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Indeterminacy in the Law of War: The Need for an International Advisory Regime

Ariel Zemach

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INDETERMINACY IN THE LAW OF WAR: THE NEED FOR AN INTERNATIONAL ADVISORY REGIME

*Ariel Zemach**

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INTRODUCTION

The law of war is replete with indeterminacies, which extend to the core precepts of this body of law, namely, the principles of distinction, precaution, proportionality, and humanity.¹ The extent of ambiguity in the law of war and the broad

1. Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a "They," Not an "It"*, 96 MINN. L. REV. 194, 241–42 (2011) (pointing to indeterminate norms of the law of war, Rao observes, “[t]he malleability of these standards allows for multiple interpretations.”); *Id.* at 201 (noting that “[n]ew types of warfare and evolving technological capacity make indeterminacy about the content and application of international law particularly acute.”); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 60 (2007) [hereinafter GOLDSMITH] (“The laws of war are often written in vague terms, and are subject to different interpretations. They prohibit, for example, ‘disproportionate’ casualties and ‘outrages upon personal dignity’—terms that can mean very different things to different people, and that can easily be used as rhetorical weapons.”); Antonio

range of interpretive approaches such as indeterminacy admits have led David Kennedy to conclude that as “strange as it may seem, there is simply more than one law of armed conflict, as enforced by different jurisdictions and as viewed by different participants.”² From a humanitarian perspective, current indeterminacies in the law of war have a devastating effect because they make this body of law amenable to manipulation by belligerent parties, leaving them free to pursue an extremely permissive interpretation of the law, contrived to align with military self-interest. Indeterminacy in the law of war also fosters arbitrariness and inequality in the enforcement of the law by various compliance agents, which discredits the law and further encourages belligerent parties to exploit indeterminacies in the law to advance their military aims. The term “compliance agent” is defined here broadly to encompass any international or national audience whose response to a violation by a state of the law of war represents the cost to the state of such violation. Among compliance agents are other states, international courts, non-governmental organizations (NGOs), and foreign and domestic public opinion.

This article reviews the causes of indeterminacy in the law of war, which concern (a) the large number of contingencies that must be explored in the legislation of determinate norms of the law of war and the legislative costs that attach to such an effort; (b) the deficiencies of the primary mechanism for generating norms of the law of war—multilateral treaty negotiations—a legislative environment least conducive to the exploration of a large number of contingencies; and (c) the high-stakes subject

Cassese, *On Some Merits of the Israeli Judgment on Targeted Killings*, 5 J. INT'L CRIM. JUST. 339, 341 (2007) (“It is common knowledge that most rules of international humanitarian law on the conduct of hostilities . . . are rather broad and ambiguous.”); Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 CONN. J. INT'L L. 367, 389 (2011) [hereinafter Cohen, *Legal Operational Advice*] (observing that “modern international humanitarian law actually leaves a lot of questions unanswered. It is replete with gray areas and ambiguities, many of which were intentional.”); *id.* at 382 (considering ambiguities to be “the main problem with international humanitarian law.”); Matthew E. Winter, “*Finding the Law*”—*The Values, Identity, And Function of the International Law Adviser*, 128 MIL. L. REV. 1, 9 (1990) (observing that “the law of war contains ‘more gray areas than black and white.’”).

2. DAVID KENNEDY, *OF WAR AND LAW* 38 (2006).

matter of the law of war, which implicates the most pressing interests of states. This article argues that the causes of current indeterminacy in the law of war would persist with equal force to frustrate future attempts to increase determinacy in the law by concluding additional multilateral treaties. This prediction is consistent with the broad recognition in the legal literature of the prohibitive costs of renegotiating multilateral treaties.³

This article explores an avenue for allaying the adverse consequences of indeterminacy in the law of war, which is not treaty-based, but rather turns on the exercise by the U.N. Security Council (SC) of its powers under the U.N. Charter in the fulfillment of its responsibility to maintain international peace and security.⁴ The article argues that indeterminacy in the law of war may be allayed through a model of an optional bargain between each state and the SC. As part of the bargain, the SC would offer incentives to states to cede the advantages they derive from the indeterminacy of the law of war (i.e., the possibility of pursuing an extremely permissive interpretation of it) by subscribing to an international advisory regime (“advisory regime”), undertaking to follow an interpretation of the law of war laid out by international legal advisors.

This bargain would not take the form of an agreement between the SC and the states that subscribe to the advisory regime (“operating states”) regarding the content of particular norms of the law of war. Rather, it would stipulate a *general interpretive approach* to the law of war that would guide the interpretive efforts of the advisors. The application of such an interpretive approach would be secured not through limitations imposed upon the interpretive discretion of the international advisors, but rather through the selection of advisors, tailored to ensure that they are inclined to embrace the desired interpretive approach.

3. Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 353 (2008) [hereinafter Blum, *Bilateralism, Multilateralism*] (“Multilateral regimes enjoy a substantial degree of stability, a derivative of the prohibitive costs of renegotiations among treaty members. . . .”); Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 ISR. L. REV. 41, 60 (2008) [hereinafter Cohen, *Rules and Standards*] (observing that “changes in international treaties are in any case prohibitively expensive.”); EMILY CRAWFORD, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT 208 (2015) (elaborating on the barriers for the adoption of a new multilateral humanitarian law treaty, “some of which seem potentially insurmountable.”).

4. U.N. Charter, arts. 24–25, 39.

The advisory regime would offer operating states, as well as individuals acting on their behalf, comprehensive protections against adjudicative enforcement measures that concern military operations conducted by the state in the course of an armed conflict, insofar as the state follows the legal guidance provided by the international advisors. These protections, grounded in the exercise by the SC of its binding powers under Chapter VII of the U.N. Charter,⁵ would extend to the realms of both criminal and non-criminal adjudication conducted before any international or foreign national court. The terms of the advisory regime would also significantly reduce the likelihood that a state subscribing to it would be subject to economic sanctions imposed in response to its military operations. The appeal of the advisory regime for states would transcend protections against enforcement measures and extend to the opportunity to secure the reputational and legitimacy benefits attached to compliance with the law of war.

The desirability of the advisory regime from a humanitarian perspective, as well as its political feasibility in terms of its appeal for the various states, depend on the nature of the general interpretive approach that would dominate the work of the international advisors. This article identifies an interpretive approach to the law of war that would make the proposed advisory regime the best bargain from a humanitarian perspective that is politically feasible. The proposed interpretive approach marks the farthest point a state would be willing to stray from the most permissive interpretive approach to the law of war emanating from indeterminacy in the law to secure the benefits that the advisory regime offers.

The proposed advisory regime is preferable, from a humanitarian perspective, to current indeterminacy in the law. Indeterminacy in the law gives rise to diverging interpretations of particular norms of the law of war, both by states engaged in an armed conflict and by various compliance agents. Such divergence may result in compliance agents treating a state as a violator of the law of war, triggering enforcement measures directed against the state and its agents, and exacting a reputational cost for the state (“non-compliance costs”). But the effectiveness of such potential non-compliance costs in influencing state conduct is currently diminished by the gap between the most a state would be

5. *See infra* Part IV.

willing to concede by restraining its military efforts to avoid these costs, and the far more restrictive understanding of the liberties the state can take in the conduct of military operations advanced by various compliance agents. This article demonstrates that the bargain underlying the advisory regime would allow the SC to leverage the potential non-compliance costs for a state resulting from current indeterminacy in the law in a manner that increases the influence of such costs on state conduct.

A state would be able to subscribe to the proposed advisory regime by undertaking to act in accordance with the international advisors' interpretation of the law of war, and to otherwise cooperate with the advisors in accordance with the guidelines set forth by the SC for the operation of the advisory mechanism. To enhance the political feasibility of the proposed advisory regime, these obligations would not be legally binding upon the operating state, as opposed to the binding nature of the norms of the law of war themselves. The obligations undertaken by an operating state under the advisory regime would qualify as what the literature refers to as "soft law."⁶ This article argues that despite their non-binding nature, these obligations would have a strong compliance pull and go a long way to induce states to follow the legal guidance provided by the international advisors.

The international advisors would lay out a body of instructions, which would contain the norms of the law of war as interpreted by the advisors. The instructions would form the bulk of the legal guidance provided to an operating state under the advisory regime. Operating states would typically subscribe to the advisory regime during peacetime, and most of the legal guidance contained in the instructions would be published in the absence of an armed conflict. The advisory role of the international advisors would not extend to the provision of *ex ante*, real-time advice on the legality of particular operations planned by the military, a function that would remain the exclusive domain of domestic military lawyers.

The advisory regime would apply to hostilities amounting to either an international or non-international armed conflict. The legal guidance provided under this regime would consist of the law of war. Because "the law of occupation developed as part of

6. See *infra* notes 97–98 and accompanying text.

the law of war,”⁷ the advisory regime would also apply to situations of occupation, with all references to the law of war in this article concerning both the law regulating the conduct of hostilities amounting to an armed conflict and the international law of occupation.

The main vehicle by which the bargain underlying the advisory regime would be put into action would take the form of an oversight mechanism that the international advisors would use to monitor compliance with the law of war by an operating state. If, based on the information available to them, the advisors are concerned that a particular action taken by the state may be inconsistent with the law of war, they would initiate a *post facto* review of such action. The protections against adjudicative enforcement measures available to the operating state and its agents under the advisory regime would be removed with regard to conduct that the advisors have determined, upon completion of the *post facto* review, to be in violation of the law of war. Protections from economic sanctions and the reputational and legitimacy benefits attached to a stamp of legality provided by the advisory regime to the military operations of a state would also be linked to the views taken by the advisors in the exercise of their oversight role.

The advisory regime would operate under the auspices of the SC, and its terms would be laid out by an SC resolution. This article demonstrates that the powers of the SC under the U.N. Charter accommodate the establishment by the SC of the proposed advisory regime, including the limitations on the jurisdiction of both international and national courts required under the terms of the advisory regime.

Part I of this article will briefly illustrate the indeterminacy in the law of war. It will also review the causes of indeterminacy in the law of war and its costs. Part II will discuss the terms of the bargain underlying the advisory regime, which concern the interpretive approach to the law of war used by the international advisors and the benefits that the advisory regime holds for states. Part II will also elaborate on the significance of the soft law obligations undertaken by an operating state under the advisory regime. Part III will describe the criteria and process for the selection of international advisors. It will also elaborate on

7. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 2 (2012).

the form of the legal guidance that would be provided by the proposed advisory mechanism to states, as well as delineate the framework for a process of *post facto* review by the advisors of the legality of the military actions of an operating state. Part IV will examine the purview of SC powers under the U.N. Charter and show that these powers allow for the introduction of the advisory regime by way of SC action. It will also elaborate on the scope and significance of the protections against adjudicative enforcement measures provided to an operating state and its agents under the advisory regime. Part IV will conclude by examining the extent of protections against economic sanctions that could be afforded to states under the advisory regime as an incentive to follow the legal guidance provided by the advisors.

