ARTICLE

"VIOLENT, VICIOUS, AND FAST": LSCO LAWYERING AND THE TRANSFORMATION OF AMERICAN IHL

*Naz Khatoon Modirzadeh**

ABSTRACT

In this Article, I examine a phenomenon unfolding within the United States's military legal establishment: an effort by a segment of military lawyers to define how the law of armed conflict (LOAC) applies to the wars they anticipate fighting in the future.[1] *I refer to this effort as LSCO lawyering: the development, advancement, and institutionalization of a vision of LOAC tailored to large-scale combat operations (LSCOs), understood here as multi-domain warfare against a peer adversary such as China. Drawing on doctrinal materials, planning documents, and conversations with current and former armed-forces legal advisers from the United States and allied or partner forces, I trace how LSCO lawyering reflects a diagnosis of interpretive and institutional crisis—a perceived mismatch between prevailing legal expectations and the operational realities of high-intensity war—and a response that aims not to dismantle LOAC but to reassert it on terms viewed as credible and feasible under conditions of existential conflict.*

At the heart of this project lies a reconfiguration of what I call American international humanitarian law (IHL): the United States's distinctive assemblage of legal interpretations, operational practices, and normative commitments that shape its approach to the conduct of hostilities. While LSCO lawyering is often framed internally as a modest clarification of existing law, I suggest that it functions as a far-reaching attempt to reshape the interpretive ecosystem within which LOAC is applied by privileging internal coherence, institutional discretion, and operational speed over policy overlays, external scrutiny, and extensive civilian-protection norms. The LSCO lawyering project does not reject the law, but it does aim to narrow its aperture to ensure that legal interpretation does not require, in the view of its proponents, normatively undue or operationally unsustainable limits on commanders preparing to fight—violent, vicious, and fast—in a potentially existential war, which would entail extraordinarily high consequences for civilian death and destruction.

The emergence of LSCO lawyering sheds light on deeper conditions within the law of armed conflict's normative and interpretive architecture. It brings to the surface long-standing tensions—between operational feasibility and

[1] The *Harvard National Security Journal* (NSJ) generally avoids the first-person perspective. I have chosen to depart from that convention here in order to offer a more direct—and less abstract—narrative voice. My use of first-person is not biographical, but intended to humanize the subject and avoid the clinical distance that too often characterizes writing on war. Any departures from NSJ's usual conventions are my own.

civilian protection, between internal judgment and external review, between doctrinal minimalism and progressive development—that have shaped the field for decades. As a project grounded in anticipatory planning, LSCO lawyering highlights the degree to which LOAC interpretation is shaped not only by treaty text or customary practice but also by institutional culture, professional memory, and perceived strategic necessity. In that sense, it offers a revealing case through which to examine the evolving contours of LOAC as a legal, operational, and epistemic system—one whose boundaries are still being contested and whose authority remains under active construction.

CONTENTS

"[A] world war is approaching." — Kori Schake, American Enterprise Institute

INTRODUCTION

In late 2023 and into 2024, the world was flooded with images from one of the most devastating armed conflicts of the twenty-first century. At the U.S. State Department, spokesperson Matthew Miller delivered briefings that many viewed as hollow and evasive as to whether Israel had violated international humanitarian law (IHL) (also known as the law of armed conflict, or LOAC).[2] Secretary of State Antony Blinken avoided addressing allegations

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The phrase "violent, vicious, and fast" was used by Lieutenant General Charles N. Pede, the U.S. Army's Judge Advocate General, during his remarks at the 25th Annual National Security Law Conference. *See* Maj. Gen. Charlie Dunlap, *LTG Pede on the COIN/CT "hangover"; ROE, war-sustaining targets, and much more!*, LAWFIRE (Mar. 7, 2020), https://sites.duke.edu/lawfire/2020/03/07/ltg-pede-on-the-coin-ct-hangover-roe-war-sustaining-targets-and-much-more/?u [https://perma.cc/6L87-YG5R] ("I'm asking our academic and NGO communities to remember and understand the existential nature of nation-state warfighting. To look back at the LOAC as written in law, not in policy. To distinguish between policy and the law in warfighting, and to call out any deliberate effort to conflate the two. To remember the clarity of our former TJAG when he educated the world on what the law is, responding to the German complaint about shotguns. Near-peer, state-on-state fighting will be existential. It will be violent, vicious, and fast, and we must not tie our hands as we end the last war—hoping the next will be the same. This is the context in which we may find ourselves."). *See also* Kori Schake, *Has World War III Begun?*, AM. ENTER. INST. (Jan. 8, 2025), https://www.aei.org/articles/has-world-war-iii-begun/ [https://perma.cc/W63T-99LE].

[2] *See, e.g.*, *Transcript of Matthew Miller's State Department Press Briefing*, U.S. DEP'T OF STATE (Mar. 25, 2024), https://2021-2025.state.gov/briefings/department-press-briefing-march-25-2024/ [https://perma.cc/CAM8-37E4] ("So we have not made an assessment or

of war crimes by Israel, adhering instead to ambiguous language.[3]

Critics across the liberal and progressive elite, as well as legal advisers to many states around the world, armed with United Nations (UN) Special Rapporteur Francesca Albanese's warnings about the manipulation of IHL[4]

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draw[n] the conclusion that [Israel is] in violation of international humanitarian law when it comes to the provision of humanitarian assistance into Gaza. That said, we do believe there is very much more that they can do to let humanitarian assistance go in . . . ."); *Transcript of Matthew Miller's State Department Press Briefing*, U.S. DEP'T OF STATE (Oct. 16, 2024), https://2021-2025.state.gov/briefings/department-press-briefing-october-16-2024/ [https://perma.cc/3GDG-3RUQ] ("So we want to see [Israel] fully investigate and, if appropriate, hold people accountable. If there are people who have committed violations of the [Israel Defense Forces] code of conduct, they need to be held accountable under Israel's military justice system. If there are people that have violated international humanitarian law, they need to be held accountable. If we see violations of the laws of war, of international humanitarian law, we have procedures that we look at as well.").

[3] In an exit interview describing the Joseph R. Biden administration's strategies regarding Afghanistan, Ukraine, and Gaza over the last four years, former Secretary of State Antony Blinken was asked, "[D]o you believe that Israel's actions have been consistent with the rules of war?" In response, Blinken deflected, stating simply that before the October 7 attacks, the administration was "pursuing normalization between Saudi Arabia and Israel" and that, after the attacks, "we were determined to do everything we could to help ensure that Oct. 7 would never happen again." Asked again, "Has Israel respected the rules of war in Gaza?" Blinken answered, "We, as you know, have looked and continue to look at that in depth. And we put out our own reports on this with our own assessments. And when it comes to the actions that Israel has taken, in its just defense in trying to make sure that Oct. 7 never happens again, we've said from Day 1 that *how* Israel does that matters. And throughout, starting on Day 1, we tried to ensure that people had what they needed to to get by." Pressed further about whether Israel had met its responsibilities, Blinken replied, "we pressed them very hard to take actions that would ensure that more assistance got to people," and that "[t]here's a big difference between intent and result, whether it's under the law or under any one standard. The results that we were seeing were grossly insufficient. That is, the results in getting people the assistance they needed. Just as making sure that people are protected, I think has been insufficient. There's a very different question about what was the intent." Lulu Garcia-Navarro, *'The Interview': Antony Blinken Insists He and Biden Made the Right Calls*, N.Y. TIMES (Jan. 4, 2025), https://www.nytimes.com/2025/01/04/magazine/antony-blinken-interview.html [https://perma.cc/6YJ2-5LBR]. *See also* Transcript: Secretary of State Antony Blinken on "Face the Nation," with Margaret Brennan, CBS NEWS, May 12, 2024, https://www.cbsnews.com/news/antony-blinken-secretary-of-state-face-the-nation-transcript-05-12-2024/ [https://perma.cc/DB5X-VF9B] (When asked, "[I]s Israel living up to international humanitarian law standards?" Blinken replied that "[f]rom day one, President Biden has been determined to support Israel in defending itself and trying to make sure that October 7 never happens again.").

[4] *See* Francesca Albanese (Special Rapporteur), Hum. Rts. Council, *Anatomy of a Genocide – Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, U.N. Doc. A/HCR/55/73 (July 1, 2024) ("A key finding of this report is that Israel has strategically invoked the IHL framework as 'humanitarian camouflage' to legitimize its genocidal violence in Gaza."); *see also* Francesca Albanese (Special Rapporteur), Gen. Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 – Genocide as colonial erasure*, U.N. Doc. A/79/384 (Oct. 1, 2024) ("Israel has continued to use 'medical shielding' arguments to target healthcare facilities. According to the World Health Organization (WHO), in 300 days, 32 out of 36 hospitals were damaged, with 20 hospitals and 70 out of

and independent reports on conduct violations,[5] saw this reticence as emblematic of American hypocrisy. They pointed to U.S. condemnations of Russia's conduct in Ukraine[6] and of Sudanese atrocities,[7] suggesting that the

119 primary healthcare centres incapacitated. By 20 August, Israel had attacked healthcare facilities 492 times.").

[5] *See, e.g.*, AMNESTY INT'L, *Israel/Occupied Palestinian Territory: 'You Feel Like You Are Subhuman': Israel's Genocide Against Palestinians in Gaza*, AI Index MDE 15/8668/2024 (Dec. 5, 2024), https://www.amnesty.org/en/documents/mde15/8668/2024/en/ [https://perma.cc/CAM8-37E4] (concluding, based on approximately a year of independent investigation, that Israel is committing genocide against Palestinians in Gaza and demonstrating that Israel is committing serious violations of IHL based on visual and digital evidence, including satellite imagery, video footage, and photographs, in addition to eyewitness testimony, media reports, other NGOs' reports and data sets, and statements by senior Israeli government and military officials); U.N. Hum. Rts. Council, *Rep. of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, U.N. Doc. A/HRC/56/26, at 18 (June 12, 2024), https://www.documentcloud.org/documents/24742379-a-hrc-56-26-auv/ [https://perma.cc/63QK-DFHY] (concluding that "Israel has committed war crimes, crimes against humanity and violations of IHL and IHRL"); HUMAN RIGHTS WATCH, *Israeli Forces' Conduct in Gaza Human Rights Watch and Oxfam Submission to Biden Administration's NSM-20 Process* (Mar. 19, 2024), https://www.hrw.org/news/2024/03/19/israeli-forces-conduct-gaza [https://perma.cc/3PHK-KXBH] (documenting various IHL violations by Israel).

[6] *See, e.g.*, Press Release, Antony Blinken, U.S. Sec'y of State, War Crimes by Russia's Forces in Ukraine (Mar. 23, 2022), https://2021-2025.state.gov/war-crimes-by-russias-forces-in-ukraine/ [https://perma.cc/V678-6NG2] ("We've seen numerous credible reports of indiscriminate attacks and attacks deliberately targeting civilians, as well as other atrocities. Russia's forces have destroyed apartment buildings, schools, hospitals, critical infrastructure, civilian vehicles, shopping centers, and ambulances, leaving thousands of innocent civilians killed or wounded. Many of the sites Russia's forces have hit have been clearly identifiable as in-use by civilians. . . . Today, I can announce that, based on information currently available, the U.S. government assesses that members of Russia's forces have committed war crimes in Ukraine."); Press Release, Antony Blinken, U.S. Sec'y of State, Crimes Against Humanity in Ukraine (Feb. 18, 2023), https://it.usembassy.gov/crimes-against-humanity-in-ukraine/ [https://perma.cc/XY7A-WEPD] ("Based on a careful analysis of the law and available facts, I have determined that members of Russia's forces and other Russian officials have committed crimes against humanity in Ukraine. Members of Russia's forces have committed execution-style killings of Ukrainian men, women, and children; torture of civilians in detention through beatings, electrocution, and mock executions; rape; and, alongside other Russian officials, have deported hundreds of thousands of Ukrainian civilians to Russia, including children who have been forcibly separated from their families. These acts are not random or spontaneous; they are part of the Kremlin's widespread and systematic attack against Ukraine's civilian population.").

[7] *See, e.g.*, Press Release, Dorothy Shea, Chargé d'affaires ad interim, U.S. Mission to the United Nations, Remarks at a UN Security Council Briefing by the ICC Prosecutor for Sudan (Jan. 27, 2025), https://usun.usmission.gov/remarks-by-ambassador-dorothy-shea-charge-daffaires-ad-interim-at-a-un-security-council-briefing-by-the-icc-prosecutor-for-sudan/ [https://perma.cc/LZD3-CKD6] ("The Rapid Support Forces (RSF) and allied militias have systematically murdered men and boys — even infants — on an ethnic basis, and deliberately targeted women and girls from certain ethnic groups for rape and other forms of brutal sexual violence. Those same militias have targeted fleeing civilians, murdering innocent people escaping conflict, and prevented remaining civilians from accessing lifesaving supplies. The other belligerent, the Sudanese Armed Forces (SAF) has also

reluctance to critique Israel stemmed not from legal conclusions but from politics: a special relationship with its Middle Eastern ally, double standards, and a deliberate disregard of IHL breaches. The United States's unwillingness to act, they feared, placed IHL in peril. If the world's leading military power and self-proclaimed defender of the rules-based international legal order would not uphold the law, what hope was there for the credibility of international law in the face of devastating conflicts? Many international lawyers feared that IHL was on the brink of irrelevance.

This Article illuminates the story from a different perspective. The United States's reluctance to identify a single specific violation of IHL by Israel in the catastrophically destructive Gaza war,[8] I argue, was not solely about Israel, geopolitics, or hypocrisy. It was also rooted in a deeper transformation within the U.S. military and its legal apparatus.

About two miles from Miller's lectern, top military lawyers at the Pentagon also had their eyes on Gaza. They, too, feared that the war was pushing IHL to its breaking point.[9] But where their civilian colleagues saw U.S. disinclination to name Israel's conduct as the law's undoing, the Pentagon lawyers viewed the crisis in a much different light. To them, their

committed war crimes in Sudan. The SAF has committed lethal attacks on civilians, including widespread bombing of civilian infrastructure including schools, markets, hospitals, and they've committed torture and extrajudicial executions."); Press Release, Samantha Power, Administrator, U.S. Agency for Int'l Dev., Designation of War Crimes and Crimes against Humanity Committed in Sudan (Dec. 6, 2023), https://allafrica.com/stories/202312070245.html [https://perma.cc/3LT5-CY39] ("Nearly 20 years after Secretary Colin Powell announced a determination of genocide in Darfur, today, Secretary of State Antony Blinken announced his determination that members of the Rapid Support Forces (RSF) and Sudanese Armed Forces (SAF) have committed war crimes in Sudan, and that the RSF and allied militias have committed crimes against humanity, including murder, rape and other forms of sexual violence, deportation or forcible transfer, and persecution, and are responsible for ethnic cleansing in Darfur.").

[8] On May 10, 2024, in a report required under National Security Memorandum 20 (NSM-20), the Biden administration did not draw direct conclusions establishing a specific IHL violation by Israel. *See* John Ramming Chappell, *Key Takeaways from Biden Administration Report on Israeli Use of US Weapons*, JUST SEC. (May 11, 2024), https://www.justsecurity.org/95583/israel-weapons-hamas-us-report-takeaways/ [https://perma.cc/95FA-RL22] ("Given the nature of the conflict in Gaza, with Hamas seeking to hide behind civilian populations and infrastructure and expose them to Israeli military action, as well as the lack of USG [U.S. government] personnel on the ground in Gaza, it is difficult to assess or reach conclusive findings on individual incidents. Nevertheless, given Israel's significant reliance on U.S.-made defense articles, it is reasonable to assess that defense articles covered under NSM-20 have been used by Israeli security forces since October 7 in instances inconsistent with its IHL obligations or with established best practices for mitigating civilian harm.").

[9] Geoffrey S. Corn & Tyler Smotherman, *Improving Compliance with International Humanitarian Law in an Era of Maneuver War and Mission Command*, 78 SMU L. REV. 3, 5 (2025) ("Indeed, the profound impact of perceived indifference to humanitarian interests in the current conflict between Israel and Hamas exemplifies this essential link between strategic legitimacy and tactical IHL compliance.").

colleagues'—and the wider public's—outcry over the death and destruction wrought by Israeli tactics was itself part of the crisis. It was a crisis that those in the Pentagon had quietly been predicting and preparing for over the preceding years. The response to Gaza was a confirmation of their fears.

To the military lawyers and their allies in the academy (most of whom are themselves former military or government lawyers), the war in Gaza was undeniably tragic. But it was nothing on the scale of the war that they were preparing for. These lawyers, the practitioners who possess by far the greatest degree of influence over how the law actually operates in armed conflicts involving the United States, were preparing for a war that, they predicted, would be fought across land, air, sea, space, and cyberspace; result in hundreds of thousands of casualties across the globe; and leave entire cities in rubble. Unlike Gaza, such a war would be truly existential for the Western world.

In short, they were preparing for an all-out war with China.

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This is a story about what happened at the Pentagon and elsewhere in the U.S. armed forces. It tells how a key part of the U.S. military's legal apparatus is engaged in an extensive and intensifying effort to define how LOAC applies to the wars it anticipates fighting in the future. Undertaken in good faith by legal practitioners tasked with ensuring compliance with the law, this effort is, as far as I can tell, neither a cynical attempt to subvert LOAC nor a project to justify indiscriminate violence. Rather, these lawyers—operating within a national security strategy that prioritizes preparation for large-scale combat operations, or LSCOs (pronounced LISS-kos)—are articulating what they take to be the soundest legal approach to address what is framed internally as a crisis: the perceived mismatch between existing legal expectations and the realities of high-intensity warfighting against a peer adversary. Their work carries profound consequences.

In this Article, I examine what I call "LSCO lawyering." I do so not to claim that the positions advanced are necessarily wholly new or constitute a marked departure from historical U.S. practice. Instead, I aim to illuminate a phenomenon that is unfolding within a segment of the U.S. military: an internal legal and strategic move animated by a diagnosis of crisis and accompanied by a vision of restoration (or, perhaps, renewal). My purpose is to describe the legal arguments being constructed and to trace their development and potential trajectory, with particular attention to how these arguments seek to shape the future of war.

My core contention is that a group of U.S. military lawyers—in response to what they perceive as a dangerous misalignment between current legal expectations and the demands of high-intensity war against a peer

adversary—is engaged in a far-reaching effort to (re)interpret LOAC in ways that tilt the balance away from humanitarian restraint and toward military necessity. This phenomenon of "LSCO lawyering" does not represent a rejection of law but rather a strategic project to reshape American IHL and public expectations around the legal limits of wartime violence, one with the potential to significantly alter the normative and institutional architecture that has governed U.S. targeting practices since at least the so-called Global War on Terror (GWOT). My analysis encompasses not only legal norms in the form of IHL treaties and customary rules but also legally adjacent social and political expectations and associated military strategies, operational constraints, and tactics that have shaped U.S. behavior concerning civilian protection in recent armed conflicts.[10]

To clarify the terms I use:

- By LSCOs, I mean multi-domain operations against a peer adversary—a formulation interchangeable with other terms used to describe U.S. or Western conflict with a "near-peer" adversary or large-scale military operations.[11]
- By LSCO lawyering, I mean the practice by a group of U.S. military legal advisers of developing, advancing, and institutionalizing a vision of LOAC tailored to LSCOs. It describes both a body of legal interpretation and a broader internal project that seeks to align LOAC with what military lawyers and planners perceive as the strategic, operational, and moral imperatives of existential conflict. The term aims to capture both a mode of legal reasoning and a vision of legal restoration that is embedded within, and seeks to influence, military doctrine, public expectation, and the future of American IHL.
- By American IHL, I mean the United States's distinctive assemblage of interpretations, practices, normative commitments, and exceptions that shape its approach to LOAC.

My analysis suggests that LSCO lawyering is in a mutually reinforcing relationship with those shaping military doctrine and devising operational planning. Military lawyers are setting out the legal baseline in ways that both

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[10] *See* Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, L. & WAR 48, 50 (2014) ("Notably, the description is not confined to hard legal norms in the form of treaty or customary law, but includes social and political norms that direct states' behavior during times of armed conflict. This is because I believe that law, politics, social norms, and morality all interact and shape one another to guide wartime conduct, especially as regards some actors—specifically, liberal democracies.").

[11] *See* Abby Zeith & Lakmini Senevirante, *Reducing the Human Cost of Large-Scale Military Operations*, SSRN (Feb. 10, 2025), https://ssrn.com/abstract=5172527 [https://perma.cc/UQM4-KQAX]; *see also* Lakmini Senevirante, Abby Zeith, & Kosuke Onishi, *Reducing the Human Cost of Large-Scale Military Operations*, LIEBER INST. (Jul. 3, 2023) https://lieber.westpoint.edu/reducing-human-cost-large-scale-military-operations/ [https://perma.cc/CT9T-DTNF].

reflect and help structure strategic concerns and perceived operational realities, thereby contributing to a feedback loop between legal interpretation and operational design. The lawyers engaged in this work see themselves as striving to apply LOAC rigorously and in good faith. They do not view themselves as dismissing the law. On the contrary, they frame their efforts as reinforcing the legitimacy of the law by aligning its application with what they perceive as the imperatives of LSCOs. They understand their project, in this sense, as an effort not to dismantle LOAC but to restore it—so that it remains, in their view, credible, coherent, and relevant under conditions of existential conflict.

The implications of this effort are far-reaching. The interpretation of LOAC advanced by LSCO lawyers would, if adopted, permit significantly more death and destruction than the more restrictive interpretations endorsed by many other states, the International Committee of the Red Cross (ICRC), a range of legal scholars, and civilian-protection advocates in non-governmental organizations (NGOs). The legal vision advanced here is premised on the possibility of high-intensity war against an adversary capable of inflicting catastrophic losses. In such a context, LSCO strategists and their legal counterparts argue, many of the legally adjacent constraints developed during the counterterrorism and counterinsurgency eras would be operationally unsustainable. The law, they contend, must be interpreted in a way that preserves military effectiveness under the extreme conditions of LSCOs.

By design, this Article is diagnostic. I seek to illuminate where LSCO lawyering raises difficult questions about what LOAC requires, but I do not endeavor to answer these questions or take a position on competing doctrinal positions. Instead, I trace the interpretive logics, institutional postures, and normative ambitions at the heart of LSCO lawyering in order to illuminate their significance. That choice is deliberate. It reflects my conviction that the core stakes here lie not—or, at least, not only—in determining which legal reading is "correct" but in identifying how the law is being reimagined, by whom, and toward what ends. Rather than treating the field as a settled doctrinal battleground, I propose that we cast attention first on the terrain itself: what the debate is, where it is taking place, and who is participating in it.

I focus on the legal interpretive ecosystem of the conduct of hostilities rather than other domains of LOAC. Nothing in the LSCO literature that I have read suggests a move to weaken prohibitions on torture, sexual violence, or other core IHL treatment protections. Indeed, a central tenet of the LSCO mindset is that the goal is not lawless violence but a form of legality that preserves operational effectiveness in existential war. LSCO lawyers view wanton cruelty as corrosive to discipline and military success. It is therefore coherent—and, for many of them, essential—to argue for a reinterpretation of LOAC in preparing for LSCO while maintaining commitments to core prohibitions on the treatment of civilians and adversary prisoners of war.

To understand LSCO lawyering, it is crucial to focus on the area of LOAC that governs the conduct of hostilities. The core rules—especially distinction, proportionality, and precautions in attack—are formally clear and legally binding. Yet, these rules also require deeply context-dependent judgments. Within this space of interpretation, LSCO lawyering aims to solidify a vision of flexibility for military commanders. The result is an effort to ensure that legal interpretation does not impose what are seen as undue or unrealistic limitations on the conduct of war. This raises a central question: is this approach lowering the legal floor of civilian protection or merely restating the law's demands under different strategic conditions?

The broader backdrop to LSCO lawyering is that while IHL is designed to be universal in scope, the United States has long cultivated a legal posture that is, in some respects, consonant with the positions of other states and, in other respects, a clear departure—especially regarding the conduct of hostilities. This posture reflects a dual identity of the United States. On one hand, it holds a self-conception as a global exemplar of ethical warfare and, on the other, it embodies a persistent unwillingness to accept certain legal constraints that many other states have treated as foundational, particularly through Additional Protocol I (AP I). American IHL, as used here, does not denote a codified alternative legal regime but, rather, an influential configuration of legal thought and practice that is both embedded in and resistant to the universalist ambitions of IHL. This concept of American IHL is not fixed. It reflects both continuity and enduring contention over what the law is, what it ought to be, and who makes those determinations.

Public perception is also crucial with respect to LSCO lawyering. In my experience, one of the most effective constraints on military conduct has not been legal doctrine alone but doctrine paired with public expectation and accountability. LSCO lawyering appears increasingly concerned with shaping these perceptions, both within the military and among civilian audiences. This raises a complex question: is the principal aim of LSCO lawyering to ensure clarity about what the law requires or to influence public expectations in a way that reduces scrutiny and broadens the legal space for military action? In short, who owns the law—and whose expectations should shape its application in war?

In charting LSCO lawyering, I do not offer a prognosis of geopolitical developments. Nor do I predict the course of a potential U.S.–China war. Rather, I analyze a professional project unfolding in real time.

In Part I, I trace how U.S. military strategists and planners have reoriented the institutional and cultural apparatus of warfighting from counterterrorism operations toward the anticipation of large-scale military operations against a peer adversary, with a particular focus on China. I examine the strategic pivot to maneuver warfare and multi-domain operations, the envisioned operational environment of LSCOs, and how a narrative of China

as an outlaw state has helped structure this shift. In Part II, I show how certain U.S. military lawyers responded to this strategic turn by identifying a perceived legal crisis: a gap between LOAC as they interpret it and the legal expectations shaped by two decades of counterterrorism-era practices. In Part III, I map the solution that LSCO lawyers have proposed: an effort to reframe the interpretation and application of LOAC's core targeting rules by stripping them to their minimal doctrinal core and resisting legal constraints they view as policy-based or humanitarian overlays. In Part IV, which is partly speculative, I outline the emerging playbook for transforming legal, institutional, and public understandings of targeting law, including a strategic communications campaign aimed at shifting both expert and civilian expectations regarding what the law permits in high-intensity war. In Part V, I engage with key counterarguments to my description and my arguments, including claims that LSCO lawyering is doctrinally unremarkable, politically implausible, or strategically peripheral. In the Conclusion, in light of several early indicators emerging from the current Trump administration's Department of Defense (DoD), I raise the possibility that LSCO lawyers now operate under a leadership far more aligned with their critique of IHL than they may have anticipated, though perhaps in ways more extreme than they intended. Throughout this Article, I treat LSCO lawyering as a real and unfolding legal phenomenon that seeks to help remake the conduct of hostilities and the associated interpretive ecosystem of American IHL.

My analysis draws on a review of published scholarship, doctrinal materials, and other military-related publications, as well as in-depth conversations with current and former U.S. military legal advisers. I also spoke with many of their counterparts in allied and partner forces whose perspectives helped clarify both the distinctiveness and the potential implications of the positions advanced by LSCO lawyers. These exchanges inform the account that follows.

I. THE PLANNING

"[W]hile the consequences for failure in counter-insurgency fights are serious and should not be trivialized, they pale in comparison to the consequences of failure against a peer adversary. The risk of defeat in counterinsurgency, while serious, are generally local and recoverable. A loss at the hands of a peer-adversary will be catastrophic and could very well change the global balance of power."[12]

"We agree that China poses the preeminent challenge to U.S. interests and the most formidable military threat. We agree with the 2022 [National

[12] David Deptula, Airpower, Law and the Warfighter's Perspective, Keynote Address, Duke Law School Center on Law Ethics and National Security's 28th Annual National Security Law Conference (Feb. 24, 2023) *in* LAWFIRE, March 2023, https://sites.duke.edu/lawfire/2023/03/06/lt-gen-david-deptula-usaf-ret-on-airpower-law-and-the-warfighters-perspective/ [https://perma.cc/8XZA-279K].

Defense Strategy] in making China the top priority for U.S. planning and investment."[13]

"My gut tells me we will fight [China] in 2025."[14]

"For as long as most readers will remember, the United States has maintained a considerable military advantage over any potential rivals on the planet. This is no longer the case."[15]

"In conflict with China, we can't afford to miss opportunities. A potential war with China will also be conducted at a level of technological innovation and lethality never before seen."[16]

In this part, I describe how the U.S. military has shifted its focus from counterterrorism to preparing for great-power competition, particularly against China, in part by reframing its strategy around LSCOs and maneuver warfare. This transformation emphasizes rapid, decentralized decision-making, psychological disruption, and maximal violence, reflecting the unique challenges of facing a peer adversary in contested battlefields. At the same time, a narrative portraying China as an autocratic violator of international law reinforces the urgency of this recalibration and the perceived existential threat to U.S. dominance.

A. From Counterterrorism to Great Power Competition

It is difficult to move the focus, ethos, and culture of one of the world's largest and most expensive bureaucracies. It is difficult to lawmakers, taxpayers, and voters—after telling them for twenty years that Islamist jihadism is the greatest threat to their safety and security[17]—that there is in fact

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[13] COMM'N ON THE NAT'L DEF. STRATEGY, REPORT OF THE COMMISSION ON THE NATIONAL DEFENSE STRATEGY 5 (2024), https://www.armed-services.senate.gov/imo/media/doc/nds_commission_final_report.pdf [https://perma.cc/WHF2-UGJP].

