META-LAW OF ARMED CONFLICT PRINCIPLES

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I. INTRODUCTION

With the ongoing and tragically avoidable war in Ukraine as its reference point, this brief symposium contribution aims to accomplish two objectives.[1] First, to justify the search for possible "meta" principles that explain, but transcend, traditional Law of Armed Conflict (LOAC) principles.[2] Second, to propose such a set of tentative meta-principles as a starting point for deeper elaboration and critique, too nuanced for the limited scope of this rough preliminary sketch.[3] These tentative meta-principles may, upon inspection, be overly broad or too specific; they may be redundant or incomplete. I do not suppose they are already exhaustive and comprehensive. But to strengthen their credibility, this essay will suggest that such meta-principles (whatever they may be or however they may be expressed) offer at least four critical benefits—genealogical, interpretive, gap-filling, and decisional.[4]

No such second-order legal principles related to warfare exist in law, scholarship, or practice—so why bother to identify or create any from, apparently, scratch? The conventional war in Ukraine, defending its sovereignty from the unlawful aggression of Russia,[5] is a live case study on how the laws of war do—or do not—actually constrain the use of armed force and how those laws might—or might not—be used to hold military troops and their commanders (or even political officials) accountable for criminal use of armed force.[6] The same can be said of any armed conflict, of course, and the brutality and costs of the fighting in Ukraine are *fundamentally* no different than wars waged between nation states in Europe since the first world war.[7] But the character of this war—some of the ways in which it is

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1. *See infra* Parts II–IV (explaining the benefits of the meta-principles and advocating for their adoption).

2. *See infra* Parts II–III (outlining traditional Law of Armed Conflict (LOAC) principles).

3. *See infra* Part IV (suggesting meta-principles).

4. *See infra* Section IV.B (listing the benefits of meta-principles).

5. Unlawful in two ways: a violation of *jus ad bellum* international law governing a state's right to use armed force, and violations of *jus in bello* prohibitions on military operations affecting civilians and non-combatants. *See* U.N. Charter art. 2(4) (1945) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); Amanda Macias, *Russia Has Committed More than 65,000 War Crimes in Ukraine, Prosecutor General Says*, CNBC, https://www.cnbc.com/2023/02/01/ukraine-russia-war-65000-war-crimes-committed-prosecutor-general-says.html (last updated Feb. 1, 2023, 9:14 PM); *What Is a War Crime and Could Putin Be Prosecuted Over Ukraine?*, B.B.C. NEWS (July 20, 2023), https://www.bbc.com/news/world-60690688.

6. Edith M. Lederer, *UN Chief: Rule of Law Risks Becoming 'Rule of Lawlessness'*, AP NEWS (Jan. 12, 2023, 8:50 PM), https://apnews.com/article/russia-ukraine-politics-united-states-government-myanmar-nations-1856dc8d5af5d5decb0b8fafb729ad40 (quoting U.N. Secretary-General Antonio Guterres); Shelby Magid & Yulia Shalomov, *Russia's Veto Makes a Mockery of the United Nations Security Council*, ATL. COUNCIL (Mar. 15, 2022), https://www.atlanticcouncil.org/blogs/ukrainealert/russias-veto-makes-a-mockery-of-the-united-nations-security-council/.

7. Anatol Lieven, *Ukraine's War Is like World War I, Not World War II*, FOREIGN POL'Y (Oct. 27, 2022, 9:11 AM), foreignpolicy.com/2022/10/27/ukraines-war-is-like-world-war-i-not-world-war-ii/.

fought, and some of the tools Ukraine and Russia use to fight it—are thoroughly modern, savvy, and technologically sophisticated.[8] Ironically, the same could be said during both world wars—for example, the deployment of chemical weapons, the advent of aerial and submarine warfare, the exploitation of radio communication, and the first use of atomic weapons altered the *character* of conflict.[9] The technological advancements being exploited by the parties now—some enabled by artificial intelligence (AI) and involving autonomous or semi-autonomous combat systems—implicate the duties, obligations, and permissions of the LOAC, also known as the Law of War (LoW) or International Humanitarian Law (IHL),[10] just as the technological marvels and terrors in the first half of the twentieth century did.[11]

II. THE LOAC, IN PRINCIPLE

The LOAC is a set of international legal obligations—encoded by treaties like the Geneva Conventions of 1949,[12] regulations in the Hague Conventions,[13] and more contemporary international agreements like the

8. Marc Santora, *Surrender to a Drone? Ukraine Is Urging Russian Soldiers to Do Just That*, N.Y. TIMES (Dec. 20, 2022), https://www.nytimes.com/2022/12/20/world/europe/russian-soldier-drone-surrenders.html.

9. Azar Gat, *The Changing Character of War*, *in* THE CHANGING CHARACTER OF WAR 27, 27 (Hew Strachan & Sibylle Sceipers eds., 2011); *see* GERARD J. DEGROOT, *'Killing is Easy': The Atomic Bomb and the Temptation of Terror*, *in* THE CHANGING CHARACTER OF WAR, *supra*, at 9.

10. Page Wilson, *The Myth of International Humanitarian Law*, 93 INT'L AFFS. 563, 563 (2017) (describing how the contemporary nomenclature for the body of laws regulating armed force in hostilities between nations and protecting war victims, IHL, evolved from earlier use of "law of war" or "law of armed conflict"). The U.S. military considers IHL to be slightly broader in scope than the "law of war" as the former would not include the law of neutrality, but the latter would. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.3.1 (rev. ed. 2023) [hereinafter DOD LOW MANUAL], https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF; *see also* Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 9, ¶ 102 (Dieter Fleck ed., 1999) (explaining humanitarian law requirements in war). For consistency, this Article will use LOAC throughout, but its thesis remains unchanged even if one would prefer to call them "Meta-IHL" or "Meta-Law of War" principles because all three labels describe *jus in bello* rules, in contrast to *jus ad bellum*, the central subject here.

11. *See infra* Part II (discussing some of the technological marvels of the twentieth century).

12. *E.g.*, Geneva Convention (1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I] (providing protection for wounded and sick soldiers on land during war); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II] (providing protection for wounded, sick, and shipwrecked military personnel at sea during war); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (setting out specific rules for the treatment of prisoners of war); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (laying out the Geneva Convention).

13. *E.g.*, Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (establishing the laws to be used in wars on land between signatories); Convention Respecting the

CCW[14]—and the rest largely accounted for in "Customary International Law"[15]—but applicable only during "armed conflicts."[16] The LOAC is the *lex specialis* that purports to govern the use of armed force outside of peacetime domestic and international law, usually conducted by nation states against other nations or non-state armed groups, which would otherwise be unlawful in situations outside of armed conflict.[17] Generally, the LOAC is concerned with two large issues.[18] First, the problem of how, when, and why to protect victims—civilians and non-combatants (e.g., prisoners of war or detainees)—from the dangers of armed conflicts second, the types of means and methods of warfare that can lawfully be employed during armed conflicts, given the paradoxical objective of waging and ending hostilities swiftly, balanced against deeply-rooted humanitarian goals and fundamental human rights.[19] The resulting law is a "dialectical compromise" between the "two opposing forces" of military necessity and humanity.[20] The compromise serves to provide answers, or standards, for at least five questions that are

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Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV] (laying out the Hague Convention).

14. *E.g.*, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (banning and restricting the use of particular weapons); Protocol (IV) on Blinding Laser Weapons, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 13, 1995, 1380 U.N.T.S. 163 (prohibiting the use of laser weapons specifically designed to cause permanent blindness).

15. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. L. INST. 1987) (defining it as "general and consistent practice of states followed by them from a sense of legal obligation [*opinio juris*]"); *see also* Statute of International Court of Justice art. 38(1)(b) (defining international custom "as evidence of a general practice accepted as law").

16. "Armed conflict" lacks a standard definition. The U.S. interprets it, for the purposes of applicability of Common Article 2 of the 1949 Geneva Conventions, as "any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity[,] or scope of the fighting." Department of State, Telegram 348126 to American Embassy at Damascus, Dec. 8, 1983, III CUMULATIVE DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW 3456, 3457 (1981–1988 eds.). A more widely accepted definition is "an armed conflict exists whenever there is a resort to armed force between [s]tates or protracted armed violence between governmental authorities and organized armed groups." Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

17. C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 446 (1953) ("A clear illustration of [the *lex specialis* principle's] applicability is afforded by instruments relating to the laws of war which, in the absence of evidence of a contrary intention or other special circumstances, must clearly be regarded as a *leges speciales* in relation to instruments laying down peace-time norms concerning the same subjects."). There is a notable debate with respect to whether LOAC "displaces" everyday Human Rights Law or simply "complements" it. That debate is outside the scope of this Article, but for relevant points, see Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMANITARIAN L. STUD. 52 (2010) and Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310 (2007).

18. Michael N. Schmitt, *Military and Humanity in International Humanitarian Law*: *Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 798 (2010).

19. *Id.*

20. *Id.*

highly relevant to the planning and execution of tactical level military operations—how the fighting is actually done:

> 1. What kinds of weapons or tactics are not permitted? (e.g., biological weapons, poisons, and any weapon specifically intended by design to cause superfluous injury or pain—gratuitous violence).[21]
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> 2. What kinds of *use* of weapons or tactics are not permitted? (e.g., use of a lawful weapon in a manner calculated to cause unnecessary suffering;[22] prohibition on "indiscriminate attacks").[23]
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> 3. Who is protected from attacks? (e.g., civilians not directly participating in hostilities).[24]
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> 4. What is protected from attacks? (e.g., "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.").[25]
>
> 5. What is the minimum standard of care and treatment of persons under the control of belligerent parties (e.g., detainees in a non-international armed conflict,[26] or prisoners of war[27]), or are *hors de combat* because of wounds or sickness?[28]

The LOAC's purpose can be articulated in functionalist or instrumentalist terms, as the U.S. does.[29] But the LOAC's teleology can also be understood, as aspirational normativity, by reference to the Geneva Conventions of 1949—at least as expressed by a draft preamble prepared by

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21. *See, e.g.*, Hague IV, *supra* note 13, annex art. 23(e) (explaining causes of unnecessary suffering).

