *Q&A with the Pentagon about Battle Damage Assessments, the Law of War Manual, and Non-Combatants who Support the Enemy*, POWER WARS BLOG (Aug. 9, 2016), <http://www.charliesavage.com/?p=1265> [<https://perma.cc/92AC-JE7V>].

111. DoD Manual, *supra* note 2, § 5.12.3.3.

112. DoD Manual, *supra* note 2, § 17.15.2.2 (“Medical units and transports that are part of armed forces or groups, however, are deemed to have accepted the risk of harm due to their deliberate proximity to military objectives. Although the presence of such medical units . . . would not serve to exempt nearby military objectives from attack due to the risk that such medical units . . . would be incidentally harmed, feasible precautions must be taken to reduce the risk of harm to such medical units.”).

113. DoD Manual, *supra* note 2, § 5.10.1.2.

However, not all U.S. policy documents reflect the view set out in Section 5.10.1.2¹¹⁴ and, as commentators have noted:

[I]t is hard to imagine that U.S. commanders would order a strike in which the expected harm to protected military personnel, such as medical personnel, and the sick and wounded, would be excessive in relation to the expected direct and concrete military advantage—especially after they have implemented feasible precautions.¹¹⁵

Interestingly, in this same section, the DoD Manual cites the Rome Statute, Art. 8(2)(b)(iv), which describes “excessive” in relation to “civilians,” “civilian objects” or “widespread, long-term and severe damage to the natural environment.”¹¹⁶ The DoD Manual provides the Rome Statute citation as an example of treaty provisions articulating that “a prohibition on attacks expected to cause excessive incidental harm do[es] not reflect protections for military personnel who are protected from being made the object of attack.”¹¹⁷ It is true that both API Article 57 and the Rome Statute adopt the term “civilians” in the context of the excessiveness calculation and there appears to be no comment by the ICC so far on how military personnel are protected in this context. More broadly, the DoD Manual’s asserted position is not universally accepted. An ICRC survey found that the military manuals in Australia, Canada, France, and New Zealand, for example, all require a commander to weigh the military value arising from the success of the operation against the possible harmful effects to protected persons and objects in a proportionality analysis.¹¹⁸

114. See generally CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTIONS, ENCLOSURE D, JOINT METHODOLOGY FOR COLLATERAL DAMAGE ESTIMATION (Feb. 13 2009) (explaining that the proportionality requirement and the rule of precaution each apply to, and protect, military personnel who may not themselves be targeted. It does not hint at any two-track differentiation between the two legal restrictions).

115. Marty Lederman, *Thoughts on Distinction and Proportionality in the December 2016 Revision to the Law of War Manual*, JUST SECURITY (Dec. 19, 2016), <https://www.justsecurity.org/35617/thoughts-distinction-proportionality-december-2016-revision-law-war-manual/> [<https://perma.cc/SC6P-LCNU>] [hereinafter *Thoughts on Distinction*].

116. DoD Manual, *supra* note 2, § 5.10.1.2 n.297.

117. DoD Manual, *supra* note 2, § 5.10.1.2.

118. INT’L COMM. OF THE RED CROSS, CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, Geneva, Aug. 12, 1949, art. 12, Commentary of 2016; INT’L COMM. OF THE RED CROSS, *Australia: Practice Relating to Rule 14, Proportionality in Attack*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_au_rule14 [<https://perma.cc/LC5Q-B9HE>] (The Australian military manual “requires a commander to weigh the military value arising from the success of the operation against the possible harmful effects to protected persons and objects. There must be an acceptable relationship between the legitimate destruction of military targets and the possibility of consequent collateral damage.”); INT’L COMM. OF THE RED CROSS, *Canada: Practice Relating to Rule 14, Proportionality in*

Thus, although the Manual may diverge with developing customs, there is no apparent divergence between the DoD Manual and the Rome Statute with regard to the proportionality analysis for protected military personnel.

One concern about the new passage in the December 2016 Revised Manual is that it did not include a clear reminder that *civilian* medical facilities and personnel are always protected against both deliberate attacks and against precautions and proportionality rules. Section 7.8.2.1 provides that “[t]he incidental killing or wounding of [medical and religious] personnel, due to their presence among or in proximity to combatant elements actually engaged by fire directed at the latter, gives no just cause for complaint,”¹¹⁹ and that “[m]edical and religious personnel are deemed to have accepted the risk of death or injury due to their proximity to military operations.” Some readers might understand these statements to refer to all “medical and religious personnel,” regardless of whether they are part of the armed forces. This reading would conflict with the Rome Statute, and also with other sections of the DoD Manual that clearly set out the required protections for civilian medical facilities.¹²⁰

Attack, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_ca_rule14 [<https://perma.cc/8TXH-8765>] (Under the Canadian Military Manual, proportionality requires “weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other. There must be a rational balance between the legitimate destructive effect and undesirable collateral effects. As an example, you are not allowed to bomb a refugee camp if its only military significance is that refugees in the camp are knitting socks for soldiers. As a converse example, you are not obliged to hold back an air strike on an ammunition dump simply because a farmer is ploughing a field beside it. Unfortunately, most applications of the principle of proportionality are not quite so clear cut.”); INT’L COMM. OF THE RED CROSS, *France: Practice Relating to Rule 14, Proportionality in Attack*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_fr_rule14 [<https://perma.cc/JX64-6UVC>] (“[a]pplication of [the proportionality] principle raises the question of the balance between the means used and the desired military effect. The application of the principle of proportionality does not exclude that collateral damage may be suffered by the civilian population or civilian objects provided they are not excessive in relation to the concrete and direct military advantage anticipated”); INT’L COMM. OF THE RED CROSS, *New Zealand: Practice Relating to Rule 14, Proportionality in Attack*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_nz_rule14 [<https://perma.cc/N6RJ-ADVD>] (Under Military Manual of New Zealand proportionality “involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other. That is, there must be an acceptable relation between the legitimate destructive effect and the undesirable collateral effects”).

119. Read in conjunction with DoD Manual, *supra* note 2, § 7.8.1.

120. See, e.g., DoD Manual, *supra* note 2, §§ 7.8, 11.15.2, 17.15.

2. Civilians Working In Or Near Military Objectives

The Manual retains the following language: “the party controlling civilians and civilian objects has the primary responsibility for the protection of civilians and civilian objects.”¹²¹ It is unclear what this would mean in practice. On its face, the language focuses on “the party controlling civilians,” but in practice, the language does not seem to reduce the non-controlling party’s obligation to abide by the laws of war. The Revised Manual also states that the “responsibility of the defending force” for the presence of civilian workers “is a factor that may be considered in determining whether such harm [to civilians] is excessive.”¹²² This is supported by footnotes that also imply a weighing of civilian categories within the proportionality calculus.¹²³ It is, however, hard to find support under either customary law or the relevant provisions in API for including different categories of civilians in a proportionality analysis once it is determined that they are not directly participating in hostilities.¹²⁴

3. Human Shields

The December 2016 Revised Manual include some improvements that clarify the protections that apply to human shields. The Manual includes some clear statements that are consistent with the Rome Statute. For example, Section 5.12.3.4 explains that “[i]f civilians are being used as human shields, provided they are not taking a direct part in hostilities, they must be considered as civilians in determining whether a planned attack would be excessive, and feasible precautions must be taken to reduce the risk of harm to them.”¹²⁵

121. DoD Manual, *supra* note 2, § 5.2.1.

122. DoD Manual, *supra* note 2, § 5.12.1.4.

123. DoD Manual, *supra* note 2, § 5.12.3.3 n.412 (citing that it is “doubtful that incidental injury to persons serving the armed forces within a military objective *will weigh as heavily* in the application of the rule of proportionality as that part of the civilian population which is not so closely linked to military operations”; and that State practice “suggests the existence of at least one *intermediate category*: persons who, while not taking a direct part in hostilities, are so intimately connected with a military objective that they have forfeited the right to be free from risk of collateral damage”) (emphasis added).

124. See Hathaway, *supra* note 45 (arguing that the “variable weighing of the lives of different types of civilians—that threatens to undermine the salutary changes in the Manual passages about proportionality.”).

125. See Rome Statute, *supra* note 1, art. 8(2)(b)(xxiii) (“Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.”). Further discussion at *supra* Section I.C.

The *Manual* is clear that both voluntary and involuntary human shields must be counted in the proportionality analysis.¹²⁶ However, it also states that “the enemy[’s] use of VOLUNTARY human shields may be CONSIDERED AS A FACTOR in assessing the legality of an attack.”¹²⁷ The ICRC also considers “voluntary” human shields to be a particularly challenging topic—however, the focus of the ICRC analysis is whether the action amounts to direct participation in hostilities. The DoD’s more general statement that it is a “factor” in assessing legality potentially blurs the line between the distinction and proportionality analyses.¹²⁸

B. *Precautions in Attack*

This Part is related to the rule that combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other protected person and objects. The DoD Manual discusses the rule under the umbrella of “the proportionality principle.” Although it is the subject of ongoing debate,¹²⁹ this Part will not address the merits and criticisms related to that classification as they do not raise any particular conflicts with the Rome Statute.

The DoD Manual acknowledges that: “in some cases, a party to a conflict may attempt to use the presence or movement of the civilian population or individual civilians in order to shield military objectives from seizure or attack.”¹³⁰ Importantly, the DoD Manual recognizes that in such situations, “commanders should continue to seek to discriminate in conducting attacks and take feasible precautions to reduce the risk of harm to the civilian population and civilian objects.”¹³¹

126. DoD Manual, *supra* note 2, § 5.12.3.4.

127. DoD Manual, *supra* note 2, § 5.16.4.

128. Compare Janina Dill, *The DoD Law of War Manual and the False Appeal of Differentiating Types of Civilians*, JUST SECURITY (Dec. 1, 2016), <https://www.justsecurity.org/35068/dod-law-war-manual-false-appeal-differentiating-types-civilians/> [https://perma.cc/9MAG-BBD9], with Charles J. Dunlap, Jr., *A Squarable Circle?: The Revised DoD Law of War Manual and the Challenge of Human Shields*, JUST SECURITY (Dec. 15, 2016), <https://www.justsecurity.org/35597/squarable-circle-revised-dod-law-war-manual-challenge-human-shields/> [https://perma.cc/AT3N-7TZY].