[14] *Read for Yourself: The Full Memo from AMC Gen. Mike Minihan*, AIR & SPACE FORCES MAG. (Jan. 30, 2023), https://www.airandspaceforces.com/read-full-memo-from-amc-gen-mike-minihan/[https://perma.cc/VX9R-AJNE].

[15] ROBERT SPALDING, STEALTH WAR: HOW CHINA TOOK OVER WHILE AMERICA'S ELITE SLEPT 80 (2019) [hereinafter SPALDING, STEALTH WAR].

[16] Deptula, Airpower, Law and the Warfighter's Perspective, *supra* note 12.

[17] *See, e.g.*, NAT'L SEC. COUNCIL, *Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends, in* NATIONAL SECURITY STRATEGY (2002), https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss3.html [https://perma.cc/4N2B-GDG9] ("The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism—premeditated, politically motivated violence perpetrated against innocents . . . . We make no distinction between terrorists and those who knowingly harbor or provide aid to them. The struggle against global terrorism is different from any

a far greater threat that they ought to be taking more seriously. Yet this is exactly what the United States government and its defense leadership have been doing since around 2020.[18]

The "pivot to Asia" has recast America's most significant adversaries away from bearded men hiding in caves with Kalashnikovs to the two great powers of China and Russia (though they are often mentioned together, the former is framed as far more concerning in national-security terms). It has initiated a massive shift in weapons research and development, billions of

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other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time."); THE WHITE HOUSE, *U.S. President, President Discusses Global War on Terror* (Sep. 5, 2006) https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060905-4.html [https://perma.cc/Y8S9-UB7P] ("The greatest threat this world faces is the danger of extremists and terrorists armed with weapons of mass destruction—and this is a threat America cannot defeat on her own."); George W. Bush, U.S. President, Speech at United States Military Academy at West Point Commencement (June 1, 2002) *in* SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, 2008, at 129, https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf [https://perma.cc/967E-A434] ("All nations that decide for aggression and terror will pay a price. We will not leave the safety of America and the peace of the planet at the mercy of a few mad terrorists and tyrants. We will lift this dark threat from our country and from the world."); Jim Garamone, *Rumsfeld: Two Options in Terror War*, AM. FORCES PRESS SERV. (Aug. 26, 2003), https://www.af.mil/News/Article-Display/Article/138641/rumsfeld-two-options-in-terror-war/ [https://perma.cc/BN4A-2CKQ] (highlighting Defense Secretary Donald Rumsfeld's remarks to servicemembers at Lackland Air Force Base: "Rumsfeld said the war on terrorism is unlike any the United States has fought in the past. Sep. 11, 2001, ushered in a new age of asymmetric warfare. 'The threats we have faced have not been so much large armies, large navies and large air forces locked in great battle, but suicide bombers, cyberterrorists and low-intensity warfare and the spreading contagion of weapons of mass destruction.'"); Condoleezza Rice, Nat'l Sec. Advisor, Opening Remarks: The Nat'l Comm'n on Terrorist Attacks Upon the United States (Apr. 8, 2004), https://govinfo.library.unt.edu/911/hearings/hearing9/rice_statement.pdf [https://perma.cc/97ZB-F8MS] ("So the attacks came. A band of vicious terrorists tried to decapitate our government, destroy our financial system, and break the spirit of America."); George W. Bush, U.S. President, State of the Union Address to the 108th Congress (Jan. 28, 2003), *in* SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, 2008, at 156–58, https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf [https://perma.cc/984M-68T9] ("And this nation is leading the world in confronting and defeating the man-made evil of international terrorism . . . . Today, the gravest danger in the war on terror, the gravest danger facing America and the world, is outlaw regimes that seek and possess nuclear, chemical, and biological weapons.").

[18] In this section, I ignore entirely whether these predictions are politically, factually, or empirically sound. That is, I do not examine or judge whether the United States is "correct" in some objective sense in identifying China as the pacing challenge, whether it is true that China is increasingly seeking out conflict with the United States, or whether it is accurate that direct armed conflict between the United States and China at some point in the next two or three decades is highly likely. For my purposes, the key question is whether the military *behaves* as though this is the case, and whether the military lawyers that I discuss are shifting their sights to this future conflict. I assume all decent people fervently wish that this conflict never actually takes place, but that wish has little power in the kinds of legal machinations I discuss here.

dollars of procurement and contracting, and an emphasis on troop recruitment and readiness.[19] It has been translated into new curricula for officers and

[19] *See generally* U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY'S COMPETITIVE EDGE 1 (2018), https://media.defense.gov/2020/May/18/2002302061/-1/-1/1/2018-NATIONAL-DEFENSE-STRATEGY-SUMMARY.PDF [https://perma.cc/LCA5-QY85] (explaining that "[i]nter-state strategic competition [with China and Russia], not terrorism, is now the primary concern in U.S. national security"); Nat'l Def. Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017) (§§ 1251–1254 set forth the Indo-Asia-Pacific Stability Initiative, authorizing the secretary of defense to invest in critical advanced offensive and defensive capabilities, enhance regional force readiness through joint training operations, expand U.S. presence in the region, and strengthen key alliances and partnerships); U.S. DEP'T OF DEF., OFFICE OF THE UNDER SECRETARY OF DEFENSE (COMPTROLLER)/CHIEF FINANCIAL OFFICER FY 2019 DEFENSE BUDGET OVERVIEW 1 (U.S. Dep't Def. 2018), https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2019/FY2019_Budget_Request_Overview_Book.pdf [https://perma.cc/2WCG-UZ5T] (authorizing increase in active-duty personnel). While the 2018 National Defense Authorization Act (NDAA) began to reorient defense appropriations toward Indo-Pacific Operations (INDOPACOM), subsequent NDAAs reflect the most substantive pivot in U.S. defense appropriations from Middle Eastern stability operations toward countering Chinese aggression and expansion. *See, e.g.*, Nat'l Def. Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018) (increasing research and development spending by $1.2 billion, authorizing $235 million to support force posture expansion for INDOPACOM, authorizing increase in active-duty end strength, authorizing over $30 billion to "modernize" the joint force with new aircraft and ships, and increasing multi-year contracting initiatives); Nat'l Def. Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3951-52 (2020) (allocating $2.3 billion to the Pacific Deterrence Initiative designed to "enhance the United States deterrence and defense posture in the Indo-Pacific region, assure allies and partners, and increase capability and readiness in the Indo-Pacific region."). Moreover, the 2022 National Defense Strategy identifying China as the United States's "pacing challenge" further increased the resources directed toward INDOPACOM (and simultaneously decreased Middle Eastern operational spending). U.S. DEP'T OF DEF., 2022 NAT'L DEF. STRATEGY 3 (2022); Nat'l Def. Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, 137 Stat. 489-90 (2023) (allocating $14.7 billion to the Pacific Deterrence Initiative, a $12.4 billion increase from FY 2021, establishing Indo-Pacific Campaigning Initiative to facilitate increased frequency of joint training operations and partner engagement, and decreasing U.S. Central Command (CENTCOM) Middle East operational budget by $4.9 billion). The most recent FY 2025 NDAA funding allocations solidifies the shift in reorienting appropriations to INDOPACOM. U.S. DEP'T OF DEF., OFFICE OF THE UNDER SECRETARY OF DEFENSE (COMPTROLLER)/CHIEF FINANCIAL OFFICER FY 2025 DEFENSE BUDGET OVERVIEW 3-2–3-3, 3-6 (Apr. 4, 2024), https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2025/FY2025_Budget_Request_Overview_Book.pdf [https://perma.cc/66Z5-RGVP] (demonstrating contrast between INDOPACOM's $800 million increase from FY 2024 request of $9.1 billion to $9.9 billion and CENTCOM's $3.8 billion decrease from FY 2024 request of $20.9 billion to $17.1 billion).

Moreover, several major defense contractor chief executive officers (CEOs) have taken note of the shift in U.S. defense appropriations to the Indo-Pacific region and have shifted their companies' strategic focus accordingly. *See generally* CTR. FOR STRATEGIC & INT'L STUD., *Twenty-First Century Warfare: A Conversation with Jim Taiclet* (Oct. 13, 2021), https://www.csis.org/analysis/twenty-first-century-warfare-conversation-jim-taiclet [https://perma.cc/Z3KS-FR94] (Lockheed CEO Jim Taiclet opining: "I share the perspective

military academies, contributing to a shift away from a focus on terrorist tactics and Islamist ideology toward teaching young recruits about the dangers from the Pacific[20] (words like "Red" and "Dragon" have started showing up more and more in military writing, military trade non-fiction publications, and even novels targeted to military readers and sold in commissaries around the world).[21] The People's Republic of China is often referred to by military

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of our senior military uniformed and civilian leadership, which is we're back into an area—renewed era of great power competition, predominantly with China and Russia . . . . So as a result, maintaining an effective deterrent—which I feel Lockheed Martin is in the deterrent business. You know, we are here to provide what our defense establishment needs to deter and prevent war, and if that's not possible to prevail on it."); Letter from Alex Karp, CEO, Palantir, to Shareholders (Nov. 4, 2024), https://www.palantir.com/q3-2024-letter/en/ [https://perma.cc/LMK4-MHAC] ("The growth of our business is accelerating, and our financial performance is exceeding expectations as we meet an unwavering demand for the most advanced artificial intelligence technologies from our U.S. government and commercial customers."); *Industry Perspectives on Def. Innovation and Deterrence: Hearing Before the Subcomm. on Cyber, Info. Techs. & Innovation of the H. Comm. on Armed Servs.*, 118th Cong. 1 (2023) (statement of Brian Schimpf, Co-Founder and CEO, Anduril Industries), https://armedservices.house.gov/sites/evo-subsites/republicans-armedservices.house.gov/files/statement%20of%20brian%20schimpf%20-%20full%20statement%20-%20citi%20sep%202023%20(final).pdf [https://perma.cc/FA7E-ZHUN] ("The U.S. defense enterprise is in a strategic predicament . . . . Anduril's mission recalls the World War II-era drive for the United States to become the 'arsenal of democracy.'"); COUNCIL ON FOREIGN RELS., *CEO Speaker Series with Kathy Warden of Northrop Grumann* (June 23, 2021), https://www.cfr.org/event/ceo-speaker-series-kathy-warden-northrop-grumman [https://perma.cc/7VLR-4LZ9] ("Well, certainly China has been investing in their military complex, and as a result, has seen a significant growth in their capacity and seeing indications of a desire to expand territorially. And as a result of this, nations, including the U.S., need to contemplate what it means to deter China from further expansion or potential military aspirations."); Christopher E. Kubasik, *U.S. Def. Indus. Strength is Our First Line of Def.*, BREAKING DEF. (Mar. 25, 2024), https://breakingdefense.com/2024/03/us-defense-industrial-strength-is-our-first-line-of-defense/?_ga=2.227331998.2048828730.1711368258-2105695367.1711368258 [https://perma.cc/6DAT-4PN5] ("Wars in Ukraine and the Middle East, alongside rising tensions in the Indo-Pacific, have forced a spotlight on the hard truth that the U.S. Defense Industrial Base (DIB) is at a crossroads on how to execute on DoD's modernization priorities and maintain the arsenal of democracy."); *Indus. Perspectives on Def. Innovation and Deterrence: Hearing Before the Subcomm. on Cyber, Infor. Techs. & Innovation of the H. Comm. on Armed Servs.*, 118th Cong. (2023) (statement of Jim Taiclet, Chairman, President, and CEO, Lockheed Martin Corporation), https://armedservices.house.gov/sites/evo-subsites/republicans-armedservices.house.gov/files/jdt%20hasc%20citi%20testimony%209.20.2023%20final%2009.18.23%20at%201115.pdf [https://perma.cc/X64K-UEZ5] ("Increasing collaboration with trusted allies and partners through a multilateral, multinational approach will elevate the resilience of the West's critical defense supply chains, ensuring an effective deterrent against near-peer competitors and rogue states alike.").

[20] *See* Lisa Franchetti, 33rd Chief of Naval Operations, U.S. Dep't of Navy, CNO Remarks at America's Future Fleet: Reinvigorating the Maritime Indus. Base (Dec. 5, 2025) (describing preparing for conflict with China by 2027 as the U.S. Navy's "North Star").

[21] For a small sampling of the literature discussing the rise of China from U.S. military academy and professional reading lists across the armed forces *see, e.g.,* QIAO LIANG AND WANG XIANGSUI, UNRESTRICTED WARFARE (1999); TOSHI YOSHIHARA & JAMES R.

leadership as "the pacing challenge," which points to China's express intention to match and exceed U.S. military and technological capability by 2040.[22]

B. Maneuver Warfare and the Recalibration of Military Doctrine

While the DoD would be the first to point out that elected officials, not U.S. military leaders, decide whether to go to war, it is nevertheless tasked with ensuring readiness for any conflict deemed necessary by civilian leadership. Accordingly, the DoD began to prepare for what such a war with China would look like and how it would be won. In the war-planning and war-strategy

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HOLMES, RED STAR OVER THE PACIFIC: CHINA'S RISE AND THE CHALLENGE TO U.S. MARITIME STRATEGY (2010); SPALDING, STEALTH WAR, *supra* note 15; ROBERT SPALDING, WAR WITHOUT RULES: CHINA'S PLAYBOOK FOR GLOBAL DOMINATION (2022) [hereinafter SPALDING, WAR WITHOUT RULES]; ROGER T. AMES, SUN TZU: THE ART OF WARFARE (1993); RUSH DOSHI, THE LONG GAME: CHINA'S GRAND STRATEGY TO DISPLACE AMERICAN ORDER (2023); TAYLOR M. FRAVEL, ACTIVE DEFENSE: CHINA'S MILITARY STRATEGY SINCE 1949 (2019); PHILLIP C. SAUNDERS & ANDREW SCOBELL, PLA INFLUENCE ON CHINA'S NATIONAL SECURITY POLICYMAKING (2015); ROBERT HADDICK, FIRE ON THE WATER: CHINA, AMERICA, AND THE FUTURE OF THE PACIFIC (2014); HENRY KISSINGER, ON CHINA (2011); ROBYN MEREDITH & LAUREL MERLINGTON, THE ELEPHANT AND THE DRAGON: THE RISE OF INDIA AND CHINA, AND WHAT IT MEANS FOR ALL OF US (2007); ELIZABETH C. ECONOMY, THE WORLD ACCORDING TO CHINA (2022); M. TAYLOR FRAVEL, ACTIVE DEFENSE: CHINA'S MILITARY STRATEGY SINCE 1949 (2019); JUDE BLANCHETTE, CHINA'S NEW RED GUARDS: THE RETURN OF RADICALISM AND THE REBIRTH OF MAO ZEDONG (2019); QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG (1966); ODD ARNE WESTAD, RESTLESS EMPIRE: CHINA AND THE WORLD SINCE 1750 (2012).

[22] U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 4 (2022) ("The [People's Republic of China (PRC)] has expanded and modernized nearly every aspect of the [People's Liberation Army], with a focus on offsetting U.S. military advantages. The PRC is therefore the pacing challenge for the Department."); U.S. DEP'T OF DEF., NATIONAL MILITARY STRATEGY 1 (2022) ("The PRC is our most consequential strategic competitor, modernizing its military and preparing to fight and win a war with the United States."); David H. Berger, *The Case for Change: Meeting the Principal Challenges Facing the Corps*, MARINE CORPS GAZETTE 1, 8 (2020), https://www.mca-marines.org/wp-content/uploads/The-Case-for-Change-2.pdf [https://perma.cc/WAY9-PXMA] ("The passing of our Nation's 'unipolar moment' and the emergence of revisionist great power competitors in China and Russia, coinciding with a sea change in the character of warfare driven by social and technological change, demands that we move rapidly to adapt to the circumstances of a new era."); STRATEGIC STUD. INST. U.S. ARMY WAR COLL., ANNUAL ESTIMATE OF THE STRATEGIC SECURITY ENVIRONMENT 6 (2022) ("The rapid advance of PRC global influence presents the greatest threat to U.S. security objectives."); *see also* Low De Wei, *Full Text of Xi Jinping's Speech at China's Party Congress,* BLOOMBERG (Oct. 18, 2022), https://www.bloomberg.com/news/articles/2022-10-18/full-text-of-xi-jinping-s-speech-at-china-20th-party-congress-2022?leadSource=uverify%20wall [https://perma.cc/MZJ8-QF6C] (During his speech to the 20th National Congress of the CCP, President Xi Jinping remarked that "complete reunification of our country must be realized, and it can, without a doubt, be realized. . . . [The PRC] reserves the option to take all measures necessary."); James Griffiths, *China Ready to Fight 'Bloody Battle' Against Enemies, Xi Says in Speech*, CNN (Mar. 20, 2018), https://www.cnn.com/2018/03/19/asia/china-xi-jinping-speech-npc-intl [https://perma.cc/69TR-ABAU] (Speaking to the 13th National Congress of the CCP, Xi stated that "we are resolved to fight the bloody battle against our enemies . . . with a strong determination to take our place in the world.").

senses, the clearest aspect of the shift away from counterterrorism operations[23] and the GWOT was a move away from contingency operations, attrition-oriented tactics, and counterinsurgency thinking toward combined-arms maneuver warfare.[24]

In contrast to attrition-based strategies that rely on physical destruction, maneuver warfare emphasizes disorienting and destabilizing the enemy through rapid, unanticipated actions and bold, opportunistic tactics, prioritizing psychological disruption to secure decisive battlefield advantages.[25] Maneuver

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[23] *See, e.g.*, Robert Kussart, *Sharpening the Asymmetric Advantage*, NCO J. 1, 5 (Dec. 6, 2024), https://www.armyupress.army.mil/Journals/NCO-Journal/Archives/2024/December/Asymmetric-Advantage/ [https://perma.cc/UC2F-P7NU] ("During the war on terrorism, Soldiers almost always had unlimited overmatch. Micro-tactical units (e.g., squads) regularly used strategic and operational assets to solve simple problems, such as armed irregulars with rifles and improvised explosive devices (IEDs). The days of providing air support to a conventional squad with fixed-wing aircraft dropping 2,000-pound GPS-guided bombs on a team of insurgents with AK-47s are long gone. . . . As a Soldier who learned from Ukraine's challenges firsthand, I realized that the ambiguity and chaos during the war on terrorism were child's play compared to Large-Scale Combat (LSCO) and Multi-Domain Operations (MDO)."); Pat Mulholland & John Wirges, *Shortening the "Competition Kill Chain" Through Irregular Warfare Campaigning*, 37 SPECIAL WARFARE 43 (2024), https://www.swcs.mil/Portals/111/SWM_SPRING%2024_vol%2037%20issue%201%20FINAL.pdf [https://perma.cc/2YDG-66KF] ("In [the] GWOT environment, U.S. military capabilities maintained conventional dominance in all domains against a series of insurgent enemies . . . . Today's environment is different. The U.S. military must get comfortable in the culturally ambiguous position of supporting other agencies and departments."); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, para. C-1. (Oct. 1, 2022) [hereinafter FM 3-0] ("For decades, U.S. military forces conducted uncontested and generally predictable deployments from home stations to operational theaters because threat actors lacked the capability to significantly affect deploying units at home station or while in transit to a theater of operations. This is no longer the case. Peer threats possess the capability and capacity to observe, disrupt, delay, and attack U.S. forces at any stage of force projection, including while still positioned at home stations in the United States and overseas.").

[24] In military writings, the terms LSCO, HIC (high intensity conflict), and MDO (multi-domain operations) are often used interchangeably when discussing or alluding to future war with China. Two scholars say, "Looking towards the future, the United States and its allies are once again focused on deterring and defeating near-peer threats in a full-spectrum conflict. In a great power struggle with China or Russia—or, in the worst-case scenario, China and Russia—Western armed forces will be faced with a conflict environment unlike any they have seen since WWII. Assuming nuclear deterrence holds and neither side is able to obtain total air superiority (both likely scenarios), combined arms maneuver and close-quarters battle between relatively large formations will define the conflict." Corn & Smotherman, *supra* note 9, at 10.

[25] *See, e.g.*, MARINE CORPS DOCTRINAL PUBLICATION 1, WARFIGHTING 72 (1997), https://www.marines.mil/portals/1/publications/mcdp%201%20warfighting.pdf [https://perma.cc/592R-48GY] ("The essence of maneuver is taking action to generate and exploit some kind of advantage over the enemy as a means of accomplishing our objectives as effectively as possible. That advantage may be psychological, technological, or temporal as well as spatial. Especially important is maneuver in time—we generate a faster operating tempo than the enemy to gain a temporal advantage."); ARMY DOCTRINE PUBLICATION 3-0, UNIFIED LAND OPERATIONS 6 (2011) ("Combined arms maneuver is the application of the

warfare[26] is often described in almost artistic terms, typically seen as requiring more creativity and fluidity by armed forces. It focuses on achieving victory through marshaling and embracing the most challenging aspects of warfare: fear, confusion, poor communication, and the reliance on effective command structures to impose orders and instructions across time and distance. Rather than crushing the adversary through sheer might or overpowering them in a direct battle of firepower and strength, maneuverists emphasize:

- Initiative (empowering commanders to be bold and creative and to take maximal risks within the broad goals of the operation);

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elements of combat power in unified action to defeat enemy ground forces; to seize, occupy, and defend land areas; and to achieve physical, temporal, and psychological advantages over the enemy to seize and exploit the initiative. It exposes enemies to friendly combat power from unexpected directions and prevents an effective enemy response."); William S. Lind, *Defining Maneuver Warfare for the Marine Corps*, MARINE CORPS ASS'N (Mar. 1, 1980) https://www.mca-marines.org/gazette/defining-maneuver-warfare-for-the-marine-corps/ [https://perma.cc/XQ9K-KLGJ] ("The objective is the enemy's mind not his body. The principal tool is moving forces into unexpected places at surprisingly high speeds. Firepower is a servant of maneuver, used to create openings in enemy defenses and, when necessary, to annihilate the remnants of his forces after their cohesion has been shattered.").

[26] DEEP MANEUVER: HISTORICAL CASE STUDIES OF MANEUVER IN LARGE-SCALE COMBAT OPERATIONS xi (2018) ("Deep maneuver for large-scale combat operations at the division and corps level has not been practiced for many years in the US Army. The focus on stability operations and protracted counterinsurgency campaigns caused a shift away from large-scale combat operations and conducting deep maneuver. The current operational environment demands that we once again sharpen our focus on the threats that exist today and study deep maneuver as a core competency."); Gen. Mark Milley, *Strategic Inflection Point*, 110 JOINT FORCE Q. 6, 12 (2023), https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-110/jfq-110_6-15_Milley.pdf [https://perma.cc/8T7H-9J22] ("The expanding operating environment means the Joint Force must also practice expanded maneuver. The [Joint Warfighting Concept] challenges the warfighter to think creatively about moving through space and time, including—but not limited to—maneuver through land, sea, air, space, cyber, the electromagnetic spectrum, information space, and the cognitive realm."); JOINT CHIEFS OF STAFF, DEVELOPING TODAY'S JOINT OFFICERS FOR TOMORROW'S WAYS OF WAR: THE JOINT CHIEFS OF STAFF VISION AND GUIDANCE FOR PROFESSIONAL MILITARY EDUCATION & TALENT MANAGEMENT 6 (2020), https://www.jcs.mil/Portals/36/Documents/Doctrine/education/jcs_pme_tm_vision.pdf?ver=2020-05-15-102429-817 [https://perma.cc/6TL3-BBTJ] ("The driving mindset behind our reforms must be that we are preparing for war. In future wars we envision all-domain operations to generate effective joint command and control, globally integrate effects, and conduct cross-domain fires and maneuver. Maneuver, via simultaneous combinations of both physical and cognitive capabilities, across an expanded battlespace seeks to directly create critical vulnerabilities in an adversary's systems and generate multiple dilemmas. The Joint Force's ability to create and exploit these all-domain dilemmas is a critical operational advantage in future contingencies across the conflict spectrum. Globally integrated and all-domain operations present challenges for tomorrow's warfighters that our educational system must adapt to today."); Pat Garrett & Frank Hoffman, *Maneuver Warfare is Not Dead, But It Must Evolve*, 149 PROCS. 11 (2023) ("Reports of the death of maneuver warfare are premature, but its continued utility depends on adaptation. Updating maneuver warfare to 'system disruption warfare' would better stress disrupting adversary systems across all domains . . . . Properly understood and updated, maneuver warfare remains critical to the future. Seizing the initiative, seeking an information advantage, exploiting tempo, and employing surprise and deception remain relevant.").

- Speed (because maneuver warfare emphasizes weakening the enemy whenever and wherever possible and inflicting as much chaos and doubt as possible within their ranks, violence must be imposed the moment opportunities arise);
- Maximalist violence (connected to speed, maneuver tactics emphasize the advantage of being in an offensive position and shocking the adversary); and
- Decentralized decision-making (to enable the kind of initiative, boldness, and risk-taking required by this kind of warfare, as well as to ensure continuity of operations when cut off from higher command due to communications denial, low-level commanders must be empowered to take high-stakes decisions quickly, without relying upon approval by higher command).[27]

In discussing a future war with China, an Army Chief of Staff paper states,

> The Multi-Domain Army of 2035 introduces a transformational change to joint warfighting. By 2035, the Army will enable the Joint Force to maneuver and prevail from competition through conflict with a calibrated force posture of multi-domain capabilities that provide overmatch through speed and range at the point of need. Dynamic employment and posture of Army forces during competition will provide range in depth to penetrate complex A2/AD [anti-access/area denial] systems and achieve cross-domain effects—creating opportunities and providing options to deter, deescalate, or promptly transition to win the first battle. Army formations and capabilities will provide the necessary speed, both physical and cognitive, to achieve decision dominance required for a faster-paced, distributed, and complex operating environment. The Multi-Domain Army will set the conditions for the Joint Force to fight and win integrated campaigns necessary to defeat state actors.[28]

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[27] *See* David Deptula, *In a Dangerous World, New Pentagon Mitigation Plan Would Hobble U.S. Forces*, DEF. OP. (Sep. 12, 2022), https://defenseopinion.com/in-a-dangerous-world-new-pentagon-mitigation-plan-would-hobble-u-s-forces/183/ [https://perma.cc/25YK-MPLM] ("Given the growth in capability and capacity of peer competitors, which today are equal to or greater than the U.S., the Pentagon is counting on winning future conflicts by achieving an advantage in information assimilation and making decisions at all levels at a rate exceeding that of our adversary. That is the whole point behind DOD's effort to develop joint all-domain command and control (JADC2) and is at the heart of the U.S. military's joint warfighting concept. Fundamental to this concept is the realization that U.S. personnel need to be empowered to operate in a distributed mode, executing under mission command in a decentralized fashion. In other words, the DOD is counting on our military personnel to be better at handling the fog and friction of war than our adversaries.").

[28] GEN. JAMES C. MCCONVILLE, ARMY MULTI-DOMAIN TRANSFORMATION: READY TO WIN IN COMPETITION AND CONFLICT, CHIEF OF STAFF PAPER #1 1 (2021),

C. Preparing for Peer Conflict: Challenges and Continuities

Crucially, U.S. military officials predict that this kind of demanding warfare will be required in environments that are vastly different from those of the GWOT.[29] First, they point to the significant possibility that a Chinese adversary would have the ability to impose communications obstacles, if not a total denial of communications.[30] Such actions would effectively sever the ability of commanders in the field to relay their observations and questions to higher command and to receive instructions from their superiors. In addition, this could mean that many of the networked and technologically advanced weapons and platforms utilized to striking effect in the GWOT would be

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https://api.army.mil/e2/c/downloads/2021/03/23/eeac3d01/20210319-csa-paper-1-signed-print-version.pdf [https://perma.cc/5GJS-BKRA].

[29] Lt. Gen. Charles Pede & Col. Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next,"* 101 MIL. REV. 6, 7 (2021) ("[T]he next fight may not be with an asymmetric blend-into-the-market enemy. In a LSCO fight, a commander may have to confront and defeat a large enemy armored column accompanied by infantry supported by warplanes overhead, long-range fires into our rear areas, together with confusion induced by cyber and electronic warfare attacks. Commanders will need to intuitively know and confidently apply the actual rules of war, unhindered by the lingering hangover of constrained COIN ROE. Mastery of the law of war may very well mean the difference between victory and defeat.").