22. DOD LOW MANUAL, *supra* note 10, at 58, § 2.3.

23. Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

24. *Id.* art. 51(3).

25. *Id.* art 53(a); *see, e.g.*, Hague IV, *supra* note 13, annex art. 25 ("The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.").

26. GCI, *supra* note 12, art. 3; GC II, *supra* note 12, art. 3; GC III, *supra* note 12, art 3; GC IV, *supra* note 12, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

27. GC III, *supra* note 12.

28. *Id.*

29. DOD LOW MANUAL, *supra* note 10, § 1.3.4, at 15–16 (describing the "main purposes" as "protecting combatants, noncombatants, and civilians from unnecessary suffering;" protecting the sick, wounded, shipwrecked, and prisoners of war in the hands of their enemies; "facilitating [a] restoration of peace;" a tool for commanders to control the effective and efficient use of armed force; and "preserving the professionalism and humanity of combatants"); *see also* NAT'L SEC. L. DEP'T, JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 57 (2022) [hereinafter OPERATIONAL LAW HANDBOOK], https://tjaglcs.army.mil/documents/35956/56931/2022+Operational+Law+Handbook.pdf (listing three humanitarian purposes and three functional purposes of the LOAC).

the International Committee of the Red Cross during the Stockholm Conference in 1948: "Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking."[30] A generation earlier (with world war in between), the Preamble to the 1929 Geneva Convention on the Wounded and Sick stated simply that the drafters were "animated by the desire to lessen, so far as lies in their power, the evils inseparable from war."[31] And even before that, at the 1899 Hague Convention (II), the parties agreed—in what has since been referred to as the "Martens Clause" after its drafter—to the following:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the *principles of international law*, as they result from the *usages established between civilized nations*, from *the laws of humanity*, and the *requirements of the public conscience*.[32]

Not only does this clause provide a menu of the constituent parts of the "principles of international law," it was ultimately incorporated in the Additional Protocols of 1977[33] and indicates that some "law" necessarily governs in the absence of expression in a treaty, even if it is in the form of "natural law."[34] Moreover, it establishes that a standard exists for interpreting a rule of international humanitarian law that is "not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles [of international law] and dictates."[35] It

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30. INT'L COMM. RED CROSS, REMARKS AND PROPOSALS SUBMITTED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS 8 (1949), https://file.loc.gov/storage-services/ll/llmp/rc-remarks-proposals/irc-remarks-proposals.pdf. The Preamble further states: "Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed *hors de combat* by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succoured [sic] and tended without distinction of race, nationality, religious belief, political opinion or any other quality." *Id.*

31. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, Preamble, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303.

32. 1899 Hague Convention II with Respect to the Laws and Customs of War on Land, Preamble, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, *reprinted in* JAMES BROWN SCOTT, TEXTS OF THE PEACE CONFERENCES AT THE HAGUE, 1899 AND 1907 6, 48 (James Brown Scott ed., 1908) (emphasis added). For a discussion of the Martens Clause and its utility applied in "transnational" conflict (e.g., between a state and a non-state armed group, like a terrorist organization operating internationally), see Jeffrey D. Kahn, '*Protection and Empire': The Martens Clause, State Sovereignty, and Individual Rights*, 56 VA. J. INT'L L. 1 (2016).

33. AP I, *supra* note 23, art. 1(2) ("In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.").

34. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 37 INT'L REV. RED CROSS 125, 133 (1997).

35. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgement, ¶ 525 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

further implies that some means or methods of warfare are not permitted even though they have not been expressly prohibited.[36]

Given that LOAC protections are applied by the state whether lawfully or unlawfully engaged in hostilities (a *jus ad bellum* legal question), and enforceable against the state and its agents in various forms and fora of criminal adjudication, we may consider these to echo what might be classified as *Ur-principles* of the LOAC.[37]

> 1. The LOAC intends, as an index of the public conscience, to mitigate the inevitable and foreseeable sufferings of warfare to the extent that is reasonably possible under the circumstances, broadly construed, and
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> 2. The LOAC's reason for this intention is an axiomatic respect for (a) the self-evident autonomy and dignity of human beings, broadly construed, whether combatant or noncombatant or civilian, even if positive law does not yet express it, and (b) the preference that peace, not warfare, is the default relationship among peoples and states (that warfare is a pathology, an aberration), and
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> 3. The LOAC recognizes an inherent tension—and assumes imbalances exist—between the sovereignty of the state, to lawfully wage war and to manage the good order and discipline of its military agents, and the sovereignty of the individual affected by warfare, broadly construed.[38]

And while these may be foundational sources from which spring the traditional LOAC principles, even these *Ur-principles* might be said to reduce even further to a yet more abstract and higher set of goals.[39] Consider, for example, John Rawls' "familiar and traditional principles of justice" which he described as the "basic charter of the Law of Peoples."[40] He included the principle that "[p]eoples are free and independent, and their freedom and independence are to be respected; [p]eoples are to honor human rights; [and] [p]eoples are to observe certain specified restrictions in the conduct of war."[41]

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36. Ticehurst, *supra* note 34, at 126.

37. *See infra* Part III (discussing the LOAC rules and what or when it governs).

38. *See* Geoffrey S. Corn & Chris Jenks, *Cluster Munitions and Operational Considerations*, LAWFARE (July 20, 2023, 8:01 AM), https://www.lawfaremedia.org/article/cluster-munitions-and-operational-considerations ("Striking an effective balance between the necessities of war and the humanitarian imperative to mitigate the suffering of war is the very essence of the law of armed conflict.").

39. *See infra* Part III (explaining the history of the LOAC principles and the core principles adopted by the U.S. and other countries).

40. JOHN RAWLS, THE LAW OF PEOPLES 37 (2001).

41. *Id.* The extent to which this present effort contributes to Rawls' project is set aside for now. His subject was even broader, exploring a fundamental social contract structure regulating the moral and political "principles and norms of . . . law and practice" among "peoples" internationally, not on the international legal relationships between states as they go to war, a more specific subset of what he had in mind. *Id.* at 3, 25. This Article will not engage directly with Rawls' principles, but one hopes at least to

The LOAC consists primarily of treaties and customary international law (CIL), supplemented by any relevant and persuasive judicial decisions from international tribunals.[42] But as it is currently explained or taught, it is certainly no stranger to general behavior-guiding standards and principles.[43] The LOAC's heart beats with four (maybe five) chambers; four (or five) presumptively axiomatic "principles" that expound basic, unalterable values: distinction, military necessity, proportionality, and humanity, and, under the U.S. interpretation, "honor."[44] What these principles say, and an appreciation of their influence, is described briefly below in Part III.[45] But LOAC's anatomy is still not as well understood as we would like to imagine.[46]

Despite their evident utility and normative power, a dilemma remains.[47] There is no firm basis on which a practitioner (like a military commander) can decide what to do when not only is there no explicit regulatory, treaty-based, or customary law-based rule on point, but when the LOAC principles themselves are too ambiguous to provide a standard for the use of armed force or treatment of civilians during entirely new, novel, and unprecedented circumstances of armed conflict.[48] In other words, it is unclear

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remain faithful to those outer contours.

42. DOD LOW MANUAL, *supra* note 10, § 1.9, at 34–35 (commenting on the "subsidiary" nature of judicial decisions by international courts, binding only the parties to that particular case and not on other tribunals or subsequent cases of the same court).

43. *See infra* Part III (noting core principles used by countries are from custom and practice).

44. DOD LOW MANUAL, *supra* note 10, § 2.1, at 50. More will be said about these principles in Part III, *infra*, but suffice to say that there is no universally agreed-upon catalogue of LOAC principles or its definitions, though they are certainly similar across militaries. *See infra* Part III (discussing the principles). The British consider four principles: military necessity, distinction, proportionality, and humanity. UNITED KINGDOM MINISTRY OF DEF., JOINT SERV. PUBL'N [JSP] 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 21–26 (2004) [hereinafter 2004 U.K. LOAC MANUAL]. The Danish military also considers the same four. DANISH MINISTRY OF DEF., MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 66–76 (Jes Rynkeby Knudsen ed., 2016). The Australian military identifies three: necessity, proportionality, and unnecessary suffering (also called "humanity") and considers "distinction" to be a related but not a "basic principle." AUSTRALIAN DEF. FORCE, AUSTRALIAN DEFENCE DOCTRINE PUBLICATION 06.4: LAW OF ARMED CONFLICT 2-2 to 2-7 (2006). The German armed forces consider the principles to be military necessity, humanity, discrimination, and proportionality (also referred to as the prohibition to cause civil damage excessive in relation to the military advantage). FED. MINISTRY OF DEF., JOINT SERVICE REGULATION (ZDV) 15/2: LAW OF ARMED CONFLICT MANUAL 10, 26, 53–54, 161 (2013). Canada articulates them as three primary "concepts" (military necessity, humanity, and chivalry), three "fundamental principles" ("humanitarian principle," "Principle of the Law of Geneva," and the "Principle of the Law of the Hague"), and four "operational principles" (distinction, proportionality, non-discrimination, and reciprocity). CHIEF OF DEF. STAFF, JOINT DOCTRINE MANUAL B-GJ-005-104/FP-021: LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS 2-1 to 2-3 (2001). Many thanks to Professor Corn for drawing my attention to these differences and similarities.