129. Compare *Thoughts on Distinction*, *supra* note 115, with Geoffrey F. Corn, *Initial Observations on the Law of War Manual Revision: “Three ups/Three downs,”* JUST SECURITY (Dec. 14 2016), <https://www.justsecurity.org/35531/initial-observations-law-war-manual-revision-three-upsthree-downs/> [https://perma.cc/V3L4-XMQH].

130. DoD Manual, *supra* note 2, § 5.4.4.

131. DoD Manual, *supra* note 2, § 5.4.4.

1. Feasibility of Precautions

The language regarding feasibility of precautions in API Article 57(2) is similar to the DoD Manual's discussion on "Affirmative Duties to Take Feasible Precautions for the Protection of Civilians."¹³² Commentary on the Rome Statute's war crimes provision Article 8(2)(b) notes that the crime encompasses attacks "effectuated without taking necessary precautions to spare the civilian population The required *mens rea* may be inferred from the fact that the necessary precautions [in the sense of Art. 57 API] . . . were not taken before and during an attack."¹³³

The potential difference lies in the DoD Manual's interpretation of the term "feasible." The Manual sets out that "[t]he standard for what precaution must be taken is one of *due regard* or *diligence*."¹³⁴ However, the same section subsequently provides an example where "a commander may determine that a precaution would not be feasible because it would result in increased operational risk (*i.e.*, a risk of failing to accomplish the mission) or an increased risk of harm to his or her forces."¹³⁵ Although the Revised Manual clarifies the meaning of "operational risk," the construction fails to clarify what risk of harm to the commander's forces would be sufficient to determine that precautions are not *feasible*. For example, could a commander conclude that deploying a helicopter to warn civilians to evacuate is not feasible if the helicopters could otherwise be used to protect a military compound? Does it depend on the number of helicopters available or the likelihood of an attack on the military compound? What factors are weighed in this feasible analysis? Generally, the DoD Manual provisions regarding effective advance warning are qualified with terms

132. DoD Manual, *supra* note 2, § 5.2.3. Compare API, *supra* note 17, art. 57(2) (stating that parties should "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life . . . refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"), with DoD Manual, *supra* note 2, § 5.2.3 ("Parties to a conflict must take *feasible* precautions to reduce the risk of harm to civilian population and other protected persons and objects. Feasible precautions to reduce the risk of harm to civilians and civilian objects must be taken when planning and conducting attacks.") (emphasis added).

133. KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY, 131–32 (2003).

134. DoD Manual, *supra* note 2, § 5.2.3.2 (emphasis added).

135. *Id.*

such as “to the extent feasible” without further guidance or elucidation of factors that might be at issue.¹³⁶

Although there is no clear line to draw for every example, some commentators have expressed concern that the current construction could limit “feasible” to only “risk-free” circumstances, instead of balancing humanitarian considerations with military considerations.¹³⁷ Although the DoD could revise the DoD Manual to clarify this statement, it is unlikely that “risk-free” is the intended meaning as it runs contrary to the overall tone of the sections encouraging precautions and is also contrary to previous DoD statements of practice.¹³⁸ Indeed, the DoD Manual cites previous U.S. commentary, which states that “wanton disregard for possible civilian casualties” is prohibited.¹³⁹

Examples of approaches to feasible precautions in the DoD Manual can be found in the section titled “Feasible Precautions Should Be Taken to Mitigate the Burden on Civilians,” which includes the following:

Cultural property . . . may be used for purposes that are likely to expose it to destruction or damage if military necessity imperatively requires such use. The requirement that military necessity imperatively require such acts should not be confused with convenience or be used to cloak slackness or indifference to the preservation of cultural property. This waiver of obligations with respect to cultural property is analogous to the requirement that enemy property may only be seized or destroyed if imperatively required by the necessities of war.¹⁴⁰

136. See, e.g., DoD Manual, *supra* note 2, n.35 (“We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, *unless circumstances do not permit*”) (citing Matheson, *supra* note 77) (emphasis added); see also DoD Manual, *supra* note 2, § 5.11.5.2 (Effective Advance Warning “to the extent feasible”); DoD Manual, *supra* note 2, § 6.12.5.4 (General Rules for Using Mines, Booby-Traps and Other Devices include an obligation to give effective advance warning “unless circumstances do not permit”).

137. Adil Haque, *DoD’s Unbalanced Stance on Precautions Against Harming Civilians*, JUST SECURITY (July 7, 2015), <https://www.justsecurity.org/24454/defense-department-kill-civilians-not-hard/> [<https://perma.cc/6K8B-9E8D>].

138. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3–60, JOINT TARGETING, A-5 (2013) (noting that “circumstances permit” effective advance warning of an attack when “any degradation in attack effectiveness is *outweighed* by the reduction in collateral damage [e.g.,] because advanced warning allowed the adversary to get civilians out of the target area.”) (emphasis added).

139. DoD Manual, *supra* note 2, § 5.2.3.2 n.47 (citing *U.S. Comments on the International Committee of the Red Cross’s Memorandum on the Applicability of International Humanitarian Law in the Gulf Region*, DIGEST OF U.S. PRACTICE IN INT’L LAW 2057, 2064 (1991–1999)).

140. DoD Manual, *supra* note 2, § 5.18.3.1.

Interestingly, this feasibility language appears to be drawn from a U.S. Army Memorandum of President Dwight D. Eisenhower, which similarly emphasizes caution not to use military necessity “to cloak slackness or indifference”:

If we have to choose between destroying a famous building and sacrificing our own men, then our men’s lives count infinitely more and the building must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operational needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference.¹⁴¹

The Rome Statute also includes exceptions for military necessity for war crimes related to destruction of property, deportation or transfer of persons, or serious violations of the laws and customs of war.¹⁴² More generally, the Rome Statute sets out several “grounds for excluding criminal responsibility” by stating the following:

[A] person shall not be criminally responsible if, at the time of that person’s conduct . . . (c) [t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.¹⁴³

Commentators have expressed concern that this section may also be construed to introduce a military necessity defense for war crimes.¹⁴⁴ However, this section characterized by various limitations is generally interpreted to require a proportionate response that is limited to imminent force to create a very narrow scope in which this potential “defense” may be applicable.¹⁴⁵

Overall, the DoD Manual and the Rome Statute grapple with the same challenge of balancing military necessity with expected

141. DoD Manual, *supra* note 2, § 5.18.3.1 n.602.

142. Rome Statute, *supra* note 1, arts. 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(viii), 8(2)(e)(xii).

143. Rome Statute, *supra* note 1, art. 31(1).

144. See Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 BOSTON U. INT’L L.J. 39 (2010).

145. *Id.*

behavior in conflict. The DoD Manual's general definition of "feasible" does not incorporate guidance on factors to consider when a precaution may cause "harm to forces."¹⁴⁶ That analysis could be construed narrowly. However, the feasibility of precautions does not negate the requirement of conducting attacks in line with proportionality. Thus, for an action in compliance with the Manual to amount to a war crime, it would likely require a reading that ignores the context of the Manual's feasibility definition, which would also likely lead to violation of the Manual's other provisions.

2. Precautions "when a choice is possible between military objectives"

API Article 57(3) provides, "[w]hen a choice is possible between military objectives" for a similar military advantage, the military should choose the attack that is expected to "cause the least danger to civilian lives and to civilian objects"¹⁴⁷ The Revised Manual states the following:

[W]hen facing [a choice among several military objectives for achieving a particular military advantage], provided that all other factors are equal, the object to be selected for attack shall be the object the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.¹⁴⁸

However, the DoD Manual states that API Article 57(3) is:

not a part of customary international law. The provision applies "when a choice is possible . . . ;" it is not mandatory. An attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination.¹⁴⁹

The statement in the DoD Manual that Article 57(3) "is not mandatory" has raised concerns that the Manual is dismissive of the obligations set out in API Article 57(3).¹⁵⁰ However, the "admittedly unartful reading of Article 57(3)" could also be interpreted as a comment on the absolute nature of the obligation rather than a wholesale rejection of the obligation.¹⁵¹ In support

146. DoD Manual, *supra* note 2, § 5.2.3.2.

147. The full text of API Article 57(3) states: "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on [*sic*] which may be expected to cause the least danger to civilian lives and to civilian objects." API, *supra* note 17, art. 57(3).

148. DoD Manual, *supra* note 2, § 5.11.7.

149. DoD Manual, *supra* note 2, § 5.11.7.1 n.379.

150. See Adil Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, 92 INT'L L. STUD. 31, 42–45 (2016).

151. Charlie Dunlap, *The DoD Law of War Manual and its Critics: Some Observations*, 92 INT'L L. STUD., 85, 101–03 (2016).

of the latter interpretation, commentators point to the ICRC's interpretation of the United States' position, which has not been disputed by the United States.¹⁵²

The DoD Manual's language regarding precautions in attack does not appear to conflict with norms of international humanitarian law or the Rome Statute. However, since it is an area in which the DoD Manual has placed particular emphasis, clarification may address points of confusion that potentially undermine the proportionality principle.

C. *Summary of Proportionality Analysis*

The challenge in addressing proportionality, with regard to both the Rome Statute and international standards generally, is the international tribunals' minimal review of the proportionality analysis in practice.¹⁵³ In this relative vacuum, the DoD Manual has sparked important discourse in the United States regarding issues such as the applicability of proportionality to military medical personnel and facilities as well as the protection of such personnel and facilities from incidental injury and/or collateral damage.¹⁵⁴ The Revised Manual corrected some language that appeared to conflict with Rome Statute principles of proportionality by placing significant weight on the "assumption of risk" of persons in proximity to military operations. However, the language regarding the relative weighing of protected persons in the proportionality calculus (including civilians working near military objectives and "voluntary" human shields) risks undermining the central purpose of the proportionality principle to a point where it may diverge from the way in which the ICC would approach the analysis.