[30] *See, e.g.*, FM 3-0, *supra* note 23, at paras. 6-69 ("Russia and China can contest joint operations across the globe, from the strategic support area in the continental U.S., along air, land, and maritime shipping lanes, to intermediate staging bases, and forward to tactical assembly areas. Because strategic lines of communications usually include key land areas, Army forces play a critical role in defending them."); U.S. DEP'T OF ARMY, TRADOC G-2, THE OPERATIONAL ENV'T 2024–2034: LARGE SCALE COMBAT OPERATIONS 17 (Aug. 1, 2024) [hereinafter TRADOC G-2] https://g2webcontent.z2.web.core.usgovcloudapi.net/OEE/Story%20Posts/TRADOCG2_2024JUL30_OE_2024_2035_Lg_Scale_Comb_anonymous.pdf [https://perma.cc/82R2-QEY7] ("In LSCO, U.S. Forces will face adversaries' anti-access/area denial efforts focused on denying our deployment into theater and preventing our freedom of action once deployed."); Maj. Gen. Gary M. Brito & Maj. Keith T. Boring, *Disrupted, Degraded, Denied, but Dominant: The Future Multi-Domain Operational Environment*, *in* DEEP MANEUVER: HISTORICAL CASE STUDIES OF MANEUVER IN LARGE-SCALE COMBAT OPERATIONS 236 (Jack D. Kem ed., 2018) ("Future enemies will seek to deny US and Allied space-based intelligence, reconnaissance, and PNT capabilities, such as the global positioning system and secure satellite communications. Disrupting space-based capabilities would better enable adversaries to degrade US forces in the physical domains."); *see also* U.S. MARINE CORPS, ANNUAL UPDATE, FORCE DESIGN 2030 9 (June 2023) https://www.marines.mil/Portals/1/Docs/Force_Design_2030_Annual_Update_June_2023.pdf [https://perma.cc/GC4X-XVCX] ("Given the exponential growth of anti-access and area-denial capabilities, coupled with the increasing range of sensors, and expanding weapons-engagement zones, we will begin experimenting with amphibious platforms as motherships to distribute and extend the range of our capabilities."); Joe Mroszczk, *Multi-Domain Effects Battalion: Space Integration and Effects in Multidomain Operations*, 104 MIL. REV. 95, 102 (Mar. 2024) (arguing that for A2/AD systems, "China and Russia have expanded investments and launches of space-based ISR satellites and continue to improve their architectures for distribution of the data to find and target U.S. and allied forces.").

temporarily or permanently disrupted.[31] Perhaps most distinct from the GWOT, military planners predict that a war with China will not allow the United States to assume its air superiority—requiring a greater focus on land warfare with air support where possible—and will entail more missile warfare from land, sea, and air, potentially including long-range hypersonic weapons. (Importantly for the next part of our discussion, this environment would not allow for collection of intelligence from air assets.)[32] Finally, a future war with China is anticipated to occur in densely populated urban terrain.[33] The U.S.

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[31] *See* Brito & Boring, *supra* note 30, at 235 ("US forces no longer monopolize these capabilities. Enemies already are capable of synchronizing space and cyberspace means to locate and attack forces with precision weapons and use electronic warfare (EW) capabilities to disrupt or degrade Army information networks."); *see also* Gen. David H. Berger, *Preparing for the Future: Marine Corps Support to Joint Operations in Contested Littorals*, ONLINE EXCLUSIVE: MIL. REV. 1, 1 (2021) ("Given the rapidly advancing capabilities of our pacing threat, the People's Republic of China (PRC), the joint force's historically dominant capability to sense and understand its operating environment will be vigorously contested or denied in every domain.").

[32] *See, e.g.*, U.S. DEP'T OF THE AIR FORCE, AIR SUPERIORITY 2030 FLIGHT PLAN 3 (2016), https://www.af.mil/Portals/1/documents/airpower/Air%20Superiority%202030%20Flight%20Plan.pdf [https://perma.cc/6LBK-58MA] ("Emerging integrated and networked air-to-air, surface-to-air, space and cyberspace threats, as well as aging and shrinking fleets of US weapon systems, threaten the Air Force's ability to provide air superiority at the times and places required in the highly contested operational environments of 2030 and beyond . . . The Air Force's projected force structure in 2030 is not capable of fighting and winning against this array of potential adversary capabilities."); ERIC HEGINBOTHAM ET AL., U.S. AND CHINESE AIR SUPERIORITY CAPABILITIES: AN ASSESSMENT OF RELATIVE ADVANTAGE, 1996-2017 (2015), https://www.rand.org/pubs/research_briefs/RB9858z3.html [https://perma.cc/7G6G-8BQ3] ("Although the United States continues to maintain unparalleled air-to-air capabilities, the modernization of Chinese air forces, combined with the inherent difficulties of operating over long distances in the Asian theater, make it increasingly challenging for the United States to gain air superiority during the first days or weeks of a possible conflict with China.").

[33] *See, e.g.*, Michelle Tan, *Army Chief: Soldiers Must Be Ready to Fight in 'MegaCities'*, DEF. NEWS (Oct. 5, 2016), https://www.defensenews.com/digital-show-dailies/ausa/2016/10/05/army-chief-soldiers-must-be-ready-to-fight-in-megacities/ [https://perma.cc/9G7R-NPKC] ("In the future, I can say with very high degrees of confidence, the American Army is probably going to be fighting in urban areas," [then Chief of Staff of the Army Mark Milley] said. "We need to man, organize, train and equip the force for operations in urban areas, highly dense urban areas, and that's a different construct. We're not organized like that right now."); Brito & Boring, *supra* note 30, at 233 ("[Future enemies] will fight in environments disadvantageous to US forces, such as dense urban environments, subterranean environments, or the cyberspace domain. These future enemies will have long studied American capabilities to coordinate technical reconnaissance, satellite-based communications, and air and maritime power to enable ground freedom of maneuver and overmatch. They will be more adaptive—employing combinations of traditional, unconventional, and hybrid strategies to threaten US interests. Army forces will face future battlefields that are more lethal, and fight through degraded conditions."); Audra Calloway, *Army Wargames Shape the Future of Urban Warfare*, U.S. ARMY (Jan. 4, 2019), https://www.army.mil/article/215731/army_wargames_shape_the_future_of_urban_warfare [https://perma.cc/J3KX-VQ8W] ("'[Dense urban environments are] where we're going to be fighting in the future. We're not going to be in a flat, somewhat unrestricted desert or a mountainous environment. We're going to be in large megacity areas, where we're going to

Army's Training and Doctrine Command notes, "[a]n increasingly urban [operational environment] means LSCO will include dense urban warfare in environments with challenging warfighting conditions."[34]

The various branches of the U.S. military that would be responsible for fighting this war have responded to the challenge by studying the kinds of dramatic shifts in division structure and mental preparedness that they must implement to reorient their troops. For example, with respect to the Army, two scholars, Walt Reed and Justin DeLeon, argue that "[t]he need for convergence in a multidomain construct acknowledges the temporal absence of supremacy in certain domains that the U.S. Army once enjoyed during the GWOT and requires a paradigm shift in the cognitive approach to modern warfare."[35] Other service branches are developing similar approaches. In seeking to lay out what would be needed to achieve this shift, strategists emphasize the necessity of integrating advanced technologies, rethinking command hierarchies, and fostering a culture of adaptability to ensure that U.S. forces can effectively operate in contested and multi-domain environments against peer adversaries.[36]

Preparing for LSCO concerns the entire machinery of the U.S. military. Medical military scholarship, for instance, has begun laying the groundwork for a change in core medical ethics in planning for "battlefield next."[37] Based on LSCO modeling that assumes 3,000 or more combat casualties per day, LSCO-oriented military medical personnel propose the introduction of "reverse triage," an approach in which military medical professionals would prioritize care for the least wounded soldiers who can reenter the battlespace.[38]

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have to be able to fight into trying to defeat the enemy under those circumstances and environments,' [Lt. Col.] Kroeger said."); Michael G. Anderson, *Fight for the City: Creating the School of Urban Warfare*, MOD. WAR INST. AT WEST POINT (Aug. 30, 2022), https://mwi.westpoint.edu/fight-for-the-city-creating-the-school-of-urban-warfare/ [https://perma.cc/A639-57PL] ("The lack of a dedicated urban warfare school and training facility reveals that even though urban fighting is decidedly in the US military's future, we are not doing enough to prepare for it.").

[34] TRADOC G-2, *supra* note 30, at 4.

[35] Walt Reed & Justin DeLeon, *The Agile U.S. Army Division in a Multidomain Environment*, 104 MIL. REV. 39, 41 (2024).

[36] The development of the JADC2 (Joint All-Domain Command and Control Strategy) also appears to be part of this approach. *See generally* U.S. DEP'T OF DEF., SUMMARY OF THE JOINT ALL-DOMAIN COMMAND AND CONTROL (JADC2) STRATEGY (Mar. 2022), https://media.defense.gov/2022/Mar/17/2002958406/-1/-1/1/SUMMARY-OF-THE-JOINT-ALL-DOMAIN-COMMAND-AND-CONTROL-STRATEGY.pdf [https://perma.cc/JW6B-LZTF].

[37] *See generally* E. Ann Jeschke & Sarah L. Huffman, *Reimaging "Honorable Death" in Future Large Scale Combat Operations*, *in* SPECIAL REPORT: A SELECTION OF PAPER PRESENTED AT THE 2019 FORT LEAVENWORTH ETHICS SYMPOSIUM 69 (2019), https://thesimonscenter.org/wp-content/uploads/2019/10/Ethics-Symp-2019-p69-79.pdf [https://perma.cc/6546-HYNY]. My thanks to Chris Jenks for discussion on this point.

[38] *See generally* Col. Matthew Fandre, *Medical Changes Needed for Large-Scale Combat Operations*, 100 MIL. REV. 37 (May-June 2020) (describing "reverse triage" as "prioritizing

This development illustrates that LSCO planning is geared toward a scale of conflict and casualties that the U.S. military has not encountered in decades and that requires wholesale transformation of military thinking and action.[39]

D. Framing the Enemy: China as Outlaw

Notably, while the fast-building narrative of this new (but also very old) kind of war was being constructed, and while the vast institutional resources and organizational models of the world's most lethal military were being oriented toward a powerful state adversary, one key element of the GWOT model was retained. The LSCO approach claims that China shares one critical trait with the Islamist jihadis: they both have no intention of following international law.[40] One prominent military scholar notes: "The autocracies of Russia and China consider life cheap and have no compunction with breaking laws of armed conflict. We can rest assured that they will not exercise the same

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casualties . . . based on a utilitarian principle to maximize the number of service members who can remain in the fight" instead of "based on severity of injuries"); Michael Wissemann, *Large Scale Combat Operations Will Bring New Medical Ethics Challenges*, WAR ON THE ROCKS (Dec. 8, 2023), https://warontherocks.com/2023/12/large-scale-combat-operations-will-bring-new-medical-ethics-challenges/ [https://perma.cc/KF2J-9X3Y] (explaining the need to "[train] on the concept of 'reverse triage' — treating those who might not be the most severely wounded but rather those that can most quickly be returned to the front" and describing the ethical challenges for medical providers who "have grown accustomed to saving lives, not losing them" by "put[ting] medical professionals in a very uncomfortable space, deciding who lives and dies").

[39] Mason H. Remondelli et al., *Casualty care implications of large-scale combat operations*, NAT'L INSTS. OF HEALTH (May 31, 2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC10389308/ [https://perma.cc/2AZD-RGTU].

[40] In a book that appears on various armed services' professional reading lists, retired Brigadier General Robert Spalding discusses the book Unrestricted Warfare, which, written by two CCP colonels, comprises part of China's military strategy. SPALDING, WAR WITHOUT RULES, *supra* note 21 ("Qiao and Wang wrote exactly the plan the CCP needed. It is a doctrine that says essentially 'everything is war' . . . that this kind of war—unrestricted war, war without rules—needed to be permanent."). Where "[t]he first rule of unrestricted warfare . . . is that there are no rules, with nothing forbidden," "[t]he authors are telling the CCP that only suckers and losers follow international rules," a parallel to decentralized, non-state terrorist networks that constantly defied international norms by hiding among civilian populations and using them as shields. *Id.* at 161. Importantly, Spalding notes that "[n]ow every civilian is a potential warrior or target, every aspect of modern life is a potential weapon, and every sphere of human activity is a potential battlefield." *Id.* at 74. *See also* Jeffrey S. Lehmkuhl, *Countering China's Malign Influence in Southeast Asia: A Revised Strategy for the United States*, 7 J. INDO-PACIFIC AFFS. 139, 162 (May–June 2024) ("Unlike Western governments, the CCP does not strictly adhere to a peace-and-war dichotomy; instead, it operates along a continuum of conflict, employing tactics of unrestricted warfare."); McConville, *supra* note 28, at 1 ("China and Russia continue to challenge the rules-based international order. Both have become increasingly more assertive in an effort to advance their agendas, aimed at supplanting the U.S. globally."); Second Lieutenant Robert C. German, *The Other Side of COIN*, SMALL WARS J. (Jan. 6, 2021), https://smallwarsjournal.com/2021/01/06/other-side-coin/#_ednref3 [https://perma.cc/V7YB-VQGJ] ("The application of COIN tactics at an operational level could be the method by which the United States could unsettle the Chinese as they continue to ignore the current rules laid out by world powers.").

diligence as America and our allies in minimizing human suffering and limiting casualties."[41] The primary military-oriented literature and expert commentary emphasize that in its "quest for global hegemony,"[42] China believes that there are "no rules, no restrictions against using any kind of force"[43] and that "the willingness to publicly accept rules while privately flaunting them is at the heart of the [Chinese Communist Party's] effectiveness."[44] At this stage in the story, this claim should not be understood as a legal one (that is, it is not reasoned out as an expert observation about the actual compliance of the People's Republic of China with specific obligations of international law). Rather, it serves to underscore and heighten the sense that the United States is ill-prepared to face an adversary that both seeks world domination (by unseating the actor currently in that position) and strategically plans to violate any and all rules of international law in its bid for supremacy.[45] Ultimately, while the core logic of the turn to China is rooted in distinguishing this adversary and what is required to defeat it from the GWOT, the specter of a wealthy and militarily sophisticated superpower that has been quietly and deceitfully plotting for decades to undermine and reshape the international order serves as an urgent rallying cry for recalibrating U.S. military and legal strategies.[46]

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[41] Deptula, Airpower, Law and the Warfighter's Perspective, *supra* note 12.

[42] SPALDING, WAR WITHOUT RULES, *supra* note 21, at 191.

[43] *Id.* at 186. Furthermore, the legal office at USINDOPACOM has an active "counter-lawfare" program to highlight and counter all of the ways the United States believes China is operating counter to international law. *See* J06 Office of the Staff Judge Advocate, *Key Appointments*, https://www.pacom.mil/Contact/Directory/J0/J06-Staff-Judge-Advocate/ [https://perma.cc/V8DL-JVS4].

[44] SPALDING, WAR WITHOUT RULES, *supra* note 21, at 161; *see also* U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MIL. AND SEC. DEVS. INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 49 (Dec. 18, 2024), https://media.defense.gov/2024/Dec/18/2003615520/-1/-1/0/MILITARY-AND-SECURITY-DEVELOPMENTS-INVOLVING-THE-PEOPLES-REPUBLIC-OF-CHINA-2024.PDF [https://perma.cc/T3RK-U7BM] ("The PRC has long challenged foreign military activities in its territorial seas and EEZ in a manner inconsistent with customary international law in the UNCLOS. However, in recent years, the PLA has begun conducting the same types of military activities inside and outside the FIC in the EEZs of other countries, including the United States. This activity highlights the PRC's *double standard in the application of its interpretation of international law*." (emphasis added)).

[45] *See generally* U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MIL. AND SEC. DEVS. INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 139 (Oct. 19, 2023), https://media.defense.gov/2023/Oct/19/2003323409/-1/-1/1/2023-MILITARY-AND-SECURITY-DEVELOPMENTS-INVOLVING-THE-PEOPLES-REPUBLIC-OF-CHINA.PDF [https://perma.cc/MJ7D-S9GC] ("Between the fall of 2021 and fall of 2023, the United States has documented over 180 instances of PLA coercive and risky air intercepts against U.S. aircraft in the region – more in the past two years than in the previous decade. Over the same period, the PLA has conducted around 100 instances of coercive and risky operational behavior against U.S. Allies and partners, in an effort to deter both the United States and others from conducting lawful operations in the region.").

[46] *See, e.g.*, Kyle Amonson & Dane Egli, *The Ambitious Dragon: Beijing's Calculus for Invading Taiwan by 2030*, 6 J. INDO-PACIFIC AFFS. 38, 54 (Mar.–Apr. 2023) ("Either way, the actions of an ambitious dragon are catalyzing historic changes in the twenty-first-century

By the 2018–2019 appropriations cycle, the U.S. military establishment began to implement these changes in earnest, with the 2018 National Defense Strategy urging the services to shift their attention to Russia and China. This was accompanied by decreases in budgetary demands for resources in the Middle East alongside significant increases to funds for the Pacific theater[47] and shifts in strategy in the Army Field Manual 3-0 and other services' texts focused on retraining and retooling away from contingency warfare and toward multi-domain operations and maneuver capability. The U.S. Army Combined Arms Center published a *Large-Scale Combat Operations Historical Case Study* manual for training commanders and soldiers, which emphasized "the execution of large-scale ground combat to develop soldiers and leaders capable of executing operations to defeat peer and near-peer aggression around the world."[48] Simultaneously, training materials and syllabi for U.S. military

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security environment that must be understood and countered with active defense and deterrence."); U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS, *supra* note 44, at 135 ("Several PLA exercises and training events have included simulated strikes on mock U.S. assets and infrastructure, including a U.S. military runway on Guam and U.S. Navy vessels. In 2023, the PLA conducted offensive and defensive training, including simulated air-launched strikes against maritime platforms, following U.S. military peacetime operations in East Asia. PRC media sources have stated that this activity is intended to improve the PLA's training realism and prepare for combat operations against foreign forces."); *Testimony on U.S. Indo-Pacific Posture: Hearing Before the S. Armed Servs. Comm.*, 117th Cong. (2021) (statement of Philip S. Davidson, Admiral, U.S. Navy) ("A combat-credible, conventional deterrent posture is necessary to prevent conflict, protect U.S. interests, and to assure our allies and partners. Absent a convincing deterrent, the People's Republic of China (PRC) will be emboldened to take action to undermine the rules-based international order and the values represented in our vision for a Free and Open Indo-Pacific."); Press Release, U.S. Dep't of Def., Department of Defense Releases Declassified Images, Videos of Coercive and Risky PLA Operational Behavior (Oct. 17, 2023), https://www.defense.gov/News/Releases/Release/Article/3559903/department-of-defense-releases-declassified-images-videos-of-coercive-and-risky/ [https://perma.cc/6NW5-ZVXA] (asserting that "the PLA's coercive and risky behavior [in the South China Sea] seeks to intimidate and coerce members of the international community into giving up their rights under international law.").

[47] *See* COMM'N ON THE NAT'L DEF. STRATEGY, *supra* note 13.

[48] Thomas Bolen & Vince Carlisle, *Creating Powerful Minds: Army University Education Initiatives for Large-Scale Combat Operations*, 98 MIL. REV. 84 (Sep.-Oct. 2018) (discussing *Large-Scale Combat Operations Historical Case Study*); *see also* WEAVING THE TANGLED WEB: MILITARY DECEPTION IN LARGE-SCALE COMBAT OPERATIONS (Christopher M. Rein ed., 2018); BRINGING ORDER TO CHAOS: HISTORICAL CASE STUDIES OF COMBINED ARMS MANEUVER IN LARGE-SCALE COMBAT OPERATION (Peter J. Schifferle ed., 2018); LETHAL AND NON-LETHAL FIRES: HISTORICAL CASE STUDIES OF CONVERGING CROSS-DOMAIN FIRES IN LARGE-SCALE COMBAT OPERATIONS (Thomas G. Bradbeer ed., 2018); THE LONG HAUL: HISTORICAL CASE STUDIES OF SUSTAINMENT IN LARGE-SCALE COMBAT OPERATIONS (Keith R. Beurskens ed., 2018); DEEP MANEUVER: HISTORICAL CASE STUDIES OF MANEUVER IN LARGE-SCALE COMBAT OPERATIONS 236 (Jack D. Kem ed., 2018); INTO THE BREACH: HISTORICAL CASE STUDIES OF MOBILITY OPERATIONS IN LARGE-SCALE COMBAT OPERATIONS (Florian L. Waitl ed., 2018); PERCEPTIONS ARE REALITY: HISTORICAL CASE STUDIES OF INFORMATION OPERATIONS IN LARGE-SCALE COMBAT OPERATIONS (Col. Mark D. Vertuli & Lt. Col. Bradley S. Loudon eds., 2018); THE COMPETITIVE ADVANTAGE: HISTORICAL CASE STUDIES OF SPECIAL OPERATIONS FORCES IN LARGE-SCALE COMBAT

officers in the academies demonstrated a turn away from Islamist jihadism toward China.[49]

OPERATIONS (Robert Tougchi & Michael Krvido eds., 2019); THE LAST 100 YARDS: THE CRUCIBLE OF CLOSE COMBAT IN LARGE-SCALE COMBAT OPERATIONS (Paul Berg ed., 2019); MAINTAINING THE HIGH GROUND: THE PROFESSION AND ETHIC IN LARGE-SCALE COMBAT OPERATIONS (C. Anthony Pfaff & Keith R. Beurskens eds., 2021); DEEP OPERATIONS: THEORETICAL APPROACHES TO FIGHTING DEEP (Jack D. Kern ed., 2021); ENDURING SUCCESS: CONSOLIDATION OF GAINS IN LARGE-SCALE COMBAT OPERATIONS (Donald P. Wright & Erick Michael Burke eds., 2022).

[49] *See, e.g.*, U.S. MARINE CORPS WAR COLL., *Book List AY25*, https://www.usmcu.edu/Portals/218/MCWAR%20AY25%20Reading%20List.pdf [https://perma.cc/A7D2-9FB4] (professional military education institution intended for officers grade O-5 and O-6. Some works include: AMES, *supra* note 21; DOSHI, *supra* note 21; FRAVEL, *supra* note 21; SAUNDERS & SCOBELL, *supra* note 21; U.S. DEP'T OF THE ARMY JOHN F. KENNEDY SPECIAL WARFARE CTR. AND SCH.: THE SPECIAL OPERATIONS CTR. OF EXCELLENCE, *Irregular Warfare Reading List*, https://www.swcs.mil/Portals/111/Irregular%20Warfare%20Proponent%20IW%20Reading%20List.pdf [https://perma.cc/98N9-ZFAF] (special operations training intended for enlisted and officer military personnel of all branches. Some works include: LIANG & XIANGSUI, *supra* note 21; IRREGULAR WARFARE CTR. PRESS, THE FUTURE FACES OF IRREGULAR WARFARE: GREAT POWER COMPETITION IN THE 21ST CENTURY (2024); THOMAS RID, ACTIVE MEASURES: THE SECRET HISTORY OF DISINFORMATION AND POLITICAL WARFARE (2020)); U.S. DEP'T OF THE AIR FORCE, *Air Force Chief of Staff Leadership Library* (Jan. 2025), https://www.af.mil/About-Us/CSAF-Leadership-Library/ [https://perma.cc/YW6U-KMGP] (intended for all airmen "to equip [them] with the knowledge, skills, and perspectives essential for effective leadership in the 21st century."); U.S. NAVAL WAR COLL., *Intermediate-Level Course Strategy & Policy Department Syllabus* (Fall 2024), https://dnnlgwick.blob.core.windows.net/portals/0/NWCDepartments/Strategy%20and%20Policy%20Department/ILC%20S&W%20Fall%202024%20Syllabus%20--%20Final.pdf?sv=2017-04-17&sr=b&si=DNNFileManagerPolicy&sig=ZqT9O4vskEghdFpylo7I2gZmy8npTlus7IrO%2FoePSsI%3D [https://perma.cc/25Z6-2BN6]; U.S. NAVAL WAR COLL., *Reading Room List* (Feb. 3, 2025), https://usnwc.libguides.com/c.php?g=409838&p=2791818 [https://perma.cc/DUK2-BCYS] (providing recommendations for current students); *2025 Commandant's Professional Reading List: Stragety*, U.S. MARINE CORPS, https://www.mca-marines.org/commandants-professional-reading-list-strategy/ [https://perma.cc/HF3E-KY68] (last visited Nov. 12, 2025) (example of division-specific recommendations for all marines. Some works include: SETH G. JONES, THREE DANGEROUS MEN: RUSSIA, CHINA, IRAN AND THE RISE OF IRREGULAR WARFARE (2021); NAT'L DEF. UNIV. PRESS, CHAIRMAN XI REMAKES THE PLA: ASSESSING CHINESE MILITARY REFORMS (2019); CHINESE AMPHIBIOUS WARFARE: PROSPECTS FOR A CROSS-STRAIT INVASION (Andrew S. Erickson, Conor M. Kennedy & Ryan D. Martinson eds., 2025)); U.S. DEP'T OF THE NAVY, *Chief of Naval Operations Pro. Reading List*, https://dod.overdrive.com/dod-armymwr/professionalreading/collection/1556298 [https://perma.cc/P69R-GUS6] (example of professional recommendations for all seamen including works such as MICHAEL MCDEVITT, CHINA AS A TWENTY-FIRST-CENTURY NAVAL POWER (2020), and MICK RYAN, WAR TRANSFORMED (2022)); *cf.* U.S. MARINE CORPS, *2013 United States Marine Corps Pro. Reading Program*, https://www.dinfos.dma.mil/portals/66/documents/library/2013unitedstatesmarinecorpsprofessionalreadinglist.pdf [https://perma.cc/3FR4-SYB9] (recommending works such as DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE (1964); DAVID KILCULLEN, THE ACCIDENTAL GUERRILLA: FIGHTING SMALL WARS IN THE MIDST OF A BIG

By 2020–2021, while the fires of the GWOT continued to burn in the Middle East and Africa, one of the world's largest and most lethal organizations, employing some three million individuals, embarked on an epochal institutional, financial, and cultural transformation. The bulk of this transformation focuses on articulating new threats, marshaling and shifting resources, identifying procurement needs, and crafting strategy and tactics. The overall message is clear: the old war is over, it was relatively easy to win in the narrow military sense, and it never threatened the nation. The next war will be a war for survival, and, in order to achieve victory, the U.S. military (and, by extension, the civilians who support it) must be dedicated to identifying and ruthlessly extracting assumptions, biases, and practices that will obstruct the path to victory.

As they began to flesh out what the military legal preparations for this future war would entail, senior military lawyers and military-affiliated LOAC experts identified a problem. It began as a "gap" and, within two years, it became increasingly framed as an existential threat, perhaps *the* existential threat, facing the United States and its allies.

II. THE PROBLEM

"*Given the real possibility that the United States will participate in a high intensity conflict in the near future, we need a fundamental re-training/reeducation of an entire generation of commanders who were schooled in the law of armed conflict mainstays of military necessity and proportionality only as they applied in a counter-insurgency environment."*[50]

"Twenty years of [Counterinsurgency (COIN)] and [Counterterrorism (CT)] operations have created a gap in the mindset — in expectations — for commanders, soldiers, and even the public. Army forces suffer our own CT 'hangover,' having become accustomed to operating under highly constrained, policy-driven rules of engagement. Compounding this phenomenon is a public perception. Nongovernmental organizations, academics, and critics consider 'smart bombs' and CT tactics to have become normative rules in warfighting. In short, they are not. This gap—the space between what the law of war actually requires, and a growing expectation of highly constrained and surgical employment of force born of

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ONE (2009); and MARGARET K. NYDELL, UNDERSTANDING ARABS: A CONTEMPORARY GUIDE TO ARAB SOCIETY (2012)); U.S. DEP'T OF THE ARMY, *The U.S. Army Chief of Staff's Pro. Reading List* (2013), https://api.army.mil/e2/c/downloads/332649.pdf [https://perma.cc/MZ6Z-4JAH] (recommending titles such as MARY HABECK, KNOWING THE ENEMY: JIHADIST IDEOLOGY AND THE WAR ON TERROR (2007), and SHERARD COWPER-COLES, CABLES FROM KABUL: THE INSIDE STORY OF THE WEST'S AFGHANISTAN CAMPAIGN (2011)).

[50] Mike Lacey, *Experts Weigh in on Laws of Armed Conflict Priorities*, LIEBER INST. (Feb. 18, 2021), https://lieber.westpoint.edu/experts-weigh-in-on-law-of-armed-conflict-priorities/ [https://perma.cc/S5T5-JZHW].

our recent experience coupled with our critics' laudable but callow aspirations—left unchecked, threatens to unnecessarily limit a commander's legal maneuver space on the LSCO battlefield."[51]

In this part, I examine how LSCO authors have identified what they describe as a pervasive obstacle to legal and operational clarity: the so-called "CT hangover." This term signals a perceived legacy of counterterrorism-era norms—particularly policy-imposed restraints on targeting and civilian harm mitigation—that, in their view, have been misapprehended as binding elements of LOAC. These commentators argue that such conflation, rooted in the normative architecture of the GWOT, has generated a dangerous misalignment between legal expectations and the demands of high-intensity warfighting. The result, they contend, is a gap: between the law as they interpret it and the expectations of certain military personnel, as well as policymakers and publics. To resolve this tension, LSCO lawyers call for a restoration of a particular vision of American IHL that strips away what they see as humanitarian overlays developed under fundamentally different operational conditions and that reasserts legal interpretations aligned with the realities of large-scale, high-lethality warfare against peer adversaries.

A. The "CT Hangover": A Legacy of Misaligned Expectations

As they translated the national security planning into operational law for warfighting, the LSCO lawyers identified a concern that, in their view, far surpassed any tactical or hardware challenges. They singled out what they refer to as the "CT stain," or the "CT hangover"—a situation in which the exceptionally unusual circumstances of the past war, which resulted in victory, would be carried into the next. "As we move from two decades of counter-insurgency, we must be vigilant that we do not superimpose the restrictions of the last war over a future fight, or the consequences may be catastrophic," one LSCO lawyer observed.[52] The LSCO lawyers frame the problem as one where the combination of primarily fighting non-state adversaries who did not distinguish themselves from the civilian population, extensive engagement by the military with NGOs and IHL academics during the GWOT, the U.S. government's interest in winning "hearts and minds" (meaning that part of the definition of the mission and strategy was to minimize killing and destruction to avoid alienating the local population), and the overwhelming might of the United States and its allies against outmatched non-state groups all led to the development and adoption of wide swaths of *policy decisions* that are today being misunderstood as the *requirements* of LOAC.[53] To put it very simply:

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[51] Pede & Hayden, *supra* note 29, at 16.

[52] Deptula, Airpower, Law and the Warfighter's Perspective, *supra* note 12.