I. THE CAUSES AND CONSEQUENCES OF INDETERMINACY IN THE LAW OF WAR

The law of war is vague. Consider the principle of distinction, which allows directing attacks against combatants and generally prohibits attacking civilians.⁸ In the case of an armed conflict between a state and an armed group, it is often unclear whether members of the group are considered combatants or civilians.⁹ An exception to the prohibition against attacking civilians holds that civilians may be targeted when they “take a direct part in hostilities.”¹⁰ Yet, the distinction between direct participation in hostilities, which removes the protection from attack afforded to civilians, and indirect participation in the hostilities, which does not have such effect, remains unclear.¹¹ The principle of distinction further requires belligerents to distinguish between military objects, which may legitimately be attacked, and civilian objects, which may not.¹² In the case of infrastructure that serves both the civilian population and the military (e.g., power plants, oil refineries), the criteria for classifying objects as either military or civilian are unclear.¹³ The law of war limits the permission to launch attacks that may result in

8. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 48, 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

9. See *infra* notes 126–27 and accompanying text.

10. Protocol I, *supra* note 8, art. 51(3).

11. See *infra* notes 129–131 and accompanying text.

12. Protocol I, *supra* note 8, arts. 48, 52(2).

13. See *infra* notes 134–35 and accompanying text.

collateral civilian casualties by a requirement of proportionality.¹⁴ This requirement, however, “can mean very different things to different people.”¹⁵

These are but a few examples of the many indeterminacies in the law of war. Indeterminacy in the law manifests in legal norms that take the form of standards rather than rules. A rule is a legal norm that is given content *ex ante*, while a standard is a legal norm that is given content *ex post*.¹⁶ Louis Kaplow thus explains:

[A] rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator. (A rule might prohibit “driving in excess of 55 miles per hour on expressways.”) A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator. (A standard might prohibit “driving at an excessive speed on expressways.”)¹⁷

Commentators have observed, however, the absence of *pure* rules or standards,¹⁸ as “legal commands mix the two in varying degrees.”¹⁹ Rather, the distinction between rules and standards refers to “a continuum in which a norm may have more characteristics of a rule or a standard.”²⁰

Indeterminacy in the law, that is, legislative choices to enact standards rather than rules, has largely been explained with reference to legislative costs.²¹ Commentators have observed that rules tend to be over- and under-inclusive in relation to their purposes because an effort to give content to the law *ex ante* cannot take into account the circumstances of each particular act to

14. Protocol I, *supra* note 8, art. 51(5)(b).

15. GOLDSMITH, *supra* note 1, at 60.

16. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992) (noting that “arguments about and definitions of rules and standards commonly emphasize the distinction between whether the law is given content *ex ante* or *ex post*.”).

17. *Id.* at 559–60.

18. Cohen, *Rules and Standards*, *supra* note 3, at 44 (observing that “there exists no pure *rule* or *standard*.”).

19. Kaplow, *supra* note 16, at 561.

20. Cohen, *Rules and Standards*, *supra* note 3, at 44.

21. Kaplow, *supra* note 16, at 562 (“Rules are more costly to promulgate than standards because rules involve advance determinations of the law’s content.”).

which the norm applies.²² Hence, rules often “give inadequate consideration to case-specific contextual factors. Normally, hard and fast rules, by striking a balance among competing values in advance, produce results that are under- or over-protective of one or another value in many individual circumstances.”²³

In view of over- and under-inclusiveness concerns, often the only tenable alternative to the use of standards would be a *complex* rule, as opposed to a simple one, which would address a large number of contingencies pertaining to the lawfulness of a particular conduct.²⁴ The effort to explore *ex ante* a large number of contingencies in the formation of a complex rule would not completely resolve under- and over-inclusiveness concerns, but may reduce them to a degree where they are not prohibitive of the introduction of a rule.²⁵ The cost of such an effort, however, often makes legislators reluctant to opt for the promulgation of rules.²⁶

In the realm of the law of war, the legislative costs impediment to the introduction of rules looms large. The question of whether a balancing between the competing interests underlying the law of war—military necessity, on one hand, and humanitarian interests, on the other—ought to yield a norm of the law of war that prohibits or requires a particular action often depends on a large number of contingencies.

Consider the standard-like norm of the law of war requiring that “effective advance warning shall be given of attacks which

22. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695 (1976) (observing the “costs of mechanical over- and underinclusion” attached to the application of rules.); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1227 (1983) (observing that “rules are over- and under-inclusive in regard to their purposes.”).

23. Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J.I.L. 151, 167–68 (2013).

24. Kaplow, *supra* note 16, at 565–66 (noting that the assertion that rules are inherently over- and under-inclusive in comparison with standards ignores the possibility of complex rules); Cohen, *Rules and Standards*, *supra* note 3, at 58 (noting that “rules can be complex too, and take into consideration many factors.”).

25. Cohen, *Rules and Standards*, *supra* note 3, at 58 (observing that “no legal norm is able to completely cover all contingencies, but complex rules may cover most cases, if an attempt is made to do so.”).

26. Kaplow, *supra* note 16, at 595 (observing with regard to the legislation of complex rules that, “[c]ase-by-case creations (and re-creations) of complex formulas are expensive.”).

may affect the civilian population, unless circumstances do not permit.”²⁷ Introducing the warning requirement as a rule rather than as a standard requires addressing *ex ante* contingencies, such as the degree of foreseeable impact on civilians that requires a warning; the level of risk that a warning would compromise the mission, which justifies an exemption from the obligation to provide a warning; the level of threat to the attacking force resulting from the warning that justifies not giving it; the level of specificity and clarity required of a warning; the amount of time that must be given for evacuation; and the method by which the warning is conveyed.²⁸ Some of these aspects of the warning requirement are dependent on a range of circumstances that vary from one situation to the next.

The norms of the law of war are created mainly through multilateral international treaties. The legislative cost impediment to the introduction of rules is compounded by the realities of multilateral treaty negotiations, a legislative environment that is least conducive to the exploration of a large number of contingencies.²⁹ The tendency of this international legislative process to produce standards rather than rules has been explained by “the need to accommodate the hodgepodge of values, interests, and preferences of a large number of participants, the fear of noncompliance by some participants, and the lack of immediate and direct reciprocity among all.”³⁰

The subject matter of the law of war further encumbers efforts on the part of multilateral treaty negotiators to agree upon clear rules, as negotiations touch upon the core national security interests of states, as well as upon strong humanitarian convictions, and are therefore likely to be contentious.³¹ The drafters

27. Protocol I, *supra* note 8, art. 57(2)(c).

28. Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack Under International Law: Theory and Practice*, 87 INT'L L. STUD. 359, 377–92 (2011) (discussing the various elements of the “effective warning” requirement).

29. Blum, *Bilateralism, Multilateralism*, *supra* note 3, at 350 (observing that many scholars agree that multilateral treaty negotiations “tend to impose open-ended, standard-setting obligations, rather than clear, specific rules.”).

30. *Id.*

31. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at xxxiv (1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS] (observing with regard to the negotiations leading to the adoption of the Additional Protocols to the Geneva Conventions, “though treaties of this nature

of humanitarian law treaties have therefore intentionally opted for the indeterminacy of standards³² as a compromise between conflicting views.³³ Indeterminacy in the law of war reflects the broader “problem of large stakes”³⁴ in international law, which concerns the sensitivity of states to international law restrictions that involve the most pressing interests of the state, including those implicated by war. Such sensitivity manifests both in frequent failure to comply with existing restrictions and in reluctance to accept new restrictions that are clear and unequivocal.³⁵ State sensitivity to law of war restrictions is not uniform across the international community, as the prospects of involvement in future armed conflicts vary from one state to the next, which largely explains controversies arising during law of war multilateral treaty negotiations.

Observing the cost of indeterminacy in international law, Thomas Franck explained that “indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance.”³⁶ Such noncompliance is based on manipulative interpretation of the law:

Since few persons or states wish to be perceived as acting in obvious violation of a generally recognized rule of conduct, they may try to resolve the conflicts between the demands of a rule and their desire not to be fettered, by “interpreting” the rule

have humanitarian aims, their implementation raises political and military problems, to begin with, that of the survival of the State. Thus it was not possible to escape this tension between political and humanitarian requirements.”).

32. Cohen, *Legal Operational Advice*, *supra* note 1, at 382 (observing that the law of war “has been designed specifically as a system which leaves much room for interpretation.”); *id.* at 389 (observing that the law of war is replete with ambiguities, “many of which were intentional.”).

33. See, e.g., COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 31, at 678, n. 3 (observing that Article 57 of the First Additional Protocol to the Geneva Conventions, which requires belligerents to take precautions in attack, “was a subject that required lengthy discussions and difficult negotiations in the Diplomatic Conference, and the text which was finally agreed upon is the fruit of laborious compromise between the various points of view.”).

34. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1883–85 (2002) [hereinafter Guzman, *A Compliance-Based Theory of International Law*].

35. See *infra* notes 86–90 and accompanying text.

36. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 714 (1988).

permissively. A determinate rule is less elastic and thus less amenable to such evasive strategy than an indeterminate one.³⁷

The amenability of indeterminate norms to manipulative interpretation is exacerbated in the context of the international legal system, which, notwithstanding the proliferation of international judicial and quasi-judicial entities engaged in the enforcement of international law, remains unstructured and lacks a central adjudicative authority.³⁸ Compared to domestic legal systems, the decentralized nature of the international legal system diminishes its capacity to provide authoritative meaning to flexible standards, leaving states “free to rest on extreme positions which tend to aggravate uncertainties still further.”³⁹

Current indeterminacies in the law of war render this body of law vastly amenable to manipulation by belligerent parties, leaving them free to pursue an extremely permissive interpretation of the law, designed to align with military self-interest. As one commentator noted, state officials “will define compliance in instrumental terms that exploit the indeterminacy of international law. Officials will strategically use imprecision and uncertainty in international law to provide flexible interpretations that meet the needs of particular circumstances.”⁴⁰ Although

37. *Id.* at 714.

38. Waxman, *supra* note 23, at 153 (noting that “for the most part . . . application and enforcement of international law are decentralized, occur outside formal international institutions, and remain largely the province of states.”).