III. WEAPONRY

This Part considers the treatment of certain categories of weaponry under the Rome Statute and the DoD Manual. The key issue is whether there are areas where the DoD Manual adopts a less prohibitive approach than the Rome Statute, such that conduct

152. John B. Bellinger, III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study, Customary International Humanitarian Law*, 89 INT'L REV. OF THE RED CROSS 443, 444 (2007).

153. Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, 46 ISR. L. REV. 271, 272 (2013).

154. W. BOOTHBY & W. VON HEINEGG, *THE LAW OF WAR, A DETAILED ASSESSMENT OF THE U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL*, CAMBRIDGE UNIVERSITY PRESS 192-93 (2018); see Hathaway, *supra* note 45; *Thoughts on Distinction*, *supra* note 115.

permitted by the Manual could constitute a crime under the Rome Statute.

First, this Part considers the use of expanding bullets, which are only prohibited by the DoD Manual in circumstances where they will cause “superfluous injury.”¹⁵⁵ Second, it considers the permissibility of the use of riot control agents under the Rome Statute and the DoD Manual, in relation to which it appears that there is some risk that the DoD Manual is less prohibitive than the Rome Statute.

A. *Expanding Bullets*

The DoD Manual takes the view that: “[t]he law of war does not prohibit the use of bullets that expand or flatten easily in the human body. Like other weapons, such bullets are only prohibited if they are calculated to cause superfluous injury.”¹⁵⁶ The DoD Manual further states that the DoD’s 2013 finding was consistent with the “longstanding position of the United States . . . not to apply a distinct prohibition against expanding bullets.”¹⁵⁷ One argument the DoD has posited for the use of expanding bullets is that they could reduce the risk of collateral damage in a situation where a regular bullet that passes through a target is particularly dangerous—for example, in a crowded area, near explosives, or on an aircraft.¹⁵⁸

By contrast, the Rome Statute contains a specific prohibition against the use of expanding bullets in both IAC and NIAC. Article 8(2)(b)(xix) of the Rome Statute states, “[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” constitutes a war crime in IAC. In 2010, at the ICC’s Review Conference in Kampala, Uganda, a corresponding prohibition with regards to NIAC was adopted through the passage of the Rome Statute’s Article 8(2)(e)(xv).

155. DoD Manual, *supra* note 2, § 6.4.1.

156. DoD Manual, *supra* note 2, § 6.5.4.4.

157. DoD Manual, *supra* note 2, § 6.5.4.4. The 2013 review conducted by the DoD is not available in the public domain and we are therefore unable to comment on the scope and/or quality of the review (footnote 77 of the DoD Manual merely states that “[p]ortions of the analysis in this review are presented in the following paragraphs.”).

158. The DoD Manual language, if granted interdepartmental approval, would reflect a shift in U.S. policy toward expanding bullets. KEITH E. PULS, LAW OF WAR HANDBOOK, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT 178 (2004).

The Rome Statute further sets out the constituent elements of the war crime of employing expanding bullets (Elements of Crimes) as follows:

- The perpetrator employed certain bullets.
- The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
- The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
- The conduct took place in the context of and was associated with an IAC.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁵⁹

The DoD Manual focuses on the so called “Superfluous Injury Rule” for weaponry. The Manual prohibits weapons that are “designed to increase the injury or suffering of the persons attacked beyond that justified by military necessity.”¹⁶⁰ And according to Section 6.6.3: “[t]he test for whether a weapon is prohibited by the superfluous injury rule is whether the suffering caused by the weapon provides no military advantage or is otherwise clearly disproportionate to the military advantage reasonably expected from the use of the weapon.”¹⁶¹

The DoD Manual provides examples of factors that are relevant when deciding whether a weapon is prohibited including (i) the capability of the weapon to incapacitate enemy combatants; (ii) the availability of alternative weapons; (iii) the cost of using the weapon; (iv) the risk to the civilian population; (v) the painfulness of wounds; and (vi) the ease with which they may be treated.¹⁶² It emphasizes that “[a] weapon is only prohibited if the suffering is clearly or manifestly disproportionate to the military necessity.”¹⁶³

There is a general lack of case law regarding the “superfluous injury” standard in international criminal tribunals which makes it difficult to draw clear conclusions regarding the status of expanding bullets under international criminal law. Some guidance is available, however, from other international courts. In the

159. Elements of Crimes, *supra* note 84, at 33 (quoting art. 8(2)(b)(xix)).

160. DoD Manual, *supra* note 2, § 6.6.2. The provisions concerning expanding bullets cross refer to DoD Manual § 6.6 (“Weapons Calculated to Cause Superfluous Injury”). The prohibition on weapons calculated to cause superfluous injury is applicable also in NIAC. DoD Manual, *supra* note 2, § 17.13.1.

161. DoD Manual, *supra* note 2, § 6.6.3.

162. DoD Manual, *supra* note 2, §§ 6.6.3.1–2.

163. DoD Manual, *supra* note 2, § 6.6.3.3.

ICJ's *Nuclear Weapons* case, the United Nations General Assembly asked the ICJ to determine whether the threat or use of nuclear weapons, in any circumstances, is permitted under international law.¹⁶⁴ Here, the ICJ referred to the principle of superfluous injury as one of the fundamental tenets of international humanitarian law: "it is prohibited to cause *unnecessary suffering* to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In applying that second principle, States do not have unlimited freedom of choice of means in the weapons they use."¹⁶⁵ The ICJ defined unnecessary suffering as "a harm greater than that unavoidable to achieve legitimate military objectives."¹⁶⁶ This language appears stricter than the DoD Manual's "clearly disproportionate to the military advantage."¹⁶⁷ Nonetheless, because the ultimate determination was that the ICJ did not have "sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance,"¹⁶⁸ it is unclear whether the ICJ would have ruled differently regarding expanding bullets.

There is an ongoing debate concerning the status of a prohibition on the use of expanding bullets under customary international law and the scope of any prohibition (*i.e.*, whether the rule encompasses both the use of expanding bullets in the IAC and NIAC contexts or solely the former). The weight of authority, however, appears to support the proposition that expanding bullets are prohibited at least in IAC. In particular, a study by the ICRC has found that state practice has established the ban on expanding bullets as a norm of customary international law.¹⁶⁹ Accordingly, con-

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

165. *Id.* ¶ 78. The ICJ also considered the prohibition of poisoned weapons contained in the Hague Convention (and Regulations), noting that there is no uniform definition of "poison or poisoned weapons," but such weapons have the effect of poison and asphyxiation, which separates it from the definition of nuclear weapons. *Id.* ¶ 54–55; see also INT'L COMM. OF THE RED CROSS, *Rule 70: Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70 [<https://perma.cc/H7HD-8HD4>].

166. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, at ¶ 78 (July 8).

167. DoD Manual, *supra* note 2, § 6.6.3.

168. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, at ¶ 95 (July 8).

169. INT'L COMM. OF THE RED CROSS, *Rule 77: Expanding Bullets*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule77 [<https://perma.cc/M9KM-BQKY>]. Considering views of, *inter alia*,

duct that is permissible under the Manual regarding use of expanding bullets could constitute a crime under the Rome Statute if the ICC imposes a strict reading of the text.

However, the DoD Manual posits that its approach is consistent with the Rome Statute's prohibition on employing expanding bullets:

[t]he war crime of using expanding bullets that is reflected in the Rome Statute . . . has been interpreted by States only to criminalize the use of expanding bullets that are also calculated to cause superfluous injury and not to create or reflect a prohibition against expanding bullets as such.¹⁷⁰

This might include, situations where use of expanding bullets "will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security)."¹⁷¹ In particular, the DoD Manual relied on the interpretation of the third element of the above-cited Elements of Crimes (Third Element of Crime) and an excerpt from a statement in Resolution RC/Res.5 at the ICC Review Conference in 2010. The DoD Manual states that:

The Elements of Crimes explain that this rule is not violated unless, *inter alia*: "[t]he perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect." When adopting an amendment at the Review Conference in 2010 that would apply this crime to non-international armed conflict, Parties to the Rome Statute reiterated this understanding and explained that the "crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law."¹⁷²

The language of the Rome Statute and its legislative history, however, do not entirely support the interpretation espoused by the DoD Manual. Specifically, the prohibition of expanding bullets in the Rome Statute is based on and directly derived from the 1899 Hague Declaration on Expanding Bullets (1899 Hague Declaration), which is the origin of this war crime.¹⁷³ The wording of

MANUAL OF THE LAWS OF NAVAL WAR, art. 16(2), (Aug. 9, 1913); COMMISSION ON RESPONSIBILITY OF THE AUTHORS OF WAR AND ON ENFORCEMENT OF PENALTIES 115 (Mar. 29, 1919); U.N. Secretary-General's Bulletin, Observance by United Nations Forces of International Humanitarian Law, Sec. 6.2 St/SGB/1999/13 (Aug. 6, 1999), On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, Sec. 6.1(b) (xix) UNTAET/RED/2000/15.

170. DoD Manual, *supra* note 2, § 6.5.4.5.

171. PULS, *supra* note 158, at 178.

172. DoD Manual, *supra* note 2, § 6.5.4.5 (citing REVIEW CONFERENCE OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (May 31–June 11, 2010)).