[53] *See, e.g.,* CHARLES WALD ET AL., 2014 GAZA WAR ASSESSMENT: THE NEW FACE OF CONFLICT 35 (2015) ("[T]he persistence of misconceptions about LOAC's content and requirements will enable continued manipulation of legal arguments, risk incentivizing further exploitation of civilian populations and thereby risk greater civilian deaths in future

the purported problem is that the U.S. government, U.S. soldiers, and the U.S. public are deeply confused. They are portrayed as misunderstanding the law, and that misunderstanding may spell the difference between victory and defeat in LSCOs.

The most influential text for LSCO lawyers, and the highest-level articulation of the scope and scale of the problem, was captured in a piece titled "The Eighteenth Gap,"[54] by then-Judge Advocate General of the U.S. Army[55] Lt. Gen. Charles Pede and Col. Peter Hayden, head of the Strategic Initiatives for the Army Judge Advocate General's Corps.[56] Published in early 2021 (building on an earlier speech by Pede), the piece discusses a key aspect of the strategic LSCO puzzle: a 2017 Army study that identified seventeen "conventional warfighting capability gaps that emerged in the force" after years of CT positioning.[57] Pede and Hayden note that "as the Army reorganized itself for COIN and CT . . . [d]octrine changed, force structure changed, hardware changed, tactics changed."[58] The Army publication was meant to highlight the key gaps between force readiness and culture in the final stages of the GWOT and the coming war with China. Pede and Hayden then argue

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urban conflicts."); Lt. Gen. Charles Pede, *Mind the Gap: The COIN Hangover & DoD's New Policy to Protect Civilians on the Battlefield*, LIEBER INST. (Nov. 22, 2024), https://lieber.westpoint.edu/mind-gap-coin-hangover-dods-new-policy-protect-civilians-battlefield/[https://perma.cc/R8XW-X7XP] ("[A]ll stakeholders must recognize and persistently remind the world that the policy does not—by its own language—create new law. It is policy only."); Justin MacDonald & Ryan McCormick, *The U.S. DoD Civilian Harm Mitigation and Response Action Plan on Future Battlefields*, ARTS. OF WAR (Sep. 23, 2023), https://lieber.westpoint.edu/civilian-harm-mitigation-response-action-plan-future-battlefields/ [https://perma.cc/83XG-FZJ4] ("Beyond the precautionary tools developed to ensure the United States complies with LOAC principles, civilian and military leaders layered policy restrictions and limitations via mechanisms like the rules of engagement or heightened targeting procedures. Although such efforts are prudent as policy considerations enacted appropriately for specific types of military operations, they are not required under the law of war. It is important to recall the difference between law and policy in every situation and to recognize the basis on which legal requirements exist in international law.").

[54] Pede & Hayden, *supra* note 29, at 6.

[55] The highest ranking lawyer in the U.S. military's largest branch, fielding some half a million active-duty soldiers.

[56] At least one key piece precedes and clearly influences Pede and Hayden, drafted by two judge advocates reflecting on their experience running exercises and simulations in the U.S. European Command Area of Responsibility (EUCOM AOR). They argued (in what I believe was the first military legal publication to explore the key LSCO ideas discussed in this Article) that in leading exercises focused on "high intensity conflict" (which would later become known as LSCO), they observe that "a CT mindset continues to dominate many aspects of relevant U.S. policies and practices and the outlook of many commanders, staff, and legal advisers charged with planning and executing operations." Where I discuss their ideas here, it should be noted that they *preceded* Pede and Hayden in publishing their analysis, but appeared not to shift the entire discipline of military lawyering in the way the later piece by more senior officers does. *See* Col. Gail A. Curley & Lt. Col. Paul E. Golden, Jr., *Back to Basics: The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience,* 1 ARMY L. 23, 24 (2018).

[57] Pede & Hayden, *supra* note 29, at 61.

[58] *Id.* at 6.

that the drafters missed an "eighteenth gap," one that is, in their view, "one of the greatest dangers to our future success."[59] The gap is, fundamentally, one between the real law that applies to LSCO and the law that people think applies: "the lack of understanding with regard to the difference between the law of armed conflict (LOAC) as codified in custom and treaty, and the rising tide of uncodified assertions, legal commentary, and accumulated policy overlays resulting from years of precision CT warfighting."[60] It is a gap between what is actually binding and what is expected, deemed acceptable, or mistakenly perceived to be binding.

In articulating the risks of this gap as the United States prepares for the most violent and destructive war since 1945, Pede and Hayden identify the two key domains that merit study, focus, and action in order to "eliminate the eighteenth capability gap to win the next fight":[61] public legal discourse and the armed forces. They argue that the gap is the result of a set of actors—some on the inside, others on the outside—feeding a cycle of undue and unfounded concern about civilian casualties. The authors carefully avoid ascribing intentionality, assuming that all actors involved are simultaneously well-intentioned and misinformed.

The external community is made up of "scholars, interest groups, and nongovernmental organizations."[62] (It is worth noting that in these authors' view, and in the views of many of the LSCO documents I reviewed, the ICRC is demoted to and lumped in with other mere non-governmental or humanitarian organizations. This is quite distinct from its treatment in most military speech during the GWOT.[63] Frequently, it appears that UN bodies and experts are also part of this group.) Pede and Hayden worry that while this community's "contributions to the study of the law of war are real and growing with every new well-intentioned blog article," their grasp of the law is shaky. Rather than describing the limited nature of the laws of war, these "experts" are pushing "a more aspirational 'evolution' of the law"[64]—an evolution that would shrink the U.S. military's "legal maneuver space"[65] to the point that victory in LSCO becomes impossible. The external critiques are encouraging—even facilitating—public concern regarding the fate of civilians. That, in turn, causes the government to keep ratcheting up the degree of restrictions on the conduct of hostilities in order to maintain political legitimacy.

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[59] *Id.*
[60] *Id*. at 7.
[61] *Id*.
[62] *Id*.
[63] *See, e.g.*, *Lt. Gen. Charles Pede, Judge Advocate General of the United States Army*, EMORY SCH. L., at 28:48 (Feb. 26, 2018), https://www.youtube.com/watch?v=wrIpH0EkqaE [https://perma.cc/L3HK-A8BD] (referring to the ICRC as a "well intentioned interest group").
[64] Pede & Hayden, *supra* note 29, at 7.
[65] *Id*. at 18.

B. A Legal Crisis

As a framing and agenda-setting piece, Pede and Hayden's intervention is exceptionally skilled and successful. If it were a traditional academic piece, we would think of it as a seminal text. "The Eighteenth Gap" elegantly and compellingly defines a problem, identifies two major categories where the problem can be found, and calls for significant doctrinal, intellectual, and political work to solve the problem. It also provides a ready-made model for other services to adopt and use to analyze their own version of the crisis. The piece was quickly followed by numerous military legal publications,[66] speeches,[67] conferences, and workshops.[68] As with any seminal text, there were those who built on the original thesis, those who pushed back on certain elements, and those who went far beyond the original thesis. However, Pede and Hayden's central observation—that there is an urgent problem about a legal culture that has established very thick roots in the military, the public, and the political domain—was rapidly influential and not challenged on these terms by military authors.

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[66] *See, e.g., generally* Lt. Stuart W. Risch & Col. Ryan B. Dowdy, *Multi-Domain Operations: Judge Advocate Legal Services' Role in MDO and Bridging the Eighteenth Capability Gap,* 4 ARMY L. 91 (2022); Maj. Jason D. Young, *Civilian Harm Mitigation and Response Action Plan: Observations from a Combat Training Center*, LIEBER INST. (Apr. 21, 2023), https://lieber.westpoint.edu/chmr-ap-observations-combat-training-center/ [https://perma.cc/AAB8-AS3L]; Mike Lacey, *Experts Weigh in on Laws of Armed Conflict Priorities*, ARTS. OF WAR (Feb. 18, 2021), https://lieber.westpoint.edu/experts-weigh-in-on-law-of-armed-conflict-priorities/ [https://perma.cc/4R5Z-U23F]; Deptula, *In a Dangerous World*, *supra* note 27; MacDonald & McCormick, *supra* note 53; Jason Young, Joshua Herzog & Chad Bird, *Unleash the King of Battle: Legal Myth Busters*, 2 FIELD ARTILLERY PRO. BULL. 46, 46 (July 2023), https://www.dvidshub.net/publication/issues/67689 [https://perma.cc/UX6P-9KX2]; Brian L. Cox, *Representative Sara Jacobs and Senator Dick Durbin Take Aim at the DoD Law of War Manual – and Miss*, CORNELL L. Fac. WORKING PAPERS 1, 1 (2023), https://scholarship.law.cornell.edu/clsops_papers/130 [https://perma.cc/PZF2-TVSU]; Corn & Smotherman, *supra* note 9; Lt. Col. John Cherry, Sqn. Ldr. Kieran Tinkler & Michael Schmitt, *Avoiding Collateral Damage on the Battlefield*, JUST SECURITY (Feb. 11, 2021), https://www.justsecurity.org/74619/avoiding-collateral-damage-on-the-battlefield/[https://perma.cc/75Y5-2R5E]; Maj. John P. Policastro, *LOAC Babies and COIN Bathwater*, 1 ARMY L. 49 (Jan. 2023).

[67] *See, e.g.*, Lt. Gen. Charles Pede, Keynote Address, Duke Law School Center on Law Ethics and National Security's 25th Annual National Security Law Conference (Mar. 7, 2020) *in* LAWFIRE, March 2020, https://sites.duke.edu/lawfire/2020/03/07/ltg-pede-on-the-coin-ct-hangover-roe-war-sustaining-targets-and-much-more/[https://perma.cc/5MZQ-2CD5]; Deptula, Airpower, Law and the Warfighter's Perspective, *supra* note 12.

[68] *See, e.g.*, Jennifer Maddocks & Thomas Wheatley, *Lieber Workshop 2024: International Law and The Future of Multi-Domain Operations in the Indo-Pacific*, LIEBER INST. (Dec. 3, 2024), https://lieber.westpoint.edu/lieber-workshop-2024-international-law-future-multi-domain-operations-indo-pacific/[https://perma.cc/7J4E-83HQ] ("Workshop participants nevertheless highlighted a perceived 'mentality gap' related to fighting LSCO against a peer adversary."); Ronald Alcala, *Workshop on Legal Roles and Responsibilities Concerning Large-Scale Combat Operations*, LIEBER INST. (Mar. 23, 2023), https://lieber.westpoint.edu/event/workshop-legal-roles-responsibilities-large-scale-combat-operations/ [https://perma.cc/V7TP-YJKB].

Pede and Hayden provide guidance for future research, writing, and military legal advocacy work by pointing to specific areas of concern. They argue that external actors have capitalized on their proximity to military thinking and practice during the GWOT years to promulgate and advocate for "humanitarian legal creep"[69] and for policies that seek to "turn the LOAC standard on its head."[70] These efforts, they warn, may "ripen into state practice, and . . . the very *opinio juris* by which mere state practice becomes accepted as binding international law."[71] Examples of these kinds of policies include demands for low civilian casualties from attacks,[72] demands for an end to the use of explosive weapons in urban or densely populated areas,[73] claims that the use of cluster munitions or anti-personnel landmines are unlawful,[74] complex proportionality balancing and elaborate precautionary measures,[75] and the expectation that NGOs, journalists, and courts should be able to scrutinize and evaluate U.S. military conduct during hostilities on the basis of international law.[76]

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[69] Pede & Hayden, *supra* note 29, at 14.
[70] *Id.*
[71] *Id.*
[72] *See, e.g.*, Curley & Golden, *supra* note 56, at 24.
[73] *See, e.g.*, U.N. Off. for Disarmament Affs., Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising From the Use of Explosive Weapons in Populated Areas, (Nov. 18, 2022), https://cms.ewipa.org/uploads/political_declaration_on_ewipa_en_175fb28c49.pdf [https://perma.cc/KCK4-UMU9]; Andrea Farrés et al., *The Need and Possibility of Banning Explosive Weapons,* 57 CENTRE DELÀS D'ESTUDIS PER LA PAU 5 (Nov. 2022); Hajer Naili, *CIVIC Urges Immediate Implementation of Pol. Declaration on Explosive Weapons*, CTR. FOR CIVILIANS IN CONFLICT (Nov. 18, 2022), https://civiliansinconflict.org/press-releases/civic-urges-immediate-implementation-of-political-declaration-on-explosive-weapons/[https://perma.cc/662A-G4V5].
[74] *See, e.g.*, Daniel J. Raccuia, *The Convention on Cluster Munitions: An Incomplete Solution to the Cluster Munition Problem,* 44 VAND. J. OF TRANSNAT'L L. 465 (2011); Denise Garcia, *Banning Evil: Cluster Munitions and the Successful Formation of a Global Prohibition Regime,* 5 CORN. INT'L AFF. REV. 36 (2012); Thomas M. McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31 (2008); Ryan Kocse, *Final Detonation: How Customary Int'l Law Can Trigger the End of Landmines,* 103 GEO. L. J. 749 (2015).
[75] *See, e.g.*, AMNESTY INT'L U.K., *Gaza: Israeli Attacks on Two Displaced Persons' Camps in Rafah Should Be Investigated as War Crimes* (Aug. 27, 2024) https://www.amnesty.org.uk/press-releases/gaza-israeli-attacks-two-displaced-persons-camps-rafah-should-be-investigated-war [https://perma.cc/L9WQ-23QW]; U.N. Off. of the High Comm'r of Hum. Rts., Rep. on Indiscriminate and Disproportionate Attacks During the Conflict in Gaza (October – December 2023) (June 19, 2024), https://www.ohchr.org/sites/default/files/documents/countries/opt/20240619-ohchr-thematic-report-indiscrim-disprop-attacks-gaza-oct-dec2023.pdf [https://perma.cc/CM38-JC6S]; Larry Lewis, *Israeli Civilian Harm Mitigation in Gaza: Gold Standard or Fool's Gold?,* JUST SEC. (Mar. 12, 2024), https://www.justsecurity.org/93105/israeli-civilian-harm-mitigation-in-gaza-gold-standard-or-fools-gold/[https://perma.cc/6MN9-QP8M].
[76] *See, e.g.*, Charlie Savage et al., *Newly Declassified Video Shows U.S. Killing of 10 Civilians in Drone Strike,* N.Y. TIMES (Jan. 19, 2022),

In terms of internal actors, LSCO lawyers identify what they perceive to be a troubling weakening of the resolve and willingness to kill and destroy on the part of infantry and young commanders: "[T]raining exercises revealed that some commanders hesitated when action was demanded. A momentary pause to consider what level commander had release authority for a five-hundred-pound bomb meant a missed enemy formation, or worse, a formation of dead American soldiers."[77] Recall that a key element of maneuver warfare is the notion that military forces employing that tactic will be empowered and enabled to apply maximum violence at speed,[78] an approach that is contingent upon the lowest possible level of command being able to make independent decisions with confidence.[79] In the view of some LSCO lawyers, examples of legal practices that are anathema to successful utilization of the style of warfare identified as necessary to win a war against China include:

- Low civilian casualty thresholds that trigger a requirement for higher-level authorization;[80]
- Rules of engagement (ROE) that are internalized more as instruments of restraint than enablers of combat power;[81]

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https://www.nytimes.com/2022/01/19/us/politics/afghanistan-drone-strike-video.html [https://perma.cc/JT8M-Z46F]; Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html [https://perma.cc/E8UR-WTZC]; AMNESTY INT'L, *Left in the Dark: Failures of Accountability for Civilian Casualties by International Military Operations in Afghanistan*, AI Index ASA 11/006/2014 (Aug. 11, 2014), https://www.amnesty.org/en/documents/ASA11/006/2014/en/[https://perma.cc/UU8U-4LBK].

[77] Pede & Hayden, *supra* note 29, at 16.

[78] *See, e.g.*, Milford Beagle Jr., Joseph B. Berger III & Jack D. Einhorn, *Lethal Force, Risk, and LSCO: Preparing for Permissive Rules of Engagement in Large Scale Combat Operations*, MIL. REV. 1, 4 (2025) https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/Online-Exclusive/2025/Lethal-Force-Risk-and-LSCO/Lethal-force-risk-and-lsco-UA.pdf [https://perma.cc/5PPJ-4WFT] ("In LSCO against a declared hostile force, commanders will have wide discretion to apply lethal force against numerous military targets in a time-constrained environment.").

[79] *Id.* ("In LSCO, commanders must train and empower their subordinates to exercise discretion at each echelon of command.").

[80] *See* Curley & Golden, *supra* note 56, at 25 ("Exceedingly low tolerances for civilian casualties are a feature of CT operations and stem from the CT mindset . . . but the fact is it remains a critical factor in the CDE methodology and determining the appropriate engagement authority." However, "commanders, operators, and legal advisors have to be cognizant of the fact that in a HIC, the consistent elevation of engagement authority based on casualty estimates could have catastrophic consequences for the U.S. formations involved, particularly at the start of Phase III offensive operations."); Beagle, Berger & Einhorn, *supra* note 78, at 6 ("In LSCO, there will not be explicit ROE that requires a level of approval if we are likely to injure X number of people.").

[81] *See* Curley & Golden, *supra* note 56, at 24–25 ("While judge advocates at USAREUR have yet to completely flush out appropriate thresholds for determining positive identification, and whether it is even necessary beyond a baseline 'reasonable certainty' standard, one thing is clear—that commanders, operators, and legal advisors need a mindset

- Proportionality assessments requiring extensive deliberation and legal-adviser review that are unsuited to the speed of LSCO battles;[82]
- Precautionary requirements that are interpreted to mandate forgoing certain attacks when civilian casualties cannot be avoided;[83] and
- Information standards for target identification that presume multiple independent verifiable sources.[84]

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change to become more comfortable with the concept of employing force when they do not possess perfect or near perfect information about a target which would most certainly be the predominant scenario in a HIC."); Young, Herzog & Bird, *supra* note 66, at 47 ("This misconception [positive identification] is a tightening of the LOAC principle of distinction born out of COIN requirements."); Young, *supra* note 66 ("No doubt, red teaming, PID, and other efforts to avoid target misidentification are worthwhile, but policy makers should be mindful of realities on the ground they contest. Commanders at the tactical level—'the level of warfare where battles and engagements are planned and executed'—do not own or control many, if any, high-fidelity sensors. Furthermore, most tactical commanders do not have the personnel or time to conduct extensive red teaming processes. And, if engaged in LSCO, the commander will almost certainly be overwhelmed by simultaneous operational requirements.").

[82] Corn & Smotherman, *supra* note 9, at 7 ("When engaged in the hasty targeting required by dynamic combined arms operations, combat leaders will face a very different decision-making equation, one that will often deny them the opportunity to work through these principles in a way that even remotely resembles the deliberate targeting process."); Robert Lawless, *2023 DOD Manual Revision–The Civilian Presumption's Durability*, LIEBER INST. (Sep. 8, 2023), https://lieber.westpoint.edu/Civilian-Presumptions-Durability/[https://perma.cc/WYR3-PZZ8] ("Consider, for example, a targeting decision made by a squad leader in an intense and high-tempo battlefield situation. The squad leader's targeting decision may entail a relatively light burden of proof . . . . Indeed, the revised Manual suggests that the burden in particularly intense armed conflict situations must be light enough to permit combatants to 'react immediately.' Thus, the law must allow military personnel to act 'at the speed of relevance.'").

[83] *See* Young, *supra* note 66 ("Frequently, during training for LSCO, commanders and staffs believe the legal requirement for feasible precautions in the attack requires foregoing a military advantage when the operation cannot avoid civilian harm."); Cox, *Representative Sara Jacobs and Senator Dick Durbin Take Aim, supra* note 66, at 10 ("Based on my previous experience as a military lawyer, I have found the articulation of "all" feasible precautions to encourage an unwarranted and impermissible degree of second guessing in the aftermath of an attack."); SEAN WATTS, THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 142 (Ronald T.P. Alcala & Eric Talbot Jensen eds., 2019) ("[States] should actively manage notions of what is both feasible and, more important, reasonable as precautions in attack."); Corn & Smotherman, *supra* note 9, at 28 ("For example, the obligation 'to take feasible precautions to reduce the risk of harm to the civilian population and other protected persons and objects' is not absolute.").

[84] *See* Lawless, *supra* note 82 ("Given the character of contemporary warfare—and forecasts about the future battlefield—it seems that to remain workable, the presumption must have capacity to take on an especially weak character when appropriately demanded by the circumstances. Indeed, given predictions about the tempo, complexity, and intensity of the future battlefield, it would seem that in some situations the presumption's particular brittleness would entail practical insubstantiality."); Hitoshi Nasu & Sean Watts, *2023 DoD Manual Revision – The Civilian Presumption Misnomer*, LIEBER INST. (Aug. 1, 2023), https://lieber.westpoint.edu/civilian-presumption-misnomer/[https://perma.cc/N356-EWPF] ("Will the presumption [of civilian status] similarly feed speculation and criticism that U.S. forces have not applied the law of war and DoD legal policies in good faith? Will the

The very idea that targeting decisions require direct legal scrutiny, or even demand that the commander involve a Judge Advocate General (JAG),[85] is also seen as part of the "CT stain." LSCO authors emphasize that commanders and infantry steeped in the CT mindset—"raised on a constant diet of constraining CT rules of engagement for nearly twenty years"[86]—tend to look over their shoulders, or seek consultation or advice from lawyers before employing lethality.[87]

Perhaps the most revealing concern for LSCO lawyering is the sense that the public has absorbed these misrepresentations and misunderstandings about what the law requires. American military officials are trained on the notion that the quickest path to military defeat exists not on the battlefield but back home. This, for them, is a core lesson of Vietnam and, in some ways, the foundational lesson of Iraq and Afghanistan.[88] It is here that LSCO lawyers

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presumption merely prove to be, as Professor Geoffrey Best put it, yet another 'aid to vilification?'"); Cox, *Representative Sara Jacobs and Senator Dick Durbin Take Aim*, *supra* note 66; Beagle, Berger & Einhorn, *supra* note 78, at 6 ("Due to the speed and lethality of the peer LSCO fight, we may only know the size of the building and nothing more.").

[85] *See* Maddocks & Wheatley, *supra* note 68 ("Moreover, in LSCO, commanders will need to become comfortable in applying LOAC without a lawyer present."); Risch & Dowdy, *supra* note 66, at 93 ("In the next fight, [Judge Advocates] may not be physically present with target decision authorities."); Rob Borcherding & Drew Kernan, *Large-Scale Combat Operations Symposium – Legal Considerations Before and During LSCOS*, LIEBER INST. (May 24, 2023), https://lieber.westpoint.edu/legal-considerations-before-during-lscos/ [https://perma.cc/87QQ-NM7R] ("The LSCO scenario, presumably spread over vast terrain and a multitude of headquarters empowered to launch offensive and defensive fires, will require some outsourcing. Lawyers will simply not have the capacity to advise on every major strike."); Beagle, Berger & Einhorn, *supra* note 78, at 3 ("[O]ur leaders at these reduced-footprint command posts need to have the confidence without the benefit of a JA's advice to assume prudent risk as defined by the commander.").

[86] Pede & Hayden, *supra* note 29, at 8.

[87] *See, e.g.*, Maj. Gen. Charles Dunlap, *DoD's law of war about-face is problematic for both civilians and warfighters*, LAWFIRE (Aug 4, 2023), https://sites.duke.edu/lawfire/2023/08/04/dods-law-of-war-about-face-is-problematic-for-both-civilians-and-warfighters/[https://perma.cc/4AUE-9SKC] ("However, introducing legal jargon to say 'targets must be identified beyond a reasonable doubt' (or even by a preponderance of the evidence) shifts the key responsibility for mission accomplishment from commanders to lawyers."); Nasu & Watts, *supra* note 84 ("Soldiers are most often called upon to make an Article 50 civilian/combatant determination in the stressful, hurried, and chaotic conditions of combat. And the overwhelming majority of these persons will have no training or experience with presumptions of the legal sort.").

[88] *See* Pfaff & Beurskens, eds., *supra* note 48, at xii ("Thus, when the American public lost trust in the Army near the end of the Vietnam War, the Army lost its status as a military profession and much of its autonomy . . . . The American people expect conflicts fought on their behalf to be both effective *and* ethical. Failure in either area means loss of trust and professional status for the Army, similar to the experience after Vietnam."); Joshua Glonek, *The Trust Lapse: How Our Profession's Bedrock is Being Undermined*, 93 MIL. REV. 40 (2013), https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/MilitaryReview_20131031_art008.pdf [https://perma.cc/TBD7-

identify the most concerning gap between what may be required to win the kind of war that national-security leaders predict and what relevant publics may be currently willing to accept.[89]

YJBH] ("Public trust in the Army was at a low [after the Vietnam War], with many blaming the military for the war as much as they blamed the civilian policymakers whose orders the military was carrying out."); Yoram Dinstein, *XVIII Concluding Remarks: LOAC and Attempts to Abuse or Subvert it*, 87 INT'L L. STUD. 483, 484 (2011) ("The Vietnam conflict has shown that a civilized country such as the United States can win military battles, yet lose a war only because public opinion at home turns against it."); Maj. John R. Davis, *Defeating Future Hybrid Threats: The Greatest Challenge to the Army Profession of 2020 and Beyond*, 93 MIL. REV. 2, 25 (2013), https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/MilitaryReview_20131031_art001.pdf [https://perma.cc/8ZTS-H885] ("The lack of quick and tangible results in a hybrid war raises questions of confidence in the military strategy to the conflict. Measures of effectiveness and timelines for termination of the conflict can be hard to gauge and then explain to the public. Waning popular support for the war inevitably follows."); *compare* Martin G. Clemis, *The Enduring Lessons of Vietnam: Implications for US Strategy and Policy*, U.S. ARMY WAR COLL. PUBL'NS (June 18, 2025), https://publications.armywarcollege.edu/News/Display/Article/4218109/the-enduring-lessons-of-vietnam-implications-for-us-strategy-and-policy/ [https://perma.cc/AH84-SMGJ] ("For Hanoi, American public opinion was the point upon which all their energies (military, political, diplomatic) were directed. Over time, Hanoi's method of war proved highly effective, as growing numbers of Americans became disillusioned with what appeared to be an endless and unwinnable war. Ultimately, the diplomatic struggle helped turn public opinion against the war.") *with* Stephen L. Melton, *Center of Gravity Analysis—the Black Hole of Army Doctrine*, *in* ADDRESSING THE FOG OF COG: PERSPECTIVES ON THE CENTER OF GRAVITY IN US MILITARY DOCTRINE 81, 90 (Celestino Perez, Jr. ed., 2022), https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/COG.pdf [https://perma.cc/Y6H9-Q4VA] (describing Afghanistan as "[a] largely rural insurgency with strong religious and ethnic components aided by out-of-country supporters and sanctuaries. No identifiable COG or decisive battles. This war is now in its eleventh year, the longest in American history. As in Iraq, the American public has grown tired of the effort and its expense."); Col. Steve Boylan, *Public Opinion: A Center of Gravity Leaders Forget*, 95 MIL. REV. 93, 98 (2015) https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/MilitaryReview_20151031_art015.pdf [https://perma.cc/4PYD-S8SM] ("Interpreted from a Clausewitzian perspective, the need to continue with Operation Iraqi Freedom with the stated objective of establishing democracy and stability in Iraq had soured in the public mind. In other words, the Bush administration recognized that the moral center of gravity of the U.S.-led counterinsurgency war in Iraq was deteriorating as public opinion polls reflected frustration with constant setbacks reported in the media. This led to decisions that included replacing or marginalizing a large number of senior advisors, the introduction of a new counterinsurgency doctrine together with a new strategy, and a decision to 'surge' additional units to the war front in an effort largely aimed at restoring equilibrium and resilience to the U.S. moral center of gravity.").

[89] GEOFFREY P. R. WALLACE, INTERNATIONAL LAW AND THE PUBLIC: HOW ORDINARY PEOPLE SHAPE THE GLOBAL LEGAL ORDER 247 (2024) ("The specific conditions and pathways through which international law shapes public opinion remain open theoretical and empirical questions."); *id.* at 96–97 ("Empirical tests of reputation in international relations are difficult because information about an actor's type is fundamentally unknown, and the ways audiences process and make inferences based on actors' behavior are similarly tough to measure."); Janina Dill, Scott D. Sagan & Benjamin Valentino, *Inconstant Care: Pub. Attitudes Towards Force Protection and Civilian Casualties in the United States, United*

For several of the LSCO lawyers, Israel's experience in Gaza has only deepened this fear. In their view, the widespread "perception of Israeli indifference to civilian suffering," although untethered from "legal reality," has undercut and overshadowed Israel's tactical successes, contributing to "perceptions of strategic failure."[90] They fear the application of similar "skewed standards" awaits the United States "if the principles of LOAC are not publicly clarified for the international community."[91]

To locate ourselves in the arc of LSCO lawyering's rise, at this point, the national security establishment has determined that conflict with China is here and that an all-out conflict between the United States and that country is highly likely in the coming decades, if not years.[92] The most senior military officials, as well as key military strategy documents for the Army, Air Force, Marine Corps, and Navy indicate that preparing for this conflict will require a profound set of changes in the development of concepts of operations and strategy, military hardware, force posture, and organizational command structure, as well as an interpretation of legal and cultural frameworks to align with the demands of LSCO against a peer adversary.[93] They emphasize that

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Kingdom, and Israel, 67 J. CONFLICT RESOL. 587, 588–89 (2023) ("[T]here appears to be significant variation in attitudes towards the human costs of war among Western democracies. A 2016 report by the International Committee of the Red Cross, for example, asked respondents whether 'attacking enemy combatants in populated villages or towns in order to weaken the enemy, knowing many civilians would be killed' was 'wrong or just part of war.' 62% of Israelis, of Americans, and 40% of British citizens agreed that it was 'just part of war.' We have few theories to explain these wide cross-national differences. Moreover, we lack an explanation for how individuals form preferences when they face a choice between force protection and avoiding civilian casualties."); Rachel Brewster, *The Limits of Reputation on Compliance*, 1 INT'L THEORY 323, 324 (2009) ("Without a means of assessment, any claim about the power of reputation remains non-falsifiable and therefore has less theoretical force."). Wallace used data from a rich conventional survey to investigate how people's actual knowledge of international law shapes their policy attitudes. Looking at a battery of wartime violations, individuals with a greater awareness of IHL were shown to generally hold more restrained views toward abusive wartime behavior, however this knowledge premium does not appear to hold across all issue areas. But in those domains where international law can provide new information, the legal rules appeared to do so in principled ways that can shape policy preferences. *See* WALLACE, at 163–98.