39. Julius Stone, *On the Vocation of the International Law Commission*, 57 COLUM. L. REV. 16, 38 (1957). *See also* Waxman, *supra* note 23, at 176–77 (noting that “[f]lexible standards may retain their objective content in domestic law settings because there are mechanisms like courts for reviewing them and providing authoritative meaning.” By contrast, “the international legal system lacks formal adjudicative processes necessary to make flexible standards operate effectively. . .”).

40. Rao, *supra* note 1, at 267. *See also* Roger Normand & Chris Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT’L L.J. 387, 413 (1994) (observing that “the Gulf War and other wars of this century provide ample evidence that states can manipulate vague humanitarian principles of the laws of war to shield their conduct from closer scrutiny.”); Cohen, *Legal Operational Advice*, *supra* note 1, at 382 (observing the indeterminacy in the law of war, Cohen argues that “[s]enior military commanders and other external bodies like the Ministry of Justice [of Israel] are aware of this characteristic of [international humanitarian law], and exploit it to promote their positions.”).

concerns that “flexibility becomes manipulability”⁴¹ arise in relation to every indeterminate norm, such concerns are compounded when it comes to the law of war, given the pressing circumstances regulated by its norms and the high stakes involved.⁴² Citing some of the ambiguities of the law of war, commentators thus noted that “in the absence of either explicit boundaries or an implicitly shared understanding, belligerents would inevitably interpret these terms in the heat of battle to suit their immediate military needs.”⁴³ There is little doubt that the opportunity to stretch the law of war to the permissive end of a broad interpretative continuum, presented to states by the indeterminacy in the law of war, has a devastating effect from a humanitarian perspective. Indeterminacy in the law of war severely diminishes its capacity to advance its paramount humanitarian objective of “alleviating as much as possible the calamities of war.”⁴⁴

In the absence of a central adjudicative authority, international law is largely enforced “through appraisal by individual states and, to some extent, non-governmental and international organizations that wield informal influence in shaping expectations and opinion among domestic and international audiences.”⁴⁵ The interaction between the decentralized structure of the international legal system and the indeterminacy of the law of war, which allows belligerent parties to invoke extremely permissive interpretations of the law, also grants broad interpretive liberties to the various compliance agents assessing the legality of a state’s military operations. States and other international actors may therefore reprimand a belligerent party for non-compliance with the law of war based on a legal view that stretches the law of war to the *restrictive* extreme of a broad interpretative continuum, emanating from indeterminacy in the law. Such an

41. Waxman, *supra* note 23, at 179.

42. Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L.J. 163, 173 (2011) [hereinafter Blum, *On a Differential Law of War*].

43. Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 74 (1994).

44. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 17 (2004) (“The paramount precept of the [Law of International Armed Conflict]—to reiterate again the language of the St Petersburg Declaration . . . is ‘alleviating as much as possible the calamities of war.’”).

45. Waxman, *supra* note 23, at 156.

interpretive approach often reflects sincere humanitarian convictions, as many mechanisms for the enforcement of the law of war, operated by states, international organizations, and NGOs, “feed on, and into, a growing Western-liberal humanitarian consciousness, which loathes war in principle and holds the humanitarian functions of the laws of war in high regard.”⁴⁶ A restrictive interpretation of the law of war may also be invoked by third states as a vehicle for the advancement of far less noble foreign policy interests.⁴⁷ When such interpretation is directed by compliance agents against one of the belligerent parties for the benefit of the other, it amounts to “lawfare,” defined as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”⁴⁸

Hence, there is no guarantee that a choice by a belligerent party to cede an extremely permissive interpretation of the law of war for the sake of a more moderate one would shield it from the adverse consequences of non-compliance with international law, inflicted upon the belligerent party by various compliance agents. The interpretative liberties of the various compliance agents responding to the actions of belligerent parties provide little incentive for the latter to refrain from taking full advantage themselves of indeterminacies in the law of war.

Moreover, indeterminacy in the law of war exacerbates the already pressing problem of inequality in the enforcement of international law, as it augments the liberty of states acting as compliance agents to align their interpretations of the law with self-serving foreign policy considerations concerning the belligerency at hand.⁴⁹ Such arbitrary enforcement undermines the

46. Blum, *On a Differential Law of War*, *supra* note 42, at 174.

47. Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 191 (2006) (cautioning against the application of universal jurisdiction to war crimes because the vagueness of the laws of war makes “war crimes allegations and prosecutions vulnerable to massage by politically motivated states for purely sensationalist or propagandist, rather than legal, incentives.”).

48. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 146 (2008).

49. Colangelo, *supra* note 47, at 191; Waxman, *supra* note 23, at 174 (observing that lawyers advocating greater determinacy in the law regarding resort to force “contend that any flexible discretion will result in arbitrary or unjust enforcement that discredits law. In their view, clear rules help to prevent phony or unprincipled enforcement, because they are more difficult for

legitimacy of the law and may further encourage belligerent parties to exploit indeterminacies in the law to advance their military interests.

The adverse effect that indeterminacies in the law of war have on compliance with international law transcends the purview of each ambiguity; it extends to long-term compliance habits and the integrity of state mechanisms for compliance with international law, comprised of military lawyers and other government legal advisors. Subscribing to the view that “the laws of war are often written in vague terms, and are subject to different interpretations,”⁵⁰ Neomi Rao cautions that instead of developing habits of robust compliance, “government officials may internalize a habit of flexible or instrumental compliance—they will figure out how to make their preferred policies compliant with international law.”⁵¹

II. THE PROPOSED INTERNATIONAL ADVISORY REGIME

Indeterminacy in the law of war may be allayed through an optional bargain between each state and the SC. In this proposed model, the SC would provide incentives for states to cede the advantages they derive from the indeterminacy of the law of war by subscribing to an international advisory regime. Participating states would undertake to follow the interpretation of the law of war laid out by international legal advisors. This Part will discuss the basic terms of the bargain underlying the proposed advisory regime. The terms concern the interpretive approach dominating the interpretation of the law of war by the international advisors, the benefits that the advisory regime holds for states, and the “soft law” nature of the obligations undertaken by states in subscribing to the advisory regime. In view of considerations of political feasibility, this Part will also suggest that the right to subscribe to the advisory regime be restricted to states.

strong states to pervert in pursuit of their own national interests.” This argument seems to apply to indeterminacy in the law of war as well).

50. Rao, *supra* note 1, at 241.

51. *Id.* at 260.

A. The Advisory Regime and the Interpretive Continuum of the Law of War

The bargain underlying the advisory regime would not take the form of an agreement between the SC and the states that subscribe to this regime regarding the content of particular norms of the law of war. Rather, it would focus on the selection of a *general interpretive approach* to the law of war that would guide the interpretive efforts of the advisors. Under the proposed advisory regime, abiding by the advisors' interpretation of the law of war would secure for a state a comprehensive protection from enforcement measures undertaken by various international law compliance agents, as well as the reputational and legitimacy benefits attached to compliance with the law of war.

The appeal of the advisory regime from a humanitarian perspective, and its political feasibility in terms of its appeal for the various states, depend on the nature of the general interpretive approach that would dominate the work of the international advisors. A quest for an objective interpretation of the law of war would be futile because indeterminacy renders it "susceptible to systematically inconsistent interpretations."⁵² Commentators have pointed to two competing interpretive approaches to the law of war, which David Luban termed "the Law of Armed Conflict vision" ("LoAC vision") versus "the International Humanitarian Law vision" ("IHL vision").⁵³ These terms are used in the

52. David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J.I.L. 315, 321 (2013). See also Rao, *supra* note 1, at 203 (discussing how indeterminacies in the law of war allow "for a range of plausible or defensible interpretations.").

53. Luban, *supra* note 52, at 315–16. Similarly, Eyal Benvenisti points to a "cleavage between two visions of the law [of war—A.Z]." Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 82 (2006). Benvenisti elaborates:

The first vision, espoused by governments and armies . . . views the laws of war primarily as a compact between rival armies to coordinate how they can 'conciliate the necessities of war with the laws of humanity.' The second vision, reflected in recent decisions of international tribunals and in articulations of humanitarian organizations, reads the law as a manifest of humanitarian fraternity, and their role as its promoters. . . . This internal tension within the *jus in bello* is captured by its two contemporary appellations: the more inspirational and prevalent 'International Humanitarian Law'

present article as well. Both visions accept the basic, standard-like norms of the law of war (e.g., the principles of distinction, precaution, proportionality, and humanity), but they reach different conclusions in their application, as they assign the competing interests underlying the law of war, military necessity and human dignity, “different logical priority.”⁵⁴

The LoAC vision begins with the assumption that the existence of armed conflict fundamentally transforms the regulation by the law of state conduct. Hence, the LoAC vision “assigns military necessity and the imperatives of war-making primary, axiomatic status. In this vision, the legal regulation of warfare consists of adjustments around the margins of war to mitigate its horrors.”⁵⁵ Notwithstanding the importance of this function of the law of war, “it is logically secondary, and it yields to the *force majeure* of military necessity.”⁵⁶ By contrast, “[t]he IHL vision begins with humanitarianism, and assigns human dignity and human rights primary status.”⁵⁷ Underlying this perception is contempt for the phenomenon of war. According to the IHL vision, the perception of war as a human failure cannot be reconciled with prioritizing military necessity, and by extension, war itself, over humanitarian values.⁵⁸ Luban observed that:

Where legal restrictions operate in the margins of military necessity under the LOAC vision, IHL strains to relegate war to the margins of peacetime rights. As a result, its mode of legal interpretation is maximalist in just those places—the restraints and obligations of warriors—where LOAC is minimalist, and minimalist in the places where LOAC is maximalist: in discretion and deference to the military.⁵⁹

and the more neutral ‘Law on International/Non-International Armed Conflict.’

Id. at 82–83.

54. Luban, *supra* note 52, at 329.

55. *Id.* at 316.

56. *Id.*

57. *Id.* See also Benvenisti, *supra* note 53, at 82–83 (observing that the IHL vision “highlights the overriding and unconditional humanitarian obligation toward civilians regardless of their nationality.”).

58. Luban, *supra* note 52, at 316 (noting that the IHL vision “regards war as a human failure . . . not something that deserves legal priority over the protection of rights and dignity.”).

59. *Id.* at 329.

Yet, the interpretive approaches of the purist LoAC vision and of the purist IHL vision—the former consistently adhering to the most permissive interpretation of the norms of the law of war plausible under the indeterminacy of the law, and the latter consistently adhering to the most restrictive interpretation—do not represent a dichotomy that accounts for all law of war jurists.⁶⁰ Rather, these visions of the law of war represent the ends of a continuum of possible interpretive approaches: the law of war interpretive continuum. Although these visions reflect the views of many law of war jurists, many others do not adhere to an extreme interpretive approach that consistently favors either the maximization of restrictions and minimization of military discretion, or the opposite. The difference between the views of some lawyers whose interpretive approach can roughly be described as leaning toward the LoAC vision and of those who adhere to an interpretive approach that is somewhat closer to the IHL vision may be moderate. The selection of an interpretive approach to the law of war must therefore be determined by reference to the law of war interpretive continuum, bounded by the permissive LoAC vision at the one end, and by the restrictive IHL vision at the other.