173. See DÖRMANN, *supra* note 133, at 292–94.

the prohibition in the 1899 Hague Declaration is similar to its wording in the Rome Statute: “[t]he Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions.”¹⁷⁴

When drafting the Third Element of Crime, the focus of the ICC Preparatory Committee (PrepCom) was on determining the appropriate standard of knowledge (*i.e.*, the *mens rea*) of the perpetrator.¹⁷⁵ The PrepCom acknowledges that the adopted language should exclude soldiers who use ammunition in good faith and believe that it is in conformity with international law.¹⁷⁶ The general agreement was that the types of perpetrators that should be captured by the provisions include:

- Those who choose to use the ammunition described in Article 8(2)(b)(xix) and commanders who are aware of the type of ammunition used; and
- Soldiers who manipulate standard munitions.¹⁷⁷

The PrepCom debated various proposals before settling on language that was intended as a compromise between a requirement of a precise knowledge of wound ballistics (and the precise consequences of using expanding bullets) and the absence of a mental element regarding the type of bullets such as strict liability.¹⁷⁸ The language ultimately adopted was inspired by the 1899 Hague Declaration, the Preamble to which refers to the Declaration of St. Petersburg of 1868 that notes the prohibition of the “employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”¹⁷⁹

In this context, commentators have noted that the word “uselessly” in the Third Element of Crime appears open to interpretation but nevertheless was not intended to import a military necessity justification to the use of expanding bullets.¹⁸⁰ In particular, Michael Cottier argued that the mental requirement in the Third Element of Crime “must be interpreted in accordance with

174. Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body, The Hague Peace Conferences of 1899, July 29, 1899, 160 L.N.T.S. 463.

175. See DÖRMANN, *supra* note 133, at 293; David W. Glazier et al., *Failing Our Troops: A Critical Assessment of the New Department of Defense Law of War Manual*, 42 YALE J. INT’L L. 215, 250 (2017).

176. See DÖRMANN, *supra* note 133, at 293.

177. See DÖRMANN, *supra* note 133, at 293; Triffiterer, *supra* note 26, at 422–23.

178. See DÖRMANN, *supra* note 133, at 293.

179. Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868.

180. *Id.*

the Rome Statute and the underlying prohibition” and that it “clearly cannot mean that a person knowing that the expanding or flattening effect of a bullet offers a military advantage, automatically becomes immune to criminal responsibility The prohibition of dum-dum bullets does not allow for a ‘military necessity’ exception.”¹⁸¹

The PrepCom considered that this formulation would capture the categories of perpetrators set out above. From the available commentary on the *travaux préparatoires* (the various documents, transcripts and other records regarding the negotiation and drafting of the treaty), however, there is no suggestion that it was intended to import a military necessity justification for the use of expanding bullets.¹⁸² The DoD Manual appears to argue that this underlying philosophy means that expanding bullets are only prohibited to the extent that they cause superfluous injury. The alternative, and more widespread interpretation, however, is that expanding bullets have been prohibited *because* they cause superfluous or aggravating injury.¹⁸³

In response to these arguments, the DoD Manual sets out examples to argue that not all expanding bullets are “calculated to cause superfluous injury”:

The U.S. armed forces have used expanding bullets in various counterterrorism and hostage rescue operations, some of which have been conducted in the context of armed conflict A model example in [drawing from domestic law enforcement] is the case of Ewald K., which occurred in Chur, Switzerland, in 2000. In this case, although there was no risk to innocent bystanders, Swiss Police snipers deliberately used expanding rifle bullets in order to ensure that Ewald K. had no opportunity to return fire, but would be killed instantly This motivation was accepted by the Cantonal Court as sufficient to justify the use of expanding rifle bullets”¹⁸⁴

The Rome Statute also contains a general provision proscribing the use of weapons that by their nature cause superfluous injury or unnecessary suffering. Article 8(2)(b)(xx) reads:

181. Triffterer, *supra* note 26, at 423; WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 244 (2010); *see also* Glazier et al., *supra* note 175, at 57. A note on terminology: expanding bullets are also colloquially known as “dum-dum” bullets following their development by the British at their Dum-Dum arsenal in Calcutta, India in the nineteenth century.

182. *See supra* note 179; Triffterer, *supra* note 26, at 422–423; SCHABAS, *supra* note 181.

183. Triffterer, *supra* note 26, at 422.

184. DoD Manual, *supra* note 2, § 6.5.4.4, n.81 (quoting NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 417 n.103 (2009)).

Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.¹⁸⁵

Commentary in the Statute's *travaux préparatoires* shows that the PrepCom considered and rejected proposals to subsume the prohibition on the employment of certain weapons (including expanding bullets) under an over-arching *chapeau* (introductory text) that discussed superfluous injury in favor of a specific prohibition.¹⁸⁶ An analysis of the legislative history of the provision suggests discrepancies between it and the DoD Manual's treatment of expanding bullets. In theory, knowingly ordering the use of expanding bullets in a manner that is permissible under the Manual could constitute a crime under the Rome Statute; however, it is important to keep in mind that the Rome Statute also applies a gravity threshold for case admissibility.¹⁸⁷

B. *Poisonous or Gaseous Weapons*

This Part considers the prohibition on poisonous and gaseous weapons under the Rome Statute and the DoD Manual, respectively. In general, there is no significant difference or conflict between the Rome Statute and the DoD Manual in this area. Riot control agents that fall under the umbrella of poisonous or gaseous weapons, however, have emerged as an area where there may be discrepancies between the Rome Statute and the DoD Manual. This Part also considers this issue under customary international law.

185. Note that article 8(2)(b)(xx) is not operative as the State Parties have not agreed on a list of weapons ("of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate") to include in an annex. For instance, the Rome Statute does not give the ICC general jurisdiction without an agreed list of weapons specified in an annex. See M.N. SCHMITT, LOUISE ARIMATSU & TIM McCORMACK, *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW* 351 (Springer 2010).

186. SCHABAS, *supra* note 181, at 245; Roger S. Clark, *Building on Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare*, 12 *NEW CRIM. L. REV.* 366, 376 (2009).

187. SCHABAS, *supra* note 181, at 199–200 (noting that "[a] single murder committed during armed conflict could be a war crime. But the *Rome Statute*, in article 8(1), imposes a threshold on the war crimes to be prosecuted by the Court: 'The Court shall have jurisdiction in respect to war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.'").

Article 8(2)(b)(xvii) of the Rome Statute provides that “[e]mploying poison or poisoned weapons” constitutes a “serious violation” of international law in IAC and falls under the definition of a “war crime.”¹⁸⁸ Article 8(2)(b)(xviii) further states that “[e]mploying asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” constitutes a “serious violation” of international law in international armed conflicts and falls under the definition of a “war crime.” Corresponding prohibitions were adopted in 2010 regarding armed conflicts which are not of an international character.¹⁸⁹

The Elements of Crimes regarding Article 8(2)(b)(xvii) to 8(2)(b)(xviii) sets out four elements, which according to Article 9 of the Rome Statute, shall assist the court in the interpretation and application of the articles:

- The perpetrator employed a [substance, gas or other analogous or device].
- The [gas, substance or device] was such that it causes death or serious damage to health in the ordinary course of events, through its [asphyxiating or toxic] properties.
- The conduct took place in the context of and was associated with an IAC.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The Rome Statute does not specify which gases, liquids, materials or devices are covered by the prohibition, and it is a question that has been debated both before and after the Rome Statute entered into force.¹⁹⁰ Instead, the parties to the Rome Statute incorporated an effect-based definition through the inclusion of the second element by requiring that the relevant substance “causes death or serious damage to health in the ordinary course of events, through its [asphyxiating or toxic] properties.”¹⁹¹

It is unclear whether riot control agents (such as tear gas and pepper spray) are prohibited under the Rome Statute and, so far, there is no case law relating to it in the ICC or any other relevant

188. Rome Statute, *supra* note 1, art. 8(2)(b)(xvii).

189. *Id.* art. 8(2)(e)(xiii)–(xiv).

190. See DÖRMANN, *supra* note 133, at 281 (noting that “in order to avoid the difficult task of negotiating a definition of poison, the text adopted includes a specific threshold with regard to the effects of the substance: ‘The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.’ These effects must be the consequence of the toxic features of the substance. A number of delegations opposed the word ‘serious’ in ‘serious damage to health,’ but eventually joined the consensus.”).

191. Triffterer, *supra* note 26, at 416–18.

international tribunals.¹⁹² Furthermore, if riot control agents are covered by the prohibition, it is uncertain whether the ICC would make an exception for their use in certain situations such as during “defensive military modes.” As will be described below, the DoD has adopted this position.

The general view, also taken by the PrepCom, appears to be that riot control agents would not be prohibited by the Rome Statute in *most* circumstances in accordance with the effect-based definition.¹⁹³ However, it has also been emphasized that it is difficult to distinguish between lethal and non-lethal agents—gases that are generally considered as non-lethal may be lethal or extremely harmful dependent upon how they are deployed including the dosage, if used against vulnerable persons, and other circumstances such as use in an enclosed room.¹⁹⁴ Therefore, it has been asserted that the use of riot control agents in war may be prohibited in some situations.¹⁹⁵

The use of poison, poisonous gases, chemical and biological weapons in war has been prohibited under several conventions to which the United States has been a signatory (including the 1899 and 1907 Hague Conventions, the 1925 Geneva Gas Protocol, and the 1993 Chemical Weapons Convention). The DoD Manual expressly refers to these conventions and there are no significant differences or conflicts between the Rome Statute and the DoD Manual in relation to the fundamental prohibitions on poisonous and gaseous weapons.¹⁹⁶

The DoD Manual contains general and strict prohibitions against the use of, *inter alia*, poison and poisoned weapons,¹⁹⁷

192. Michael J.A. Crowley, *Chemical control: Exploring Mechanisms for the Regulation of Riot Control Agents, Incapacitants and Related Means of Delivery* 314, 324 (2012) (Ph.D dissertation submission, University of Bradford).

193. See DÖRMANN, *supra* note 133, at 285.

194. See David A. Koplow, *Tangled up in Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations*, GEO. J. INT'L L. (2005). For example, tear gas is not generally considered “lethal” but can be lethal if used in close proximity to a child or an individual with a weakened respiratory system.

195. See DÖRMANN, *supra* note 133, at 286; Triffiterer, *supra* note 26, at 417–18.

196. DoD Manual, *supra* note 2, § 6.8.2 n.175. Compare Rome Statute, *supra* note 1, art. 8(2)(b)(xvii) (“[For the purpose of this Statute, ‘war crimes’ means:] Employing poison or poisoned weapons”) with DoD Manual, *supra* note 2, § 6.8.2 (“It is prohibited to use in war asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices. The United States has determined that this rule is part of customary international law.”).