[90] Corn & Smotherman, *supra* note 9, at 36–37.

[91] ROBERT ASHLEY ET AL., GAZA CONFLICT 2021 ASSESSMENT: OBSERVATIONS AND LESSONS 42 (2021), https://jinsa.org/wp-content/uploads/2021/10/Gaza-Assessment.v8-1.pdf [https://perma.cc/G2GP-LLKW]; *see also* Omer Dostri, *Israel's Struggle with the Information Dimension and Influence Operations during the Gaza War*, MIL. REV. (2024), https://www.armyupress.army.mil/journals/military-review/online-exclusive/2024-ole/dr-dostri-israel-gaza-war/ [https://perma.cc/F9DH-X4DR]; WALD ET AL., *supra* note 53, at 35–49.

[92] *See e.g.*, Franchetti, *supra* note 20 (describing CNO Franchetti's office clock counting down to January 1, 2027, the year the Navy needs to be prepared for China to invade Taiwan).

[93] *See* U.S. MARINE CORPS, ANNUAL UPDATE, FORCE DESIGN 2030, *supra* note 30, at 16 ("Although many elements of FD2030 are already in use, our modernization has only just begun. We must capitalize on our momentum and accelerate modernization so that we stay

the conditions in which this war will be fought will be as different as imaginable from the wars of the past twenty years. In a sense, the LSCO battlefield will be both much more similar to the wars of the early and mid-twentieth century, and futuristic in terms of the involvement of outerspace, the electromagnetic sphere, autonomous weapons, and cyber operations. It will place the burdens of judgment on very young commanders to make rapid decisions with maximum lethality.

According to LSCO lawyers, it is untenable to fight under current targeting expectations.[94] What exists in 2025 is not only the black-letter law of

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ahead of competitors. To accelerate most effectively, we will put capabilities as rapidly as possible into the hands of tactical commanders who are campaigning every day. Time is not on our side, and we must work at a tempo greater than our competitors."); U.S. DEP'T OF THE NAVY, ADVANTAGE AT SEA: PREVAILING WITH INTEGRATED ALL-DOMAIN NAVAL POWER 5–6 (2020) ("Moreover, China's and Russia's aggressive naval growth and modernization are eroding U.S. military advantages. Unchecked, these trends will leave the Naval Service unprepared to ensure our advantage at sea and protect national interests within the next decade." The naval strategy then emphasizes several implications to prevail against peer adversaries, including strengthening alliances, increasing American presence in contested maritime domains, and exploiting "activities short of war[.]"); U.S. DEP'T OF THE AIR FORCE, AIR SUPERIORITY 2030 FLIGHT PLAN, *supra* note 32, at 3 (2016) ("Developing and delivering air superiority for the highly contested environment in 2030 requires a multi-domain focus on capabilities and capacity. Importantly, the rapidly changing operational environment means the Air Force can no longer afford to develop weapon systems on the linear acquisition and development timelines using traditional approaches."); FM 3-0, *supra* note 23, at ix ("This version of FM 3-0 establishes multidomain operations as the Army's operational concept. Conceptually, multidomain operations reflect an evolutionary inflection point, building on the incremental changes in doctrine as the operational environment has changed over the last forty years."). *See also* U.S. Dep't of the Army, *AUSA Contemporary Military Forum: Army 2030 - Preparing Today for Tomorrow's Fight*, DVIDS (Oct. 10, 2022) https://www.dvidshub.net/video/860148/ausa-contemporary-military-forum-army-2030-preparing-today-tomorrows-fight [https://perma.cc/MY5P-GAR2] (Discussing the Army of 2030, then Chief of Staff of the Army General James C. McConville stated, "We are at an inflection point right now. We're coming out of 20 years of irregular warfare, counterterrorism, counterinsurgency. And we recognize and we see what's going on around the world, that we need to be able to fight large scale combat operations in a multidomain operations environment where we're contested in every single domain . . . . And so we're changing our doctrine.").

[94] *See, e.g.*, Deptula, Airpower, Law and the Warfighter's Perspective, *supra* note 12, at 25 ("As we move from two decades of counter insurgency, we must be vigilant that we do not superimpose the restrictions of the last war over a future fight, or the consequences may be catastrophic."); Pede & Hayden, *supra* note 29, at 7 ("Commanders will need to intuitively know and confidently apply the actual rules of war, unhindered by the lingering hangover of constrained COIN ROE. Mastery of the law of war may very well mean the difference between victory and defeat."); Camilla Cooper, *Curing the COIN Hangover*, LIEBER INST. (Jul. 7, 2023), https://lieber.westpoint.edu/curing-coin-hangover/[https://perma.cc/J26J-2PR5] ("So, training suggests that the COIN hangover causes us to lose battles and it makes us vulnerable. It causes operational indecision and ineffectiveness because the expectations of certainty and lack of civilian harm are not possible to meet when the opponent is a peer rather than an insurgent group."); MacDonald & McCormick, *supra* note 53 ("An application of restrictive policies in an inflexible manner, even when noble in intent, only serves to increase friction and inhibit success in the next anticipated conflict with peer-level adversaries.").

IHL but also a dense layering of policy preferences, interpretive practices, and normative expectations—many of which exceed (in the view of the U.S. government) what strict interpretations of treaty texts and customary rules require. These overlays, shaped by decades of counterterrorism operations, reflect an era in which the United States had the "luxury"[95] of imposing stringent restrictions without jeopardizing strategic objectives.[96] LSCOs are said to demand an approach that restores primacy to military imperatives, even if doing so means discarding humanitarian ideals that, while normatively powerful, are not legally mandated.[97] Pede and Hayden bluntly sum up this dilemma, so central to the eighteenth-gap thesis, as such:

> Deceptively attractive rules borne of comparatively clinical COIN and CT operations would be disastrous on a catastrophic scale, were they to be applied to near-peer war. Simply put, such notions must be rejected. If we are to win on Battlefield Next, we must be ready to fight with the law that is, not the law as some would wish it to be. Decades of surgical strikes with precision weapons and weaponeering has its place. That place is not LSCO.[98]

The "gap" metaphor functions only if one accepts that relatively few binding rules of LOAC apply to the United States and that those rules are open to potentially extensive interpretation—and that much of the rest is modifiable. The perceived confusion stems from the belief, within and beyond the military, that the entire assemblage of policy preferences, operational constraints, and normative considerations instantiated in respect of CT operations is binding.

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[95] Young, *supra* note 66.

[96] *See, e.g.*, *id*. ("[C]oncerns with maintaining 'legal maneuver space' stress the importance of acknowledging what the LOAC does not prohibit, as opposed to the situation-specific policy restrictions U.S. forces had the luxury to implement in slower-paced COIN and CT operations against numerically and technically inferior adversaries."); Cooper, *supra* note 94 ("I'm not saying these are negative policies—in these operations they were considered necessary as COIN operations cannot succeed if the civilian population is alienated—but they are not always possible to adhere to, and they will not always be appropriate.").

[97] *See, e.g.*, Curley & Golden, *supra* note 56, at 24 ("[C]ommanders, operators, and legal advisors need a mindset change to become more comfortable with the concept of employing force when they do not possess perfect or near perfect information about a target which would most certainly be the predominant scenario in a HIC. "); Deptula, *In a Dangerous World*, *supra* note 27 ("[The Civilian Harm Mitigation and Response Action Plan]" has little relevance to the conduct of operations in a major regional conflict, where the magnitude of threats, rapid execution timelines and distributed and decentralized nature of combat will not allow for the studied review this report imagines."); Deptula, Airpower, Law and the Warfighter's Perspective, *supra* note 12, at 26 ("Conditions will be very much different in the contested operations of a major regional conflict in Europe or the western Pacific . . . . It means that the intensity of conflict is not going to allow for exquisite, centralized analysis for the prosecution of each and every target"); MacDonald & McCormick, *supra* note 53 ("Planning for future LCSO requires commanders to confidently and nimbly shed the COIN/CT fighting mindset toward full conventional warfighting against a declared near-peer enemy where every domain (land, sea, air, space, and cyberspace) is highly contested.").

[98] Pede & Hayden, *supra* note 29, at 16.

For LSCO lawyers, addressing the concerns raised by "The Eighteenth Gap" literature and the corrosive effects of the "CT stain" will require more than rhetorical reaffirmation. It will necessitate a forward-looking project for the future of the law: a playbook for closing the gap.

That is, in the view of LSCO lawyers, if multi-domain maneuver warfare is the only viable path to defeat China in future LSCOs—and if this strategy demands rapid, independent decision-making by junior commanders to maximize lethality—then the existing legal approach to targeting must be rethought. It must reflect the demands of high-intensity combat, where the kinds of delay, legal scrutiny, and external checks of the counterterrorism era risk enabling defeat before a shot is fired.

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The move already underway in assessing the perceived gap between existing law and LSCO realities is subtle but significant. What counts as the binding core—the "basics" of IHL—is being framed through a lens that prioritizes pragmatic, military-necessity-oriented interpretations. These are drawn from sources and readings that resonate with long-standing U.S. practice while largely sidelining what are often cast as "aspirational" or overly humanitarian overlays. The result is framed as a clarification of—rather than a break from—the law: an effort to (re)align legal expectations with what LSCO proponents understand to be the operational demands of future war. In this sense, the approach is both a return to LOAC fundamentals and a rearticulation of which fundamentals matter and why. The lawyers involved are not directly arguing for a transformation of treaty interpretation or a withdrawal from binding customary IHL rules. Yet, their work is nonetheless helping to generate a (re)configuration of legal baselines that mirrors the strategic and operational logic of LSCO.

III. THE SOLUTION

"If the principles of LOAC are not publicly clarified for the international community, the United States and potential coalition partners may well be confronted by similarly skewed standards that Israel now faces. This would negatively affect the ability of law-abiding militaries to conduct effective combat environments that are widely understood as legitimate by the international media and public. Mitigating such misunderstandings and deliberate distortions will require rectifying the lack of clarity regarding LOAC requirements, particularly in urban warfare."[99]

"This distinction between law and policy is fundamental to the gap between the law of war and its misperception. And the distinction will be profoundly important on Battlefield Next, when survival and victory on the battlefield

[99] ASHLEY ET AL., *supra* note 91, at 42.

with near-peer demands adherence to the law in a construct that recognizes the necessities of war."[100]

"Victory in large-scale maneuver war does not depend solely on 'a state's capacity to finance military forces, nor [on] competent leadership at the central level, the size of the combat forces, or technological superiority.' War is primarily a human endeavor where victory or defeat is decided by human factors, not material ones. Commanders at every level—as well as other combat leaders such as platoon and squad leaders—must be empowered to independently and creatively apply their combat power against the enemy . . . . Doctrine and training should inculcate an aggressive mindset and encourage junior combat leaders to take calculated risks on their own initiative. In other words, armed forces must instill in all leaders the mantra, 'In the absence of orders, Attack!'"[101]

In this part, I examine how the U.S. military's shift toward LSCO involves confronting both internal legacies and external pressures, including by revisiting its own IHL contributions that once emphasized civilian protection but are now seen as impeding operational effectiveness. LSCO lawyers call for narrow interpretations of core LOAC targeting rules—including distinction, proportionality, and precautions in attack—to center military necessity, resist external scrutiny, and vest compliance judgment in those directly involved in military operations. These moves aim to reshape legal and cultural baselines to allow decisive action in armed conflicts framed as existential, unencumbered by constraints developed for counterterrorism operations.

A. Unraveling the "CT Stain": An American Legal Paradox

Until this point, our story has unfolded largely within the U.S. armed forces: in professional newsletters, service magazines and journals, and bureaucratic military manuals, case studies, and assessments. The prediction of a new era of warfare, the decision to transform the DoD to prepare for this war, and the lawyers' identification of a profound and dangerous gap between how the law is perceived by young soldiers and the American public and the kind of flexible and unhindered decision-making apparatus required to facilitate victory in this war leaves LSCO planners with a multidimensional problem that is at once doctrinal, cultural, and operational. "The Eighteenth Gap" authors—echoing concerns from senior officers about hesitancy among junior troops to kill at the scale LSCO demands[102] and about public and

[100] Pede & Hayden, *supra* note 29, at 10.
[101] Corn & Smotherman, *supra* note 9, at 12–13.
[102] *See, e.g.,* Cooper, *supra* note 94 ("[Commanders] are so caught up in being certain about the identity and location of their opponents and carrying out operations in ways that do not cause civilian harm, that they fail to drive the adversary out of their area. Not only that, they leave themselves vulnerable to lawfare tactics because the opponent realizes that they will go

political resistance to such violence[103]—identify not just problematic interpretations or applications of LOAC rules but also a political and legal culture they believe must be transformed. Even more challenging, these individuals have candidly assessed that the problem is just as much inside the house as it is outside. For all their concern about NGOs, the UN, and non-military academic IHL experts, the LSCO planners highlight that the U.S. military itself has significantly contributed to the culture of LOAC they now seek to remake.

The dramatic changes to military doctrine and culture that the LSCO planners seek cannot be achieved in the pages of the *Army Lawyer* or in speeches to military audiences. It is one thing for the DoD to decide that it is going to shift its troop allotments, set targets for new kinds of weapons, or rewrite battlefield strategy. However challenging these changes are, they are entirely within the control of the bureaucracy. "The Eighteenth Gap" gestures toward something more ambitious and more contentious. It reflects a perceived need to resist and, in part, reverse a trajectory for LOAC that the United States has helped to chart: one marked by increasing formalization and normative constraint in the regulation of hostilities. It is worth recalling that the skepticism voiced by LSCO legal thinkers extends beyond the reports of NGOs or statements by UN special rapporteurs. Their critiques reach inward as well, toward portions of the DoD Law of War Manual,[104] the Civilian Harm

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to extreme lengths to protect civilians."); Curley & Golden, *supra* note 56, at 24 ("[E]xperience of restrictive positive identification was so ingrained in Air Force operators and lawyers that, in some cases, they refused to engage multiple targets for fear of violating the ROE or the LOAC."); Young, *supra* note 66 ("While training at JMRC for LSCO, BCTs routinely lose most of their combat power because they are getting the context wrong – confusing the civilian harm mitigation policies of past conflicts for what the law requires – all in a well-intentioned, if mistaken, effort to avoid collateral damage when attempting to seize urban terrain.").

[103] *See, e.g.*, Maddocks & Wheatley, *supra* note 68 ("It is apparent from this conflict [in Gaza] that public opinion will not readily accept the large scale of civilian deaths that are likely in any LSCO."); Deptula, *In a Dangerous World*, *supra* note 27 ("American political leaders have done our nation a disservice by failing to explain to the public that civilian casualties are an unfortunate reality in war. Instead of reiterating that important fact, the Austin report's recommendations perpetuate an unrealistic expectation: that the U.S. can apply lethal force with great omniscience, in a fully informed environment with little—if any—risk."); Maj. Gen. Charles Dunlap, *Civilian Casualties, Drones, Airstrikes and the Perils of Policy*, WAR ON THE ROCKS (May 11, 2015), https://warontherocks.com/2015/05/civilian-casualties-drones-airstrikes-and-the-perils-of-policy/ [https://perma.cc/QRH9-3PUG] ("It is no wonder that critics have a field day when civilian casualties do occur, as is wholly predictable when thousands of targets are struck. Misunderstandings about the propriety of the use of force can have a severely deleterious effect on operations vital to national security.").

[104] *See generally* Brian L. Cox, *2023 DOD Manual Revision–Tactical Concerns Related to the Presumption of Civilian Status–Part I*, LIEBER INST. (Aug. 14, 2023), https://lieber.westpoint.edu/practical-concerns-related-presumption-civilian-status-part-i/ [https://perma.cc/88YY-N7Y6]; Nasu & Watts, *supra* note 84; William H. Boothby, *2023 DOD Manual Revision–A Commentary on the Amendments*, LIEBER INST. (August 23, 2023),

Mitigation and Response Action Plan (CHMR-AP),[105] and various ROEs and policy documents[106] promulgated by the United States government. These texts, alongside U.S. condemnations of Russian conduct,[107] Department of Justice war crimes prosecutions of foreign armed forces,[108] and the training of allied military lawyers,[109] have helped instantiate a particular vision of IHL marked by detailed guidance and normatively protective ambition. That these approaches now prompt concern from within suggests the extent to which American LOAC doctrine has internalized a model of warfare that some in the

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https://lieber.westpoint.edu/commentary-on-amendments/ [https://perma.cc/D4J5-ZUCH]; Lawless, *supra* note 82.

[105] *See* MacDonald & McCormick, *supra* note 53 ("As admirable as it is for the CHMR-AP to attempt to push beyond what the law requires, commanders must always be guided by LOAC in conducting military operations. If it is not implemented with great caution, the CHMR-AP could very well impede U.S. armed forces from prevailing in future armed conflict."); Deptula, *In a Dangerous World*, *supra* note 27 ("[T]he recommendations in [the CHMR-AP] threaten to undermine U.S. combatant forces and their commanders, limiting America's ability to wage war and potentially increasing the risk of civilian casualties in the future."); *see also* Young, *supra* note 66; Brian Cox, *Commitment to Balance Is Vitally Important for Successful Implementation of CHMR-AP*, LAWFARE (Oct. 25, 2022), https://www.lawfaremedia.org/article/commitment-balance-vitally-important-successful-implementation-chmr-ap [https://perma.cc/QUC8-TRM4].

[106] *See, e.g.*, Dunlap, *Civilian Casualties*, *supra* note 103 ("The [U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities] are an object lesson of the perils of trying to appease critics by attempting to use policy to 'improve' upon what international law provides and permits."); MacDonald & McCormick, *supra* note 53 ("Unduly burdensome policy positions cut directly against the necessities of war that are likely to emerge, to the detriment of those engaged in combat.").

[107] *See, e.g.*, Press Release, Anthony Blinken, U.S. Sec'y of State, War Crimes by Russia's Forces in Ukraine (Mar. 23, 2022), https://2021-2025.state.gov/war-crimes-by-russias-forces-in-ukraine/ [https://perma.cc/2CZY-G264]; Jeff Mason & Simon Lewis, *Biden says Putin committed war crimes, calls charges justified,* REUTERS (Mar. 18, 2023), https://www.reuters.com/world/europe/us-says-no-doubt-russia-is-committing-war-crimes-ukraine-after-icc-issues-putin-2023-03-17/ [https://perma.cc/4ST9-P9PW]; Press Release, Off. of Pub. Aff., U.S. Dep't of Just., Attorney General Merrick B. Garland Delivers Remarks Announcing Four Russia-Affiliated Military Personnel Charged with War Crimes in Connection with Russia's Invasion of Ukraine (Dec. 6, 2023), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcing-four-russia-affiliated [https://perma.cc/X6WB-R5LN].

[108] *See* Press Release, Off. of Pub. Aff., U.S. Dep't of Just., Four Russia-Affiliated Military Personnel Charged with War Crimes in Connection with Russia's Invasion of Ukraine (Dec. 6, 2023), https://www.justice.gov/opa/pr/four-russia-affiliated-military-personnel-charged-war-crimes-connection-russias-invasion [https://perma.cc/YN9G-JJVF]; Press Release, Off. of Pub. Aff., U.S. Dep't of Just., Criminal Charges Unsealed Against Two Former High-Ranking Syrian Government Intelligence Officials for War Crimes against Americans and Other Civilians (Dec. 9, 2024), https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-two-former-high-ranking-syrian-government-intelligence [https://perma.cc/M3CJ-LVTM].

[109] *See, e.g.*, Welcome to the Defense Institute of International Legal Studies, DEF. SEC. COOP. UNIV., https://dscu.edu/diils#:~:text=About%20Us,%2C%20and%20defense%2Dsector%20civilians [https://perma.cc/LSX9-97RJ] (last visited Nov. 9, 2025).

LSCO community view as increasingly misaligned with the realities of large-scale, high-intensity conflict.

At least since the mid-1990s, it has often served U.S. political and strategic interests to promote a vision of itself as the global exemplar of humane warfighting.[110] This self-conception—reflected in public messaging, legal doctrine, and military training—casts the United States as uniquely committed to the legal regulation of armed conflict. Criticism from NGOs, UN bodies, or academic observers, while frequently dismissed as misinformed or detached from actual warfare, operated within this narrative: their focus tended to fall on individual airstrikes or targeting decisions rather than on questions of aggression or structural (il)legality. These critiques unfolded in information environments largely shaped by the United States, where access to after-action reports or casualty assessments was tightly controlled. Even sharp reproach often reinforced the idea that the United States was being held to, and aspired to meet, exceptionally high legal standards.

Yet this framing, persuasive in some circles, was never universally accepted. In many foreign defense academies and legal institutions, the United States has been seen not as the standard-bearer of the most stringent interpretations of IHL but as selectively rigorous: committed to certain legal constraints while resisting others. LOAC doctrinal positions such as the classification of "war-sustaining" objects as legitimate targets, the legal rationale for Guantánamo Bay detentions, and the rejection of key provisions of AP I have long drawn skepticism. Events such as Abu Ghraib, aspects of drone warfare, and the enduring detention regime at Guantánamo have complicated the image of U.S. leadership in the humanization of warfare. Still, in contrast to Russia or China, the United States has often been perceived—particularly by Western allies—as more legally self-conscious and institutionally invested in LOAC's relevance. These aspects of IHL discourse, of legal culture, helped to project a particular vision of American liberal leadership, providing a palatable form of war suited to the human-rights age and uncontested U.S. hegemony. What emerged was not so much a global consensus on U.S. legal stringency as a distinct legal culture—American IHL—defined by its complex mixture of commitments, exceptions, and ambivalences.

This all matters with respect to LSCOs because the interpretive ecosystem of IHL applicable to the conduct of hostilities as we know it today—the very "CT stain"—is, in short, partly an American creation, one that now threatens to undermine the kind of warfare the LSCO planners believe to be essential for national survival.

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[110] *See generally* SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR (2021); Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225 (2014).

B. Delegitimizing External Scrutiny in LSCO

During the GWOT years, military legal advisers frequently responded to external allegations of unlawful conduct by cautioning that civilian harm, while tragic, could not in itself establish a violation of the law. Under LOAC, they argued, legality turns on context-specific judgments that external observers often lack the information to make.[111] As two former military lawyers put it, while attack effects may (or may not) be *probative* of legal compliance, depending on the circumstances, they are rarely if ever *dispositive* as to whether or not the law has been violated.[112] Within the IHL community, these questions remain the subject of ongoing debate. The relevant legal standards are, in many key respects, unsettled; the criteria for assessing compliance are still evolving; and views diverge sharply on what constitutes meaningful external assessment—whether through international scrutiny, domestic institutions, or public and civil-society engagement.

While military lawyers were often wary of the so-called "NGO perspective," they frequently had productive contact during the GWOT with external critics and independent investigators. At the senior level, military legal practitioners participated in academic and other conferences and workshops where they heard and engaged with the concerns of humanitarian organizations, legal academics, and international law experts. The military frequently responded to demands for information about operations from journalists. With organizations that were seen as "serious" and skilled at IHL, such as the ICRC as well as some actors within the United Nations and the NGO community, military practitioners and military-adjacent academics often collaborated on clarifying legal standards, refining operational guidelines, and addressing shared concerns about civilian protection. After external demands for greater transparency and accountability regarding civilian casualties, the government agreed to provide Congress with annual reporting on civilian harm mitigation and response policies.[113] Perhaps no document better illustrates this

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[111] *See, e.g.*, WALD ET AL., *supra* note 53, at 37 ("LOAC, in short, does not condone a post hoc effects-based critique."). *See generally* Geoffrey Corn & Rachel VanLandingham, *The Flawed Human Rights Watch Report on Gaza*, LAWFARE (June 26, 2019), https://www.lawfaremedia.org/article/flawed-human-rights-watch-report-gaza [https://perma.cc/5FVT-JS9S].

[112] *See* Corn & VanLandingham, *supra* note 111.

[113] Exec. Order No. 13,732, 3 C.F.R. 241 (2016) (requiring U.S. intelligence officials to publicly disclose the numbers of people killed in drone strikes and other attacks on terrorist targets outside of war zones, and mandating an annual unclassified summary of strikes and deaths resulting from the strikes); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1057, 131 Stat. 1283, 1572 (2017); Alexandra Schmitt, Daphne Eviatar & Rita Siemion, *Department of Defense's Report on Civilian Casualties: A Step Toward Transparency?*, JUST SEC. (June 1, 2018), https://www.justsecurity.org/57718/department-defenses-report-civilian-casualties-step-transparency/ [https://perma.cc/2JV8-R33E] ("On June 1, the U.S. Defense Department (DoD) submitted to Congress its report on the more than 500 civilians it estimates were

kind of collaboration than the CHMR-AP, which culminated in the creation of an office of civilian protection in the DoD as well as the institutionalization of civilian harm tracking and mitigation mechanisms across service branches.[114] Finally, the United States was seen as highly sensitive to (usually quiet) scrutiny from allied states and those involved in coalition operations, sometimes altering ROEs for joint operations or adapting targeting measures to align with coalition partners' legal and operational standards. In a sense, while non-military scrutiny of targeting and its effects were never celebrated or wholeheartedly welcomed by the armed forces, the GWOT years saw intense dialogue, fruitful exchange, and even collaboration with outsiders on the basis that all actors shared a core commitment to the protection of civilians during hostilities.

One can anticipate that LSCO legal reasoning might increasingly frame external scrutiny as strategically misaligned with the demands of high-intensity war. At the core of such a stance is a sharpened version of a long-standing doctrinal argument: that the legality of an attack under LOAC cannot be assessed solely by its effects. For decades, military and military-adjacent legal practitioners have contended that outcomes—however tragic—are not themselves indicative of legal violations. Instead, the relevant legal inquiry centers on the decision to attack, judged according to the information available and circumstances prevailing at the time.

This view finds textual and legal doctrinal support. The targeting rules in AP I are framed in terms of reasonableness and feasibility and require judgments based on "the circumstances ruling at the time."[115] The *travaux préparatoires* largely confirm that the drafters understood the law to focus on

killed and injured in U.S. military operations in 2017."); *Obama Administration Discloses Civilian Deaths From Drones*, CBS NEWS (July 1, 2016, 4:48 PM), https://www.cbsnews.com/news/obama-administration-discloses-civilian-deaths-drones/ [https://perma.cc/M6WE-3WTZ]; Peter C. Combe II, *Practice Notes: Civilian Casualties: Practical Application of the Law of Prevention and Response*, 5 ARMY L. 38, 65 (2021), https://tjaglcs.army.mil/Periodicals/The-Army-Lawyer/tal-2021-issue-5/Post/5805/Practice-Notes-Civilian-Casualties [https://perma.cc/5LNZ-GPAJ].

[114] U.S. DEP'T OF DEF., CIVILIAN HARM MITIGATION AND RESPONSE ACTION PLAN 1 (2022) ("The Civilian Protection Center of Excellence (CP CoE) will serve as a hub and facilitator of DoD-wide analysis, learning, and training related to CHMR, and will directly support the efforts of the combatant commands and the military services."); *see generally* MADISON HUNKE, ANNIE SHIEL & LOREN VOSS, CTR. FOR CIVILIANS IN CONFLICT AND THE STIMSON CTR., TRACKING IMPLEMENTATION OF THE CIVILIAN HARM MITIGATION AND RESPONSE ACTION PLAN (CHMR-AP) (2024).

[115] 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 AP I] art. 57(4) (reference to "reasonable" precautions); *id.* art. 58 (on precautions against the effects of an attack to the maximum extent "feasible"); *id.* art. 52(2) (strictly limiting attacks to military objectives "in the circumstances ruling at the time").

the moment of decision rather than on outcomes.[116] This position also finds reinforcement in international criminal jurisprudence, which has tended to focus on the individual attacker's intent and knowledge at the moment of the strike.[117] The doctrine of state responsibility in this area of LOAC remains underdeveloped, particularly in terms of drawing clear legal conclusions from

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[116] 6 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, CDDH/SR.41, 179, 214, 223, 226, 253 (May 26, 1977) (A delegate from Turkey said that, "[A]s far as his delegation was concerned, the word 'feasible' in Article 50 and other articles should be interpreted as related to what was practicable, taking into account all the circumstances at the time and those relevant to the success of military operations."); *id.* at 214 (A delegate from the Netherlands said "[I]t was the Netherlands delegation's view that the word 'feasible' when used in Protocol I, for example in Articles 50 and 51, should in any particular case be interpreted as referring to that which was practicable or practically possible, taking into account all circumstances at the time."); *id.* at 226 (A delegate from Germany said that they would "interpret the word 'feasible' as meaning what is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations."); *id.* at 253 (A delegate from the United States said that, "It is the understanding of the United States Government that the word 'feasible' when used in draft Protocol I, for example in Articles 50 and 51, refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations."); *id*. at 179, 181, 188, 195, 204 (A delegate from Canada said that, "In the view of the Canadian delegation, a specific area of land may also be a military objective if, because of its location or other reasons specified in Article 47, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."); *id.* at 188 (Germany agreeing with this interpretation); *id.* at 181 (United Kingdom also agreeing with the Canadian position); *id.* at 195 (Netherlands same); *id.* at 204 (United States same).