This article proposes an advisory regime that represents the best politically feasible bargain from a humanitarian perspective, based on the selection of an interpretive approach that would prevail under the proposed regime. Such an interpretive approach must not stray from the IHL vision toward the LoAC vision more than is necessary to maintain the appeal of the advisory regime from the states' point of view. For states, the current indeterminacy in the law of war provides an opportunity to invoke extremely permissive interpretations of the law of war that conform to their military interests. To fully preserve this advantage, the advisory regime would have to adhere to the purist LoAC vision. Although the proposed advisory regime would stray from this vision, states would have an incentive to subscribe to this regime because the broad interpretive liberties resulting from indeterminacy in the law of war are available also to the various compliance agents assessing the legality of military operations. Such interpretive liberties may result in the treatment of a state by various compliance agents as a violator of the law of war based on an interpretive approach that either

60. *Id.* at 316.

approximates or leans toward the restrictive IHL vision, even if the actions of the state would be considered lawful under an interpretation of the law that is not extremely permissive. Subscribing to the proposed advisory regime, an operating state would cede its own interpretive liberties in order to reduce its vulnerability to those of various compliance agents.

Assessing how much a state would be willing to concede in the interpretive approach to the law of war that would prevail under the advisory regime essentially raises a question of compliance. To what extent would a state be willing to restrain its military operations to avoid the costs associated with being perceived by various compliance agents as having violated the law of war?

The international law and international relations literature offers several competing compliance theories concerning the effect that international legal norms have on the conduct of states.⁶¹ The present inquiry follows instrumentalist compliance theories, which maintain that states comply with international law only when doing so serves their self-interest, namely, “when the total benefits of doing so outweigh the costs.”⁶²

The appeal of the proposed advisory regime for states depends on a cost-benefit analysis that corresponds to that which determines whether states comply with international law. The benefit that the advisory regime offers to states lies in the protection it provides against the damage associated with the perception by various compliance agents that the state violated the law of war. The cost for a state of subscribing to the advisory regime is expressed by the gap, along the interpretive continuum of the law of war, between the interpretive approach of the purist LoAC vision, which represents the maximum amount of liberties that a state may reasonably assert in its military operations relying on the indeterminacy in the law, and the interpretive approach

61. See Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict*, 32 N.Y.U. J. INT'L L. & POL. 591, 647–51 (2000) (reviewing the various compliance theories).

62. Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 138 (2005) [hereinafter Guzman, *Saving Customary International Law*]. Guzman further observes, “international law (customary or otherwise) offers some ‘compliance pull,’ encouraging states to obey the law. A state will not violate a norm of customary international law if that violation would generate gains smaller than its costs.” *Id.* See also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 100 (2005) (noting that instrumentalist compliance theories hold that “states comply with treaties when it is in their rational self-interest to do so, and not otherwise.”).

followed by the international advisors. The costs and benefits of the advisory regime for a state cannot be neatly separated from each other, as the value of the protections available under the advisory regime can only be measured in relation to the normative path a state must follow to secure these protections. This Part now turns to review the benefits that the advisory regime holds for states.

B. The Benefits of the Advisory Regime for States

Instrumentalist theorists observed that the costs of violating an international norm, bearing on the conduct of states, consist of direct sanctions and reputational costs.⁶³ Direct sanctions concern “specific punishments meted out by other states in response to a violation.”⁶⁴ Reputational costs are of two types. The first concerns reputation for compliance with international law obligations, which affects the future range of opportunities for international cooperation available to the state.⁶⁵ If a state lacks good reputation for compliance with its international obligations, “other states will not want to enter into cooperative agreements [with that state] that provide joint gains because of the possibility of opportunistic defection.”⁶⁶ The second type of reputational costs emanating from non-compliance with international law concerns the “global standing”⁶⁷ of the state in terms of the “popular perception of the state with a global audience.”⁶⁸

The benefits that the advisory regime offers to states correspond to the costs they incur for non-compliance with the law of war. The advisory regime would offer states and individuals acting on their behalf comprehensive protections, grounded in the exercise by the SC of its binding powers under Chapter VII of the U.N. Charter, against adjudicative enforcement measures,

63. Guzman, *Saving Customary International Law*, *supra* note 62, at 134.

64. *Id.*

65. Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 236 (2009).

66. *Id.* at 236–37. *See also* Guzman, *Saving Customary International Law*, *supra* note 62, at 135 (noting that “if the reputational harm affects expectations about compliance with international agreements, it will also be more difficult for the violating state to enter into such agreements in the future.”).

67. Brewster, *supra* note 65, at 238 (noting that “it is important to differentiate between what we popularly think of as the global standing of the state (or global public opinion) and the state's reputation for compliance with international law.”).

68. *Id.* at 240.

insofar as the state follows the legal guidance provided by the international advisors. In the sphere of criminal law, such protections would preclude criminal proceedings against the agents of the state (i.e., members of the armed forces of the state and their political superiors) before any international court or foreign national court, regardless of the basis for jurisdiction invoked by such national court. The terms of the advisory regime would also preclude non-criminal adjudicative measures pursued by various compliance agents. The International Court of Justice (ICJ) has recently construed customary international law to grant a state complete immunity from civil claims brought against the state before the courts of other states in relation to the conduct of its armed forces in the course of armed conflict.⁶⁹ The advisory regime would afford a state that follows the legal guidance provided by the international advisors protections against adjudication by *international courts* of claims against the state arising from the armed conflict in question. In addition, it would protect the agents of the state against civil proceedings before foreign national courts if such proceedings are not already precluded under the principle of foreign state immunity.⁷⁰

The advisory regime would also significantly reduce the likelihood that a state that subscribed to this regime would be subject to economic sanctions imposed in response to its military operations.⁷¹ Economic sanctions against a state consist of the denial of foreign economic assistance or trade benefits aimed at inducing the state to change its internal or external policies.⁷² Economic sanctions may be imposed by the SC in the exercise of its

69. Jurisdictional Immunities of the State (Ger. v. Italy, Greece Intervening), Judgment, 2012 I.C.J. Rep. 143, ¶¶ 77–78 (Feb. 3).

70. The principle of foreign state immunity grants a state immunity from civil claims brought against the state before the courts of other states, subject to certain exceptions. See generally Jurisdictional Immunities of the State (Ger. v. Italy, Greece Intervening), 2012 I.C.J. Rep. 143, ¶¶ 55–61 (Feb. 3). This immunity generally extends to agents of the state. National courts disagree, however, on whether the agents of a state enjoy immunity before foreign national courts also with regard to civil claims alleging violation of *jus cogens* norms. See discussion *infra* Part IV.C.

71. See discussion *infra* Part IV.D.

72. Michael Reisman has defined economic sanctions as follows:

Economic sanctions may take many forms and may be applied unilaterally or multilaterally, but like all uses of the economic instrument, they involve the purposive threat or ac-

authority under Article 41 of the U.N. Charter to take coercive non-military measures that are necessary for the maintenance of international peace and security.⁷³ States may employ economic sanctions against another state also in the absence of SC guidance in order to promote their own foreign policy interests⁷⁴ (“unilateral economic sanctions”). Although unilateral economic sanctions are decentralized and not guided by SC action, they often “form part of a broad network of . . . concerted transnational efforts”⁷⁵ on the part of several states.

The SC resolution establishing the advisory regime would assure states that in considering whether the military operations of an operating state warrant the exercise by the SC of its powers under Article 41 of the U.N. Charter, the SC would take into account the content of the legal guidance provided to the state by the international advisors. The SC would also include, within the resolution establishing the advisory regime, a non-binding clause requesting states to refrain from imposing unilateral economic sanctions aimed at promoting humanitarian interests on an operating state. States would be urged to exercise such restraint as long as, according to the international advisors, the conduct of the operating state demonstrates sufficient respect for the advisory regime to justify the continued application of this regime.⁷⁶ Part IV below demonstrates that, although SC action restricting the freedom of states to impose unilateral economic sanctions would represent a problematic interference with state sovereignty, the exercise by the SC of its non-binding powers could go a long way to dissuade Western economic powers from resorting to such sanctions.

tual granting or withholding of economic indulgences, opportunities, and benefits by one actor or group of actors in order to induce another actor or group of actors to change or adjust an internal or external policy.

W. Michael Reisman, *When are Economic Sanctions Effective? Selected Theorems and Corollaries*, 2 *ILSA J. INT'L & COMP. L.* 587, 587 (1995–1996).

73. U.N. Charter, art. 41.

74. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INT'L L.* 1, 4–5 (2001).

75. *Id.* at 8.

76. The grounds for the termination by the international advisors of a state's participation in the advisory regime are specified in Part III.F. below.

The benefits of the advisory regime for states would transcend protections against enforcement measures and extend to the opportunity to secure the reputational and legitimacy benefits attached to compliance with the law of war. A stamp of legality provided by the advisory regime for a state's military operations would go a long way to ensure that such operations do not damage the reputation of the state for compliance with international law. More importantly, such a stamp of legality would confer legitimacy on the military operations of the state and ensure that such operations do not harm the popular perception of the state with a global audience. David Kennedy observed that "law has become a mark of legitimacy—and legitimacy has become the currency of power."⁷⁷ Compliance with the law is intuitively perceived as an independent moral good.⁷⁸ A stamp of legality therefore gives military operations "a humanitarian cover that helps shield them from criticism."⁷⁹ This legitimizing effect reduces the political costs for a state of military operations in terms of foreign relations and of public opinion at home and abroad. Hence, "law is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate."⁸⁰

C. The Interpretive Approach to the Law of War Under the Advisory Regime

In return for the benefits gained under the advisory regime, states would submit to an interpretive approach that deviates from the purist LoAC vision. The bargain underlying the advisory regime would allow the SC to leverage the potential non-compliance costs for a state resulting from current indeterminacy in the law in a manner that increases the effect of such costs on state conduct. The effectiveness of such potential costs in influencing state conduct is currently diminished by a gap be-

77. KENNEDY, *supra* note 2, at 45.

78. See Jochnick & Normand, *supra* note 43, at 57 (observing that "because people generally view compliance with 'the law' as an independent good, acts are validated by simply being legal. In particular, sovereign conduct that complies with the law will *appear* more legitimate than that which violates it.").

79. *Id.* at 56. See also KENNEDY, *supra* note 2, at 116 (observing that the legal vocabulary has been "promoted as a universal vernacular for evaluating the political legitimacy of military action.").