197. DoD Manual, *supra* note 2 § 6.8.1. (“It is especially forbidden to use poison or poisoned weapons. For example, poisoning the enemy’s food or water supply is prohibited. Similarly, adding poison to weapons is prohibited. The rule against poison and poisoned weapons reflected in the 1899 Hague II Regulations has been interpreted not to include

asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,¹⁹⁸ chemical weapons,¹⁹⁹ and biological weapons.²⁰⁰ These prohibitions also apply in NIAC.²⁰¹

In contrast to the Rome Statute, however, the DoD Manual contains explicit provisions regarding riot control agents such as tear gas and pepper spray.²⁰² The DoD Manual also states that the prohibition on gases is only applicable to the use of gases that are designed to kill or injure human beings.²⁰³ For that reason, the DoD Manual considers riot control agents not to be “chemical weapons” or “otherwise to fall under the prohibition against asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices.”²⁰⁴

Instead, the DoD Manual contains a separate provision regarding riot control agents that generally prohibits the use of riot control agents “as a method of warfare.”²⁰⁵ This provision is the 1993 Chemical Weapons Convention.²⁰⁶ The DoD has, however, interpreted the prohibition as not prohibiting “the use of riot control agents in war in defensive military modes to save lives.”²⁰⁷ The DoD Manual states that such permitted use includes situations where civilians are used to mask or screen attacks in areas outside the zone of immediate combat to protect convoys from terrorists, paramilitary organizations, and even rescue missions in remotely isolated areas.²⁰⁸ The DoD has also taken the position that it is not prohibited from using riot control agents in military operations outside of war or armed conflict (including peacekeeping missions).²⁰⁹ There are consequently a number of exceptions to the

poison gas weapons that were developed during the modern era, which were subsequently prohibited Poisons are understood to be substances that cause death or disability with permanent effects when, in even small quantities, they are ingested, enter the lungs or bloodstream, or touch the skin.”).

198. DoD Manual, *supra* note 2, § 6.8.2.

199. DoD Manual, *supra* note 2, § 6.8.3.

200. DoD Manual, *supra* note 2, § 6.9.

201. DoD Manual, *supra* note 2, § 17.13.1.

202. DoD Manual, *supra* note 2, § 6.16.1.

203. DoD Manual, *supra* note 2 (“This prohibition on poison applies to weapons that are designed to injure or kill by poison. It does not apply to weapons that injure or cause destruction by other means that also produce toxic byproducts.”).

204. DoD Manual, *supra* note 2, § 6.8.2.

205. DoD Manual, *supra* note 2, § 6.16.

206. DoD Manual, *supra* note 2, § 6.16 n.391.

207. DoD Manual, *supra* note 2, § 6.16.2.

208. DoD Manual, *supra* note 2, § 6.16.2.

209. DoD Manual, *supra* note 2, § 6.16.2.

prohibition on riot control agents under the DoD Manual that are not explicitly stated in the Rome Statute.

The use of poison, poisoned weapons, biological weapons, and chemical weapons is prohibited in IAC, and is generally considered to be prohibited in NIAC under customary international law.²¹⁰ Under customary international law, the use of riot control agents is permitted in domestic riot control situations but prohibited as a method of warfare in both IAC and NIAC. It appears that no country has claimed the right to use riot control agents as a method of warfare in military hostilities except for the United States which asserts that the use in “defensive military modes to save lives” would not constitute a “method of warfare.”²¹¹

Accordingly, it appears that there may be, at least in theory, circumstances in which U.S. military personnel might deploy riot control agents that would fall within the scope of the war crime set out in the Rome Statute.

C. *Summary of Weaponry Analysis*

In summary, the DoD Manual may conflict with the Rome Statute by limiting the prohibition on expanding bullets to circum-

210. See LIEBER CODE, art. 70 (cited in Vol. II, Ch. 21, § 4); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 80–82 (July 8) (regarding international armed conflict (IAC)); INT'L COMM. OF THE RED CROSS, *Rules 72–74, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul [<https://perma.cc/PTY5-SMBB>] (regarding non-international armed conflict (NIAC)). The Rome Statute, as originally drafted, did not include poisoned weapons as a war crime in sections dealing with NIAC. However, at the 2010 Kampala Review Conference, the IAC weapons ban was extended to cover NIACs. See REVIEW CONFERENCE OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ¶ 36 (May 31–June 11, 2010) (“resolution RC/Res. 5 . . . amended the Rome Statute to bring under the jurisdiction of the Court the war crimes of employing poison or poisoned weapons, employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices, and employing bullets which expand or flatten easily in the human body, when committed in armed conflicts not of an international character.”).

211. INT'L COMM. OF THE RED CROSS, *Rule 75: Riot Control Agents*, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule75 [<https://perma.cc/9B5N-CRK9>]; see also DoD Manual, *supra* note 2, § 6.16.2 (stating that “[i]t is prohibited to use riot control agents as a method of warfare. The United States has understood this prohibition not to prohibit the use of riot control agents in war in defensive military modes to save lives, such as use of riot control agents: in riot control situations in areas under direct and distinct US military control, to include controlling rioting POWs; in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided; in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners; and in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists, and paramilitary organizations”); see also U.S. DEP'T OF THE ARMY FIELD MANUAL FM 27-10 (1956) (setting out similar language as DoD Manual § 6.16.2).

stances where they are designed to cause superfluous injury. There is an ongoing debate concerning whether expanding bullets are prohibited under customary international law, especially insofar as the prohibition relates to NIAC. The preponderance of authorities, however, endorses the view that the use of these bullets is prohibited.

In relation to riot control agents, the prevailing view appears to be that their use will, in most circumstances, not be covered by the prohibition against chemical and gaseous weapons in the Rome Statute. There are, however, no clear authorities or case law, and there at least appears to be a risk that deployment of riot control agents in accordance with the exceptions of the DoD Manual that may constitute a violation of the Rome Statute as well as customary international law in certain circumstances.

IV. DETENTION

This Part analyzes the DoD Manual's standards for detention and its potential divergences from the Rome Statute. The analysis extends beyond the DoD Manual by referring to and incorporating additional U.S. domestic policies and laws that complement the DoD Manual's provisions on the treatment of detainees. These include, *inter alia*, the Detainee Treatment Act of 2005, Executive Order 13491, DoD Directive 2310.01E, 1997 Multi-Service Detention Regulation, and the United States Field Manual on Intelligence Interrogation.

Generally, the DoD Manual and the Rome Statute agree on the treatment of detainees. In practice, however, there is potential divergence regarding the duration of detention allowed and the concrete judicial guarantees that the state must afford to detainees in a NIAC.

A. *End of Detention*

The duration of detention permitted under the DoD Manual is the most notable potential conflict with the standards in the Rome Statute and Geneva Conventions as the appropriateness of detention depends on the definition of "cessation of conflict" and the conditions that justify prolonging detention.

Geneva Convention III and IV (the Geneva Conventions) provide that a state must generally release detainees when the circumstances justifying the arrest, detention or internment cease to

exist.²¹² In an IAC, an “unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities is a grave breach of Additional Protocol I.”²¹³ Similar obligations apply with respect to civil detainees as described in the following:

Except in cases of arrest or detention for penal offences, such persons [who were arrested, detained or interned for actions related to the armed conflict] shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.²¹⁴

An unjustifiable delay of civilians also amounts to a grave breach of API.²¹⁵

The 1997 Multi-Service Detention regulation and DoD Directive 2310.01E (2014) comply with the Geneva Conventions and APs. According to the former, detained civilians are to be released “after hostilities cease”²¹⁶ unless they have “judicial proceedings pending.”²¹⁷ Similarly, the latter provides that POWs will be released when “active hostilities have ceased, and as soon as a safe and orderly transfer or release is practicable” unless they have

212. Geneva Convention III, *supra* note 17, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”), art. 109 (“Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war.”); Geneva Convention IV, *supra* note 17, art. 132 (“Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.”), art. 133 (“Internment shall cease as soon as possible after the close of hostilities.”); Rome Statute, *supra* note 1, art. 8.(2)(a)(vii).

213. APII, *supra* note 17, art. 85.4(b) (“In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol: . . . unjustifiable delay in the repatriation of prisoners of war or civilians.”).

214. API *supra* note 17, art. 75(3). *See also* Geneva Convention IV, *supra* note 17, art. 132 (“Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.”), art. 46(1) (“In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.”).

215. API, *supra* note 17, art. 85.4(b).

216. ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, ARMY REGULATION 190-8 § 6-16(a)(2) (1997) (“After hostilities cease and subject to the provisions of (3) below, CI will be released as soon as the reasons for their internment are determined by the theater commander to no longer exist.”).

217. *Id.* § 6-16(a)(3) (“The CI who are eligible for release but have judicial proceedings pending for offenses not exclusively subject to disciplinary punishment will be detained until the close of the proceedings. At the discretion of the theater commander, the CI may be detained until completion of their penalty. The CI previously sentenced to confinement as judicial punishment may be similarly detained.”).

criminal proceedings pending or have been convicted and sentenced.²¹⁸

In contrast to the Rome Statute and this DoD guidance, the DoD Manual raises some questions on its compatibility with obligations under the Geneva Conventions and APs. According to the DoD Manual, the “continuation of hostilities” justifies the detention of an individual who has participated in hostilities or belongs to armed groups engaged in hostilities.²¹⁹ According to the same section, release of individuals who participated in hostilities is thus “generally only required after the conflict has ceased.”²²⁰ Since it is possible for hostilities to cease before a conflict does, there may be a divergence in the standards regarding timing for release of detainees.²²¹

More broadly, the ability to detain an individual until the conflict or hostilities cease raises unique challenges in today’s protracted conflicts. Commentators have argued that, in the balance between the traditionally recognized principles of military necessity and humanity, the DoD framework construes “military necessity” broadly and with insufficient attention to humanitarian considerations.²²² If the DoD Manual was read to mean that detention can continue for many years and beyond active hostilities, this might be

218. DEP’T OF DEFENSE DIRECTIVE 2310.01E § m(1) (May 9, 2006) (“In general, POWs will be repatriated and unprivileged belligerents (who do not qualify for protected person status under Reference (e) [General Convention Relative to the Treatment of Civilian Persons in Time of War of August 12, 1949]) will be released or transferred to the custody of another country after a competent authority determines that, for such purposes, active hostilities have ceased, and as soon as a safe and orderly transfer or release is practicable. However, detainees who have been convicted of an offense or against whom criminal proceedings for an offense are pending may be detained until the end of such proceedings, and, where applicable, until the completion of the punishment.”).