[117] Case No. 47: The Hostages Trial: Trial of Wilhelm List and Others, [1949] 8 U.N. WAR CRIMES COMM'N, LAW REP. TRIALS WAR CRIMINALS 34 ("[A]n individual should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question."); United States v. Wilhelm List et al., in Trials of War Crimes Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. XI TWC 1297 (1948) ("[T]he conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgement but he was guilty of no criminal act."); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), 58-59, [hereinafter *Galić* case] ("In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack"; and "to establish the mens rea of a disproportionate attack, the Prosecution must prove . . . that the attack was launched willfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties."). *See also* Michael Bothe, Karl Partsch & Waldemar Solf, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 320 (1982) ("In the 1851 case of *Mitchell v. Harmony*, arising out of the seizure of civilian goods by a military commander during the Mexican-American war, the US Supreme Court had occasion to comment: 'In deciding upon . . . necessity . . . the state of facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own . . . . The discovery afterwards that [the information] was false or erroneous will not make him a trespasser.'").

the effects of military action. Even international human rights law, which more often permits post hoc evaluation of state conduct, recognizes the relevance of reasonableness, due diligence, and good faith decision-making rather than requiring harmless outcomes.

Yet, while this legal framing has deep roots, the LSCO discourse moves it in a more forceful and categorical direction. Where past U.S. legal posture acknowledged the relevance of effects—particularly in assessing precautionary measures across a sequence of attacks—the emerging LSCO approach tends to assert that outcomes are entirely irrelevant to legality. This position risks collapsing meaningful distinctions between focusing on the decision and disregarding effects altogether. It also brushes aside LOAC doctrinal nuances, such as concerns adjusting precautions in light of observed civilian harm during an ongoing or comparable operation.

What is distinctive in LSCO lawyering is not the underlying LOAC doctrinal claim but the institutional posture it supports. Increasingly, external scrutiny is framed not as misguided but as illegitimate: unless one was directly involved in the operation, one is presumed incapable of rendering (any aspect of) a valid judgment.[118] This stance reflects a deeper anxiety: that, during the GWOT, humanitarian and legal institutions came to exert undue influence over the normative environment in which military decisions are made. From a LSCO perspective, such scrutiny goes beyond second-guessing commanders to alter the conditions under which future operations can be effectively planned and executed.[119]

In this vision, the law is to be interpreted from within the command structure, not through the lens of public accountability.[120] Critique, that is, can

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[118] *See, e.g.*, Brian L. Cox, *New York Times, Law of War, and Congressional Overreach in U.S. Military Operations*, CORNELL L. FAC. WORKING PAPERS 1, 45 (2022), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1132&context=clsops_papers [https://perma.cc/3B2W-NXF5] ("The substantive analysis of the case studies explored above reveals systemic deficiencies that exist in the collection of high-profile media coverage featured in the critical assessment conducted in the present work, though these shortcomings should come as no surprise given the nature of external journalistic reporting on inherently internal and specialized operational and accountability processes.").

[119] An example of this view is seen manifested in Defense Secretary Pete Hegseth informing Pentagon employees of the impending closure of the Civilian Harm Mitigation and Response Office, and the Civilian Protection Center of Excellence. *See* John Ismay & Azmat Khan, *Hegseth Cuts Pentagon Work on Preventing Civilian Harm*, N.Y. TIMES (Mar. 4, 2025), https://www.nytimes.com/2025/03/04/us/politics/hegseth-pentagon-civilian-harm.html# [https://perma.cc/8LY2-99XU].

[120] *See, e.g.*, Brian L. Cox, *In Defence of Doctrinal Assessments: Proportionality and the 31 October Attack on the Jabalia Refugee Camp*, EJIL: TALK! (Nov. 10, 2023), https://www.ejiltalk.org/in-defence-of-doctrinal-assessments-proportionality-and-the-31-october-attack-on-the-jabalia-refugee-camp/ [https://perma.cc/2CFF-LH8G] ("[O]bservers and commentators not directly involved in an attack or tasked with assessing compliance

be valid in the sense of comprehensiveness only insofar as it is internal. As one senior official notes,

> [C]ollection of civilian casualty incidents by outsider observers is an incomplete basis for understanding whether sufficient care is being taken during military operations. Outside observers, like NGOs, do not and could not gather information about when our precautions are successful in avoiding or minimizing civilian casualties.[121]

Indeed, another practitioner argues, "[E]ven when it *is* possible to develop a precise and reliable account, data accumulated in the wake of an incident does little to inform the extent of incidental damage expected *at the time* of the attack."[122] In LSCO, this even applies to attempts within the DoD to impose civilian-casualty tracking and internal investigation:

> Moreover, in the next fight these CT-centric aspirations [for investigating IHL violations] will likely be unrealistic. The guidelines require commanders to collect and record information related to military operations, to secure and preserve evidence at the scene of an "incident," and so forth . . . . Simply, existential and sustained firefights will not always lend themselves to evidence preservation protocols. We will comply with the law of armed conflict in that fight, even when our enemy does not, but we are not going to have investigative teams co-located with the company commander to collect evidence and document what happened. That commander is fighting and moving, trying to advance rapidly and cover miles, and keep her force alive, intact, and combat effective.[123]

What begins in "The Eighteenth Gap" as a call for clarifying misunderstandings among well-intentioned outsiders becomes, in LSCO discourse, something much more assertive. The issue is not (only) that non-military actors—NGOs, the ICRC, UN agencies, allied states, even

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afterward simply do not have access to the information necessary to draw authoritative conclusions."); Corn & VanLandingham, *supra* note 111
("These realities require that those who critique military operations accept that in many situations insufficient information will be available to reach solid conclusions").

[121] Paul C. Ney, General Counsel, U.S. Dep't of Def., Keynote Address at the Israel Defense Forces' 3rd International Conference on the Law of Armed Conflict (May 28, 2019) *in* JUST SEC., May 2019, https://www.justsecurity.org/64313/remarks-by-defense-dept-general-counsel-paul-c-ney-jr-on-the-law-of-war/ [https://perma.cc/T7KR-UJZ5].

[122] Brian Cox, *Nuseirat Hostage Rescue and the LOAC Proportionality Rule*, LAWFIRE (Aug. 10, 2024), https://sites.duke.edu/lawfire/2024/08/10/guest-post-brian-cox-on-the-nuseirat-hostage-rescue-and-the-loac-proportionality-rule/ [https://perma.cc/3TAS-Z326].

[123] Pede, Keynote Address, *supra* note 67.

Congress[124]—misinterpret the law or fail to grasp the realities of war. Rather, under this vision, the full legal assessment of an attack becomes inaccessible to anyone outside the chain of command. So long as the military can demonstrate that targeting decisions were guided by internal rules—rules shaped by the new LSCO legal framework—there is, by design, next to no room for comprehensive external judgment. This LSCO approach encourages abandoning the idea that outsiders, no matter their expertise or access to post-strike evidence, could offer a comprehensively valid legal assessment.[125] Instead, the only sufficiently positioned, competent, and legitimate evaluators of compliance are those directly involved in the hostilities.

For LSCO planners, this is not only doctrinally grounded in LOAC—it is strategically necessary. In their view, the past two decades of engagement with IHL experts, human-rights NGOs, and legal academics, while intended to help legitimize U.S. operations, also generated persistent expectations of transparency and justification. Civilian casualties were increasingly treated as legal events requiring legal explanations. NGO-led bomb damage assessments,[126] media commentary by IHL scholars, and fact-finding missions by UN bodies came to occupy central roles in public understandings of military legality. U.S. officials themselves helped entrench this model by, for example,

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[124] By at least one LSCO lawyer's account, even members of Congress do not have the requisite military experience and legal expertise to legitimately comment on the legality of U.S. military operations. In criticizing two members of Congress who sent a letter to the DoD questioning certain positions in the DoD Law of War Manual, the lawyer wrote, "There is no reason to believe a pair of lawmakers with no military experience and no apparent expertise related to international law involving the use of force are proficient in the highly nuanced task of evaluating whether the suggested revisions to the Manual presented in their letter unduly tip the balance in favor of humanity at the expense of military necessity." Cox, *Representative Sara Jacobs and Senator Dick Durbin Take Aim*, *supra* note 66, at 26. The same author challenges Congress's broader mandate to oversee the U.S. military, stating, "It is not uncommon to express that Congress exercises an "oversight" role in relation to the United States Government, including the executive, or that the legislature is a 'co-equal' branch alongside the executive. These characterizations are inaccurate." *Id.* at 34.

[125] This may be contrasted with the United States's approach to the failed Swiss-ICRC IHL compliance initiative (2011-2019). While some European negotiators from that initiative indicated to me that the U.S. delegation was not necessarily in favor of a robust compliance monitoring body, it did spend years negotiating and discussing what a global mechanism for state reporting on compliance with IHL treaties might look like. For more on the initiative, *see* Yvette Zegenhagen & Michael Meyer, *Improving Compliance with IHL: A Long-Term Enterprise*, LIEBER INST. (Nov. 22, 2021), https://lieber.westpoint.edu/improving-compliance-ihl-long-term-enterprise/ [https://perma.cc/XY3C-UYAW]; *see also* Jelena Pejic, *Strengthening Compliance with IHL: The ICRC-Swiss Initiative*, 98 INT'L REV. RED CROSS 315, 315–30 (2016).

[126] *See generally* Veronika Velch, *Russia/Ukraine: ICC arrest warrants for senior Russian officials a crucial step towards justice,* AMNESTY INT'L (June 25, 2024), https://www.amnesty.org/en/latest/news/2024/06/russia-ukraine-icc-arrest-warrants-for-senior-russian-officials-a-crucial-step-towards-justice/ [https://perma.cc/M879-SZWK].

supporting Open Source Intelligence (OSINT) investigations[127] into Russian actions in Ukraine,[128] criticizing targeting practices in Syria,[129] and partnering with international institutions to assess compliance elsewhere.

From the LSCO perspective, this legacy of external assessment—however well-intentioned—is now seen as incompatible with the demands of peer conflict. As one LSCO lawyer bluntly puts it: "Perhaps that is acceptable in wars of choice, but it is not in wars of survival."[130] Indeed, under this reasoning, in a future war involving mass casualties and high-intensity destruction, such scrutiny is more dangerous than distracting. It risks undermining domestic resolve (in the face of what the LSCO community plainly and repeatedly states will be casualties and destruction at the level of

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[127] *See generally* U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE & RESEARCH, *INR Open Source Intelligence Strategy (2024),* https://www.state.gov/wp-content/uploads/2024/05/INR-Open-Source-Intelligence-Strategy.pdf [https://perma.cc/UTQ7-RT2C].

[128] Laura A. Dickinson, *U.S.-ICC Symposium – U.S. Cooperation with the ICC to Investigate and Prosecute Atrocities in Ukraine: Possibilities and Challenges*, LIEBER INST. (June 20, 2023), https://lieber.westpoint.edu/us-cooperation-with-icc-investigate-prosecute-atrocities-ukraine/ [https://perma.cc/F2GR-RN73]; Press Release, Off. of U.S. Sen. Chris Coons, Senator Coons Highlights U.S. Support for ICC Efforts to Hold Russian Leaders Accountable for War Crimes in New Op-Ed (Aug. 3, 2023), https://www.coons.senate.gov/news/press-releases/icymi-senator-coons-highlights-us-support-for-icc-efforts-to-hold-russian-leaders-accountable-for-war-crimes-in-new-op-ed [https://perma.cc/WKX7-T22V]; Harold Hongju Koh, *Unpacking New Legislation on U.S. Support for the International Criminal Court*, JUST SEC. (Mar. 16, 2023), https://www.justsecurity.org/85408/unpacking-new-legislation-on-us-support-for-the-international-criminal-court/ [https://perma.cc/D2K2-8XGH]; U.S. Embassy in Guatemala, *Supporting Justice and Accountability in Ukraine*, U.S. DEP'T OF STATE (Feb. 18, 2023), https://gt.usembassy.gov/supporting-justice-and-accountability-in-ukraine/ [https://perma.cc/BC42-KCLC].

[129] John Kerry, Sec'y of State, U.S. Dep't of State, Allegations of Chemical Weapons Use in Sarmin, Syria (Mar. 19, 2015), https://2009-2017.state.gov/secretary/remarks/2015/03/239510.htm [https://perma.cc/5JL9-S732] ("[T]he Assad regime continues to terrorize the people of Syria through indiscriminate airstrikes, barrel bombings, arbitrary detention, torture, sexual violence, murder, and starvation."); Sen. Mike Lee, Statement on Syria Chemical Attacks (Apr. 6, 2017), https://www.lee.senate.gov/2017/4/sen-lee-statement-on-syria-chemical-attacks [https://perma.cc/YPY3-BGKL] ("Like all Americans, I was shocked and saddened by the images of chemical weapons used in Syria this week. The use of indiscriminate and inhumane tactics like this, especially against non-combatants, should be condemned in the strongest terms."); Jeff Abramson, *States Condemn Cluster Munitions Use*, ARMS CONTROL ASS'N. (Oct. 2017), https://www.armscontrol.org/act/2017-10/news/states-condemn-cluster-munitions-use [https://perma.cc/9D7K-4BXD] ("Reacting to the ongoing civilian toll from cluster munitions use in Syria and elsewhere, states-parties to the treaty banning cluster munitions at their annual meeting in Geneva renewed their condemnation of "any use" of such indiscriminate weapons").

[130] Cooper, *supra* note 94.

World War II[131]) and provides adversaries with material for psychological and informational campaigns.

In a major recent contribution to the LSCO effort published in *The Military Review* and titled "Lethal Force, Risk, and LSCO: Preparing for Permissive Rules of Engagement in Large-Scale Combat Operations," Lt. Gen. Milford "Beags" Beagle Jr., Lt. Gen. Joseph B. Berger III, and Lt. Col. Jack Einhorn take up Pede's call and seek to "provide commanders—and the subordinates . . . who execute their intent—with the confidence to assume prudent risk in the application of lethal force under permissive ROE."[132] This piece is co-authored by a general and two senior JAGs. They remark that, as part of the "counterinsurgency . . . hangover," "[t]oday's generation of Army senior leaders see ROE through the lens of constraint."[133] Reiterating what I identify as one of the core purposes of LSCO lawyering—the transformation of legal culture—they state, "[t]o change that culture to one that views ROE as an enabler to mission accomplishment, we need to share ideas and engage in debate, and we need to do so now. By the time we are in the fight, it will be too late."[134]

Citing Pede's description of the CT hangover, they observe that "[l]ooking ahead to LSCO against a peer adversary, the ROE will likely prioritize the survival of combat power."[135] With this reality in mind, the authors develop a vignette that usefully demonstrates the LSCO dilemma. They describe a hypothetical scenario in which "Major Casey" gets to work and is immediately faced with taking a high-stakes decision: the targeting of what appears to be "a group of apartment buildings" that are likely to contain military materiel that are very high on the "high-payoff target list (HPTL)" taped to his desk.[136] The authors note that, in this scenario, Major Casey knows that, under the ROE, he has the authority to approve the strike, and that he "mentally walks through the five [LOAC] principles—military necessity, distinction, proportionality, humanity, and honor—and confirms to himself that this is a lawful target."[137] Yet, he hesitates. He knows that "any aerial delivered munitions are likely to cause a significant but unknown amount of

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[131] Mason H. Remondelli et al., *Casualty Care Implications of Large-Scale Combat Operations*, 95 J. TRAUMA & ACUTE CARE SURGERY S180 (2023) ("The resulting operational environment, known as large-scale combat operations (LSCOs), will increase the scope of wounded service members to levels not seen since World War II (WWII)."); Matthew J. Wolynski, *The Challenge of Media Scrutiny,* 123 PROCS. 7 (1997); Laurie R. Blank, *Military Operations and Media Coverage: The Interplay of Law and Legitimacy* (Emory Legal Studies Research Paper No. 14-326, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2518846 [https://perma.cc/G9XE-BWJB].

[132] Beagle, Berger & Einhorn, *supra* note 78, at 2.

[133] *Id.* at 4.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 2.

[137] *Id.*

damage to what he believes may be apartment buildings,"[138] and that he is "evaluating a target where the civilian casualties will almost certainly not be in the thousands, but could be in the tens or a hundred."[139] He wishes to consult with his Judge Advocate, but because this is "Battlefield Next," he does not have access to the JAG. He then goes to call division command, but "then he remembers that communications with that command post have been down for the last four hours."[140]

The scenario, as the authors describe it, is precisely what I have heard from numerous military professionals, and the one that we see raised again and again in LSCO documents: the profound difference between this battle and the typical GWOT operation. This kind of battle is marked by a lack of high-quality intelligence, diminished or destroyed communication lines, and the requirement for mission commanders to take very time-sensitive decisions where delay and extensive deliberation will cost them the military objective. What is most telling to me about the LSCO concern is that it is not focused on the minutiae of doctrinal interpretation; it is focused, instead, on Major Casey's own decisiveness and appetite for risk (risk of extensive civilian casualties) under profound pressure. The real weight of the "CT stain" or hangover is on his mental disposition, his worry that even if the strike may be legal, it is not prudent. The authors elaborate on this in the vignette:

> Thinking through the military advantage to be gained by destroying enemy weapons systems that are at the top of the HPTL, Casey confirms to himself that potential civilian casualties would not be excessive in relation to that military advantage. Yet, Casey still struggles to approve a strike on this target. While he knows that he is on solid LOAC ground to strike this target, Casey is concerned about the information operations (IO) risk. His mind goes back to his time in Afghanistan in 2019, when the United States came under scrutiny for civilian casualties resulting from attacks on drug labs that the Taliban used to fund operations. He is worried that this strike might come under the same scrutiny. His mind then races further back to his time as a battery commander. He remembers the frustration he felt when he was prohibited from delivering an aerial strike on an improvised explosive device cell operating in broad daylight because there were too many civilians in the area.[141]

For these authors, the job of the JAGs preparing for LSCO, as well as their senior commanders, is to reverse the effect that the legal culture and the

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[138] *Id*.
[139] *Id.* at 6.
[140] *Id.* at 2.
[141] *Id.*

scrupulous attendance to external scrutiny throughout the GWOT had on the decision-making process of Major Casey.

This vignette crystallizes a core concern animating LSCO lawyering. The concern is not only that Major Casey hesitates but that something in the political-legal culture has cultivated hesitation itself. For LSCO proponents, that pause represents the residue of a warfighting era defined by excessive deliberation, legal overreach, and public sensitivity. For others, that same pause may be the last remaining aperture for moral and legal reflection under extreme conditions. The significance of the moment lies not in Major Casey's decision alone but also in what enables or forecloses the possibility of thoughtful restraint. In this sense, more than a tactical delay, Major Casey's internal deliberation is one of the normative fulcrums of the entire LSCO project.

C. LSCO Targeting: Legal Floor as Protective Ceiling

The vision of success articulated by LSCO lawyers—that is, the framework of law they believe should guide societal expectations and govern soldiers' conduct during hostilities—is striking in its clarity and realism. War, they assert, is inherently terrible. And the laws of war, drafted by states well-acquainted with the brutal realities of the battlefield, exist to pragmatically limit unnecessary suffering while enabling victory.[142] Once an armed conflict is established, a use of force that is directed against a legitimate military objective is generally treated as lawful—so long as, in the judgment of commanders operating under the pressures and uncertainties of combat,[143] it reflects a reasonable assessment of military necessity[144] and incorporates, as

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[142] *See e.g.,* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 796, 837 (2010) ("[W]ar cannot be conducted without restriction, for states are responsible for the well-being of their populations (including combatants) and must therefore agree with potential enemies on limitations that safeguard their interests. Moreover, history has demonstrated that undisciplined forces are difficult to lead, sharpen the enemy resolve to fight on, and antagonize the population of areas under their control. Current U.S. counterinsurgency doctrine testifies to the military utility of limits on the use of force."); *see also* Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT'L L. STUD. 307, 328 (2009) ("Since collateral damage hinders military operations by undercutting domestic and international support and by increasing insurgent strength, strict compliance with IHL norms actually complements military necessity.").

[143] *See* U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 2.2.3.3 (Updated July 2023) (June 2015) [hereinafter DOD LAW OF WAR MANUAL] ("In what is sometimes called the 'Rendulic Rule,' the law of war recognizes that persons must assess the military necessity of an action based on the information available to them at that time; they cannot be judged based on information that subsequently comes to light.").

[144] AP I, *supra* note 115, arts. 51(5)(b), 52(2); DOD LAW OF WAR MANUAL, *supra* note 143, at § 2.2.1 ("Military necessity justifies actions, such as destroying and seizing persons and property. Thus, military necessity underlies law of war concepts that explain when persons and property may be the object of attack, e.g., the concepts of 'taking a direct part in hostilities' and 'military objective.'").

warranted, proportionality and feasible precautions as understood in light of the circumstances ruling at the time. Acts of wanton violence, savagery, and the deliberate targeting of civilians, which by definition lack any connection to military necessity, remain categorically prohibited and subject to criminal sanctions within the armed forces.[145] Order and discipline are paramount, not least because chaos undermines both military cohesion and operational success. Members of the armed forces must be trained in clear and enforceable rules that prohibit unnecessary suffering,[146] grounded in the principle that the conduct of hostilities is governed by and limited to what military necessity requires.[147] In this vision, soldiers, as moral agents, are trusted to navigate wartime decisions with clarity and integrity.[148] For a war with China, the U.S.

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[145] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 143, at § 2.3.1. ("Although military necessity justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible, military necessity cannot justify actions not necessary to achieve this purpose, such as cruelty or wanton violence. Moreover, once a military purpose has been achieved, inflicting more suffering is unnecessary and should be avoided. For example, if an enemy combatant has been placed hors de combat (e.g., incapacitated by being severely wounded or captured), no military purpose is served by continuing to attack him or her."); Corn & Smotherman, *supra* note 9, at 5–6 ("This will also develop in leaders an instinct to recognize that IHL's categorical prohibitions—such as deliberately attacking civilians or using torture to extract information from prisoners of war—can never be justified by military necessity because the State has already decided that such measures will compromise strategic objectives."); Young, Herzog & Bird, *supra* note 66, at 47 ("The principle of military necessity 'justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.' This principle is not an unlimited, win-at-all-costs, declaration because the principle of unnecessary suffering prohibits tactics that maim, torture, or cause wanton destruction to civilian objects.").

[146] Pede & Hayden, *supra* note 29, at 16, 19 ("[T]o bring an end to the suffering as quickly as possible. . . . Knowing the fundamentals of the law of war and the inevitable policy overlay will allow the highly trained American soldier of the future to lawfully engage targets consistent with LOAC—and without hesitation"); *see also* Elizabeth Stubbins Bates, *Towards Effective Military Training in International Humanitarian Law*, 96 INT'L REV. RED CROSS 795, 810 (2014) ("The integration model emphasizes IHL's continued relevance when soldiers and officers learn about a new weapons system, so that they can learn whether it can be used lawfully in civilian areas, or whether it can cause superfluous injury or unnecessary suffering.").

[147] Int'l Comm. of the Red Cross, *Conduct of Hostilities*, ICRC CASEBOOK, https://casebook.icrc.org/a_to_z/glossary/conduct-hostilities [https://perma.cc/YUC7-QASF] ("The IHL rules on conduct of hostilities aim to strike a balance between military necessity and humanity[.]"); *see also* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 796, 803–04 (2010) ("[A]nalysis of most IHL rules, especially those governing the conduct of hostilities, reveals consistent sensitivity to the balance between military necessity and humanity.").

[148] *See, e.g.*, Corn & Smotherman, supra note 9, at 13–14 ("But teaching and empowering young combat leaders to make aggressive, tactically sound decisions under fire is not enough. Those decisions must also be legal and ethical."); Pfaff & Beurskens, eds., *supra* note 48, at 2 ("This professional ethic accounts for the soldier as a moral agent; the actions soldiers may take; and what the Army, as a collection of soldiers, should achieve."); Charles Garraway, *'To Kill or Not to Kill?'—Dilemmas on the Use of Force*, 14 J. CONFLICT & SEC. L. 499, 502 (2010) ("Of course, [the soldier's] decision will be instinctive—it has to be—but that instinct will be based on hours of training carried out before deployment.").

military must be prepared to inflict greater destruction and casualties than in recent conflicts, yet it is vital that this is not only operationally justified but also understood and accepted as moral by the broader public because it is consonant with LOAC.

One can understand why the LSCO trainers and leaders of wargaming exercises we met in the prior section were so profoundly frustrated by the "CT stain." In a war of total air and communication dominance, of absolute military superiority, where legal advisers stalk the walkways of targeting cells and joint-operations centers, we can see how these rules were given life, and we can understand how soldiers became accustomed to the idea that each of these rules could be made ever more detailed and exacting. We can understand why the young commanders refused to drop the 500-pound bomb in the exercise before they understood exactly who they were targeting, what the impact might be, and whether the target had been legally reviewed. We can also see just how unsuited these rules are for the kind of maneuver warfare we learned about in Part I: it is difficult to square maximum lethality, agility and surprise, low-level decision-making authorization to attack, and the primacy of speed and tempo with an assiduous and legalistic application of these rules.[149] We can see how IHL as we know it today could be understood as rendering large-scale, multi-domain maneuver warfare functionally impossible, preordaining defeat for the party that is hampered by such technical and precise requirements. In this way, the stain becomes a sludge, gumming up the works of an otherwise fast-moving choreography of aggression and destruction.

This is the context in which the LSCO file arrives on the desks of senior military lawyers. They face a different challenge than during the GWOT. Then, the argument was that a "new kind of war" required new elements of the legal framework.[150] Now, LSCO lawyering seeks to reframe existing, well-established rules by stripping them to their most minimal defensible core.

LOAC has long been understood as balancing humanitarian restraint and military necessity.[151] LSCO lawyering seeks to tilt that balance decisively

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[149] *See, e.g.*, Justin MacDonald & Ryan McCormick, *The U.S. DoD Civilian Harm Mitigation and Response Action Plan on Future Battlefields*, LIEBER INST. (Sep. 23, 2022), https://lieber.westpoint.edu/civilian-harm-mitigation-response-action-plan-future-battlefields [https://perma.cc/8SLK-SQQY] ("Assessment requirements and timelines must be made sufficiently flexible to fit into operational realities and there is no indication from the CHMR-AP that this is feasible in a LSCO conflict.").

[150] *See* Omar Khoury, *A License for Violence: How the Distinction Between International and Non-international Armed Conflict Betrays the Principles and Ideals of International Humanitarian Law*, 27 GONZAGA J. INT'L L., 1, 1 (2023) ("The law of non-international armed conflict (NIAC) fails to prevent violence as proactively as does the law of international armed conflict (IAC) because of a higher threshold for application and a weaker set of protections during conflicts involving stateless peoples and unrecognized states.").

[151] *Id.*

toward the military side of the ledger.[152] Noting that U.S. military actors in a contemporary or near-future LSCO will be unable to succeed if current perceptions of the law persist,[153] one LSCO text argues that, "[p]erhaps what is often characterized as the traditional approach—one focused on a *balance* between military necessity and humanity—may not be best suited to" LSCO.[154] The authors of this text assert, instead, that commanders should be trained to focus on military necessity without the accompanying obligation to constantly balance this against an "amorphous" notion of humanity, which, they claim, is "perhaps best suited to obligations related to the treatment of individuals who have never been or are no longer capable of participating in hostilities."[155] They point out that the demands of maneuver warfare against a powerful state adversary require military legal policymakers to redefine a core assumption of LOAC in the context of hostilities.[156] Lending operational support for this view, Lt. Gen. Beagle and his co-authors observe:

> From our experiences in the last two decades of counterinsurgency operations, our Army's culture is to view ROE through the lens of constraint. To change that culture to one that views ROE as an enabler to mission accomplishment, we need to share ideas and engage in debate, and we need to do so now. By the time we are in the fight, it will be too late. . . . Summarizing the policy overlay that prevailed through the GWOT era, Pede described the ROE as involving "notions of restrained employment of force in order to win the peace amid the reestablishment of institutions of governance." Looking ahead to LSCO against a peer adversary, the ROE will likely prioritize the survival of combat power. Commanders who will

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[152] *See, e.g.*, Young, Herzog & Bird, *supra* note 66, at 48 ("In broad terms, commanders should focus on the military advantage first, then ways to mitigate harm to civilians."); Corn & Smotherman, *supra* note 9, at 34 ("The amorphous nature of the humanity principle makes it an unwieldy companion to the necessity principle for military leaders on the battlefield. Thus, it will be operationally beneficial to supplement the 'balance' between necessity and humanity with a more pragmatic equation.").

[153] Corn & Smotherman, *supra* note 9, at 3 ("While this renewed focus on combined arms maneuver may feel similar to the Cold War era, the contemporary expectation of IHL compliance, coupled with the ever-increasing link between that compliance and the reality and perception of strategic legitimacy, make the challenge on these leaders exponentially more daunting than on their Cold War predecessors. This is an undeniable reality for armed forces fighting on behalf of democracies committed to the rule of law and respect for fundamental human rights. Indeed, the profound impact of perceived indifference to humanitarian interests in the current conflict between Israel and Hamas exemplifies this essential link between strategic legitimacy and tactical IHL compliance.").