80. KENNEDY, *supra* note 2, at 41.

tween the most a state is willing to concede in accepting restraints on its military efforts in order to avoid these costs, and the interpretive views of various compliance agents, which are far more restrictive of the liberties of belligerents in the conduct of military operations. As a result of this gap, the potential non-compliance costs for a state arising from the interpretive views of such compliance agents are wasted as a leverage for influencing the conduct of the state. The incentive for a state to renounce an extremely permissive interpretation of the law of war for the sake of a more moderate one is diminished if such concession does not suffice to relieve the state of non-compliance costs resulting from the legal perceptions prevailing in large parts of the international community. The proposed advisory regime would enable the international community, acting through the SC, to bring the full weight of the potential non-compliance costs to bear as leverage employed by the SC in shaping a bargain with potential operating states regarding the selection of an interpretive approach to the law of war.

The effort to delineate the contours of an advisory regime that represents the best politically feasible bargain from a humanitarian perspective can relate only to a generic state, and therefore cannot address cost-benefit considerations that vary from one state to another. For example, the value attributed by a state to the protections provided by the advisory regime against legal and economic enforcement measures, undertaken by various compliance agents, depends on the extent of vulnerability of the state and of its agents to such measures, which in turn depends on the realities of power in the international arena.⁸¹ Similarly, the legitimizing effect that a stamp of legality provided by the advisory regime has on the military operations of a state varies from one state to another and depends, amongst other things, on the views of the international community regarding the broader context of the conflict. The reputational costs of a law of war violation also vary from one state to another,⁸² while the evaluation by governments of such costs depends on domestic political

81. See, e.g., Guzman, *A Compliance-Based Theory of International Law*, *supra* note 34, at 1868–69 (observing that the willingness of a state to impose sanctions on another state for the violation of international law depends, among others, on “the relative power of the two countries.”).

82. See Brewster, *supra* note 65, at 244 (observing, with regard to a state’s reputation for compliance with international law, that “[r]eputational losses are also not equally effective for all states and in all strategic situations, . . .

circumstances, such as the nature of the regime and the expected length of tenure of the government.⁸³ The military costs for a state that are likely to attach to compliance with the legal guidance provided under the advisory regime depend on the military capabilities of each state.⁸⁴ It was observed that “once compliance becomes impossible without excessive risk or costs to a party’s own war efforts, the rules are bound to be ignored.”⁸⁵ Therefore, the appeal for states of any particular bargain offered by the proposed advisory regime would vary from one state to another.

Notwithstanding the difficulty of determining the terms of the advisory regime by reference to a generic state, it is possible to identify an interpretive approach to the law of war that, together with the benefits available to states under the advisory regime, would form an incentive structure that is likely to induce a large number of states to subscribe to this regime, while also approximating the best bargain from a humanitarian perspective that these states would be willing to strike. The quest for such an interpretive approach is guided by two considerations. The first concerns the recognition that an armed conflict involves the most pressing interests of a state. Addressing “the problem of large stakes”⁸⁶ in the application of international law, Andrew Guzman has observed:

International law will have the smallest impact in those areas of greatest importance to countries. This observation suggests that many of the most central topics in traditional international law scholarship are the most resistant to influence. Thus, for example, the laws of war, territorial limits (including

[R]eputational sanctions are not necessarily effective against states with significant power in certain issue areas.”).

83. See *id.* at 254 (observing that “reputational analysis is highly contingent on domestic politics.”). Citing allegations that the treatment of detainees by the United States violated international law, Brewster notes that “the Bush administration might not fully internalize the reputational costs to the United States of its decision to violate international law because the administration is in office for a limited period of time.” *Id.* at 232.

84. See, e.g., Blum, *On a Differential Law of War*, *supra* note 42, at 171 (observing that “existing legal constraints make lawful fighting much easier for the powerful than for the weak.”).

85. *Id.* at 172.

86. Guzman, *A Compliance-Based Theory of International Law*, *supra* note 34, at 1883.

territorial seas), neutrality, arms agreements, and military alliances are among the areas least likely to be affected by international law.⁸⁷

One aspect of the diminished capacity of international law to influence the war effort of a state concerns outright violations of the law. It was noted that “[o]f all possible spheres of international regulation, war seems to be the most challenging in terms of ensuring compliance with restraints.”⁸⁸ The problem of non-compliance is exceptionally severe when it comes to the law of war, in part because “the compliance pull of international law will be the weakest when the stakes at issue are large.”⁸⁹

The problem of large stakes, arising in relation to the law of war, is not restricted to non-compliance with current legal restraints, as it also includes the reluctance of states to accept additional ones. The exceptional sensitivity of states to restraints on their war effort partially explains the high extent of indeterminacy in the law of war, produced by multilateral treaty negotiations.⁹⁰ This sensitivity also affects the terms of a politically feasible advisory regime that requires states to renounce the advantages that indeterminacy in the law provides. Because an armed conflict involves their most pressing interests, states are not likely to subscribe to a compliance regime that is dominated by an interpretive approach closer to the restrictive IHL vision than to the permissive LoAC vision.

The second consideration concerns the assessment by states of the non-compliance costs that may result from their subscription to the advisory regime. The advisory regime would remove military operations inconsistent with the legal guidance provided under this regime from the realm of indeterminacy in the law, painting them as outright violations of the law of war. Currently, a state acting based on a permissive interpretation of the law of war, made plausible by indeterminacy in the law, may be treated

87. *Id.* at 1885.

88. Blum, *On a Differential Law of War*, *supra* note 42, at 173.

89. Guzman, *A Compliance-Based Theory of International Law*, *supra* note 34, at 1883. *See also* Waxman, *supra* note 23, at 177 (noting that “compliance is probably especially difficult . . . to promote with respect to force because it implicates states’ core national security interests.”).

90. Cassese, *supra* note 1, at 341 (noting that the law of war is vague partly because “states, in particular major powers, have demonstrated themselves prepared to leave these standards as loose as possible, in order to retain a broad margin of manoeuvre when engaged in combat.”).

as a violator of international law by compliance agents that adhere to a more restrictive interpretation of the law. But the boundary between the realm of indeterminacy in the law and outright violations of international law (i.e., conduct that cannot be justified on the basis of any plausible interpretation of the law) is significant when it comes to the non-compliance costs of the conduct in question.⁹¹ Crossing the line between the exploitation of indeterminacy in the law and an outright violation does not merely add to the number of compliance agents that view the conduct as a violation of the law, but it involves a qualitative leap in potential non-compliance costs. An obvious violation of the law of war may induce various compliance agents to resort to enforcement measures that are far harsher than those pursued against a state that can rely on an indeterminate norm, and mobilize several compliance agents to coordinate enforcement measures directed against the violating state.⁹² Therefore, a decision by the international advisors that a particular military operation of the state, which is currently allowed under some plausible interpretations of the law and prohibited under others, violates the law of war would result in non-compliance costs for the state that outweigh the benefits for the state emanating from a determination by the advisors that the operation in question is lawful.

Because the political feasibility of the proposed advisory regime depends on its appeal for states under a cost-benefit analysis, the interpretive approach employed by the advisors must compensate for the gap between the potential costs and potential benefits for a state of any particular decision by the advisors concerning the legality of a military operation. This requires that the advisors use an interpretive approach that is closer to the purist LoAC vision than to the purist IHL vision.

91. Franck, *supra* note 36, at 714 (observing the significance for states of not being “perceived as acting in obvious violation of a generally recognized rule of conduct,” hence the appeal for states of promoting stretched interpretations of the law in reliance of its indeterminacy).

92. Waxman, *supra* note 23, at 172–73 (noting that the argument for determinate norms of international law is premised on the assumption that “much enforcement of international law regarding force depends on the costs (political, military, economic, etc.) that other states and international actors impose on law-breakers, based in part on their own legal appraisal” and that, therefore, “determinacy—that is, the ability to generate understanding of what the law permits and what it does not—is a critical element of enforcement. . .”).

The above analysis outlines the contours of an interpretive approach to the law of war that would make the proposed advisory regime the best bargain from a humanitarian perspective that is politically feasible. The advisory regime should be dominated by an interpretive approach that does not represent the purist LoAC vision at the permissive end of the law of war interpretive continuum, that is, an approach that does not consistently adhere to the most permissive interpretation of the norms of the law of war plausible under the indeterminacy of the law. But along the law of war interpretive continuum, the interpretive approach that would prevail under the advisory regime would be closer to the purist LoAC vision than to the purist IHL vision. Let us call this interpretive approach the “moderate LoAC vision.” Such a normative path would be secured, not through limitations imposed on the interpretive discretion of the advisors, but rather through the process of selection of the international advisors, tailored to ensure that the advisors selected are disposed to embrace the moderate LoAC vision.

Applying an instrumentalist approach to compliance, this article presupposes a generic state that views any restraint on its military operations brought about by the advisory regime as the costs of such regime. More often than not, this assumption has merit also with regard to states that, acting as compliance agents in response to the conduct of other states, advance an ambitious humanitarian agenda manifested in an interpretive approach that leans toward the IHL vision. To the extent that such states are involved in an armed conflict or might conceivably be parties to such conflict in the foreseeable future, they are not likely to subject themselves to the same legal restraints that they advocate as compliance agents.⁹³ Yet, states that are ideologically committed to an interpretive approach toward the law of war that approximates or leans toward the IHL vision would be free to subscribe to an advisory regime that follows such an approach.

93. David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in jus ad bellum*, 24 EUR. J. INT'L L. 235, 238 (2013) (addressing the right of states to use force, Kretzmer observed, “states that are themselves faced with armed attacks or threats of such attacks are inevitably going to have a different perspective from uninvolved states. The perspective of the latter is likely to change radically once they too are faced with an attack.” This observation seems relevant also with regard to *jus in bello*).

D. Non-State Parties to an Armed Conflict

The right to subscribe to the advisory regime would be restricted to states. Excluding non-state parties to an armed conflict from the advisory regime would place a significant limitation on the sway of this regime as a vehicle for enhancing compliance with the law of war. But the fundamental position of the international community of states toward non-state parties to an armed conflict does not accommodate applying the incentive structure of the advisory regime to such parties.

The law of war generally denies prisoner of war status to members of non-state parties to an armed conflict, allowing their prosecution by states also for acts of violence that are lawful under the law of war.⁹⁴ It was thus observed that “the law . . . finds itself in a somewhat paradoxical position of purporting to guide the actions of those whose actions are inherently unlawful.”⁹⁵ The refusal of the international community to grant non-state belligerents immunity for acts of violence that are in compliance with the law of war cannot be reconciled with the protection against criminal prosecution that the advisory regime offers in return for compliance with the legal guidance provided by the international advisors.