219. DoD Manual, *supra* note 2, § 8.14.3.1.

220. DoD Manual, *supra* note 2, § 8.14.3.1.

221. See, e.g., Prosecutor v. Tadić, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 67 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (suggesting that the duration of hostilities and conflict do not necessarily overlap: “The definition of ‘armed conflict’ varies depending on whether the hostilities are international or internal but, contrary to Appellant’s contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference or international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting.”).

222. Int’l Comm. of the Red Cross et. al., *The Future of U.S. Detention Under International Law: Workshop Report*, 93 INT’L L. STUD. 272, 291–293 (2017) [hereinafter *The Future of U.S. Detention*]; see generally Bettina Scholdan, “The End of Active Hostilities”: The Obligation to Release Conflict Internees Under International Law, 38 HOUS. J. INT’L L. 99 (2016) (discussing military necessity in context of Guantanamo Bay, suggesting enabling and protective elements of international humanitarian law were overlooked).

considered to be an unreasonable delay under international law and ICC interpretations even if a conflict in the region continues.

In addition, the Manual provides that “other circumstances may warrant continued detention of such persons,”²²³ and adds that “[c]ontinued detention in order to facilitate a safe and orderly release may be necessary.”²²⁴ A second potential area of conflict between the DoD Manual and the Rome Statute arises from this point and requires clarification of the full range of “other circumstances” for which the DoD Manual authorizes the prolongation of detention.²²⁵

The Rome Statute defines “enforced disappearance”—a crime against humanity—as follows:

[T]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.²²⁶

As such, violating detention obligations connected with a refusal to acknowledge the deprivation could eventually rise to the level of a crime against humanity. The ICC’s approach to “unlawful confinement” is limited to international armed conflict and protected persons under the Geneva Conventions.²²⁷ The Rome Statute and Elements of Crimes do not specify that the length of detention is a factor in making confinement unlawful—rather, the confinement is considered unlawful based on the protected status of the confined person and the perpetrators’ awareness of that status.²²⁸

By contrast, the crime against humanity of imprisonment “in violation of fundamental rules of international law” is defined more broadly to occur when:

- The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
- The gravity of the conduct was such that it was in violation of fundamental rules of international law.

223. DoD Manual, *supra* note 2, § 8.14.3.1.

224. DoD Manual, *supra* note 2, § 8.14.3.2.

225. DoD Manual, *supra* note 2, § 8.14.3.1.

226. Rome Statute, *supra* note 1, art. 7(2)(i).

227. See Rome Statute, *supra* note 1, art. 8(2)(a)(vii); Elements of Crimes, *supra* note 84, at 22 (providing the elements of Article 8.2(a)(vii)-2, which limits the crime to international armed conflict and protected persons under the Geneva Conventions).

228. See Rome Statute, *supra* note 1, 8.2(a)(vii); Elements of Crimes, *supra* note 84, at 22 (stating that Article 8.2(a)(vii)-2 does not list “length of detention” as an element).

- The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
- The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Based on the Rome Statute’s formulation, it is likely that the ICC would focus on whether the actions at issue meet the elements of the war crimes of “enforced disappearance” (which is limited to a refusal to acknowledge the deprivation), “unlawful confinement” (which has a focus on the status of the confined individual), or the crime against humanity of “imprisonment . . . in violation of fundamental rules of international law” (which requires a widespread or systemic attack directed against a civilian population). Although there is a good argument that prolonged detention beyond active hostilities violates international law, it is unlikely to be charged as an individual crime unless particularly egregious circumstances meet the definition set out in the Rome Statute.²²⁹

B. *Judicial Guarantees*

The compatibility between the Rome Statute and the DoD Manual’s provision on the right to a fair trial for detainees in a NIAC depends on the specific types of judicial guarantees that are required under the Statute as well as customary international law and other treaties. Overall, the Manual appears to incorporate the fair trial requirements listed in the Geneva Conventions and APs. The challenge here reflects a broader lack of clarity regarding detention in relation to NIACs.²³⁰

The Rome Statute criminalizes serious violations of Common Article 3, which includes the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are

229. For example, the ICC’s prosecutor has charged individuals with “imprisonment or severe deprivation of liberty constituting a crime against humanity” in violation of Rome Statute Article 7(1)(e) under circumstances in which the alleged imprisonment involved over 400 civilians targeted from a particular population. *See, e.g.*, Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Decision on the Prosecutor’s Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein, ¶ 11 (Mar. 1, 2012); Prosecutor v. Harun, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶¶ 70–75 (Apr. 27, 2007).

230. *See generally* *The Future of U.S. Detention*, *supra* note 222 (discussing debate surrounding law that is applicable to NIACs).

generally recognized as indispensable.”²³¹ Unlike the Third and Fourth Geneva Conventions that list examples of fair trial guarantees when assessing the legality of an IAC detention, Common Article 3 sheds little guidance on what concrete types of fair trial protections are required in NIACs.²³² Nevertheless, as Knut Dörmann, Head of the Legal Division at the ICRC, explains:

While Common Article 3 to the Geneva Conventions does not provide a list of judicial guarantees, it is now generally accepted that Article 75(4) of Additional Protocol I to the Geneva Conventions—which was drafted based on the corresponding provisions of the International Covenant on Civil and Political Rights (ICCPR)—reflects customary law applicable in all types of armed conflict. Article 75(4), in fact, encapsulates all of Article 6(5) of Additional Protocol II, which supplements Common Article 3 in NIAC. [International humanitarian law] reinforces human rights law in that it allows no derogation from fair trial rights in situations of armed conflict.²³³

Moreover, other provisions in the Geneva Conventions and APs shed light on interpreting Article 8.2(c)(iv) of the Rome Statute. The substance of this provision was “largely influenced” by the content of Article 6(2) APII,²³⁴ which some commentators note as having, in essence, a wording identical to Common Article 3. Consequently, Article 6(2) of APII explains, rather than extends, the protections in both Common Article 3 and the Rome Statute.²³⁵ Hence, according to Dörmann, “a regular court affording all judicial guarantees which are generally recognized as being indispensable” provides rights such as, but not limited to, the “right to be afforded before and during the trial all necessary rights and means of defense,” which in turn includes “[t]he right to ade-

231. Rome Statute, *supra* note 1, art. 8(2)(c)(iv).

232. See DÖRMANN, *supra* note 133, at 409 (“To date there have been no findings on the elements of this offence by the ad hoc Tribunals.” Common Article Geneva Convention III does not clarify the interpretation of this offense.).

233. Knut Dörmann, *Detention in Non-International Armed Conflicts*, 88 INT’L LEGAL STUD. 347, 352–53 (2012). See also INT’L COMMITTEE OF THE RED CROSS, INTERNMENT IN ARMED CONFLICT: BASIC RULES AND CHALLENGES 2 (2014) (reinforcing that international humanitarian law does not permit derogation from fair trial rights in situations of armed conflict).

234. See DÖRMANN, *supra* note 133, at 408–09.

235. APII, *supra* note 17, art. 6(2). See, e.g., DÖRMANN, *supra* note 133, at 412 (“Article 6(2) APII explains common Article 3(1)(d) Geneva Convention rather than extends it In particular, it may be argued that the non-exhaustive minimum list of essential guarantees contained in Article 6(2) APII also applies to this crime.”); PICTET, *supra* note 20, at 878 (“[Common] Article 3 relies on the ‘judicial guarantees which are recognized as indispensable by civilized peoples’, while Article 75 rightly spells out these guarantees. Thus this article, and to an even greater extent, Article 6 of Protocol II (Penal prosecutions), gives valuable indications to help explain the terms of Article 3 on guarantees.”) (emphasis added).

quate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing."²³⁶

Under Section 8.16 of the DoD Manual, any sentence, including the death penalty²³⁷ against detainees must uphold "all the judicial guarantees that are recognized as indispensable by civilized peoples." This language mirrors that of fair trial protections in Common Article 3 and the vast majority of concrete examples listed in APII are included in Section 8.16 of the DoD Manual. One potential requirement under Article 8 that is not explicitly incorporated in the DoD Manual is the requirement that the defense counsel have "adequate time and facilities" to prepare the case on behalf of the detainee. However, this requirement should be considered part of the Manual's broader requirement that "all necessary rights and means of defense" be provided to detainees and their defense counsel.²³⁸ Assuming that Article 8 requires States to provide adequate time and facilities for defense counsel to prepare, it would be preferable for the DoD to explicitly provide for this in the Manual.

C. Summary of Detention Analysis

In summary, more information is necessary to determine whether the duration of detention permitted under the DoD Manual conflicts with the Rome Statute as the Manual does not define "cessation of conflict" or all circumstances that justify the detention of an individual after the cessation of a conflict. The Manual is consistent with the Rome Statute in its treatment of detainees'

236. See DÖRMANN, *supra* note 133, at 410.

237. The DoD Manual contemplates the use of the death penalty in several different provisions. Though the Rome Statute is silent on the use of the death penalty, the drafting history of the Statute makes clear that exclusion of capital punishment from penalties available to the ICC under Article 77 was both purposeful and meant to impose a complete ban on the use of the death penalty by the Court. See SCHABAS, *supra* note 181, at 316; LEE, *supra* note 105, at 331–35; Triffterer, *supra* note 26, at 989. The Court excludes any possibility of imposing capital punishment while also acknowledging that it will not interfere with national regimes that allow for the death penalty. See Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi (Oct. 11, 2013). However, it should be noted that, with respect to human rights law, "custom is rapidly changing towards a position in favor of worldwide abolition [of the death penalty]." INT'L BAR ASS'N, THE DEATH PENALTY UNDER INTERNATIONAL LAW (May 2008) <http://www.ibanet.org/Document/Default.aspx?DocumentUId=5482860b-b9bc-4671-a60f-7b236ab9a1a0> [<https://perma.cc/7KFZ-5FDA>]. Indeed, some commentators have noted that "the exclusion of the death penalty from the Rome Statute can be nothing but an important benchmark in an unquestionable trend towards universal abolition of capital punishment." SCHABAS, *supra* note 181, at 316.