45. *See infra* Part III (noting these principles as standards for conduct and influence the execution of a mission).

46. *See infra* Part III (highlighting the uncertainty about the origin of these principles).

47. *See supra* Part I (discussing the issues of technological advancements with the current LOAC principles).

48. *See infra* Section IV.B (giving examples of new armed conflict that may prove traditional LOAC principles unsuccessful).

what—if anything—serves as a principle of law between the three *Ur-principles* and the handful of time-honored LOAC principles.[49]

For example, the U.S. Department of Defense (DoD)'s *Law of War Manual* (*DoD LoW Manual*), the current definitive (at least in practice) American defense establishment's policy statement interpreting "[the] law relating to the conduct of hostilities and the protection of war victims" (*jus in bello*),[50] is premised on the following idea:

> Members of the DoD Components comply with the law of war during all armed conflicts, however characterized. In all other military operations, members of the DoD Components will continue to act consistent with the law of war's fundamental principles and rules, which include those in Common Article 3 of the 1949 Geneva Conventions and the principles of military necessity, humanity, distinction, proportionality, and honor.[51]

In the conduct of offensive cyber operations,[52] traditional consultation with the LOAC principles below the "threshold of armed conflict"[53] in which a case can be made that an "attack" as traditionally understood[54] has not occurred yet may be unrevealing. A military lawyer—in addition to a commander or civilian official with the authority to conduct such an operation—would consider its legality in light of these principles in order to act consistent with them.[55] But how one could do that, when these principles

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49. *See infra* Section IV.B (suggesting meta-principles to fill the gap in novel instances of armed conflict).

50. DOD LOW MANUAL, *supra* note 10, § 1.1.2, at 1. Of note, the *DoD LoW Manual*'s authors claim that it was written in consultation with Department of State and Department of Justice lawyers, but caveat that the *DoD LoW Manual* "does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole." *Id.* § 1.1.1.

51. DEP'T OF DEF., DOD DIRECTIVE 2311.01: DOD LAW OF WAR PROGRAM § 1.2.a. (2020) [hereinafter DOD LAW OF WAR PROGRAM] (emphasis added).

52. DEP'T OF THE ARMY, FIELD MANUAL 3-38: CYBER ELECTROMAGNETIC ACTIVITIES 3–2, fig. 3-1 (2014) (providing the U.S. definition of these operations as those intended "to project power by the application of force against enemies and adversaries in and through cyberspace" in contrast to defensive cyberspace operations and "DoD Information network Operations").

53. Javier Jordan, *International Competition Below the Threshold of War: Toward a Theory of Gray Zone Conflict*, 14 J. STRATEGIC SEC. 1, 12 (2020) (discussing the use of "cyberattacks" in "gray zone" competition). Jordan defines gray zone activities as "strategic competition between two or more states . . . [which] takes place below the threshold of armed conflict." *Id.* at 2; *see also* Frank G. Hoffman, *Examining Complex Forms of Conflict—Gray Zone and Hybrid Challenges*, 7 PRISM 30, 35–36 (2018) (summarizing multiple variations of the "gray zone" definition).

54. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 914–15 (1999) (proposing a six-factor effects test for whether a cyber operation rises to the level of an "armed attack" triggering, at least, *jus ad bellum* rules and rights of self-defense).

55. *See, e.g.*, Barack Obama, *International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World* 9 (May 2011), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf ("The development of norms for state conduct in cyberspace does not require a reinvention of customary international law, nor does it render existing international norms obsolete. Long-standing international norms guiding state behavior—in times of

speak of the "enemy,"[56] "combatant[],"[57] "attacks,"[58] and "military advantage,"[59] while only in the midst of a military operation short of an "armed conflict[]," is unclear.[60]

The war in Ukraine provides an opportunity to examine whether the modern technologies and tactics shaping this conflict actually perturb traditional understanding and application of the LOAC and its principles—and if so, what that might mean for military leaders within this war or future wars.[61] Consider these hypotheticals. First, imagine that a commander has in her arsenal an AI system that has a high probability of eliminating human error in target discrimination/distinction; has a built-in abort system ("shift cold" option);[62] will automatically correct human errors in data processing

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peace and conflict—also apply in cyberspace. Nonetheless, unique attributes of networked technology require additional work to clarify how these norms apply and what additional understandings might be necessary to supplement them.").

56. DOD LOW MANUAL, *supra* note 10, § 2.2, at 52 (defining military necessity "as the principle that justifies the use of all measures to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war").

57. *Id.* § 2.3.1, at 59 ("[T]he principle of *humanity* forbids making enemy combatants who have been placed *hors de combat* the object of attack."); *see also* 2004 U.K. LOAC MANUAL, *supra* note 44, ¶ 2.4.1, at 23 ("The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary. Thus, if an enemy combatant has been put out of action by being wounded or captured, there is no military purpose to be achieved by continuing to attack him. For the same reason, the principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action.").

58. DOD LOW MANUAL, *supra* note 10, § 2.4.1.2, at 61 ("[A]pplying the principle of proportionality in conducting attacks does not require that no incidental damage result from attacks.").

59. *Id.* (describing the principle of proportionality as creating "obligations to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained").

60. *See* Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817, 847–48 (2012) (discussing criticisms of Schmitt's six-factor test); *see also* Amy C. Gaudion, *Answering the Cyber Oversight Call*, 54 LOY. U. CHI. L.J. 139, 143 (2022) ("[L]eading scholars . . . ask whether the cyber operations occupy a legal space distinct from other military operations."); *see also* DOD LOW MANUAL, *supra* note 10, § 16.1, at 1024 ("Precisely how the law of war applies to cyber operations is not well-settled, and aspects of the law in this area are likely to continue to develop, especially as new cyber capabilities are developed and states determine their views in response to such developments."). As Professor Hathaway and her co-authors observe: "The novel conditions of cyberspace can pose challenges to applying *jus in bello* principles of necessity, proportionality, distinction, and neutrality. Because cyber-attacks are often not immediately lethal or destructive and may cause only temporary incapacity of network systems, it may be hard to evaluate whether a cyber-attack is proportional. It can also be difficult to distinguish between combatants, civilians directly participating in hostilities, civilians engaged in a continuous combat function, and protected civilians in the context of cyber-attacks." Hathaway et al., *supra* note 60, at 850.

61. *See supra* Part I (introducing the interplay between the LOAC, modern technology, and the war in Ukraine).

62. Michael Schmitt & Lt. Col. Matthew King, *The "Shift Cold" Military Tactic and International Humanitarian Law*, JUST SEC. (Feb. 20, 2018), https://www.justsecurity.org/52198/shift-cold-tactic-international-humanitarian-law/ ("A 'shift cold' occurs when an operator (e.g., a pilot, weapon systems operator in an aircraft, unmanned aerial system sensor operator, or someone on the ground like a member of a special forces team) redirects a guided munition, such as a missile or guided bomb, away from its initially-intended point of impact to another location while the munition is in flight (that is, post-launch

and intelligence conclusions; and can reliably give the commander sufficient data and opportunity on which to make a pre-strike proportionality assessment.[63] Is the commander *obligated* to use it under the LOAC's duty to take "feasible precautions," a rule with the principles of proportionality and distinction as its foundation?[64]

Alternatively, imagine that a state provides, or actively encourages the use of, certain digital technologies to its civilians during an armed conflict that allow the civilians to directly participate in hostilities.[65] Does the state owe those civilians a preliminary warning that their use of the technology—at least for some discrete period of time—erases their protection from attack under the LOAC, a rule with the principle of distinction at its heart?[66]

Or imagine a commander in the midst of fighting a large-scale combat operation, one characterized by high velocity of action or operational tempo, disaggregated units spread over large geographic areas engaged in employing and defending against significant amounts of destruction and force—hobbled by a degraded ability to communicate.[67] A sophisticated cyber-attack could wipe out the commander's ability to use the very technologies (satellites, GPS, real-time drone video footage) that he has been accustomed to using to ensure principles of distinction and proportionality are satisfied.[68] How might the commander adjust operations to remain compliant with the LOAC

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or release). This is generally done to avoid harm to civilians or to friendly forces in the target area who, at the time of weapon launch or release, were not expected to be there.").

63. *See infra* Part III (describing a pre-strike proportionality assessment).

64. DOD LOW MANUAL, *supra* note 10, § 2.4.1.2, at 61 (discussing "feasible precautions" and proportionality); *id.* § 2.5.3.2, at 64 (discussing the principle of distinction's command to use "feasible measures to separate physically their own military objectives from the civilian population and other protected persons and objects").

65. AP I, *supra* note 23, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."). The International Committee of the Red Cross (ICRC) considers this a "customary rule" of international law. *See* INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1923 (Yves Sandoz et al. eds., 1987). The U.S. "supports the customary principle on which article 51(3) is based" but does not agree that it is CIL. *See* DOD LOW MANUAL, *supra* note 10, § 5.8.1.2, at 235; *see also* INT'L L. INST., DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2007 915 (Sept. 9, 2008), https://2009-2017.state.gov/documents/organization/147120.pdf ("While we agree that there is a general principle of international law that civilians lose their immunity from attack when they engage in hostilities, we disagree with the contention that the provision as drafted in AP I [article 51(3)] is customary international law.").

66. AP I, *supra* note 23, art. 48; NILS MELZER, ICRC INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 11 (2009) ("At the heart of IHL lies the principle of distinction between the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operations."); *see infra* Section III.B (discussing direct participation in hostilities under international law).