Moreover, states are careful to make sure that the law of war does not manifest in any way that politically benefits non-state actors that are parties to a non-international armed conflict. For example, the term “combatants” has not been introduced to treaty law regulating non-international armed conflict partly because of concern on the part of states that conferring such title upon members of armed groups engaged in an armed conflict with a state would grant such groups a measure of legitimacy.⁹⁶ This suggests that the bulk of the international community would oppose non-state actors subscribing to the advisory regime, not least because of the legitimacy and reputational benefits that would attach to the stamp of legality provided to the actions of a warring party under this regime.

94. David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 *EURO. J. INT'L L.* 171, 197 (2005) [hereinafter Kretzmer, *Targeted Killing*].

95. Blum, *On a Differential Law of War*, *supra* note 42, at 201.

96. Kretzmer, *Targeted Killing*, *supra* note 94, at 197.

E. The Soft Law Nature of the Obligations Undertaken by Operating States

The proposed advisory regime is based on voluntary state participation, motivated by a cost-benefit analysis. A state would be able to subscribe to the proposed advisory regime by pronouncing its intention to act in accordance with the international advisors' interpretation of the law of war and to cooperate otherwise with the advisors in accordance with the guidelines for the operation of the advisory mechanism set forth by the SC. This pronouncement on the part of the state would take the form of a non-binding declaration. This type of declaration is often characterized in the legal literature as "soft law," a concept that encompasses "non-binding norms, such as political or moral obligations, adopted by states,"⁹⁷ in the form of "political declarations, unilateral statements by political authorities, non-binding resolutions, recommendations, and decisions adopted by inter-governmental bodies."⁹⁸

Commentators have noted that "[t]he key distinction between hard and soft law is that the former imposes greater costs on the violating state than does the latter."⁹⁹ Hence, the prospects of inducing a state to enter an obligation in the international arena often depend on the non-binding nature of such obligation.¹⁰⁰ Allowing states to subscribe to the advisory regime by undertaking a soft law obligation would enhance the political feasibility of this regime.

The non-binding nature of a state's obligations under the proposed advisory regime does not detract from the binding nature of the norms of the law of war themselves.¹⁰¹ But in and of itself, a failure by an operating state to follow the legal guidance provided by the international advisors would not, by virtue of the

97. Jaye Ellis, *Shades of Grey: Soft Law and the Validity of Public International Law*, 25 LEIDEN J.I.L. 313, 315 (2012).

98. *Id.* at 319.

99. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 177 (2010). See also Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INT'L L.J. 888, 911 (2009) (noting that "while states can always choose to ignore international law, the essence of soft law is that the cost of reneging is less when an obligation is soft rather than when it is hard.").

100. VAUGHAN LOWE, *INTERNATIONAL LAW* 96 (2007) (explaining soft law in that "[s]tates are naturally reluctant to sign up to binding legal instruments.").

101. Guzman & Meyer, *supra* note 99, at 174 (distinguishing between binding legal norms and soft law obligations regarding the interpretation of the binding norms).

state subscribing to the advisory regime, constitute a violation of international law. The soft law obligations of an operating state under the advisory regime would not present a legal hurdle for the state to advance any interpretation of the law of war in the course of any national or international adjudicative proceeding. Furthermore, no adjudicative authority would be bound by the interpretation of the law laid out by the international advisors.

Yet, soft law typically has a significant effect on the conduct of states. The soft law obligations of a state “form part of the broader normative context within which expectations of what is reasonable or proper State behavior are formed.”¹⁰² A non-binding promise by a state to follow a certain interpretation of a binding norm promotes the perception among other states that conduct by the promising state that does not comply with such interpretation also violates the underlying binding norm.¹⁰³ Thus, a non-binding obligation undertaken by an operating state to follow the legal guidance provided by the international advisors would increase the likelihood that other states view conduct on the part of the operating state that is inconsistent with such guidance as a violation of the law of war and resort to enforcement measures against that state. Similarly, the undertaking by an operating state of a non-binding obligation to follow the legal guidance of the international advisors would increase the likelihood that conduct that departs from such guidance would exact reputational costs for the state, as it would, in the eyes of the international community, diminish the credibility of a claim by the operating state that the conduct in question complies with the law of war.

Furthermore, a certain level of non-compliance by an operating state with its soft law obligations under the advisory regime would constitute grounds for terminating the regime in relation to that state.¹⁰⁴ The bargain underlying the advisory regime, and

102. LOWE, *supra* note 100, at 95–96.

103. Guzman & Meyer, *supra* note 99, at 174–75 (observing that “legal texts are often imprecise and ambiguous, and thus reasonable minds may differ over what a legal obligation requires,” but “because obligations depend on the perceptions of other states, nonbinding promises by states may create expectations about what constitutes appropriate behavior.” Non-binding promises made by states regarding the interpretation of binding norms thus “have legal consequences because they shape states’ expectations as to what constitutes compliant behavior.”).

104. See *infra* Part III.F.

the interest the operating state has in maintaining that bargain, would transcend the circumstances of a particular military operation and extend to the entire war effort of the state. The potential costs for an operating state of any given deviation from the legal guidance provided by the international advisors extend beyond the consequences of concrete enforcement measures and the reputational costs incurred in relation to the military operation at hand, and include the possible termination of the advisory regime as a whole.¹⁰⁵ Therefore, the incentives that would induce a state initially to subscribe to the advisory regime would also apply to enhance the compliance pull of the non-binding obligations undertaken by it.

The appeal of the advisory regime for operating states, manifest in the initial decision to subscribe to this regime, also suggests that the sway of the advisory regime in enhancing compliance with the law of war extends beyond the problem of indeterminacy in the law. The evaluation by states of the costs of a particular violation of an international law obligation also extends to the interest the state has in maintaining an international normative framework that benefits the state in the long term.¹⁰⁶ Hence, the incentive structure that draws states to subscribe to the advisory regime, and the link between the continued application of that regime and compliance on the part of operating states with the legal guidance provided by the international advisors, enhance the compliance pull of the law of war in general.

III. THE SELECTION OF INTERNATIONAL ADVISORS AND THEIR GUIDANCE AND OVERSIGHT FUNCTIONS

This Part will describe the criteria and process for the selection of international advisors. It will also elaborate on the form of the legal guidance provided by the international advisors to operating states, and delineate the framework for a process of *post facto* review by the advisors of the legality of the military actions of an operating state. Finally, this Part will stipulate the

105. See discussion *infra* Part III.F.

106. Franck, *supra* note 36, at 716 (observing that “states, in their relations with one another, frequently find themselves tempted to violate a rule of conduct in order to take advantage of a sudden opportunity. If they do not do so, but choose, instead, to obey the rule and forgo that gratification, it is likely to be because of their longer term interests in seeing a potentially useful rule reinforced. They can visualize future situations in which it will operate to their advantage.”).

grounds for termination by the international advisors of the advisory regime.

A. *The Selection of International Advisors*

Although the international advisory mechanism would not function as a judicial tribunal, it may aptly be described as a quasi-judicial body because its function of interpreting the law of war and applying such interpretations to determine *post facto*, with legal consequences, the compatibility of given military operations with the law of war is of a legal nature and has judicial characteristics. Therefore, the requirements of independence and impartiality, which are preconditions for the legitimacy of a judicial system,¹⁰⁷ are also essential for maintaining the legitimacy of the advisory mechanism¹⁰⁸ and must extend to the selection and functioning of the international advisors. The advisors must also possess the international stature, moral character, and legal expertise required for the performance of their high-stakes quasi-judicial role.

The advisory regime must give an operating state the opportunity to opt, through the selection of advisors, for an interpretive approach that approximates the moderate LoAC vision, but preclude a choice by the state of an interpretive approach that approximates the purist LoAC vision. It must also give a state an opportunity to advance a vision of the law of war that leans toward or approximates the IHL vision, by selecting advisors who adhere to such an interpretive approach.

A two-pronged process for the selection of the international advisors would secure these features of the advisory regime. The first prong of the selection process would consist of the appointment by the U.N. Secretary General ("Secretary General") of thirty-six international advisors, whom the Secretary General would then assign to a dozen three-member advisory panels. To facilitate the function of the advisory panels and allow a state to opt for a particular interpretive approach, the Secretary General would endeavor to ensure, as much as possible, that the panel is

107. Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, 12 GERMAN L.J. 1057, 1059 (2011) (noting that "judicial independence is a necessary condition for legitimacy.").

108. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1546 (9th Cir. 1993) (noting that "it is a fundamental precept of administrative law that when an agency performs a quasi-judicial (or a quasi-legislative) function its independence must be protected.").

monolithic in the interpretive approach of its members. To this end, the Secretary General would consult with the advisors regarding the formation of the panels. The second prong of the selection process would consist in the selection by each state of a particular advisory panel to perform the functions of the advisory mechanism in relation to that state. For the sake of efficiency, all panel decisions should be made by a majority vote.

1. The Appointment of Advisors by the Secretary General

The guidelines for the appointment by the Secretary General of the pool of advisory panels would be laid out by the SC in the form of a commentary attached to its resolution establishing the advisory regime. The commentary would reference the law of war interpretive continuum defined by the purist LoAC and IHL visions and elaborate on the perceptions underlying these interpretive paradigms. The commentary would identify the moderate LoAC vision as an interpretive approach that is closer to the purist LoAC vision than to the purist IHL vision, but which, in contrast with the purist LoAC vision, does not spell general adherence to the most permissive interpretation of the norms of the law of war made possible by the indeterminacy in the law. The commentary would guide the Secretary General to form a pool of advisory panels that represents varying interpretive approaches, to the exclusion of the purist LoAC vision, and stipulate that several of the panels must be comprised of advisors who adhere to the moderate LoAC vision.

The SC would confirm the appointment of each advisor by the Secretary General by a majority of its members. This supervisory role would allow the SC to ascertain, as far as possible, not only that the advisors possess the required qualifications, but also that the advisory pool does not include advisors adhering to an interpretive approach that approximates the purist LoAC vision. Should the SC find that, notwithstanding the guidance provided to the Secretary General through the commentary, the moderate LoAC vision lacks sufficient representation within the advisory pool, it would be able to request that the Secretary General ascribe greater weight to the need to ensure the feasibility of the advisory regime.

Moreover, the political unfeasibility of an advisory regime that does not grant a state the opportunity to opt for the moderate LoAC vision, manifest in the refusal of the bulk of the international community to subscribe to the advisory regime, would

likely exert informal pressure on the Secretary General to reexamine the compatibility of the advisory pool with the guidance provided in the commentary. The requirement that *several* of the advisory panels be comprised of advisors who adhere to the moderate LoAC vision would further diminish the risk that an inaccurate assessment by the Secretary General of the interpretive approach of some of the advisors would deny states the opportunity to opt for the moderate LoAC vision.