238. DoD Manual, *supra* note 2, § 8.16.3.

right to a fair trial during a NIAC, but it should be noted that the exact content of this obligation under international law is not settled.

V. PRISONERS OF WAR

This Part considers the classification and treatment of prisoners of war in the DoD Manual with respect to the two Rome Statute provisions that expressly apply to prisoners of war: (i) the prohibition on compelled service and (ii) the right to a fair and regular trial.

A. *Classification as a Prisoner of War*

While the Rome Statute expressly refers to prisoners of war, it does not define persons entitled to POW status. The DoD Manual defines persons entitled to POW status in accordance with Article 4A of the Geneva Convention Relative to the Treatment of Prisoners of War.²³⁹

While API expands the range of circumstances in which individuals may qualify for POW status in the Geneva Convention,²⁴⁰ the DoD Manual explicitly notes that the United States has objected to these provisions of API concerning national liberation movements and criteria for combatant status arguing that they do not reflect customary international law.²⁴¹ However, despite the United States' objection to a broader definition of POW status,²⁴² there is no apparent conflict with the Rome Statute since the only provisions under the Rome Statute that expressly apply to POWs fall under war crimes defined as “[g]rave breaches of the Geneva Conventions of 12 August 1949.”²⁴³

239. DoD Manual, *supra* note 2, § 9.3.2 at 539–40 n.45 (citing Geneva Convention III art. 4(A)); *see also* DoD Manual, *supra* note 2, § 9.1.2.1 (“POW is term of art that is defined and used in the [Geneva Convention Relative to the Treatment of Prisoners of War].”).

240. API, *supra* note 17, arts. 1(4), 43, 44 (API expands: (i) the types of armed conflict that would trigger protections to include certain national liberation movements, and (ii) the range of persons eligible for combatant status, and hence POW status); *see* Robert M. Chesney, *Prisoners of War*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 19–21 (Oct. 2009).

241. *See* DoD Manual, *supra* note 2, §§ 3.3.4, 4.6.1.2, 19.20.1.5.

242. The U.S. position denying POW status, for example, to captured Taliban and Al Qaeda fighters, has been controversial. *See, e.g.*, 2 SEAN D. MURPHY, *International Criminal Law*, in UNITED STATES PRACTICE IN INTERNATIONAL LAW 235, 252 (2006). *But see* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 368 (2004) (arguing that, contrary to conventional wisdom, the denial of POW status carries few protective or policy consequences and that the gap in protection for those classified as POWs and those not so classified is closing).

243. Rome Statute, *supra* note 1, art. 8(2)(a).

B. *Compelled Service*

Rome Statute prohibits as a war crime “[c]ompelling a prisoner of war or other protected person to serve in the forces of a hostile Power.”²⁴⁴ The DoD Manual states that “POWs, like other enemy nationals, may not be compelled to take part in operations of war directed against their own country.”²⁴⁵ While the DoD provision specifying that the POWs may not be compelled to take part in operations “against their own country” may seem narrower than the Rome Statute provision, which prohibits compelled service in the armed forces of a hostile power in any capacity (*i.e.*, in operations against countries that are not the POW’s own country),²⁴⁶ the DoD Manual states broadly in Section 9.3.7 that “[t]he non-renunciation of rights, in particular, prevents a POW from being compelled to serve in the armed forces of the Detaining Power.” Thus, the DoD Manual would appear to prohibit compelling POWs to serve in the armed forces of the Detaining Power in accordance with the Rome Statute prohibition under Article 8(2)(a)(v).

Further, the DoD Manual states that:

POWs may be compelled to do only such work as is included in the following classes: POW camp administration, installation,

244. Rome Statute, *supra* note 1, art. 8(2)(a)(v); *see also* Rome Statute, *supra* note 1 art. 8(2)(b)(xv) (“Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war.”). Commentators recognize the overlap between these two articles—Article 8(2)(a)(v), drawn from Article 130 of the 1949 Convention Relative to the Treatment of Prisoners of War as well as Article 147 of the 1949 Convention Relative to the Protection of Civilian Persons in Time of War, and Article 8(2)(b)(xv), based on Article 23 of the 1907 Hague Regulations—which has “led to drafting and interpretation difficulties.” *See* DÖRMANN, *supra* note 133, at 98; *see generally* SCHABAS, *supra* note 181, at 219.

245. DoD Manual, *supra* note 2, § 9.19.2.3; *see also* DoD Manual, *supra* note 2, § 5.27 (“During international armed conflict, it is prohibited to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war Additional restrictions are applicable with respect to POWs”). This provision of the DoD Manual cites to Article 23 of the 1907 Hague Regulations and thereby corresponds to Article 8(2)(b)(xv) of the Rome Statute.

246. The Elements of Crimes states that “[t]he perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person’s own country or forces *or otherwise serve in the forces of a hostile power.*” Elements of Crimes, *supra* note 84, at 21 (emphasis added) (quoting Article 8(2)(a)(v)(1)); *see also* Triffterer, *supra* note 26, at 314 (“During the negotiations leading to the Elements of Crimes some States wanted a clear indication that the crime under article 8 para. 2(a)(v) of the ICC Statute was not limited to compelling a protected person to act against his/her own country or forces, but also against other countries or forces, in particular allied countries and forces.’ In the end, the Preparatory Committee felt that this particular case would be covered by ‘*otherwise serve in the forces of a hostile power.*’”).

and maintenance, agriculture, industries connected with the production or the extraction of raw materials, and manufacturing industries; with the exception of metallurgical, machinery, and chemical industries; public works and building operations having no military character or purpose; transport and handling of stores not of a military character or purpose; commercial businesses, including arts and crafts; domestic services; and public utilities having no military character or purpose.²⁴⁷

Thus, this provision of the DoD Manual would also prohibit compelling POWs to serve in the forces of a hostile power against any country to the extent that such work does not fall within one of the enumerated categories.

As to the meaning of “compel,” the DoD Manual states the following:

This prohibition . . . applies to attempts to compel enemy nationals, *rather than measures short of compulsion*, such as bribing enemy nationals or seeking to influence them through propaganda. However, it is specifically prohibited for an Occupying Power to use propaganda that aims at securing voluntary enlistment of protected persons in its armed or auxiliary forces.²⁴⁸

The Rome Statute standard for “compel” is that the “perpetrator coerced one or more persons, *by act or threat*, to take part in military operations against that person’s own country or forces or otherwise serve in the forces of a hostile power.”²⁴⁹ Taking into account that bribery (not blackmail) and propaganda are not generally considered “coercion,”²⁵⁰ which is ordinarily defined to include some use or threat of force, there is no *prima facie* conflict between the two documents.

247. DoD Manual, *supra* note 2, § 9.19.2.3 (citing Geneva Convention III, *supra* note 17, art. 50) (emphasis added).

248. DoD Manual, *supra* note 2, § 5.27.1. Note that DoD Manual note 837 refers to a Nuremberg Military Tribunal case, stating there is “*pressure or coercion*” to enter into armed services as a violation of international law. *U.S. v. Weizsaecker et al.*, XIV Trials of War Criminals Before the Nuremberg Military Tribunals (1949), 549 (“We hold that it is not illegal to recruit prisoners of war who volunteer to fight against their own country, but pressure or coercion to compel such persons to enter into the armed services obviously violates international law.”). Considering that bribery and propaganda may be considered “pressure,” the DoD Manual adopts a narrower understanding of “compel” than the case cited. However, “coercion” to enter into armed services appears to be prohibited by both the DoD Manual and the Rome Statute.

249. Elements of Crimes, *supra* note 84, at 21 (emphasis added) (quoting Article 8(2)(a)(v)(1)); *see also* Elements of Crimes *supra* note 84, at 31 (providing the following element from Article 8(2)(b)(xv)(1): “The perpetrator coerced one or more persons by act or threat to take part in military operations against that person’s own country or forces.”).

250. Coercion is generally defined as “the use of force to persuade someone to do something that they are unwilling to do.” *Coercion*, CAMBRIDGE DICTIONARY (2018).

C. *Rights to a Fair and Regular Trial*

Similarly, there appears to be no conflict between the Rome Statute and the DoD Manual with respect to the right to a fair and regular trial. Rome Statute includes in the definition of war crimes the act of “[w]illfully depriving a prisoner of war or other protected person of the rights of fair and regular trial.”²⁵¹ The Elements of Crimes specifies that the war crime of denying a fair trial is assessed with regard to the “judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.”²⁵²

The DoD Manual addresses judicial proceedings and punishment applicable to POWs in detail under Section 9.28. These rules which include the right to defense by a qualified advocate or counsel of the POW’s own choice directly correspond to (and cite to) protections under the Geneva Convention.²⁵³ As such, there appears to be no conflict between the DoD Manual and Rome Statute regarding rights to a fair trial.²⁵⁴ In practice, however, this topic could be subject to a much longer debate than this Article permits, primarily with respect to the discussion of distinction and classes of persons in modern warfare. The U.S. practice of declaring captured terrorists as “unlawful combatant[s]” deprives com-

251. Rome Statute, *supra* note 1, art. 8(2)(a)(vi). Geneva Convention III, *supra* note 17, art. 130 prohibits as a grave breach “willfully depriving a prisoner of war the rights of fair and regular trial prescribed in this Convention” and contains various provisions detailing such rights. See Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 458–63 (Extraordinary Chambers in the Courts of Cambodia July 10, 2010).