67. *See* General Mark A. Milley, *Strategic Inflection Point: The Most Historically Significant and Fundamental Change in the Character of War Is Happening Now–While the Future Is Clouded in Mist and Uncertainty*, 110 JOINT FORCES Q. 8 (2023).

68. *See* Hathaway et al., *supra* note 60, at 838.

obligations and duties demanded by the command responsibility doctrine[69] yet still able to complete missions? These examples foreground a complex subject: the extent to which the LOAC principles, as currently understood and applied, can cope with the advances in technology that characterize modern warfare.[70]

III. THE LOAC PRINCIPLES

In order to divine what these intermediary meta-principles are—those that might be inferred from the three *Ur-principles* (the highest level of abstraction and normativity) and which give meaning and justify the LOAC principles, a few words describing those principles are needed.[71] The LOAC principles act as prime directives—somewhat abstract measures of control and standards of military conduct that have become encoded in military doctrine and domestic national policies binding on their respective armed forces.[72] They are considered the moral and practical axiomatic foundations for more specific rules and prohibitions found in treaties.[73] In this sense, they are interpretive guides to practitioners applying specific treaty or customary law; they can also be thought of as gap-fillers—a standard for conduct or decision-making during armed conflict when there is no explicit rule on point.[74]

These principles, in turn, are no mere talking legal points. They influence the implementation and execution of mission or operational rules

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69. The command responsibility doctrine is a well-established legal theory of criminal culpability in the LOAC. *See, e.g.*, In re Yamashita, 327 U.S. 1, 15–16 (1946) (discussing the culpability of a commanding officer who violated the laws of war); Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90 (establishing a commanding officer's culpability for war crimes committed by his or her subordinates); AP I, *supra* note 23, arts. 86–87 (acknowledging the situations where commanding officers could be culpable for the acts of their subordinates); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 90–95 (1973) (proposing a subjective factors test to be used in cases involving the Command Responsibility Doctrine); DOD LOW MANUAL, *supra* note 10, § 18.23.3, at 1153 (discussing the potential culpability of commanders who fail to take reasonable measure, to prevent their subordinates from committing war crimes).

70. *See* discussion *infra* Part III (examining the durability of the current LOAC principles given the advancements in technology).

71. *See supra* Part I (discussing the justification and development of the LOAC principles).

72. DOD LOW MANUAL, *supra* note 10, at vi ("This manual is an institutional publication and reflects the views of the Department of Defense, rather than the views of any particular person or DoD component. An effort has been made to reflect in this manual sound legal positions based on relevant authoritative sources of the law, including as developed by the DoD or the U.S. Government under such sources, and to show in the cited sources the past practice of DoD or the United States in applying the law of war."); *see supra* note 44 (citing several national law of war manuals, including those of Canada and Germany).

73. *See* DOD LOW MANUAL, *supra* note 10, § 2.1, at 50.

74. *Id.* § 2.1.2.2, at 51 ("When no specific rule applies, the principles of the law of war form the general guide for conduct during war.").

of engagement (ROE),[75] and legally binding orders on subordinate units.[76] While the U.S. considers ROE to be "permissive,"[77] these rules nevertheless act as constraints on the discretion, authority, and idiosyncratic judgment of commanders.[78] They impose boundaries or restrictions on types of armed force that may be used; the amount of armed force that may be used; where and when force may be used; and other conditions such as the mission involved, political considerations, and policy objectives.[79] The principles also inform and influence military planning for deliberate targeting operations, which necessarily include considerations of potential "collateral damage" if a strike could harm civilians or civilian objects incidental to the military objective.[80] But LOAC commitments form an absolute, do-not-cross, baseline standard that no rule within the ROE or any planning process may violate. Indeed, military lawyers (judge advocates) specializing in national security law's subfields act as LOAC corporate "compliance" officers, serving on headquarters staff as an integral part of the operational planning process, including the drafting, reviewing, and training of ROE, and the investigation—and possible prosecution—of LOAC violations.[81]

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75. Chairman of the Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces 2 (June 13, 2005) [hereinafter SROE/SRUF], https://www.esd.whs.mil/portals/54/Documents/FOID/Reading%20Room/Joint_Staff/20-F-1436_FINAL_RELEASE.pdf. The unclassified current SROE/SRUF is reprinted in OPERATIONAL LAW HANDBOOK, *supra* note 29, at 105, 116–30 (referring to ROE as a "commander's tool").

76. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 367 (3d ed. 2022).

77. OPERATIONAL LAW HANDBOOK, *supra* note 29, at 118 (reprinting page three of the SROE/SRUF, *supra* note 75) ("[U]nless a specific weapon or tactic requires Secretary of Defense or combatant commander approval, or unless a specific weapon or tactic is restricted by an approved supplemental measure, commanders may use any lawful weapon or tactic for mission accomplishment.").

78. *See id.*

79. *Summary of Changes: Revision of Joint Publication 1-04 Dated 17 August 2011*, JOINT FORCE DEV. 77 (Aug. 2, 2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_84.pdf (defining ROE as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which the United States forces will initiate and/or continue combat engagement with other forces encountered").

80. *See, e.g.*, U.S. AIR FORCE, AIR FORCE DOCTRINE PUBLICATION 3-60: TARGETING 66–74 (Nov. 12, 2021), https://www.doctrine.af.mil/Portals/61/documents/AFDP_3-60/3-60-AFDP-TARGETING.pdf (discussing the impact expected collateral damage should have on military obligations); *see also* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3160.01A: NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (Oct. 12, 2012) (available with DoD Common Access Card credentials; on hand with the author).

81. JOINT FORCE DEV., *supra* note 79, ¶ 4.b.(1)(b), at I-3; I-14 through I-15 (fig. I-4); II-12 (fig. II-6); II-15 (fig. II-9). In this vein, LOAC principles may be the grounds on which criminal accountability rests—for war crimes or lesser breaches of international law, or for violating specific provisions of national criminal laws or military discipline codes. *See* 18 U.S.C. § 2441 (criminalizing certain breaches of the Geneva Conventions and Hague Convention by any U.S. national or member of the U.S. armed forces); *see also* 10 U.S.C. §§ 810–946(a) (2023) (Uniform Code of Military Justice); *id.* § 892 (criminalizing the "fail[ure] to obey any lawful general order or regulation"); *accord* SOLIS, *supra* note 76, at 367.

The U.S., like most of its allies and partners, identifies a handful of core principles.[82] Drawing these principles into basic military doctrine emphasizes that military operations of any kind will always—at the very least—be "consistent with" with these axioms, and certainly obligates combat operations to abide by them.[83] The five principles recognized and explained in granular, exhaustive detail by the U.S. DoD LoW are military necessity, distinction, proportionality, humanity, and honor.[84]

Nearly all modern militaries that produce national military doctrine referencing LOAC define these principles in similar, if not identical, terms. Their specific meaning and how each military applies the principle in practice is covered extensively in the literature (and the manuals themselves), and no time need be spent here to review them.[85] Suffice it to say that not all parties interpret each principle in precisely the same way.[86] Also noteworthy is that

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82. JOINT FORCE DEV., *supra* note 79, at II-2.

83. DOD LAW OF WAR PROGRAM, *supra* note 51, at 3.

84. DOD LOW MANUAL, *supra* note 10, §§ II, V, VI, VIII, IX (the term "principle of proportionality" appears more than one hundred times throughout the *DoD LoW Manual*; the term "principle of distinction" appears twenty-two times). The U.S. defines "military necessity" as "the principle that 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." *Id.* § 2.2. "Distinction" is defined as a principle that "obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects." *Id.* § 2.5. "Humanity" is defined as "the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose." *Id.* § 2.3. "Proportionality" is "the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive." *Id.* § 2.4. "Honor" is a martial value that "demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing military forces." *Id.* § 2.6. Overlapping with other principles, like military necessity and humanity, honor "forbids resort to means, expedients, or conduct that would constitute a breach of trust with the enemy." *Id.* § 2.6.2.

85. *See, e.g.*, 2004 U.K. LOAC MANUAL, *supra* note 44, at 22 (stating "military necessity" is applied and permitted where "any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life[,] and money" is needed).

86. There is debate, for example, over the extent to which the principle of distinction implies a "legal duty to presume that persons or objects are protected from being targeted for attack unless the available information indicates that they are military objectives." *See generally* Caroline Krass, *Department of Defense Issues Update to DoD Law of War Manual on Presumption of Civilian Status and Feasible Precautions to Verify Military Objectives*, LIEBER INST. W. POINT: ARTICLES OF WAR (July 31, 2023), https://lieber.westpoint.edu/department-of-defense-update-law-of-war-manual/ (explaining how the updated *DoD LoW Manual* "enhances" discussion). The recent revision to the *DoD LoW Manual* adds this clear presumption, DOD LOW MANUAL, *supra* note 10, § 5.4.3.2, at 201, which did not exist in previous U.S. doctrine but was arguably already part of CIL and at least demanded by AP I. AP I, *supra* note 23, arts. 50(1), 52(3). This revision seems to be a response to sharp criticism that earlier versions of the *DoD LoW Manual* incorrectly stated that CIL does *not* include a presumption of civilian status in cases of doubt. *See, e.g.*, Ryan Goodman, *Clear Error in the Defense Department's Law of War Manual: On Presumptions of Civilian Status*, JUST SEC. (Feb. 9, 2022), https://www.justsecurity.org/80147/clear-error-in-the-defense-departments-law-of-war-manual-on-presumptions-of-civilian-status/; Marty Lederman, *Troubling Proportionality and Rule-of-Distinction Provisions in the Law of War Manual*, JUST SEC. (June 27, 2016), https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/ (both explaining the criticisms). While some experts welcomed the revision, others were not as sure. *See, e.g.*, Michael W. Meier, *2023 DoD Manual Revision—A Welcome Change to the Presumption of Civilian Status*, LIEBER INST. W. POINT: ARTICLES OF WAR (July 31, 2023), https://lieber.westpoint.edu/welcome-change-presumption-civilian-status/. *But cf.* Hitoshi Nasu & Sean Watts, *2023 DoD Manual Revision—The Civilian Presumption Misnomer*, LIEBER INST. W. POINT: ARTICLES OF WAR (July 31, 2023),

these principles are not described as "coming from" anything other than custom and practice over a long period of time and from across cultures, and a noted sage of international law often used as the authoritative historical reference for the existence and interpretations of those principles.[87] Whether eminent jurists, international tribunals, or cross-references to other national military doctrines and manuals, all citations are essentially *restatements* of the law.