[154] *Id.* at 4.

[155] *Id.* at 5.

[156] For example, the DoD Law of War Manual notes that "three interdependent principles—military necessity, humanity, and honor—[are] the foundation for other law of war principles, such as proportionality and distinction." DOD LAW OF WAR MANUAL, *supra* note 143, at 50.

> lead their formations in these permissive ROE environments will have to know the fundamentals.[157]

For many of those working within the military, and for observers outside of it, the most immediate and tangible question raised by LSCO lawyering is how ROE will be crafted in the next war. That concern is not misplaced. ROE do significant work: they translate legal interpretation into operational practice; they regulate the use of force by shaping how commanders and soldiers understand their authority in the field; and they frequently serve as the concrete interface between legal advice and combat decision-making. In conditions of degraded communications, distributed operations, and rapid maneuver, the content of ROE can determine not only tactical outcomes but strategic legitimacy. To ask how ROE will be formulated in LSCO scenarios, then, is to ask a question of serious consequence. But to treat ROE as the center of gravity in this legal transformation risks obscuring what makes LSCO lawyering distinctive. ROE are an output, not a source. They reflect—and refract—a deeper set of judgments about how LOAC should be interpreted under conditions of extreme violence. The concern that ROE are "too restrictive" often masks a broader discomfort with the normative expectations that have come to shape targeting over the past two decades: expectations around proportionality, feasible precautions, external scrutiny, and the legitimacy of legal deliberation itself.

In this sense, debates about ROE serve as proxy debates. They are shorthand for a much deeper contest over what kind of legal culture should govern the conduct of hostilities in LSCO. Is the law of targeting a binding wireframe designed to preserve discretion, or a normative structure responsive to evolving moral and political concerns? Should the authority to interpret that law reside primarily with military lawyers operating close to the battlefield, or should it be shared—however uneasily but necessarily—with publics, allies, and external legal actors? When ROE are described as either enabling or constraining, what is often at stake is a vision of what legal reasoning is for: whether it is meant to interrupt action or to support it, to create hesitation or to insulate decision-makers from it. The deeper anxiety here might not be about any particular formulation of ROE but about the shape of the legal subject who will write and apply them, as well as the political, moral, and institutional vision of law that such a subject reflects.

Notably, LSCO lawyers are not necessarily tasked with writing new law. In terms of LOAC doctrine, key aspects of the fundamental arguments they advance have long been part of American IHL. The claim that commanders must be judged based on what they knew at the time; the insistence that proportionality is a reasonableness test, not a mathematical formula; the view that "feasible" precautions must be read in light of battlefield conditions—all of these are familiar. What LSCO lawyering does, however, is

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[157] Beagle, Berger & Einhorn, *supra* note 78, at 3–4.

declare these long-standing doctrinal footholds to be, in effect, the only LOAC obligations. It insists that the legal floor is also the protective ceiling and that all the constraints layered on top of the core targeting rules over the past three decades must be stripped away. Drawing on historical examples from the pre-AP I era and earlier doctrines of strategic bombardment, LSCO proponents argue for a reimagining of the strategic environment shaping the law of targeting, emphasizing decisive action over restraint. As three LSCO authors assert: "Uncaging the King of Battle requires a rewiring of the mental models used by commanders and staffs in the targeting process. There was a time for a bias for restraint. Now commanders need a bias for action."[158]

At the center of this effort are three of the core rules of IHL governing the conduct of hostilities: distinction, proportionality, and precautions in attack.[159] For the United States, the assumption since at least the 1990s has been that these rules, while rooted, in part, in a treaty to which the United States is not a party, are binding as customary IHL.[160] These rules have, therefore, framed the legal regulation of targeting for decades. But in American IHL, they have also, especially in the last couple of decades, accrued additional

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[158] Young, Herzog & Bird, *supra* note 66, at 50.

[159] *See* DOD LAW OF WAR MANUAL, *supra* note 143, at 50.

[160] With regard to Articles 50(1) and 52(3) of AP I, see *id.* § 5.4.3.2 ("The discussion in § 5.4.3.2 (Classifying Persons or Objects as Military Objectives When Planning and Conducting Attacks) reflects the DoD view of customary international law applicable to assessing whether persons or objects are military objectives, including in cases of doubt, when planning and conducting attacks."). For Article 51 of AP I, see *id.* § 1.8.1 ("[T]he United States has expressed support for the customary principle on which Article 51(3) of AP I is based."), § 19.20.1.1 ("Some AP I provisions have been incorporated into later treaties to which the United States is a Party. For example, AP I's definition of military objective in Article 51(2) is substantially similar to the definition in Article 2(6) of CCW Amended Mines Protocol and Article 1(3) of CCW Protocol III on Incendiary Weapons[.]"), and 1236 ("[n]ote U.S. acceptance of language in the CCW Amended Mines Protocol identical to Article 52(3) of AP I."). For Article 57 of AP I, see *id.*, at 259 n.385 ("Article 57(4) provides that governments shall 'take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.' Although the United States is not a party to Additional Protocol I, we believe these provisions are an accurate statement of the fundamental law of war principle of discrimination."). *See* Michael N. Schmitt, *The Principle of Distinction and Weapon Systems on the Contemporary Battlefield*, 7 CONNECTIONS: Q.J. 46, 47 (2008) ("Article 48 of Additional Protocol I . . . . The United States, which is not a Party to the Protocol, recognizes most such rules as customary law."); *see also* RYAN B. DOWDY ET AL., U.S. DEP'T OF THE ARMY, JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DESKBOOK 21–22 ("While there is no current authoritative list of the AP I articles the U.S. currently views as either customary international law, or specifically objects to, many consider remarks made in 1987 by Michael J. Matheson . . . as the most comprehensive expression of the U.S. position.") (Rachel S. Mangas, Mathew Festa & Laura O'Donnell eds., 2016); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987); Memorandum for Mr. John H. McNeil, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, May 9, 1986 ("We view the following provisions as already part of customary international law . . . Articles 51, paragraph 2; 52, paragraphs 1 and 2 (except for the reference to 'reprisals'); and 57, paragraphs 1, 2(c), and 4.").

expectations—drawn from U.S. military doctrine, allied practices, policy documents, and public discourse—many of which LSCO lawyers now seek to shed.

Distinction is, in many ways, the most categorical of the three. The rule requires that attacks be directed only against lawful military objectives, such as combatants, civilians directly participating in hostilities, or objects that by their nature, use, purpose, or location make an effective contribution to military action and whose destruction offers a definite military advantage.[161] This is black-letter IHL. In practice, however, the U.S. military, often through policy and operational guidance, had layered onto this requirement an array of additional safeguards, such as demands for positive identification and centralized legal review of target lists. LSCO lawyering does not contest the rule itself; rather, it contests certain key parts of the interpretive ecosystem around it.[162] For example, while LSCO lawyering seeks to ensure that the category of military objectives continues to include economic and infrastructure targets critical to the enemy's war effort[163] and continues to require a low threshold of certainty to classify something as targetable, it also aims to shift responsibility for that latter determination downward to junior commanders in real time.[164] As LSCO authors argue regarding the demands of

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[161] AP I, *supra* note 115, arts. 43, 50–51, 52(2); *see also* Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, 78 INT'L L. STUD. 139, 139–40 (2001) ("There is no doubt that . . . 'the principle of the military objective has become a part of customary international law for armed conflict' whether on land, at sea or in the air.") (citing Horace Robertson, *The Principle of the Military Objective in the Law of Armed Conflict*, 72 INT'L L. STUD. 197, 207 (1998)).

[162] Young, *supra* note 66 ("In LSCO, policymakers should strive to provide clarity on prioritizing achieving the military objective over civilian harm mitigation while assuming that tactical units will not have the time and resources to red team or establish a heightened identification requirement when engaged with a peer competitor in close combat."). Another LSCO piece argues: "In broad terms, commanders should focus on the military advantage first, then ways to mitigate harm to civilians. Put another way, enemy first, enemy always—the most important factor in a commander's targeting decision is achieving the necessary effects on target." Young, Herzog & Bird, *supra* note 66, at 48.

[163] As set out by two LSCO lawyers, "Military objectives include not merely warfighting objects or facilities such as military equipment, bases, and communications/transportation nodes but also those objects that effectively contribute to an enemy's capability to sustain military operations. Such war-sustaining objectives can include electric power stations, petroleum production and refining facilities, and in appropriate cases, objects that enable funding of adversary military operations." Pede & Hayden, *supra* note 29, at 13. *See also* Cox, *Representative Sara Jacobs and Senator Dick Durbin Take Aim*, *supra* note 66, at 22–23 ("This doctrinal publication observes that in 'traditional' warfare, or what is currently termed large scale combat operations, 'success is achieved primarily by destroying the enemy's means to sustain military operations and occupying its territory.'"); *see generally* Jeffery Miller & Ian Corey, *Follow the Money*: *Targeting Enemy War-Sustaining Activities*, 84 JOINT FORCES Q. 31 (2017).

[164] Curley & Golden, *supra* note 56, at 24–25 ("While judge advocates at USAREUR have yet to completely flush [sic] out appropriate thresholds for determining positive identification, and whether it is even necessary beyond a baseline "reasonable certainty" standard, one thing is clear—that commanders, operators, and legal advisors need a mindset

this kind of warfighting, "[A]ll of this points to an increasingly obvious conclusion: military leaders need an IHL scheme that enables the preservation of legitimacy and restraint without sacrificing tactical flexibility or violence of action. Winning a sustained, conventional ground war—more so than COIN or stability operations—demands aggressive combat action and tactical flexibility on the part of junior military leaders."[165]

IHL proportionality, too, is familiar in its core binding content and contours. Under this rule, in relation to an attack, the anticipated incidental harm to civilians must not be expected to be excessive in relation to the concrete and direct military advantage anticipated.[166] Particularly since the 1990s, this rule has come to carry normative weight and operational constraints beyond its core confines. Indeed, much of the practice of proportionality came to require an ethical pause—something that required reflection, review, and, often, greater restraint.[167] ROEs imposed stricter thresholds than what was minimally legally required;[168] targeting cells included legal advisors tasked

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change to become more comfortable with the concept of employing force when they do not possess perfect or near perfect information about a target which would most certainly be the predominant scenario in a HIC."); *see also* Beagle, Berger, & Einhorn, *supra* note 78, at 6 ("In LSCO, there will not be explicit ROE that requires a level of approval if we are likely to injure X number of people. Due to the speed and lethality of the peer LSCO fight, we may only know the size of the building and nothing more. Time-sensitive decisions will have to be made on mission critical targets with limited information").

[165] Corn & Smotherman, *supra* note 9, at 12.

[166] AP I, *supra* note 115, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW R. 14 (2005) [hereinafter ICRC Customary IHL Study]; *see also* YORAM DINSTEIN, COLLATERAL DAMAGE AND THE PRINCIPLE OF PROPORTIONALITY, NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 211–24 (David Wippman & Matthew Evangelista eds., 2005); Janina Dill, *Applying the Principle of Proportionality in Combat Operations*, OXFORD INST. FOR ETHICS, L. & ARMED CONFLICT (2010); THE PRINCIPLE OF PROPORTIONALITY IN THE RULES GOVERNING THE CONDUCT OF HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (Laurent Gisel ed., 2016).

[167] AP I, *supra* note 115, art. 51(5)(b); *Galić* case, *supra* note 117, at ¶ 58 ("The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack."); INT'L COMM. OF THE RED CROSS COMMENTARY ON THE ADDITIONAL PROTOCOLS ¶ 1979 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

[168] Another practitioner echoes the key LSCO lawyers' concern, "As we are adapting to the new reality of preparing for large scale combat operations (LSCO) rather than just the next counter insurgency (COIN) or counter terrorism (CT) operation, educators and trainers are raising the same concern: our forces are struggling to recover from the COIN/CT mindset." Cooper, *supra* note 94, at 2. She argues that one focus for those seeking to "cure" the "CT hangover" is a focus on ROEs: "If they become too restrictive and detailed, it is near impossible to carry out a mission. Perhaps that is acceptable in wars of choice, but it is not in wars of survival." *Id.* at 7. She goes on to note that while not all policies focused on civilian protection should be done away with, "Depending on context, such steps may even be legally required because they are feasible. But in other situations, it is likely that it will not be possible to abide by such standards. In an LSCO against a peer or near-peer opponent, we need the full legal maneuver space, as well as robust and clear operational procedures and ROE." *Id.* at 9.

with backstopping estimates of civilian harm; and commanders considered whether a strike could be justified not only legally but publicly. LSCO lawyering accepts the rule but largely discards the growing civilian-protective ethos. It reiterates that proportionality, while requiring a commander's reasonable judgment in context, has no fixed ratios and no empirical formula.[169] It then layers onto this legal doctrinal minimum the logic of existential conflict, folding concerns about national survival into the anticipated military advantage—and, in the process, potentially conflating international legal rules regulating the use of force in international relations with LOAC. Under this framing, proportionality becomes less a restraint and more a vehicle for justifying a wider, much more extensive use of force. In other words, the LSCO interpretation does not deny the applicability of proportionality—it seeks to halt its recent protective trajectory. As two Army lawyers overseeing LSCO training exercises argue:

> Exceedingly low tolerances for civilian casualties are a feature of CT operations and stem from the CT-mindset—i.e.[,] that the U.S. owns the skies and can engage targets on its own timeline using unlimited precision munitions—but the fact is it remains a critical factor in the [collateral damage estimation (CDE)] methodology and determining the appropriate engagement authority. Aside from working to get doctrine changed, [U.S. Army Europe's (USAREUR)] judge advocates found that asking for a high civilian casualty estimate cut-off value, and delegation for exceeding those limits to the lowest possible level, was adequate short-term mitigation. The bottom line, however, is that commanders, operators, and legal advisers have to be cognizant that in a [high intensity conflict], the consistent elevation of engagement authority based on casualty estimates could have catastrophic consequences for the U.S.

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[169] *See, e.g.*, Geoffrey Corn, *The Disproportionate Confusion About Proportionality*, LAWFIRE (Oct. 26, 2023), https://sites.duke.edu/lawfire/2023/10/26/geoff-corn-on-the-disproportionate-confusion-about-proportionality [https://perma.cc/3J4E-8QYE] ("In practice, this [proportionality] means that commanders and other attack decision-makers must balance the value of attacking a target against the 'incidental and collateral' consequences of the attack on civilians and civilian property. And while it may seem frustrating, there is simply no mathematical equation at the fulcrum of this balance."); DEP'T OF THE ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE 2–13 (2019) ("The weighing or comparison between the expected incidental harm and the anticipated military advantage does not necessarily lend itself to empirical analysis."); *see also* AMICHAI COHEN & DAVID ZLOTOGORSKI, THE VAGUENESS OF PROPORTIONALITY, IN PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: CONSEQUENCES, PRECAUTIONS, AND PROCEDURES (Oxford University Press, 2021); Daniel Statman et al., *Unreliable Protection: An Experimental Study of Experts' In-Bello Proportionality Decisions*, 31 EUR. J. INT'L L. 429 (2020).

> formations involved, particularly at the start of Phase III offensive operations.[170]

The IHL precaution rule requires attackers to take all feasible measures to ensure that attacks are directed only against legitimate military objectives and to avoid or, at least, minimize incidental civilian harm.[171] It also entails an obligation of constant care in respect of civilians.[172] In American IHL, over the years, feasible precautions were operationalized into detailed procedures: munition-selection protocols, attack timing to minimize civilian presence, direct legal vetting of targets, dissemination of warnings, and behavioral analyses to assess civilian patterns of life. These precautionary practices, often developed internally within the U.S. military, became central to how legality was taught, understood, and carried out. In the LSCO vision, much of this architecture is unworkable. The concern is not core LOAC doctrinal disagreement—LSCO lawyers would affirm that precautions must still be

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[170] *See* Curley & Golden, *supra* note 56, at 24. In the U.S. military's phasing construct, Phase III operations seek to "dominate" and "achieve full-spectrum superiority," the decisive operations to win the war.

[171] *See* AP I, *supra* note 115, art. 57(2); *id.*, art. 57(1) ("In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."); *id.*, art. 57(2)(c) ("[E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."); *id.*, art. 57(3) ("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 which may be expected to cause the least danger to civilian lives and to civilian objects."); ICRC Customary IHL Study, *supra* note 166, at 19; *see also* Jean-François Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT'L REV. RED CROSS 793, 794 (Dec. 2006) ("[E]ven when a lawful attack is launched, precautionary measures are required of both the attacking party and the party being attacked, in order to avoid (or at least to minimize) the collateral effects of hostilities on civilian persons, the civilian population and civilian objects."); *id.* at 801 ("Concerning means of combat more specifically, the main issue raised by Article 57(2)(a)(ii) relates to belligerent parties' obligation to use the most precise weapons available (precision-guided munitions in particular) when carrying out attacks that may cause collateral casualties or damage."); *id.* at 800 ("[T]he obligation to use methods of attack designed to spare the civilian population and civilian objects – in any zone of attack, that is, even in enemy territory – requires that the timing of the attack be chosen with a view to limiting collateral damage. As a more recent example, the US forces who, in 2003, repeatedly bombed urban areas during operations against Iraq, decided to minimize civilian losses by trying, where possible, to conduct their attacks at night when the population had left the streets.") (citing Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* 17 (2003)); Jon Griffiths, *Attacks and Warnings in Urban Warfare*, LIEBER INST. (Nov. 9, 2023), https://lieber.westpoint.edu/attacks-warnings-urban-warfare/ [https://perma.cc/HGQ7-KV7J]. ("These hardships help explain the development of the law of war rule concerning the advance warning of attacks against populated areas. Early examples of State practice in this regard include the Lieber Code (art. 19) and the Brussels Declaration (1874), which outlined the expectation that commanders, whenever admissible, would do all in their power to warn the authorities before attacking a defended town. The 1907 Hague Regulations for Land Warfare later codified this customary practice as treaty law . . . . Ahead of the Second Battle of Fallujah (Iraq, 2004) and the Battle of Marawi (Philippines, 2018), the attacking forces gave such a warning of their impending assault of the respective cities.").

[172] AP I, *supra* note 115, art. 57(1).

taken—but operational incompatibility. In a high-intensity fight against a peer adversary, they argue, many of these more recently adopted practices become unfeasible impediments: red-teaming delays decisions; warning civilians compromises surprise; and centralizing legal review slows tempo. Accordingly, LSCO lawyering urges a stripping-down of the practice meant to uphold the precautions rule, emphasizing the feasibility standard in its most basic form and urging a posture in which minimal compliance is treated as sufficient respect for IHL.

For LSCO lawyers, these interpretations substantially narrow what they regard as the practical requirements of the core LOAC targeting rules. Where recently the law was embedded in a broader normative and institutional context on a more protective trajectory—one that included public justification, allied coordination, and post-strike review—LSCO lawyers seek to isolate it. The upshot is that, under LSCO lawyering, the rules must be read narrowly, applied internally, and assessed solely by those involved in the conduct of hostilities.

This is where the consolidation of LOAC doctrinal minimalism becomes a cultural project. For decades, the United States helped cultivate a legal culture that treated these three rules not as mere substantive and procedural thresholds but as the embodiment of a progressively protective normative commitment to restraint, precision, and legitimacy. LSCO lawyering seeks to unwind elements of that wider commitment. This is not a direct transformation of treaty text and customary rules. Yet it is, arguably, a redefinition of legal meaning.

In this sense, the LSCO project is not just or primarily about returning to LOAC basics. It is about asserting that the basics are all there is—and that nearly everything else, from internal policy to allied expectation to public scrutiny, is excess to be discarded, potentially in service of national survival.

D. The Terms of the Debate

If one steps back from the doctrinal details and the institutional positioning, what becomes clear is that LSCO lawyering emerges within, and seeks to redefine, a deeper struggle over the meaning, function, and authorship of LOAC. Crucially, the disagreement extends beyond what the law requires to how and by whom the law is understood to do its work—whether to constrain, to enable, or to legitimate.

For some, LOAC should be treated as a binding skeletal structure, a set of core prohibitions and permissions that govern the conduct of hostilities and that can endure under the extreme pressures of existential war. On this view, the law must remain stable, usable, and internally coherent, especially for those tasked with applying it in real time under degraded operational conditions. What is required is clarity: a return to the minimum and a shedding of what are seen as legalistic excesses imported from counterterrorism-era policy or

normative overreach. That position rests on an argument not only about operational necessity but also about interpretive authority—the idea that military lawyers, embedded in the planning process and attuned to battlefield realities, are better positioned to define the law's parameters.

Others take a different view. For them, the rules governing the conduct of hostilities have evolved, legitimately and intentionally, through a cumulative process of interpretation, critique, policy development, and legal refinement. The legal frameworks that shape targeting today are the result of doctrinal innovation and decades of dialogue between states, institutions, courts, NGOs, scholars, and publics. On this account, rather than clarifications, efforts to isolate LOAC from these broader normative and institutional ecosystems instead constitute erasures.

Beneath this disagreement lies a set of questions that remain unsettled and, in some circles, are considered to risk undermining established law. Those questions include:

- Whether aspects of some of the core targeting provisions of AP I—including those concerning proportionality, feasible precautions, and civilian-object status—reflect customary LOAC binding on non-contracting parties;
- Whether "dual-use" objects that contribute indirectly to warfighting may be treated as lawful targets and, if so, under what conditions;
- Whether proportionality must account for systemic or long-term harms, including effects on infrastructure, displacement, or ecosystem disruption;
- What it means for precautions to be "feasible" when communications are severed, intelligence, surveillance, and reconnaissance (ISR) is degraded, and operational tempo is paramount;
- Who is entitled to participate in defining these rules, especially whether interpretation is reserved principally for military operators or shared with publics, courts, international institutions, and (other) external legal communities; and
- Who is entitled to know about how state armed forces interpret and implement these rules, especially whether the approach to law and legality is subject to public debate and scrutiny.

These are not idle doctrinal controversies. They are markers of an evergreen dispute about what kind of law LOAC is and what kind of law it ought to be. Even identifying these as legitimate points of legal contestation is, for some, already too much: a signal of equivocation or, worse, an effort to undermine hard-won legal constraints. But it is precisely that impulse—to police the boundaries of debate—that makes the terms of engagement so important. The LSCO project, in that sense, is not only about what the law allows. It is also

about who speaks the law, whose interpretations are deemed plausible, and how the boundaries of legal reasonableness are being redrawn.

IV. THE PLAYBOOK

The legal project at the center of LSCO lawyering is not dependent on doctrinal argument alone, or even primarily. To gain traction, it must be embedded in a broader strategy that operates across military legal doctrine, institutional practice and culture, and public discourse. What begins as a targeted reinterpretation of core LOAC rules must—according to LSCO lawyers—be translated into a playbook: a coordinated set of efforts to help shift the legal, professional, and cultural baseline for how targeting law is understood and applied in relation to conditions of existential conflict. This includes not only internal legal revision, such as rewriting manuals, reeducating senior JAG leadership, and aligning targeting guidance with LSCO LOAC doctrine. It also needs to include a more outward-facing posture. LSCO lawyers seek to persuade policymakers, skeptical legal colleagues, and civilian institutions that their interpretation of LOAC is not only legally plausible but operationally necessary. Doing so is said to require a saturation approach: a deliberate attempt to shape the discursive terrain on which future debates over law and legitimacy in war will be fought. Because the zone is, as it were, yet to be flooded, and because at the time of writing we are still at the early stages of the LSCO transformation, this section is necessarily written in a predictive register.

A. Understanding the LSCO Lexicon

As the LSCO lawyering project continues in earnest, I anticipate that IHL experts—especially those more accustomed to the language of the past two decades—will increasingly encounter terminology that feels unfamiliar or only loosely tethered to conventional LOAC discourse. This is not, in my view, the result of a covert effort to obscure legal meaning but, rather, an emergent phenomenon within the legal and strategic work of LSCO lawyering. For those engaging with this project, tracking the contours of the LSCO lexicon, and the assumptions it carries, will be important.

What seems to be unfolding is a linguistic reorientation shaped by practitioners of operational law concerned with institutional advocacy. We may be likely to see certain recurring terms and frames—"legal maneuver space," "maximum flexibility," "Battlefield Next," "CT hangover"—appearing in official remarks, academic articles, think tank reports, or legal blogs. In parallel, one might observe increasing reference to the idea that certain aspects of the LOAC interpretive ecosystem, especially those developed or emphasized during the counterterrorism era, reflect "policy" rather than law or that they were tailored to the particularities of the GWOT. Phrases such as "the problematic CT stain" or "the policy choices made for the specific needs of the GWOT" may appear alongside arguments that the

conduct of hostilities under LSCO conditions remains under-specified or in need of "clarification."

I do not suggest reading these efforts as an attempt to bypass LOAC. Rather, this linguistic shift appears to be part of a broader effort to re-situate legal argument within what is perceived as the strategic and operational demands of future war.

B. General Pede's Call: "Flood the Zone"

Perhaps no aspect of the LSCO project underscores its broader ambitions as clearly as the effort to reframe how LOAC is understood in Western public discourse. General Pede's now well-known invocation to "flood the zone"[173] speaks to a deeper concern: that the legal and moral expectations formed during the counterterrorism era will remain a dominant frame unless actively contested. In this view, reshaping how LOAC is understood in the context of high-intensity interstate war is a strategic imperative.

The phrase "Battlefield Next," increasingly invoked by LSCO lawyers, signals an anticipated shift in operational realities as well as in the public and legal imagination. For some, this requires the development of a communications strategy capable of moving beyond technical audiences and into broader arenas of public understanding. This posture does not arise from disregard for public concerns; on the contrary, it reflects a concern among some military lawyers that public opinion—particularly in Western democracies—has become a key constraint on operational effectiveness, from

[173] "Flooding the zone" is a sports term drawn from American football and basketball, in which a team "floods" a zone defense by sending multiple players into that area in order to overwhelm the opposing team's defenses. In journalistic and political culture, the term is frequently attributed to Trump political adviser and political commentator Steve Bannon, who argued, "[T]he real opposition is the media. And the way to deal with them is to flood the zone with shit." The commonly understood notion is that when proposing a radical or controversial political idea, or when seeking to prevent public attention to criticism, those proposing it should saturate and overwhelm the public with so much information that it becomes difficult for anyone to focus on a particular issue or discern truth from misinformation. *See* PAUL STARR, THE DISINFORMATION AGE: POLITICS, TECHNOLOGY, AND DISRUPTIVE COMMUNICATION IN THE UNITED STATES 69 (W. Lance Bennett & Steven Livingston eds., 2020) ("In early 2018, Steve Bannon, publisher of Breitbart News and Donald Trump's former strategist, gave a concise explanation of how to exploit confusion and distrust: the way to deal with the media, he said, is 'to flood the zone with shit.' That not only sums up the logic of Trump's use of lies and distraction; it also describes the logic of disinformation efforts aimed at sowing doubts about science and democracy, as in industry-driven controversies over global warming and in Russian uses of social media to influence elections in western Europe as well as the United States. 'Flooding' the media with government propaganda to distract from unfavorable information is also one of the primary techniques the Chinese regime currently uses to manage discontent.").

Vietnam, to the GWOT, to the war in Gaza.[174] One former military legal adviser reflects on this gap between aspiration and execution:

> Despite the mandate frequently expressed by then-Army Judge Advocate General Charles 'Chuck' Pede . . . to 'flood the zone' of public discourse with strategic legal messaging, that guidance has never been realized. In reality, civil society advocates dominate the forum of public discourse . . . . In comparison, perspectives from military practitioners are more akin to a light drizzle than a flood.[175]

In other words, rather than simply interpreting the law, LSCO lawyering is also about asserting a particular understanding of the law in spaces where legal meaning is actively contested, including the press, academia, policy forums, and social media.

For some legal practitioners, observations from other conflicts have sharpened this lesson. A group of U.S. military lawyers reflecting on Israel's 2021 offensive in Gaza wrote:

> A broad campaign is required to rectify the lack of clarity regarding LOAC requirements, particularly in urban warfare. This cannot be done by cursory statements by public affairs military personnel once hostilities break out. A comprehensive and proactive effort is required to enhance overall appreciation of the U.S. commitment to LOAC and understanding of the true relationship between the law and complex military operations.[176]

Here, again, the emphasis is not on abandoning LOAC but on rearticulating its purpose and effect under LSCO conditions.

Various LSCO lawyers have argued that this effort must extend well beyond internal military channels. They have called for sustained publication in academic legal journals, deliberate outreach to civilian audiences, and

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[174] "The persistence of misconceptions about LOAC's content and requirements will enable continued manipulation of legal arguments, risk incentivizing further exploitation of civilian populations and thereby risk greater civilian deaths in future urban conflicts. For this reason, clarity on LOAC's requirements is paramount." WALD, *supra* note 53. Another practitioner states, "The Army JAG Corps also continues to do its part in closing the eighteenth gap by 'flood[ing] the zone' in international legal discourse to preserve commanders' warfighting legal authorities. However, the specter of the COIN hangover lingers, and the symptoms are not more nuanced." Risch & Dowdy, *supra* note 66, at 92.

[175] Brian L. Cox, *Commitment to Balance Is Vitally Important for Successful Implementation of CHMR-AP,* LAWFARE (Oct. 25, 2022), https://www.lawfaremedia.org/article/commitment-balance-vitally-important-successful-implementation-chmr-ap [https://perma.cc/8UU2-F6Z8].