252. Elements of Crimes, *supra* note 84, at 21 (quoting art. 8(2)(a)(vi)(1)); Triffterer, *supra* note 26, at 315 (“During the negotiations of the Elements of Crimes, a clear majority of States supported the view that the crime may also be committed if judicial guarantees other than those explicitly referred to in the Geneva Conventions . . . are denied. In order to clarify this, the words ‘in particular’ were added, thus indicating that the crime is not limited to the denial of judicial guarantees contained in the Geneva Conventions.”).

253. See, e.g., DoD Manual, *supra* note 2, § 9.28.4.2 (citing Geneva Convention III, *supra* note 17, arts. 99, 105).

254. The fair trial guarantees and standards in the Geneva Conventions may “have been developed and exceeded by more modern instruments and enriched by case law of international human rights tribunals.” SCHABAS, *supra* note 181, at 220. Article 75 of API specifies other guarantees not set forth in the Geneva Conventions, such as right of the accused to be present at his or her trial. Though the United States is not a party to API, some commentators have suggested that the guarantees mentioned in API reflect customary international law and that the findings of various human rights bodies may serve as guidance in interpreting these guarantees since they are “firmly based in contemporary human rights law.” Triffterer, *supra* at note 26, 316; see also DÖRMANN, *supra* note 133, at 100–01; CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 52 (2009).

batants of POW protections laid out in the Geneva Convention and casts confusion on the scope of their rights to a fair trial.²⁵⁵

D. *Summary of Treatment of POW Analysis*

Some definitions of a prisoner of war appear to diverge, as noted in Part I, regarding the principle of distinction. However, based on the language of the DoD Manual, there appears to be no significant conflict with the Rome Statute as to the treatment of prisoners of war.

VI. UNLAWFUL DEPORTATION OR TRANSFER

This Part compares the provisions of the Rome Statute and the DoD Manual concerning unlawful deportation or transfer. The term “unlawful deportation or transfer” comes from Article 147 of Geneva Convention IV. The language was directly incorporated into the Rome Statute²⁵⁶ and is also found in the DoD Manual.²⁵⁷

A. *Deportation or Transfer*

Both the terms “deportation” and “transfer” are used in the Rome Statute and the DoD Manual. The distinction between the two terms appears to be that “deportation” involves crossing of a national border.²⁵⁸

255. See generally Jinks, *supra* note 242; David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 L. & INEQ. 353 (2008) (concluding the military commissions and courts should read in fair trial guarantees for enemy combatants); Lionel Nichols, *David Hicks: Prisoner of War or Prisoner of the War on Terrorism?* 15 AUSTL. INT'L L.J. 56 (2008) (asserting David Hicks should have received presumptive POW status and procedural protections afforded by the Geneva Convention); Alexander Fraser, *For the Sake of Consistency: Distinguishing Combatant Terrorists from Non-combatant Terrorists in Modern Warfare*, 51 RICH. L. REV. 593 (2017) (proposing that enemy combatants should be considered today's POWs and receive a fair trial before military commissions); Michael C. Dorf, *What is an “Unlawful Combatant” and Why it Matters: The Status of Detailed Al Qaeda and Taliban Fighters*, FINDLAW (Jan. 23, 2002) <http://supreme.findlaw.com/legal-commentary/what-is-an-unlawful-combatant-and-why-it-matters.html> [<https://perma.cc/5JWV-KL77>] (describing why al Qaeda and Taliban members do not fall under the Geneva Convention's definition of POW and are not entitled to the same protections).

256. Rome Statute, *supra* note 1, art. 8(2)(a)(vii).

257. DoD Manual, *supra* note 2, § 18.9.3.1.

258. Pre-Trial Chamber II in Ruto distinguished between forcible transfer and deportation based on “where [the victims] have finally relocated as a result of these acts (that is, within the State or outside the State).” Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 268 (Jan. 23, 2012). The ICTY Appeals Chamber confirmed in *Đorđević* that deportation has an additional element: the transfer across a border. Prosecutor v. Đorđević, Case No. IT-05-87/1-A, A. Ch., Judgment, n.2159 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014)

The DoD Manual understands “transfer” to include both individual transfers and mass transfers as set out under Article 49 of Geneva Convention IV.²⁵⁹ Similarly, although Rome Statute Article 7(1)(d) refers to deportation or forcible transfer of *population*, the Elements of Crimes clarify that the transfer of one person can suffice.²⁶⁰

Among the “other violations of the laws and customs applicable in international armed conflict,” the Rome Statute includes: “the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.”²⁶¹ The DoD Manual specifies that “deportations of protected

(stating “case law has established that [forcible transfer] *may* take place within national boundaries but is not so restricted”).

Although ICTY historically considered deportation and transfer as two distinct crimes, the ICTY has acknowledged a trend toward treating the two as “one and the same,” taking into account the immateriality of determining whether there is an internationally recognized border in the context of a norm that is intended to address forcible removal from one’s home. *Prosecutor v. Stakic*, Case No. IT-97-24-T, Judgment, ¶¶ 680–84 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003). Citing the Rome Statute, the *Stakic* case noted:

It is enlightening in this context to consider how the crime of deportation has been regulated in the Statute of the International Criminal Court. That Statute utilises a single category of ‘deportation or forcible transfer of population’ and defines this crime as the ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’ . . . [I]t is clear that the Statute of the International Criminal Court does not require proof of crossing an international border but only that the civilian population was displaced . . . [C]ustomary international law has long penalised forced population displacements and the fact that the Statute of the International Criminal Court has accepted the two terms ‘deportation’ and ‘forcible transfer’ in one and the same category only strengthens the view that what has in the jurisprudence been considered two separate crimes is in reality one and the same crime.

259. Compare DoD Manual, *supra* note 2, § 11.12.3 (“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power, or of any other country, occupied or not, are prohibited, regardless of their motive”), with Geneva Convention IV, *supra* note 17, art. 49 (“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive . . . Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement”); see also DoD Manual 18.9.3.1 (“Acts Constituting Grave Breaches”).

260. See Elements of Crimes, *supra* note 84, at 11 (providing the elements of Article 7(1)(d)(2), which is crime against humanity of deportation or forcible transfer of population); see also Elements of Crimes, *supra* note 84, at 22 (providing the elements of Article 8(2)(a)(vii)-1(2), which is war crime of unlawful deportation or transfer).

261. Rome Statute, *supra* note 1, art. 8(2)(b)(viii).

persons from occupied territory to the territory of the Occupying Power, or of any other country, occupied or not,"²⁶² but does not address movement of the Occupying Power's own civilian population.

B. *Exceptions*

The Rome Statute does not specify any exception for unlawful deportation or transfer. However, under Geneva Convention IV, transfer is allowed if it is closely related to the conduct of military hostilities. Evacuation may be ordered where the safety of the population demands it and imperative military reasons can justify the transfer of protected persons as long as the corresponding reasons continue to exist.²⁶³ Furthermore, under the DoD Manual, the Occupying Power may undertake total or partial evacuation of a given area if required for the security of the population or for imperative military reasons. In this regard, the provisions in the Rome Statute and DoD Manual are likely to be similarly interpreted.

C. *Summary of Unlawful Deportation or Transfer*

This Article does not identify any direct conflict between the Rome Statute and the DoD Manual regarding unlawful deportation or transfer. It is unclear how the DoD Manual would consider movement of an Occupying Power's own civilian population, which is listed as a "serious violation[] of laws" under Article 8 war crimes provisions of the Rome Statute.

CONCLUSION

The DoD Manual provides a detailed analysis of the laws of war that sheds light on the DoD lawyers' thought process and their practical application of the laws. The Manual is of particular interest to those debating the risks that the ICC could find U.S. interpretations of the laws of war to be unacceptable, even though, as previously emphasized, the Manual reflects only the analysis of the DoD and not the U.S. Government as a whole. The attention to detail revealed in the Manual is especially helpful because it per-

262. DoD Manual, *supra* note 2, § 11.12.3.

263. Geneva Convention IV, *supra* note 17, art. 49; *see also* Prosecutor v. Naletilic Case No. IT-98-34-T, Judgment, ¶ 521 (Int'l Crim. Trib. For the Former Yugoslavia Mar. 21, 2003) (finding that unlawful deportation includes "the occurrence of an act or omission, *not motivated by the security of the population or imperative military reasons*, leading to the transfer of a person from occupied territory or within occupied territory") (emphasis added).

mits an analysis of the similarities and distinctions with Rome Statute provisions, PrepCom materials, and ICC case law, although the Manual occasionally stops short of defining key terms and some footnotes create points of potential contradiction. Overall, it is fair to say that the principles valued by the authors of the DoD Manual and the principles that underpin the Rome Statute of the ICC are the same—both derive from the longstanding principles of international law and international humanitarian law aimed at protecting civilians and limiting the harmful effects of war.

Disparities and potential conflicts do exist, which were categorized into four categories in this Article: (i) *distinction*—the Manual’s reluctance to recognize the principle that an individual should be recognized as a civilian in cases of doubt as well as the Manual’s potentially more expansive understanding of what constitutes “direct participation” in hostilities; (ii) *proportionality*—the Manual’s potentially ambiguous consideration of protected persons such as civilians working near military objectives and “voluntary” human shields in the proportionality calculus, risks weakening the obligation to abide by the principle of proportionality; (iii) *weaponry*—the Manual’s position on acceptable bullets and riot control agents which places it in tension, if not in direct conflict, with the Rome Statute; and (iv) *treatment of detainees*—the Manual’s permitted duration of detention that may conflict with the Rome Statute depending on how the DoD defines “cessation of conflict” and the conditions that justify prolonging detention.

The parameters of this analysis will continue to evolve with emerging ICC case law and further interpretations of the DoD Law of War Manual. This article considers that the Manual is generally faithful to the core principles of the law of war, and attempts to identify areas that may be potential points of contention. In particular, some of the DoD Manual commentary regarding distinction and proportionality appear to be in conflict with international standards, as well as with U.S. practice. These principles are at the heart of the law of war analysis, and any future departures from the DoD Manual in ICC case law would be notable. Further clarification of the DoD Manual and developments in international criminal law, including at the ICC, may shed more light on whether these potential areas of conflict risk exposing U.S. actors who follow the Manual to international reaction or sanction.