But where do these principles come from—where is the point of origin or source for the *cataloging* of certain named principles in this manner? In other words, who first wrote something like "the principles of the law of armed conflict/war/international humanitarian law are . . . ?" That question, it seems, has no easily discoverable answer. But, we can begin to see their formulation in the nineteenth century and become more concrete sets of axiom-like statements of legal principles over the next hundred years.[88] During the U.S. Civil War, President Lincoln relied on Dr. Francis Lieber, a loquacious, "intellectually eccentric" German professor of history and political science in New York City (and veteran of the Napoleonic Wars and the father of two Union soldiers and one Confederate soldier) to translate his lecture notes on the "laws and usages of war" into a practical field guide that would regulate the Union's military use of force consistent with the "accumulated customary rules binding all armies of the extended European World."[89] What has long been eponymously renamed the "Lieber Code," this first-of-its-kind document (issued as a general order from the Adjutant General of the Army) was based on Lieber's understanding of what "civilized" nations were routinely *doing or refraining from doing*, during hostilities out of a sense of obligation—what we would call today "customary international law."[90] Lieber, like Martens would decades later, obliquely

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https://lieber.westpoint.edu/civilian-presumption-misnomer/ (showing experts' differing opinions about the revision). Further complicating the matter, if civilian status is a rebuttable presumption, how much "evidence" rebuttal is required before the commander—acting in "good faith" based on information available at the time—may decide to attack that person or object? The *DoD LoW Manual* itself suggests no standard from criminal law is apropos. DOD LOW MANUAL, *supra* note 10, at 201 n.92.

87. *E.g.*, DOD LOW MANUAL, *supra* note 10, at 66 n.107 (citing LASSA OPPENEHIM, INTERNATIONAL LAW, VOLUME II: DISPUTES, WAR AND NEUTRALITY 227, § 67 (H. Lauterpacht ed., 7th ed., 1952); *id.* at 52 n.15 (citing MORRIS GREENSPAN, MODERN LAW OF LAND WARFARE 313–14 (1959); CHARLES HENRY HYDE, II INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 229–300 (1922); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 63, § 17 (A. Pearce Higgins ed., 7th ed., 1917)); *id.* at 58 n.48 (citing EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, book iii, ch. ix, § 173 (Charles Fenwick trans.,1916)); *id.* at 60 n.67 (citing HUGO GROTIUS, THE LAW OF WAR AND PEACE: DE JURE BELLIAC PACIS LIBRI TRES 601 (3.1.4.2) (Francis W. Kelsey trans., 1925)); *id.* at 68 n.121 (citing JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT & DISCOURSES 12 (1920)).

88. *See, e.g.*, JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012) [hereinafter LINCOLN'S CODE] (discussing an account of the history of the laws of war in America).

89. *Id.* at 2.

90. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Gov't Prtg. Off. 1898) [hereinafter LIEBER CODE], https://tile.loc.gov/storage-services/service

suggested a permanent background or foundation of unwritten law-like norms beneath these "usages," stating: "[T]he law of war imposes many limitations and restrictions on *principles of justice, faith, and honor*."[91]

The contemporary U.S. definitions of the LOAC principles may be traced back to Lieber's Code. Military necessity is defined, and its limits are explored, in articles 14,[92] 15,[93] and 68.[94] Honor is suggested in article 15.[95] Humanity is reflected in articles 16[96] and 76.[97] Distinction is described in articles 22,[98] 23,[99] 25,[100] and 35.[101] Lieber's higher level principles of justice, faith, and honor triggered the first wave of international codification of the laws of war designed to discipline the behavior of armed forces during conflict and to "mark the outer boundaries of morally acceptable behavior" in war by its combatants.[102] At the outset of the convention intended to prohibit the use of a new exploding bullet, the Preamble to the St. Petersburg Declaration in 1868 reiterated the central importance of "humanity," or preventing one side from causing unnecessary suffering in the other.[103]

/ll/llmlp/Instructions-gov-armies/Instructions-gov-armies.pdf. The Lieber Code mentions the "the common law of war" four times (articles 13, 19, 101, and 103), the "law and usages of war" or "usage of modern war" or "usages of public war" eight times (articles 4, 14, 40, 48, 60, 70, 153, and 154), and the uncodified "law of war" thirteen times (articles 11, 15, 27, 30, 33, 43, 45, 77, 80, 90, 98, 102, and 148).

91. *Id.* art. 30 (emphasis added).

92. *Id.* art. 14 ("[N]ecessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.").

93. *Id.* art. 15 (referring to the lawfulness of "incidentally unavoidable" destruction, and the permission to attack property, traffic, travel, or communication and the "appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army").

94. *Id.* art. 68 ("Unnecessary or revengeful destruction of life is not lawful.").

95. *Id.* art. 15 (referring to a duty to not break "good faith" and that "[m]en who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God").

96. *Id.* art. 16 ("Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district.").

97. *Id.* art. 76 ("Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.").

98. *Id.* art. 22 ("[T]he unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.").

99. *Id.* art. 23 ("Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.").

100. *Id.* art. 25 ("[P]rotection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.").

101. *Id.* art. 35 ("Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.").

102. LINCOLN'S CODE, *supra* note 88, at 371. It would be the beginning thrust of international reform efforts, a sign "of a new epoch of moral progress, one that would not only ameliorate the horrors of war but one day even abolish it altogether." *Id.* at 341.

103. THE DECLARATION OF ST. PETERSBURG (1868), https://ihl-databases.icrc.org/assets/treaties/130-IHL-6-EN.pdf. Officially named "The Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Weighing Under 400 Grams Weight," the conference was called to address the use of a relatively new exploding munition used "in time of war between civilized nations." *Id.* at 1. "That the

The *Oxford Manual* (1880) similarly recounted and described axiomatic principles and rules of "civilized" warfare—"codifying the accepted ideas of our age"—hoping to inspire "the gradual improvement in customs . . . reflected in the method of conducting war."[104] In what could be considered an early, unstated, attempt to divine "meta-LOAC principles," the *Oxford Manual* opens its work with six preliminary, necessarily broad-gauged "general principles."[105]

These are not, to be sure, statements of LOAC principles as they have come to be described, but the reminder of the *Oxford Manual* provides detailed prohibitions and standards that purport to be an "*application* of [the] general principles," all reflecting the core concepts of distinction, humanity, necessity, chivalry or honor, and humanity or the prevention of unnecessary suffering.[106] Several of these applied principles are expressly cross-referenced to one of the opening general principles. For instance, article 8's ban on using poison, feigning surrender, and "needless severity" is traced explicitly to article 4.[107] Articles 42 and 43 impart duties on occupying military authorities traced back to article 6.[108] Moreover, the *Oxford Manual*'s particular provisions regulating, for example, treatment of the wounded and sick,[109] are expressly "drawn from" earlier international conventions, like the 1864 Geneva Convention for the Amelioration of the

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progress of civilization should have the effect of alleviating as much as possible the calamities of war; [t]hat the only legitimate object which [s]tates should endeavour to accomplish during war is to weaken the military forces of the enemy; [t]hat for this purpose it is sufficient to disable the greatest possible number of men; [t]hat this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; [t]hat the employment of such arms would, therefore, be contrary to the laws of humanity." *Id.* at 1.

104. *The Law of War on Land Oxford, 9 September 1880*, at 1 (Sept. 9, 1880) [hereinafter *Oxford Manual*], https://ihl-databases.icrc.org/assets/treaties/140-IHL-8-EN.pdf ("It may be said that independently of the international laws existing on this subject, there are today certain principles of justice which guide the public conscience, which are manifested even by general customs, but which it would be well to fix and make obligatory.").

105. *Id.* arts. 1–6. Article 1—stating the "rule" that "the state of war does not admit of acts of violence, save between the armed forces of belligerent [s]tates . . . [therefore] [p]ersons not forming part of a belligerent armed force should abstain from such acts"—explicitly "implies a [principle of] distinction." *Id.* art. 1. This is furthered by article 2's definition of a state's "armed force" and the three conditions precedent for considering non-state armed groups ("national guards, landstrum, free corps, and other bodies") an armed force subject to the *Oxford Manual*'s rules. *Id.* art 2. Article 3 establishes presumptive personal jurisdiction: "every belligerent armed force is bound to conform to the laws of war." *Id.* art. 3. Article 4 states that combatants are not granted free discretion ("unlimited liberty") to choose the "means of injuring the enemy." *Id.* art 4. Article 5 commands that "[m]ilitary conventions made between belligerents during the continuance of war" (e.g., cease-fire agreements, surrenders) "must be scrupulously observed and respected." *Id.* art. 5. Article 6 suggests the temporary nature military authority over territory and peoples. *Id.* art. 6.

106. *Id.* at Part II (emphasis added) (capitalizing "application of general principles" in source text).