Discerning the interpretive approach of a potential advisor by reference to the law of war interpretive continuum is challenging, but possible. An evaluation by the Secretary General of the interpretive approach of potential advisors seems analogous to the evaluation by the U.S. Senate of the “judicial philosophy” of prospective federal judges nominated by the President, which has become an integral part of the Senate confirmation process.¹⁰⁹ The professional record of international law jurists, in the form of a paper trail or otherwise, often reveals a general inclination that places their interpretive approach closer to the purist LoAC vision than to the purist IHL vision or *vice versa*. Similarly, if an international law jurist is disposed to adhere consistently to the most permissive interpretation of the norms of the law of war made possible by the indeterminacy of the law, thereby manifesting the purist LoAC vision, her professional record is likely to contain strong indications of such inclination.

The main guarantee that the advisory panel does not adhere to an interpretive approach that approximates the purist LoAC

109. Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1466–67 (2009) (observing a “rough Senate consensus” that “a judicial nominee’s general judicial philosophy is appropriate for consideration” by the Senate and that confirmation proceedings demonstrated that “questions regarding general judicial philosophy can shed light on matters relevant to judicial decision making and to the Senate’s ultimate decision. . . . In short, the current Senate precedents suggest that the Senate will consider general judicial philosophy. . . .”); Lori A. Ringhand, *I’m Sorry, I Can’t Answer That”: Positive Scholarship and the Supreme Court Confirmation Process*, 10 U. PA. J. CONST. L. 331, 335 (2008) (observing that many jurists argue “that senators should not ask about a nominee’s political preferences or seek answers about particular cases or specific legal questions, but that they can and should examine a nominee’s ‘judicial philosophy’ or overall approach to constitutional interpretation. . . . To the extent that there is any current consensus on the appropriate scope of senatorial questioning, it appears to lie here. . . .”).

vision would be the advisors' lack of institutional loyalties extrinsic to the law, which may induce such an interpretive approach. The most obvious manifestation of such loyalties concerns the role of a state's own military legal advisors, which is defined by a dual function, given that military legal advisors are required to both accurately identify the constraints imposed on the military by international law and facilitate the realization of military objectives.¹¹⁰ Institutional loyalties are typically the main engine driving the interpretation of indeterminate norms to the permissive extreme of the law of war interpretive continuum.¹¹¹ The humanitarian cost of indeterminacy in the law of war is largely a function of the connection between such indeterminacy and the self-interest that guides the interpretation of the law by a state. A fundamental feature of the advisory regime would be the insulation of the advisory panel from institutional loyalties extrinsic to the law.

In the case of military legal advisors affiliated with one of the warring parties or with a close ally to such party, institutional loyalties beyond the interest in upholding the law amount to

110. Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L. L. 1, 20 (2010) (observing that, in addition to advising on the permissibility under the law of war of planned military operations, judge advocates have a responsibility "to help their commanders achieve the objectives of the mission."); Cohen, *Legal Operational Advice*, *supra* note 1, at 383 ("MAG [Military's Advocate General] lawyers are part of an institution which considers one of its major tasks to be assisting commanders to win wars. When faced with clearly prohibited practices, MAG lawyers stand their ground. During 'gray areas,' MAG lawyers try to be responsive to the military. 'Our job,' one of them publicly acknowledged, 'is to let the army operate.'). See also Rao, *supra* note 1, at 228 (identifying various agencies within the U.S. executive branch that are responsible for the interpretation of international law, and demonstrating that "each agency has a particular culture and institutional interests that shape how it provides legal analysis.").

111. Winter, *supra* note 1, at 14 (observing that the objectives, strategies, and attitudes of jurists advising on the law of war "will be directly related to their perceptions about their roles in the system and to their identification with certain groups or individuals."); *id.* at 25 (noting that "in the military environment, where loyalty to one's commander is considered the hallmark of professionalism, there is a real danger of losing one's identity as an independent adviser and assuming the goals, objectives, and strategies of the client."); Luban, *supra* note 52, at 316 (observing that "[t]he two visions of the law of war [*i.e.*, the LoAC vision and the IHL vision—A.Z.] closely track organizational cultures.").

plain partiality.¹¹² But institutional loyalties that are likely to affect the interpretation of the law of war by military legal advisors are not confined to advisors affiliated with one of the warring parties, and extend, to some degree, to the profession of military legal advisors in general. Pointing to the close professional discourse and cooperation between military legal advisors of various countries, Amichai Cohen noted that military lawyers form a “transnational network of like-minded lawyers,”¹¹³ which “fits parallel descriptions of transnational bureaucratic networks.”¹¹⁴ These networks, which are not formal institutions, “are created by like-minded regulators from around the world on a basis of shared interests and knowledge.”¹¹⁵ Cohen elaborated on the common goal of military legal advisors:

In order to confront pressures from NGOs, media and public opinion in some states, military lawyers have formed a “counter-movement” intended to promote an interpretation of IHL [international humanitarian law—A.Z.] which will prove more attenuated with state interests. This transnational network of lawyers reinforces the more “conservative” interpretation of IHL, and supports a less restrictive application of this law.¹¹⁶

The institutional affiliation of military legal advisors in general suggests that one of their loyalties is to the universal interest of militaries to minimize legal constraints in the conduct of military operations. This commitment, extrinsic to the law, is likely to lead an international advisor toward the purist LoAC vision and away from the moderate LoAC vision, frustrating the effort to ensure that the advisory regime is politically feasible and also desirable from a humanitarian perspective.

The Secretary General would therefore not appoint as international advisors those who currently are, or who have been until recently, an integral part of the legal advisory apparatus of any military. This requirement would not preclude the appointment

112. Partiality of advisors on the law of war may be defined as bias for or against one of the warring parties. *Cf.* *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002) (observing that the root meaning of “impartiality” in the judicial context “is the lack of bias for or against either *party* to the proceeding.”).

113. Cohen, *Legal Operational Advice*, *supra* note 1, at 410.

114. *Id.* at 409.

115. *Id.*

116. *Id.* at 410.

of former military legal advisors who have retired from such service a significant period of time before their appointment, as the ties that bind such lawyers to the “network of military advisors” are likely to gradually fade with the passage of time and the change of careers.

To the requirement that the international advisors be independent, impartial, and lack institutional loyalties extrinsic to the law, which may lead them toward the purist LoAC vision, it is necessary to add a requirement for international stature. Given the quasi-judicial role of the advisory mechanism, and based on the requirements for membership of international courts and quasi-judicial treaty-bodies,¹¹⁷ the advisors should be persons of high moral character, integrity, and impartiality, with recognized expertise in the law of war and human rights law and extensive experience in a professional legal capacity relevant to the functions of the advisory panels.

The advisory pool appointed by the Secretary General would likely consist mainly of jurists who have served as judges in international courts or who were otherwise a part of the legal apparatus of such a court; jurists who have held a legal position in one of the various U.N. bodies; former state judges; jurists whose professional legal experience was acquired in government service but not as military legal advisors, and academic scholars. Each advisory panel would be authorized to employ an assisting team of military experts that would provide the necessary military knowledge.

To maintain the independence of the advisory mechanism, in considering the appointment of jurists as international advisors, the Secretary General must refrain from asking these jurists questions about the interpretation of a particular norm of the law of war. There is little doubt that making the appointment of members of judicial or quasi-judicial bodies contingent upon either an explicit or implicit pre-commitment on their part regarding the interpretation of a particular norm undermines the independence of such bodies. Here too, the analogy to the process undertaken by the U.S. Senate in considering whether to confirm the appointment of would-be federal judges nominated by the President is instructive. The bulk of authority takes the view

117. For a review of such qualification requirements, see Tamar Hostovsky-Brandes & Ariel Zemach, *Controlling the Execution of a Security Council Mandate to Use Force: Does the Council Need a Lawyer?*, 36 *FORDHAM INT'L L.J.* 657, 691, n. 131 (2012).

that during Senate confirmation hearings, nominees may be legitimately asked about their “legal philosophy” in general, but not about the interpretation of specific legal norms or particular cases that do not yet represent settled law, because answers to the latter type of questions may be viewed as a pre-commitment to decide future cases in a particular way, undermining judicial independence.¹¹⁸

2. The Selection of an Advisory Panel by an Operating State

The independence of the advisory mechanism also requires that states not be allowed to select a particular advisory panel after the interpretation by the panel of the norms of the law of war has been published. The personal interests that international lawyers would have in being appointed to an advisory panel because of the power, professional prominence, and prestige attached to such appointment would also be at play in the choice of advisory panels by the various states. Making the selection of a panel by states contingent upon the favorability to states of particular interpretations of legal norms by the panel would give rise to a significant conflict of interest in the work of the panel, which would undermine its independence.

After the advisory panels have been formed, each operating state would be given three months to select a particular panel that would perform the functions of the advisory mechanism in relation to that state. The liberty of an operating state to select any of the panels comprising the advisory pool would be qualified only by the requirement that the advisors be impartial, which would bar the selection by a state of a particular panel if one of its members is affiliated in any way with that state or with one of its close allies. The Secretary General would have the power to veto a selection by a state of a particular panel on

118. Ringhand, *supra* note 109, at 335, 340; Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 937–38 (2007); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 982–83 (2007) (observing that “nominees from both parties tend to draw some line between general questions, which they will answer, and questions that may come before them as judges, which they will not—perhaps reflecting a pragmatic consensus that differences in approach to interpretation matter, but can be probed only to a limited extent through direct questioning without compromising other important values.”); Kavanaugh, *supra* note 109, at 1466.

partiality grounds. The Secretary General would appoint an additional twelve-panel advisory pool every five years to allow states that had not initially subscribed to the advisory regime to do so at a later stage.

After the three-month selection period has expired, a panel that has been selected by at least one state would embark on a process of laying out a body of *instructions* that would contain the norms of the law of war as interpreted by the panel. A panel may perform its advisory role in relation to many states, but panels selected by more than one state would issue a separate body of instructions for each of these states. Although most of the law of war applies to all states as customary international law,¹¹⁹ humanitarian law treaties may contain certain provisions that have not acquired the status of customary norms and therefore only apply to the states that are parties to these treaties. Moreover, “the particular theater of war might affect the application of the [law of war] obligation.”¹²⁰ The interpretation of a general requirement of the law of war by the advisors may therefore produce specific rules that apply to certain potential or current theaters of war, based, for example, on the density of the civilian population of a particular area, but not to others.¹²¹ The content of the instructions issued by a panel may thus vary at the margins from one state to another.