[176] ASHLEY ET AL., *supra* note 91.

assertive responses to interpretations of IHL advanced by NGOs, academics, and international legal experts.[177] The idea is to inform and shape—and perhaps even to discipline—the terms of legal debate.

Rather than direct repudiation, the strategy may involve subtle repositioning: placing military interpretations at the center of legal discourse through saturation, repetition, and institutional presence. In this way, the effort to "flood the zone" becomes not just a matter of public messaging but of reshaping the ecosystem of legal authority itself. Whether such an effort succeeds may depend as much on the persuasiveness of the legal arguments advanced as on the public's willingness to revisit foundational expectations about how the law should constrain hostilities in armed conflict.

C. Grounding the Strategic Threat in Citations and Historical Context

One element of the LSCO legal project that warrants close attention is what I anticipate will be a shift in citation patterns—especially in targeting discourse produced by military and military-adjacent authors. Given the relatively short lifespan of the current LOAC targeting interpretive ecosystem—much of it shaped during the post-9/11 counterterrorism period and influenced by AP I[178]—it is perhaps not surprising that LSCO lawyers are looking to earlier eras for legal grounding.

Indeed, we might see an increasing reliance on academic sources and examples of state practice from World War II, including scholarship on strategic aerial bombardment,[179] efforts to break the will of adversary

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[177] *See, e.g.*, Joshua F. Berry & Michael W. Meier, *Hays Parks on the Means and Methods of Warfare,* LIEBER INST. (Oct. 20, 2021), https://lieber.westpoint.edu/hays-parks-means-methods-warfare/ [https://perma.cc/2NTN-UN8U]. ("LTG (Ret.) Charles N. Pede, who recently served as Judge Advocate General of the Army, regularly encouraged the Corps to 'flood the zone' by publishing articles that describe the law as it exists and how we implement that law in actual practice."); Matthew J. Festa & Lt. Col. Patrick M. Walsh, *Why Scholarly Publishing Matters for JAGs*, 4 ARMY L. 38, 38 (2020) ("The Judge Advocate General (TJAG) mandates, 'flood the zone,' illustrating our senior leaders' encouragement to actively participate by contributing to the dialogue pertaining to military and international law.").

[178] Amid a discussion of the U.S. firebombing bombing campaign targeting Japanese cities during WWII, one U.S. Army publication presciently notes, "The strategic and ethical arguments which allowed the campaign to unfold still persist in pockets of our nation and its military." Joel N. Brown, *Lessons from the Firebombing in World War II's Pacific Theatre*, *in* MAINTAINING THE HIGH GROUND: THE PROFESSION AND ETHIC IN LARGE-SCALE COMBAT OPERATIONS 59 (C. Anthony Pfaff and Keith R. Beurskens eds., 2021).

[179] *See, e.g.*, Kenneth P. Werrell, *The Strategic Bombing of Germany in World War II: Costs and Accomplishments*, 73 J. AM. HIST. 702, 709–10 (1986) ("The strategic bombing diverted considerable German forces . . . . After the Soviet Union's entry into the war, strategic bombing served as a 'second front,' draining off one to two million of German personnel in direct air defense and in rescue and repair activities . . . . The bombing also absorbed a significant amount of German material resources, resources that thus could not be used in

populations,[180] the legal arguments surrounding existential war,[181] and the invocation of exceptions in the face of adversaries portrayed as noncompliant with LOAC.[182] Such citations may seem unfamiliar, even anachronistic, to readers steeped in the vocabulary and assumptions of post-Cold War IHL. But within the LSCO framework, these historical references serve an important function: they provide an alternative foundation for legal reasoning that aligns with the perceived demands of high-intensity state-on-state armed conflict.

Absent an understanding of the broader communications strategy—including the call to "flood the zone"—these citation choices might appear idiosyncratic. Yet, they are part of a broader effort to shift not only the jurisprudential terrain but also the narrative arc of IHL. Increasingly, one can anticipate a framing in which the current law applicable to multi-domain operations is described as in crisis: too narrowly tailored to the counterterrorism era, too brittle for the demands of LSCO, and too reliant on norms institutionalized in a period of asymmetric war.

In this respect, the LSCO approach inverts the framing familiar from GWOT-era critiques. Whereas those critiques often cast IHL as overly permissive in the face of new threats, LSCO lawyers are beginning to argue

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offensive operations."); JOHN A. WARDEN III, THE AIR CAMPAIGN : PLANNING FOR COMBAT 7 (1988) ("In World War II, the Allied "strategic" bombing campaign had emasculated the Luftwaffe and forced its concentration in the defense of the homeland.").

[180] *See, e.g.*, J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 239 (1924) ("The object of their attack will be moral, psychological and political rather than military: the aim will be so to disorganise and disturb the life and business of the enemy community as to make it impossible for the enemy State to continue to resist, and at the same time to create in the enemy population as a while a feeling of depression and hopelessness, to make the whole nation war-weary, *kriegsmüde, fatigué de guerre.*"); Pfaff & Beurskens, eds., *supra* note 48, at 67 ("Drafting a World War II letter to Arthur Harris, head of Britain's Bomber Command, Winston Churchill conceded that operations like his decision to firebomb Dresden were conducted 'simply for the sake of increasing terror.' American political theorist Michael Walzer spoke of bombing civilian centers in equally stark terms. Terrorism, he pointed out, intentionally avoids engagement with the enemy army, instead carrying out a war by political means.").

[181] *See, e.g.*, ROBIN NEILLANDS, THE BOMBER WAR: ARTHUR HARRIS AND THE ALLIED BOMBER OFFENSIVE 1939-1945 396 (2001) ("In a city, in a time of total war, everything is a valid target. The trains and buses, the power stations, the sewers, the markets and the entertainment areas, the bars, warehouses and restaurants–and the private houses and apartment blocks–all contribute to the enemy's ability to fight on. Destroy these and problems are created. When Bomber Command hit a city, the aim was to leave behind a non-productive ruin. That was a harsh policy, but a realistic one; there was a war on."); SPAIGHT, *supra* note 180, at 115 ("The justification of air bombardment is that it is essentially defensive in purpose. You kill and destroy to save yourself from being killed or destroyed.").

[182] NEILLANDS, *supra* note 181, at 387 ("[T]he basic moral issue of the bomber war was well summed up by Dr. Noble Frankland, one of the official historians and a former Bomber Command navigator, as follows: 'The great immorality open to us in 1940 and 1941 was to lose the war against Hitler's Germany. To have abandoned the only means of direct attack which we had at our disposal would have been a long step in that direction.' This seems to be absolutely true. Those who doubt it have only to consider what would have been the fate of Europe's people had Hitler completed his conquests.").

that the law is now overly restrictive and misaligned with the operational and strategic realities of twenty-first-century interstate war. The more this framing is repeated, the more it invites a shift in what is taken as the baseline challenge for IHL: not irregular conflict, but large-scale conventional war; not transnational actors, but peer adversaries; not the risk of legal overreach, but the operational costs of legal constraint.

Particularly if advanced in academic and doctrinal spaces not yet fully attuned to its significance, this strategy has the potential to reorient the field. The more the language of LSCO—crisis, confusion, constraint—becomes entrenched, the more it may shape both how law is taught and how it is practiced. As these arguments gain traction, the center of gravity in IHL may well begin to shift. The more the conversation becomes about LSCO, the more the assumptions underpinning LSCO lawyering are likely to define the terms of that conversation.

D. Imagining the Difference

A glimpse into what may be impermissible or even unimaginable under a LSCO legal posture can be seen in the U.S. military's response to a drone strike conducted during the final days of the Afghanistan withdrawal in August 2021 that killed ten civilians, including seven children.[183] Following a *New York Times* investigation, which raised doubts about the accuracy of the U.S. account (specifically that the target vehicle was carrying explosives rather than water containers), the secretary of defense ordered a formal inquiry.[184] That inquiry sought to determine "the degree to which strike authorities, procedures and processes need to be altered in the future."[185] The investigation, and the coverage it inspired, also led to members of Congress calling for a separate "accounting from the Pentagon."[186] In the weeks that followed, senior military officials acknowledged that the strike had been carried out in error: the individual targeted was an aid worker with no known ties to armed groups, and

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[183] *See Afghanistan: US Admits Kabul Dronestrike Killed Civilians*, BBC (Sep. 17, 2021), https://www.bbc.com/news/world-us-canada-58604655 [https://perma.cc/9JNT-U9NT].
[184] Christoph Koettl et al., *How a U.S. Drone Strike Killed the Wrong Person*, N.Y. TIMES (Sep. 10, 2021), https://www.nytimes.com/video/world/asia/100000007963596/us-drone-attack-kabul-investigation.html [https://perma.cc/GBM2-E8FP].
[185] Press Release, U.S. Dep't of Def., Statement by Secretary of Defense Lloyd J. Austin III on the Results of Central Command Investigation Into the 29 August Airstrike (Sep. 17, 2021), https://www.defense.gov/News/Releases/Release/Article/2780404/statement-by-secretary-of-defense-lloyd-j-austin-iii-on-the-results-of-central/ [https://perma.cc/WB3Y-P9RV].
[186] In a hearing by the House of Representatives Committee on Armed Services, Congressman Michael Turner addressed Commander of U.S. Central Command, Marine Corps Gen. Kenneth F. McKenzie, Jr., "I have a series of information that I would like released to this committee so that we can adequately provide oversight to what occurred on August 29 . . . . I just want to make it clear [that] the fact that you have an [Inspector General] investigation does not stop congressional oversight." *Ending the U.S. Military Mission in Afghanistan: Hearing Before the H. R. Comm. on Armed Services*, 117th Cong. 24 (2021) (statement of Rep. Michael Turner, Member, H. R. Comm. on Armed Services).

the vehicle contained no explosives. Gen. Kenneth F. McKenzie, Jr., then head of U.S. Central Command, offered "profound condolences,"[187] and the DoD credited the *Times* investigation for prompting and assisting its own review, a review that would likely not have occurred without such external pressure.[188] Significantly, the military defended the legality of the strike by pointing to internal policy—configured in response to public criticism from Congress, the press, and civil society—that required "reasonable certainty" that no civilians would be harmed.[189]

What this episode underscores is a pattern deeply familiar to those studying IHL as it has developed over the past several decades: a complex layering of LOAC rules with additional policy commitments and internal procedures. In this case, multiple safeguards—including target-confirmation measures, individual tracking, and prolonged surveillance—were in place. And while they ultimately failed, their very existence became the basis for public critique, policy review, and institutional accountability. In many ways, this is how much of the IHL community—including states, NGOs, and investigative journalists—has come to understand the law working: not as a fixed threshold for legality alone but as a site of contestation and review, where norms are shaped through policy, politics, and public expectation. The point here is not whether this strike violated the law[190] but that its aftermath reflects a broader legal and moral architecture that demands transparency, contrition, and a change in policy.

I anticipate that, under a LSCO-informed approach, the framing would likely be very different. The expectation of layered verification measures, or policy-driven commitments to zero civilian casualties, might not hold. The

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[187] Transcript of General Kenneth F. McKenzie Jr.'s, Commander of U.S. Central Command, and John F. Kirby's, Pentagon Press Sec'y, Press Briefing, U.S. CEN'T COMMAND (Sep. 17, 2021), https://www.centcom.mil/MEDIA/Transcripts/Article/2781320/general-kenneth-f-mckenzie-jr-commander-of-us-central-command-and-pentagon-pres/ [https://perma.cc/JW4E-PUWK].

[188] C. Todd Lopez, *DoD: August 29 Strike in Kabul 'Tragic Mistake,' Kills 10 Civilians*, U.S. DEP'T OF DEF. (Sep. 17, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2780257/dod-august-29-strike-in-kabul-tragic-mistake-kills-10-civilians/ [https://perma.cc/U25R-8JUF] ("[Commander of U.S. Central Command, Marine Corps Gen. Kenneth F. McKenzie, Jr.] outlined the findings of an investigation he directed following that strike, after reports said civilians may have been killed.").

[189] Eric Schmitt & Helene Cooper, *Pentagon acknowledges Aug. 29 drone strike in Afghanistan was a tragic mistake that killed 10 civilians*, N.Y. TIMES (Sep. 17, 2021) (updated Nov. 3, 2021), https://www.nytimes.com/2021/09/17/us/politics/pentagon-drone-strike-afghanistan.html#:~:text=Military%20officials%20defended%20the%20procedures,that%20led%20to%20that%20decision [https://perma.cc/XRA7-77J3].

[190] *See* Michael N. Schmitt & Eric W. Widmar, *"On Target": Precision and Balance in the Contemporary Law of Targeting*, 7 J. NAT'L SEC. L. & POL'Y, 379, 401 (2014) ("The law allows for mistakes in the Clausewitzian 'fog of war.' Intelligence may be incomplete or faulty, technology may fail to function properly, and tactical conditions may change after a targeting decision has been made and beyond the point at which an attack may be abandoned. IHL does not require perfection.").

presumption would not be that such measures are necessary—or even advisable—in future high-intensity conflicts. Moreover, the kind of public engagement that followed this incident—the inquiry, the apology, the media investigation credited by the military, and the calls for procedural overhaul—might be viewed not as evidence of healthy accountability but as counterproductive, even dangerous. If the flood-the-zone strategy is successful, such episodes could recede from public visibility altogether. Investigations might occur less frequently. Press conferences could become less explanatory. And calls for external scrutiny might be treated as misinformed or inappropriate.

V. COUNTERARGUMENTS

In this part, I examine the strongest counterarguments against focusing attention on the LSCO legal playbook to rigorously test the claims and evaluate their resilience under scrutiny.

A. LSCO Lawyering Is a Modest Call for Fidelity and Deference

Perhaps the most powerful objection I have encountered—and the one voiced most directly by military legal colleagues, both American and "Five Eyes"—challenges both my argument and my framing. The tone is, in effect, "calm down." To treat this as a coherent project is said to be a category error or, worse, an effort to manufacture legal controversy where none exists. Some critics go further, suggesting that the effort to distinguish law from policy—to push back against counterterrorism-era targeting overlays—is not novel but simply a return to legal fundamentals. In this view, LSCO lawyers are reiterating a familiar point: that not all operational constraints are legally required and that clarity about the boundaries of LOAC is both overdue and essential. Indeed, some point out that I, myself, have warned against mistaking policy preferences for binding law, particularly during the Obama era.

Whether one finds my framing persuasive may depend on how one understands legal change, especially in American IHL. For some, the LSCO texts are peripheral and doctrinally unremarkable. But I read them as evidence of an emergent posture that reshapes legal expectations, informs doctrinal development, and contributes to a broader institutional project. LSCO lawyering presents itself as a modest call for fidelity. Yet its impact, if successful, would be anything but modest.

B. This Is Nothing New, and It Is Not Actually About Law

A second, related line of critique holds that LSCO lawyering is neither new nor especially legal. The questions it raises—who sets the limits of war, what justifies the use of force, how suffering should be regulated—are perennial. From this perspective, every generation of military lawyers, when

faced with evolving strategic demands, invokes some version of "new war, new law" while ultimately participating in long-standing debates about law's relationship to violence. On this view, which I have heard from some U.S. senior JAGs, LSCO lawyering is simply the latest iteration of a recurring pattern: a reframing of operational necessity through familiar legal arguments. Indeed, some interlocutors have indicated to me that LSCO lawyering is strategically and morally imperative. In their view, it would be unconscionable to ask U.S. and allied forces to fight a peer conflict under a legal framework that effectively forecloses the possibility of victory.

There is something clarifying in this view. LSCO lawyering does draw from themes that have animated conduct-of-hostilities discourse for decades, perhaps especially in U.S. legal culture, where the boundary between law and policy has long been porous. LSCO lawyering is tagged by concern with preserving tactical flexibility, skepticism toward external scrutiny, and emphasis on military necessity—none of which is wholly novel.

But to cast LSCO lawyering as more of the same is to miss something important. What marks the current moment is not the novelty of the arguments but the institutional project and strategic environment in which they are embedded. These are apparently not marginal ideas. They are increasingly being institutionalized—through doctrine, command training, legal education, and strategic messaging—by a growing portion of the military legal establishment positioned to shape how the United States understands operational law in high-intensity war.

This is not, that is, just a reiteration of older debates. It is a shifting of the legal center of gravity—away from public justification and layered precaution and toward internal military judgment as a model for measuring legality. LSCO lawyering may not seek to rewrite treaties. But it is very much about many other aspects of law, including what qualifies as law, who decides, and how those decisions endure. To call it "nothing new" is to risk underestimating its significance.

C. Changing IHL as Described Is Legally and Politically Impossible

A third critique holds that IHL—grounded in treaty and customary law and reinforced by international jurisprudence—is too robust to be reshaped by LSCO lawyering. On this view, the core rules of IHL, particularly those governing targeting, are politically entrenched and legally settled. The combined weight of state practice (especially that of allies), human-rights mechanisms, NGO advocacy, and the interpretive authority of the ICRC is seen as forming a stable consensus that cannot be easily undone by a shift in U.S. operational posture.

Yet, this view risks overlooking key aspects of the historical record and the present trajectory. Many of the LOAC doctrinal positions emphasized in LSCO lawyering—skepticism toward external scrutiny, narrow readings of "feasible precautions," and expansive claims of military necessity—are not new. They reflect long-standing U.S. approaches to the conduct of hostilities, especially within the armed-forces legal community. What has shifted is not the baseline content of these views but their institutional context and the strategic imperative. And they are now being articulated with greater clarity, frequency, and ambition.

The divergence between U.S. LSCO lawyers and lawyers in the ICRC, academia, and civilian protection NGOs is also widening. In earlier eras, this normative gap was managed partly through ambiguity or diplomatic understatement. LSCO lawyering is disrupting that mode. The distinctions are now more obvious and the LSCO posture more unapologetic. In many of my conversations with current and former U.S. JAGs, what was once presented as variation within a shared framework is increasingly acknowledged as fundamental disagreement on core concerns.

As with earlier critiques, one's view here turns in part on how legal change is understood. IHL may be difficult to dismantle in formal terms. But the law of targeting—among the most conceptually thin and context-sensitive domains—is vulnerable to a steady unlayering of interpretations that reconfigure its meaning in practice. In that light, the question is not whether IHL is "too big to fail" but whether it can resist successive shifts framed as modest, incremental, and grounded in the exigencies of LSCO.

D. There Will Be No Major War between China and the United States, So This Is a Distraction

Fourth, it may be tempting to dismiss LSCO lawyering as an overreaction to an implausible scenario. A full-scale U.S.-China war, rivaling World War II in scope, may indeed seem implausible, particularly in light of political, economic, and public constraints. When I have presented aspects of this research, some listeners have responded with concern that I appear to accept the national-security framing outlined in Part I. That critique, however, misses the broader stakes.

LSCO lawyering is not dependent on the actual outbreak of a great-power war. Rather, its force lies in how it mobilizes the possibility of such conflict to justify legal, institutional, and operational changes in the present. The argument is not merely that the United States must be prepared for LSCOs. Rather, it is that this preparation requires immediate legal adaptation. The prospect of a U.S.–China war is the most visible anchor, yet the vision extends to any future scenario that might strain the perceived limits of current legal interpretations.

Moreover, these legal arguments are not confined to planning documents or hypothetical war games. They are already shaping how LOAC is taught, operationalized, and applied. Whether or not LSCOs materialize in the way some envision, the interpretive moves LSCO lawyers are making now are shifting the contours of American IHL. To dismiss these developments as speculative is to overlook their real-time embedding in the U.S. military's legal and strategic architecture.

E. LSCO Lawyering as a Tool of U.S. Neo-Imperialism

Fifth, some—perhaps especially on the left—may see LSCO lawyering as merely the latest expression of U.S. neo-imperial ambition: a project to weaponize IHL in service of global dominance, particularly over the Global South. This critique is not without force. It underscores the United States's historical entanglements with racialized violence, asymmetrical power projection, and the selective invocation of legal norms to legitimize military intervention. In this reading, LSCO lawyering is less a legal development and more a geopolitical maneuver that cloaks coercive force in the language of legality while deepening the asymmetries that international law purports to restrain.

There is value in this critique's insistence on structural context. The U.S. military's approach to targeting has long reflected a tension between claims of protective restraint and practices of extensive violence. With its emphasis on restoring "realism" to the law, the LSCO framing may be understood as reinforcing that asymmetry, especially if it translates into fewer constraints on how the United States and its allies wage war while demanding compliance from others. Yet while this account is analytically important, it does not exhaust the significance of LSCO lawyering, nor does it account for its broader potential uptake.

F. There is No Appeal for LSCO Lawyering Outside the United States

A sixth counterargument holds that LSCO lawyering is too entangled with U.S. strategic and legal culture to resonate beyond its borders. On this view, its emphasis on internal discretion, military necessity, and skepticism toward external scrutiny is specific to American IHL. LSCO lawyering, in this account, is a narrow, inward-facing framework—useful only to the Pentagon and perhaps a few close allies.

But this view might underestimate both the pragmatism and ambitions of other militaries. Even states that position themselves as anti-Western often approach LOAC—particularly the conduct of hostilities—in ways distinct from their engagement with human rights or trade law. For most armed forces, LOAC is about defining the legal space within which states may wage war. In that context, a framework that expands operational flexibility while preserving

minimal legal compliance may have broader appeal. Indeed, aspects of the LSCO approach—such as its emphasis on military judgment, legal "maneuver space," and resistance to external scrutiny—may resonate with militaries beyond the United States, including those in the Global South. This is not because they necessarily share U.S. strategic aims but because they too might seek ways to manage legal, political, and reputational risks while asserting more control over how they fight. In this understanding, a model that prioritizes military effectiveness over constraint offers a mode of legal reasoning and a rhetorical tool potentially adaptable to many settings. In attempting to make LOAC more "realistic," LSCO lawyering may make it more permissive. And that shift, once articulated and institutionalized by the U.S. military, could have ripple effects well beyond American IHL.

G. LSCO Lawyering Is Merely Prudent Planning

Seventh, it might be tempting to view LSCO lawyering as the work of a vocal but marginal subset of the U.S. military legal community. Some senior officials, in conversations I have had with them, have even described its proponents as overly zealous—outliers whose views are treated with a mix of curiosity and caution. These officials view LSCO lawyers as merely responding to higher level demands for better planning in the event of an all-out war. Much of the discourse to date has appeared in niche publications, far removed from policymaking circles. But history suggests that the influence of legal ideas should not be measured solely by their initial uptake. Indeed, when embedded in training materials, internal legal reviews, and doctrinal publications, even peripheral arguments can, over time, reshape the center.

LSCO lawyering proceeds incrementally—not by demanding sweeping legal reform but by introducing shifts in how the law is taught, how rules of engagement are framed, and how legal constraints are communicated internally and externally. Its proponents do not need formal legal change to gain traction. Instead, they are constructing a legal architecture from the inside out, reorienting interpretations through repetition, institutionalization, and alignment with strategic planning. The question is not whether LSCO lawyers will remake the entire legal landscape. It is how far their influence will and should extend and whether the transformation described here is limited to war with China.

The pace and scope of their influence thus far has been striking. I began this research in 2023 when I noticed that military lawyers I had long known were suddenly referring to a concept—LSCO—I had not encountered in international legal discourse. What they described sounded to me like preparations for a conventional armed conflict, but the legal framing was subtly different. As I continued these conversations, I encountered what some called a growing cohort of senior JAGs and military-adjacent scholars intensely focused on a potential war with China and advancing what many colleagues described as surprising, even unsettling, legal claims. At the same time, legal

advisers from European, Latin American, and African governments whom I interacted with had never heard the term "LSCO" but recognized certain phrases—such as "maximum flexibility" and "legal maneuver space"—from recent exchanges with U.S. counterparts.

By the time I completed this Article—more than halfway through the first year of the second Trump administration—what had once seemed less likely now looked increasingly plausible. The political landscape had changed. So had the structure of American alliances, the tenor of U.S. foreign policy, and the institutional latitude available to military actors. Within that altered terrain, LSCO lawyering no longer looked marginal. It looked ready to ascend, perhaps even beyond its initially envisioned objectives.

H. LSCO Lawyering Is Better than No Lawyering

A final counterargument might be put simply: now is not the time. At the time of writing, developments in the Department of Defense suggest that the United States could be increasingly hostile to legal restraints in conducting war. From this vantage point, to scrutinize LSCO lawyering now may seem politically unwise or even unfair. Indeed, by this account, LSCO lawyering is more of a bulwark than a threat, better seen as a kind of principled effort to ensure that some version of the law endures under the extreme pressures of planning for existential war.

The mere fact that a future collapse of legal constraint might be more imaginable now should not make the developments discussed in this Article immune from debate. On the contrary, it makes that debate all the more urgent. The LSCO lawyering project raises fundamental questions about the burdens placed on young commanders, the judgments that ought to be made by military legal advisers, and, perhaps most importantly, the moral and political responsibilities of the public in whose name they fight.

CONCLUSION

The initial responses I received to drafts of this Article—across a spectrum of military lawyers, international legal scholars, policy officials, and civil-society actors—were as revealing as they were divergent. Some greeted the piece with quiet acknowledgement, seeing it as an overdue documentation of legal work they regard as doctrinally unsurprising and strategically prudent. Others expressed concern, not necessarily with the arguments themselves but with the tone—that by naming and describing LSCO lawyering as a coherent phenomenon, I might be lending it undue weight or even unintentionally legitimizing a hollowing out of the law of war. Still others read the same draft as sounding an alarm: a warning about the institutionalization of a legal posture that, in their view, normalizes large-scale civilian harm while cloaking it in the language of legality.

That such a wide range of reactions could emerge in response to a single descriptive account struck me as a sign that LSCO lawyering is not merely an internal doctrinal evolution but also a live terrain of political, ethical, and legal contestation. The fact that some read this project as cautious fidelity while others saw it as an early symptom of legal nihilism may underscore a deeper point: The interpretive posture at stake here is not simply reading the law. It is remaking it. And the stakes could hardly be higher.

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On January 25, 2025, Pete Hegseth was sworn in as the twenty-ninth secretary of defense of the United States. Secretary Hegseth, a former National Guard major and Fox News host, is unusual among DoD leaders for having extensively published his views on the laws of war prior to his appointment. In his most recent book, in a chapter titled "The Laws of War, for Winners," Secretary Hegseth discusses his own frustrating encounters with law and lawyers as a soldier. On this basis, he makes an inquiry: "[I]n 2024—if you want to win—how can anyone write universal rules about killing other people in open conflict?" Secretary Hegseth reduces war to a brutal, inevitable contest of destruction, dismisses legal and ethical constraints as dangerous hindrances to victory, and portrays modern rules of engagement—particularly those emphasizing civilian protection—as naïve concessions to global opinion that weaken U.S. military effectiveness against adversaries who do not abide by such restrictions. Secretary Hegseth's solution:

> The next commander in chief will need to clean house—and rewrite these laws (much as President Trump did when he unleashed the military to defeat ISIS) . . . . Our boys should not fight by rules written by dignified men in mahogany rooms eighty years ago. America should fight by its own rules.[191]

Since Hegseth came into office, Pentagon leaders have decided to gut the Civilian Protection Center of Excellence, which is at the center of the broad, cross-command CHMR effort.[192] Secretary Hegseth dismissed, without explanation, the top uniformed military lawyers for the Air Force, Army, and

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[191] PETE HEGSETH, THE WAR ON WARRIORS: BEHIND THE BETRAYAL OF THE MEN WHO KEEP US FREE 205 (2024). President Trump recently fired the top lawyers across the U.S. military services, including the Army, Navy, and Air Force. *See also* Don Gonyea, *President Trump fires 6 top-level military officers. A retired rear admiral reacts*, NPR (Feb. 22, 2025), https://www.npr.org/2025/02/22/nx-s1-5305781/president-trump-fires-6-top-level-military-officers-a-retired-rear-admiral-reacts [https://perma.cc/RW6C-V7DV].

[192] Alex Horton, Meg Kelly & Dan Lamothe, *Pentagon moves to gut operations focused on reducing civilian harm*, WASH. POST (updated Mar. 4, 2025), https://www.washingtonpost.com/national-security/2025/03/04/trump-hegseth-pentagon-firings-civilian-harm/ [https://perma.cc/8GBA-QKUR].

Navy.[193] His personal lawyer was directly commissioned as a Navy commander in the JAG Corps as a reservist and assigned to a unit that supports the secretary's office.[194]

It thus appears that the LSCO lawyers find themselves with a more receptive leadership than they could have possibly expected when our story began. And yet, even among military lawyers who critique contemporary IHL, few share Secretary Hegseth's open disdain for the notion of international law itself. It is trite to observe that no one can predict what the coming years will entail. I wonder, though, if LSCO lawyers will ultimately find that their intellectual and operational appeals contributed to something far more radical and far less controllable than they had initially envisioned.

[193] Greg Jaffe, *In Pursuit of a 'Warrior Ethos,' Hegseth Targets Military's Top Lawyers*, N.Y. TIMES (Feb. 22, 2025), https://www.nytimes.com/2025/02/22/us/politics/hegseth-firings-military-lawyers-jag.html [https://perma.cc/5EUP-Q3XU].

[194] John Ismay, *Hegseth's personal lawyer to be commissioned as a Navy commander in the reserves*, N.Y. TIMES (Mar. 5, 2025), https://www.nytimes.com/live/2025/03/05/us/trump-news#hegseths-personal-lawyer-to-be-commissioned-as-a-navy-commander-in-the-reserves [https://perma.cc/X73R-VEC7].