107. *Id.* art. 8.

108. *Id.* arts. 42–43.

109. *Id.* arts. 10–18.

Wounded in Armies in the Field,[110] and reflect the core principles of distinction, necessity, and humanity.[111] Many of these particularized rules and standards would be repeated in later conventions.[112] The essential premise that a core set of principles exists at all has long been repeated by international bodies like the United Nations General Assembly and European Union, as well as by ad hoc international tribunals adjudicating war crime allegations.[113]

But even after seeing the manifestation of these LOAC principles in the text of treaties or cited by courts, we are still left wondering what higher normative *principle* (if any) justifies, explains, or implies them.[114] As far as modern practice and doctrine are concerned, the LOAC principles are not presupposed by *any* higher value—instead, they just *are*. But the need for prior or higher values becomes clear if we ask: "what would have to be the case such that . . . ?"[115] *What would have to be the case such that* the lawfulness of command decisions (e.g., a decision to strike a military communications node and bunker with precision-guided munition) will be evaluated based on what the commander could, should, or did reasonably know *before* making that decision, not on post-hoc *effects* of those decisions (e.g., the bomb struck the intended target, but the structure was being used as a civilian shelter, not for military purposes)?[116] Or, *what would have to be the case such that* ruses of war are permitted but perfidy is prohibited because it is dishonorable regardless of its military effectiveness?[117] Both of these rules are direct applications of the LOAC principles.[118] If one believes neither is *a self-evident truth* about the world, then a *meta*-principle—justifying, explaining, or implying the LOAC principle—must exist.[119]

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110. Convention for the Amelioration of the Wounded in Armies in the Field art. 6, Aug. 22, 1864, 22 Stat. 940, 944.

111. *Oxford Manual*, *supra* note 104, Part II.

112. Concepts of distinction can be identified with AP I, *supra* note 23, arts. 48, 52(2), and AP II, *supra* note 26, arts. 13–16. Military necessity is found in Hague IV, *supra* note 13, art. 23(g). Proportionality is found in Hague IV, *supra* note 13, annex arts. 22–23, and AP I, *supra* note 23, art. 57(2)(a)(iii). Humanity can be found in Hague IV, *supra* note 13, annex arts. 22–23 and AP I, *supra* note 23, arts. 35, 37.

113. *E.g.*, Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 100–27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (surveying references to such principles by international bodies and government officials).

114. *Id.*; *see supra* note 112 (discussing treaties).

115. *See Oxford Manual*, *supra* note 104, Part II (discussing core concepts of distinction, necessity, chivalry or honor, and humanity or the prevention of unnecessary suffering).

116. This is a statement of the "Rendulic Rule." United States v. List, et al. (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1295–96; *see also* DOD LOW MANUAL, *supra* note 10, § 2.2.3.3, at 58 (discussing the legality of command decisions).

117. AP I, *supra* note 23, art. 37.

118. *See supra* note 72 (considering LOAC principles).

119. *See supra* Part III (discussing LOAC principles).

IV. META-LOAC PRINCIPLES

A. A Tentative List

This Article takes the implication of the *1880 Oxford Manual*'s itemization of "general principles" seriously, its opening six articles before articulating their "application" in the next seventy-seven articles.[120] For the sake of brevity, this Part begins with a straightforward (if maybe crude or coarse) itemization of, what seems to me as, uncontestable—or at least uncontroversial—general war-related and legal maxims. Some of these meta-principles are descriptive; some could be interpreted as normatively prescriptive or proscriptive.

1. **Legality.** Laws are not silent during the sound of the guns.[121] Armed conflict provides no exceptions to the commandment to follow the rule of law.[122]

2. Wrongfulness. Armed conflict, by its nature,[123] is wrongful because it undermines human security and poses extreme risk to fundamental human rights; it is, however, inevitable and—under certain exceptional conditions—morally and legally justified.[124]

120. *Oxford Manual*, *supra* note 104, arts. 1–6.

121. This of course evokes the adage *inter arma enim non silent leges*, translated as "for among arms, the laws are silent" (often rephrased as "in times of war, the laws are silent"), attributed to Cicero. *See* Philip C. Bobbitt, *Inter Arma Enim Non Silent Leges*, 45 SUFFOLK U. L. REV. 253, 253 (2012).

122. This might be explained as follows: All combatant actors, at all scales of armed conflict, are subject to modes of accountability and liability for decisions, actions, and inactions. "Reasonableness" is the expectation for any authoritative decision-making by any actor, at any scale of armed conflict. "Strict liability" imposed on actors is disfavored; actions are judged, in part, by the degree of intentionality of the actor. *Jus in bello* duties, obligations, and permissions applicable to parties during an armed conflict are unrelated to the validity or legality of the parties' *jus ad bellum* decisions. This remains true regardless of the position one takes on the complementarity of human rights law and LOAC, or the displacement of human rights law in favor of the *lex specialis* of LOAC.

123. U.S. MARINE CORPS, MCDP 1: WARFIGHTING 3 (rev. ed. June 20, 1997), https://www.marines.mil/Portals/1/Publications/MCDP%201%20Warfighting.pdf (explaining that war is "a violent clash of interests between or among organized groups characterized by the use of military force"); CARL VON CLAUSEWITZ, ON WAR 101 (Michael Eliot Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1832) ("War is the realm of danger. . . War is the realm of physical exertion and suffering. . . War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty. . . War is the realm of chance."); *id.* at 113–16 (discussing the characteristics of "danger" and "physical effort" as two "sources" of the "friction" of war); *id.* at 119–21 (describing "friction"); *see also* ANTULIO J. ECHEVARRIA II, CLAUSEWITZ & CONTEMPORARY WAR 103–08 (2007) (discussing theories of war).

124. *See, e.g.*, U.N. Charter art. 2(4) (1945) (describing the prohibition of force in international relations).

3. Civilian Effect. Every military combat action, whether lethal or non-lethal, has a non-zero consequence or effect on civilian lives or resources. Civilian effects may be unintended, but they remain inevitable.[125]

4. Harm. "Harm" can be quantified, but not all harms are quantifiable.[126]

5. Paradox. Vigorous protection of fundamental humanitarian goals and human rights through the use of violence and during hostilities often prolongs the armed conflict, paradoxically exposing human rights to greater abuses and deemphasizing humanitarian goals.[127]

6. Prioritization. All else being equal, ensuring the *safety* of civilian non-combatants from the dangers and consequences of armed conflict has priority over the *safety* of those directly participating in hostilities either by their temporary conduct or their status (declared hostile force, member of a state's armed forces, etc.).[128]

7. Responsibility. Responsibility for LOAC compliance is shared among military combatants and lawful civilian authority supervising and employing the use of the armed force during armed conflict.

8. Scalability. The LOAC is scalable. In whatever form it takes, the LOAC applies with equal validity and legitimacy (but not necessarily its rules) regardless of conflict duration, geographic scale of the conflict, number of the conflict parties, types of parties (state or non-state), or degree of controlled or controllable violence committed by the belligerents.

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125. One could argue this meta-principle is overbroad. Imagine a naval battle between submarines in the North Atlantic, or an ariel "dog fight" between fighter aircraft over the Ural Mountains. Superficially, such combat imposes no risk of collateral consequences on civilians. However, non-zero consequences or effects of such engagements are certainly experienced by civilian family members of those belligerent crews—they are not sparred from the various traumas brought by war. Thinking this broadly about possible "victims" and expanding the meaning of "victimhood" is consistent with the broad abstractions depicted in these meta-principles.

126. Quantifiable harm would include the number of civilian non-combatants killed in an air strike on a military target in dense urban center, or the cost of rebuilding civil infrastructure destroyed as a result of military operations. Unquantifiable harm includes the psychological traumas experienced by combatants and non-combatants alike, or the set-back or pause in a community's cultural development as a result of the war. This meta-principle could suggest that all actors, at all scales of armed conflict, have a continuous and unabrogated duty to evaluate the risk of producing "harm" by their action or decisions; as a corollary, all actors, at all scales of armed conflict, aim to reduce, if not eliminate, "harms" caused by chance.

127. LIEBER CODE, *supra* note 90, art. 29 ("The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief."). This implies that all decisions about the use of force during armed conflict consider the relationship between the need to create decisively positive outcomes that contribute to ending the conflict and the recognition of fundamental humanitarian goals and human rights. *See id.*

128. However, "all else" is rarely "equal." Other considerations exist—including the expected military advantage tactically or strategically, and public perception (domestic and international) about a given act or actor. These other considerations *are* prioritized and weighted, thus affecting the balance between the safety of the civilian non-combatant and the safety of those directly participating in hostilities.

> **9. Uncertainty**. Uncertainty, with respect to the location, identity, and actions of particular potential targets of attack during armed conflict is ubiquitous, unavoidable, and inevitable.

These possible meta-LOAC principles should sit between the three *Ur-principles* we might associate with, or infer from, various preambles to international treaty bodies, including the *Martens Clause* and the traditional LOAC principles.[129] To the extent that any may be criticized as not self-evident, and if an evidentiary foundation is even needed to prove a "maxim" this general, their tender here will have to suffice.[130] If any are unnecessary or incorrect, or if the list is inchoate, future scholarship can only add to the thoughtful scholarly conversation about LOAC principles—a good in itself.[131] The proffered catalogue simply intends to start that conversation.

B. Utility and Benefits

Even if those above are currently ill-defined or insufficiently proven, cataloging *any* meta-LOAC principles is not a wasted exercise.[132] Scholars of humanitarian law and its practitioners (the military commanders and the military lawyers advising them) may find it easier to more clearly consider whether, and how, the LOAC may change, or should be applied, in novel circumstances of armed conflict.[133] Such meta-principles may fill a conceptual gap between what may be called the *Ur-principles* and the conventional LOAC principles.[134] Opportunity for this strategy is on the horizon: armed attacks in space or against space targets;[135] operations using or targeting AI-based systems or weapons;[136] or attempting to comport with

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129. *See supra* notes 47–49 (explaining the ambiguity that exists between the *Ur-principles* and LOAC principles).

130. Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT'L L.J. 337, 344 (2012) (discussing the importance of simplifying and clarifying "the complex . . . principles of the LOAC").

131. *See supra* notes 47–49 and accompanying text (discussing the need to better define the LOAC principles).

132. Corn & Corn, *supra* note 130, at 344 (discussing the importance of simplifying the LOAC principles into "easily applicable concepts").

133. *See supra* notes 47–49 and accompanying text(discussing the confusion that the LOAC principles frequently cause).

134. *See supra* notes 37–39 and accompanying text (introducing the *Ur-principles*). This of course presupposes it is correct to identify any such *Ur-principles*, a category first introduced in this Article.

135. Jon Brodkin, *Russian Official Says Civilian Satellites May be "Legitimate" Military Target*, ARS TECHNICA (Sept. 16, 2022, 4:35 PM), https://arstechnica.com/tech-policy/2022/09/russian-diplomat-suggests-attacks-on-satellites-in-possible-reference-to-starlink/; Jim Garamone, *Space Integral to the DOD Way of War, Policy Chief Says*, DOD NEWS (July 20, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3465982/space-integral-to-the-dod-way-of-war-policy-chief-says/.

136. Marissa Newman, *Israel Quietly Embeds AI Systems in Deadly Military Operations*, BLOOMBERG (July 15, 2023, 11:00 PM), https://www.bloomberg.com/news/articles/2023-07-16/israel-using-ai-systems-to-plan-deadly-military-operations; Ronen Bergman & Farnaz Fassihi, *The Scientist and the A.I.-Assisted, Remote-Control Killing Machine*, N.Y. TIMES (Oct. 26, 2021), https://www.nytimes.

LOAC expectations using command and control techniques and systems but without the "easily targetable" electronic aids modern militaries have grown comfortable relying on for two decades of fighting in counterinsurgency and counter-terrorism conflicts.[137]

Ultimately, these meta-LOAC principles should do at least four things if they are at all useful and reasonably accurate propositions. First, considering their degree of generalizability and abstraction, they should explain, foundationally, *why* we have the LOAC principles we do beyond ascribing their existence superficially to "customs and usages of war."[138] That is, they offer a *genealogical* benefit.[139] One can trace the ancestry or lineage of particular rules (even as far down as operational RoE regulating the behavior of an infantryman on patrol or a commander planning an assault) from martial maxim presupposed by nothing else down to normatively prescriptive duties and prohibitive commands driven by contextual factors of combat and mission.[140] This benefit may be illustrated below in the "LOAC Ladder."[141] The image or metaphor of the "LOAC Ladder" is intended to be a conceptually useful picture for thinking about—and especially teaching—the LOAC to military lawyers, leaders, and troops.[142] It is arranged in ascending order from tactical RoE up to principles from which the law itself draws meaning.[143]

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com/2021/09/18/world/middleeast/iran-nuclear-fakhrizadeh-assassination-israel.html.

137. Lt. Gen. Milford "Beags" Beagle, Brig. Gen. Jason C. Slider & Lt. Col. Matthew R. Arrol, *The Graveyard of Command Posts: What Chornobaivka Should Teach Us About Command and Control in Large-Scale Combat Operations*, MIL. REV. 1, 3 (Mar. 2023), https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/Online-Exclusive/2023/Graveyard-of-Command-Posts/The-Graveyard-of-Command-Posts-UA2.pdf.

138. *See supra* notes 90–92, 104 and accompanying text (introducing the concepts of customs and usages of war).

139. *See supra* notes 123–30 and accompanying text (defining the meta-LOAC principles).

140. *See infra* Figure 1 (showing the lineage of particular rules).

141. *See infra* Figure 1 (showing the benefits of the "LOAC Ladder").

142. *See infra* Figure 1 (showing the LOAC Ladder's use as a helpful image).

143. *See infra* Figure 1 (showing the arrangement of rules and principles).

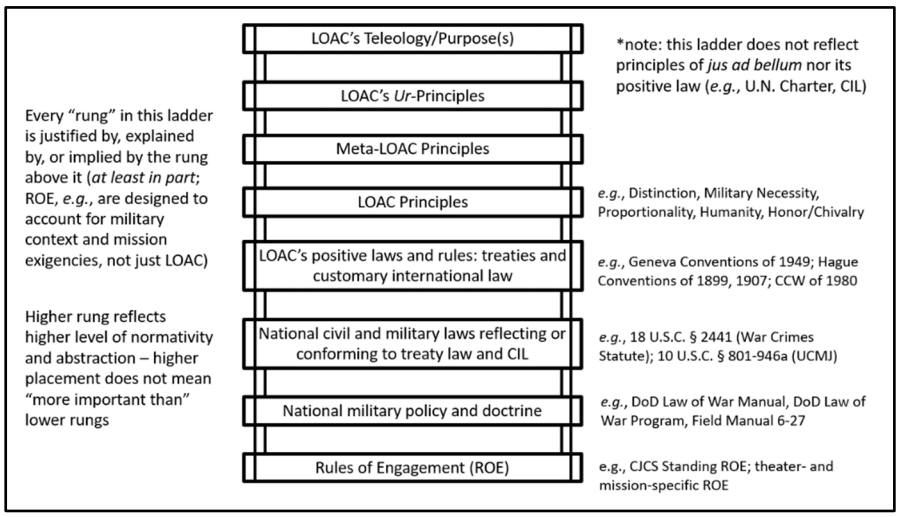

Fig. 1. The Law of Armed Conflict (LOAC) Ladder
(source: Daniel D. Maurer)

Second, these meta-principles should assist in defining each of the traditional LOAC principles and how they interrelate.[144] That is, they offer an *interpretive* benefit for the "interdependent and reinforcing parts of a coherent system."[145] The meta-principle of "paradox," for example, may explain the intuition behind linking the LOAC principle that prohibits causing superfluous injury to one's enemy (humanity) with the principle of military necessity.[146] In turn, the meta-principle of "wrongfulness" may explain the common refrain that military necessity is a "difficult concept to define and apply."[147] The implications of the meta-principle "legality" may provide a principled basis for respecting and valuing the Rendulic Rule.[148] The meta-principles of "harm" and "civilian effect" together may explain the feasible precaution demands of the LOAC principle of proportionality.[149]

Third, meta-principles should provide justifications for making considered choices about applying the LOAC principles in conflict conditions seemingly unaddressed by those principles. That is, they offer a *gap-filling* benefit in the same way that the traditional LOAC principles are

144. *See supra* notes 123–30 and accompanying text (defining the meta-LOAC principles).

145. DOD LOW MANUAL, *supra* note 10, § 2.1.2.3, at 51.

146. *Id.* § 2.3.1, at 59; *see supra* note 129 and accompanying text (introducing the "paradox" meta principle).

147. DOD LOW MANUAL, *supra* note 10, § 2.2.3, at 56; *see also* JAMES MALONY SPAIGHT, WAR RIGHTS ON LAND 113 (1911) ("There is no conception in International Law more elusive, protean, wholly unsatisfactory, than that of war necessity.").

148. *See supra* notes 123–24 and accompanying text (discussing the "legality" meta-principle).

149. *See supra* notes 127–28 and accompanying text (discussing the "harm" and "civilian effect" meta-principles).

said to fill gaps in existing treaty or CIL provisions.[150] Consider the third hypothetical introduced in Part I: does a state owe a duty to warn its own citizens of their loss of protected status when the state provides to those citizens the means and encouragement for direct participation in hostilities?[151] The ePPO app in Ukraine provides a ready illustration. This app was developed by private industry with the support of the Ukrainian government and made available to every adult citizen with access to Ukraine's e-government website.[152] The app allows the user of a mobile device, like a cellphone connected to the internet, to identify possible Russian airborne threats, like helicopters or drones, then—with a push of a button—send the geolocation data and trajectory of that threat to the nearest Ukrainian air defense artillery battery.[153] That military unit may then use the data received from the civilian app user to attack the airborne threat.[154] The act of taking and sending the data to the Ukrainian military for this purpose is largely an uncontroversial demonstration of "direct participation in hostilities," leaving the user a lawful target of the Russian military for some period of time.[155]

But as I have argued in an earlier work, the answer to whether Ukraine owes a duty to warn its civilians that a Russian attack on them—at least during their active use of the app—would not be a war crime under the LOAC, given these facts, is not at all obvious.[156] Nothing in existing LOAC imposes that duty, yet it *seems* that it *ought* to do so. Beyond mere intuition that it is right and just for the law to require this, Additional Protocol I requires the belligerent parties "to the maximum extent feasible . . . [t]ake the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting

150. *See supra* notes 72–74 and accompanying text (discussing LOAC's gap-filling effect).

151. *See supra* note 66 and accompanying text (discussing a state's duty).

152. Morgan Meaker, *Ukraine Enters a Dark New Era of Drone Warfare*, WIRED (Oct. 21, 2022, 7:00 AM), https://www.wired.com/story/russia-ukraine-drones-shahed-136-iran/; *Using the ePPO Application, Ukrainians Can Help Anti-Aircraft Fighters Shoot Down Enemy Drones and Missiles*, THE MAIN DIR. OF INTEL OF THE MINISTRY OF DEF. OF UKRAINE (Oct. 13, 2022) (English translation), https://gur.gov.ua/content/ukraintsi-cherez-zastosunok-ieppo-mozhut-dopomohty-zenitnykam-zbyvaty-vorozhi-drony-ta-rakety.html.

153. *The ePPO Application Has Started Working in Ukraine: How to Notify the Armed Forces of Ukraine About a Missile or a Drone*, VISITUKRAINE.TODAY (Oct. 25, 2022), https://visitukraine.today/de/blog/1083/the-eppo-application-has-started-working-in-ukraine-how-to-notify-the-armed-forces-of-ukraine-about-a-missile-or-a-drone.

154. *Id.*

155. Michael N. Schmitt & William Casey Biggerstaff, *Ukraine Symposium–Are Civilians Reporting with Cell Phones Directly Participating in Hostilities?*, LIEBER INST. W. POINT: ARTICLES OF WAR (Nov. 2, 2022), https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/; Michael N. Schmitt, *Ukraine Symposium–Using Cellphones to Gather and Transmit Military Information, a Postscript*, LIEBER INST. W. POINT: ARTICLES OF WAR (Nov. 4, 2022), https://lieber.westpoint.edu/civilians-using-cellphones-gather-transmit-military-information-postscript/.

156. Dan Maurer, *A State's Legal Duty to Warn Its Own Civilians on Consequences of Direct Participation in Hostilities*, LIEBER INST. W. POINT: ARTICLES OF WAR (Feb. 21, 2023), https://lieber.westpoint.edu/states-legal-duty-warn-civilians-consequences-direct-participation-hostilities/.

from military operations."[157] It also states: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."[158] Article 57(2)(c) of Additional Protocol I further requires even more than constant care: "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[159]

Nevertheless, it is not clear whether "civilian population" means those in geographic areas under the threat of attack, or instead should also be rendered to encompass *all* civilians who may be directly participating in hostilities—even though they lose their non-combatant protections owed by the enemy. Why should they lose the protections owed by their own government? If they do, it would seem a callous and avoidably narrow reading of the law that runs contrary to its spirit. Consider, from a wider lens, the legal requirement that a state must not only "disseminate the Conventions," but also "include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the *armed forces and to the civilian population*."[160] Yet, a fair reading of the rest of article 57 may make that narrow interpretation the reasonable one. It states: "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, *incidental* loss to civilian life" and to "refrain from deciding to launch any attack which may be expected to cause *incidental* loss of civilian life."[161] If a Ukrainian grandmother peering outside her sixth floor apartment window is directly participating in hostilities, using the ePPO app on her cellphone, then her temporary loss of protection from attacks by the Russian military means that her death would not be, legally, "incidental" collateral damage that the Russians are obliged to minimize—if not avoid.[162] Under this reading, little else in the law requires Ukraine to consider giving such a warning.[163]

This problem fits uneasily in the gap created by LOAC principles of distinction and proportionality.[164] They imply that civilians may lawfully engage in hostilities, though doing so removes their protection from attack, and at the same time imposes duties of precaution and care to avoid mistakes in distinguishing combatants from non-combatants and to avoid causing unnecessary collateral damage.[165] Yet neither principle read on their own, nor together, nor through their application in treaties, answers whether a state

157. AP I, *supra* note 23, art. 58.
158. *Id.* art. 57(1).
159. *Id.* art. 57(2)(c).
160. *Id.* art. 83.
161. *Id.* art. 57(2)(a)(ii)–(iii) (emphasis added).
162. *See id.*
163. *See id.*
164. *See Oxford Manual*, *supra* note 104, arts. 40, 56.
165. *Id.*

owes a duty to warn their own civilians of the consequences of direct participation in hostilities.[166] The proposed meta-principles of "civilian effect," "legality," "harm," and "responsibility," however, may reasonably fill that gap and make warning civilians under these circumstances an inferable duty.[167]

Finally, these meta-LOAC principles may amplify a basis on which commanders make considered choices about applying force consistent with the LOAC in novel conflict situations or in designing ROE to manage the use of force in such situations. [168]That is, they provide a *decisional* benefit (and, ipso facto, possess an explanatory benefit when questioning the lawfulness of a decision after the fact).[169] These benefits offer a way to test the meta-principles' validity and utility.[170]

C. Isn't the Martens Clause Enough?

In brief, no. The Martens Clause, perhaps even more than the first six articles of the *Oxford Manual*, tantalizingly suggest that the meta-principles explain, justify, and imply the traditional LOAC principles.[171] The problem, besides the fact that the *functional* meaning of the Clause remains controversial,[172] is that some of the core concepts in the Martens Clause are

166. *Id.*

167. With the space constraints of a symposium issue, applying these meta-LOAC principles to a real *jus in bello* challenge, such as the ePPO app and direct participation in hostilities, with more substantive argument will be the subject of a larger forthcoming project.

168. OPERATIONAL LAW HANDBOOK, *supra* note 29, at 117 (explaining mission goals for commanders).

169. *See id.*

170. An incidental, but important, consequence of articulating meta-LOAC principles could be a new-found facility in communicating and justifying the LOAC and its more counterintuitive elements to the general public, like the idea that knowingly causing collateral damage is not—by itself—illegal and that burying enemy soldiers in a trench rather than fighting them individually may not be a war crime. To the extent that perceptions of legitimacy and the adherence to the rule of law matter, this new vocabulary might demystify and clarify the rules by which civil government manages and controls the use of violence in the state's name against other states or non-state armed groups. On legitimacy and the rule of law mattering, see for example, Stephen W. Preston, *Foreword*, *in* DOD LOW MANUAL, *supra* note 10, at 51, § 2.1.2.3 ("Understanding our duties imposed by the law of war and our rights under it is essential to our service in the nation's defense.").

171. Ticehurst, *supra* note 34, 127–28 (describing the traditional LOAC principles).

172. Emily Crawford, *The Modern Relevance of the Martens Clause*, 6 ISIL Y.B. INT'L HUMANITARIAN & REFUGEE L. 1, 12 (2006) ("The most extreme perspective is that the Martens Clause has become a historical relic, and serves no purpose in modern international humanitarian law."); Giovanni Distefano & Etienne Henry, *The 1949 Geneva Conventions. A Commentary*, 64 n.198 (A. Clapham et al., eds. 2015) ("[The clause] presupposes that the principles of the law of nations, as they result from the usages among civilized peoples, the laws of humanity, and the dictates of the public conscience, contain specific rules of conduct in the event that the treaties are no longer binding."); *In re* Krupp *and others*, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948) ("The [P]reamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of

not defined nor given illustrative examples.[173] For instance, while "*usages established between civili*[*z*]*ed nations*" most certainly includes what today we would call "customary international law," the "*laws of humanity*, and the *requirements of public conscience*" are both so indefinite that one can conclude they are self-referential and circular.[174] In other words, if a new tactic or weapon is developed, and no positive treaty law prohibits it, the user will still need to know if its use is permitted—she must investigate whether it violates CIL.[175] Assuming it does not violate CIL, she next must ask whether its use contravenes "public conscience" (or the "laws of humanity").[176] But without further explanation of those terms, two things must be true: (1) whether the weapon or tactic so contravenes is an entirely contextual and circumstance-based question, and (2) "public conscience" (and "laws of humanity") can be as narrow or as wide as one may need in order to justify or condemn that tactic or weapon.[177] In such a case, it is as if the preamble to the Constitution included this rule of construction: in cases of ambiguity, construe the text in the light most favorable to the *interests of justice*.[178] No objectively agreed-upon *rule* can be definitively or universally inferred from such a subjective standard.[179] At most, the Martens Clause hints at the existence and importance of background values; but it only serves to drive the analyst to ultimately consider the basic LOAC principles like humanity (prevention of unnecessary suffering) and proportionality (prevention of unreasonable collateral damage), from which a rule about use could be inferred.[180] But, the Martens Clause does not itself explain, justify, or imply those principles.[181]

V. CONCLUSION

This *Symposium* Article intended to provide a preliminary and modest—and thus significantly underdeveloped—sketch of what could be called *meta-LOAC principles*.[182] Residing somewhere between foundational and difficult-to-contradict *Ur-principles* of the LOAC and the handful of traditional LOAC principles of military necessity, distinction, proportionality, humanity, and honor recognized and taught in most

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the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.").

173. Crawford, *supra* note 172, at 19 (explaining why the Martens Clause is not defined).

174. *Id.* at 3 (emphasis added).

175. *Id.* at 18.

176. *Id.* at 5.

177. *Id.*

178. *See id.*

179. *Id.*

180. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 257, ¶ 78 (July 8), https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

181. Crawford, *supra* note 172, at 3 (emphasizing the indefiniteness of the Martens Clause).

182. *See supra* Section IV.A (explaining generally the meta-LOAC principles).

contemporary military doctrines, these meta-principles continue the unintentional, but deeply important project of the *Oxford Manual* and implicitly recognized in the famous Martens Clause of the 1899 Hague Convention: that certain general principles state truths that *must be the case* in order for the conventional rules—and their LOAC principles—to make normative sense, and the corollary that such principles can be identified, cataloged, and studied.[183] That search for a higher level of abstraction is not inconsistent with the practical project of making warfare more humane and less devastating while accounting for its inevitable realities.[184] As demonstrated every day in the fields, woods, and towns of Ukraine, that project is immediately relevant to combatants and non-combatants alike.[185]

183. *See Oxford Manual*, *supra* note 104, arts. 40, 56.

184. Crawford, *supra* note 172, at 21–22 (describing how to make warfare more humane).

185. Meaker, *supra* note 152 (explaining the needs of Ukraine).