B. The Purview of the Advisory Regime and its Temporal Boundaries

The purview of the advisory regime would extend to international and non-international armed conflicts, as well as to situations of occupation. The instructions would lay out the parameters of each type of armed conflict and of occupation, and would be conveyed as two separate sets of norms, one regulating international armed conflict and situations of occupation and the other non-international armed conflict.

Moreover, once the advisory panel concluded that an operating state is a party to an armed conflict, it would make a statement to that effect and pronounce whether the conflict is an international or a non-international armed conflict. Similarly, the panel

119. Blum, *On a Differential Law of War*, *supra* note 42, at 173 (noting that “most IHL rules have become customary in nature.”).

120. *Id.* at 193.

121. *See infra* note 138 and accompanying text.

would confirm that an occupation by an operating state of a foreign territory exists if the circumstances meet the criteria for the existence of an occupation, as laid out in the instructions. A statement by the panel confirming the existence of an international armed conflict, a non-international armed conflict, or an occupation would be considered an integral part of the instructions.

A necessary limitation on the temporal scope of application of the advisory regime concerns the prolonged nature of the interpretive effort undertaken by the advisors in laying out the instructions. The advisory regime would not protect an operating state or its agents against international or foreign national adjudicative proceedings that concern a military operation that the panel determined, on the basis of an *ex post facto* review, to be contrary to the law of war. A state would be divested of such protection even if its violation of the law of war resulted from an inaccurate interpretation by the state of indeterminate norms that had yet to be clarified by the instructions at the time of the operation. If, because of the scarcity of guidance provided by the instructions, states repeatedly failed to secure the full extent of protections envisioned under the advisory regime by following the instructions, the credibility of the regime in the eyes of states would be diminished and its political feasibility undermined.

This article therefore proposes that the bargain underlying the advisory regime (i.e., the soft law obligations of an operating state and the protections that the advisory regime provides) would take effect one year after the day on which the panel began to lay out the instructions. This does not represent a time limit for the completion by the panel of the body of instructions, as the panel would be able to add to the instructions at any time. Moreover, the panel would likely continue to expand the body of instructions after the state has become a party to an armed conflict, to tailor the normative guidance it provides the state to closely correspond to the particular circumstances of the hostilities.

C. The Instructions Provided by the International Advisors

Not all treaty provisions of the law of war represent customary international law, and the conclusion of treaties is by no means the only type of state practice that contributes to the formation of customary law. The vast majority of the customary norms of the law of war, however, may be stated by reference to treaty

provisions that have attained the status of customary international law.¹²² The instructions laid out by each advisory panel may thus be organized around treaty provisions.

Each instruction would first cite the language of one or more treaty provisions, which in the view of the advisors, represent a norm of the law of war applicable to the operating state as a treaty obligation, customary law, or both. An interpretation of the norm cited would then follow, pushing that norm along a continuum defined by a pure standard and a pure rule paradigms toward the latter. In some cases, this advisory effort would convert a standard into a series of specific rules that, in the view of the advisors, represent the appropriate concretization of a general requirement of the law of war embodied in the standard. In other cases, the instructions would set forth guidelines for the application of a standard, which would reduce indeterminacy about the content of the norm, although not to a degree that alters its essentially standard-like nature. Such guidelines could combine abstract clarifications of the content of the standard with the pronouncement of a series of concrete examples for the application of the norm.

A comprehensive review of indeterminacies in the law of war that would require the attention of the international advisors far exceeds the scope of this article. A few examples of the interpretive effort to be undertaken by the advisors, however, are provided below.

1. The Prohibition Against Attacking Civilians

A fundamental imperative of the law of war concerns the principle of distinction, which holds that “[t]he parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”¹²³ This norm, enshrined in Article 48 and Article 51 of the First Additional Protocol to the Geneva Conventions¹²⁴ (“Protocol I”), has acquired the status of customary international law that applies to both international and non-international armed conflicts.¹²⁵

122. *See generally* INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Vol. I: Rules) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIL Study].

123. CIL Study, *supra* note 122, at 3.

124. Protocol I, *supra* note 8, arts. 48, 51.

125. CIL Study, *supra* note 122, at 3.

In the case of an armed conflict between a state and an armed group, which transcends the territory of the state, it is unclear whether members of the group are considered combatants or civilians.¹²⁶ This indeterminacy concerns largely the controversy over whether such armed conflict should be classified as an international or a non-international conflict, a classification that affects the civilian or combatant status of individuals.¹²⁷ The advisory panel would determine whether the armed conflict at hand is an international or a non-international one, with the instructions clarifying indeterminacies regarding the boundaries between the category of combatants and that of civilians, both in relation to an international and to a non-international armed conflict.

The law of war recognizes an exception to the protection against attack afforded to civilians under the principle of distinction. This exception holds that “civilians are protected against attack unless and for such time as they take a direct part in hostilities.”¹²⁸ This exception clearly distinguishes between direct participation in hostilities, which removes the protection against attack afforded to civilians under the principle of distinction, and indirect participation in the hostilities, which does not have such effect. The scope of conducts that amount to direct participation in hostilities remains unclear.¹²⁹ For example, the Supreme Court of Israel viewed certain forms of participation in

126. The Supreme Court of Israel concluded that members of Palestinian armed groups engaged in an armed conflict with Israel, which transcended the territory of Israel, cannot be considered combatants and must therefore be considered civilians. See HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (*Targeted Killing Case*) 2006 (2) Isr. L. Rep. 459, 486–88 (Isr.), http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf. Several commentators disagree with the view taken by the Israeli court, arguing that members of an armed group engaged in an armed conflict against a state, which transcends the territory of that state, are considered combatants. See Orna Ben-Naftali & Keren R. Michaeli, *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 271 (2003); Kretzmer, *Targeted Killing*, *supra* note 94, at 198.

127. Kretzmer, *Targeted Killing*, *supra* note 94, at 190–98.

128. Protocol I, *supra* note 8, art. 51(3).

129. CIL Study, *supra* note 122, at 23 (noting that “a clear and uniform definition of direct participation in hostilities has not been developed in State practice.”).

hostilities by civilians as direct participation,¹³⁰ whereas a commentary by the International Committee of the Red Cross (ICRC) considered such conducts to be indirect participation, having no effect on the immunity against attack afforded to civilians.¹³¹

The advisors would be able to pronounce rules clarifying which forms of participation in the hostilities other than actual fighting (e.g., production or transfer of weapons; recruitment of other civilians to take direct part in hostilities; planning or ordering the commission of acts of violence by others; financing the armed forces or providing them with food, housing, or other logistical support) amount to direct participation in hostilities and which forms are considered indirect participation. The temporal contours of the exception, which divests civilians of protection against attack only “for such time” as they directly participate in hostilities, are also unclear¹³² and would be clarified by the panel.

2. The Distinction between Military and Civilian Objects

The instructions may also contain rules resolving indeterminacies surrounding the customary norm of the law of war that requires belligerents to distinguish between military objects that may legitimately be attacked and civilian objects, which may not.¹³³ For example, the ICRC has taken the view that electric power plants are considered military objective only if they produce electricity “mainly for military consumption.”¹³⁴ One

130. Pub. Comm. Against Torture in *Isr. v. Israel*, *supra* note 126, at 496–99 (concluding that the concept of “direct participation in hostilities” includes not only persons who carry out the attacks but also those who recruit them or provide them with weapons as well as those who plan and direct the attacks).

131. INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 53 (2009), <https://www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international> [hereinafter DPH Study].

132. Pub. Comm. Against Torture in *Isr. v. Israel*, *supra* note 126, at 499–500 (concluding that persons involved in ongoing hostile activities are subject to targeting even during the time in between hostile acts.); DPH Study, *supra* note 131, at 44–45 (rejecting “any extension of the concept of direct participation in hostilities beyond specific acts.”).

133. Protocol I, *supra* note 8, arts. 48, 52(2); CIL Study, *supra* note 122, at 25.

134. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 31, at 633, note 3.

can point, however, to state practice supporting the view that power plants that serve both the military and the civilian population are considered military objective, regardless of whether the military is the main consumer of the electricity produced.¹³⁵ The advisors would have an opportunity to lay out rules resolving such controversies and clarifying the type and extent of contribution to the military effort that justifies the classification of certain dual-use objects (i.e., objects that serve both the civilian population and the military) as military objectives.

3. The Prohibition against the Use of Indiscriminate Weapons

Article 51(4) of Protocol I, which embodies a customary norm of the law of war, prohibits indiscriminate attacks.¹³⁶ This prohibition entails, among other things, that parties to an armed conflict may not use indiscriminate weapons, defined as “weapons that are incapable of distinguishing between civilian and military targets.”¹³⁷ An ICRC Commentary has observed that the determination of whether a particular weapon is considered indiscriminate may vary from one situation to another.¹³⁸ When used in densely populated areas, certain weapons with wide area effects, such as artillery shells, may be considered indiscriminate, although the use of such weapons in other, less populated areas, may be allowed.

The question of whether the use of a particular weapon should be considered an “indiscriminate attack” extends to normative assessments, as it requires determining the degree of imprecision that brings the use of the weapon under the prohibition, in view of the vicinity and density of civilian presence. The advisors

135. UK MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 56–57 (2004); US Department of Defense, *Conduct of the Persian Gulf War, Final Report to Congress* (1992) (Department of Defense Report) 96; YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 105 (2nd ed., 2010) [hereinafter DINSTEIN, *CONFLICT*].

136. Protocol I, *supra* note 8, art. 51(4); CIL Study, *supra* note 122, at 37.

137. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. Rep. 226, 257 [P 78] (July 8). *See also* Protocol I, *supra* note 8, art. 51(4)(a); CIL Study, *supra* note 122, at 40, 244–46.

138. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 31, at 623 (explaining how many take the view that “means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack.”).

would be able to set rules that respond to the circumstances of a given theater of war, banning the use of certain types of weapons in certain areas designated by the advisors.

4. The Proportionality Requirement

The law of war principle of proportionality prohibits “any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³⁹ The application of the proportionality principle is highly problematic because it requires weighing incommensurables: the value of innocent human lives against the military value of destroying a military objective.¹⁴⁰ Any attempt to lay out comprehensive guidelines clarifying the relative weight of the various interests and values pertaining to proportionality analysis, transforming the proportionality requirement from a standard-like norm into a rule-like norm, would be hampered by “the very nature of the principle of proportionality—an open-ended legal standard designed to accommodate an indefinite number of changing circumstances.”¹⁴¹

The instructions, however, could address various unresolved questions concerning the application of the proportionality requirement. For example, the instructions could offer guidance regarding the relevance to proportionality analysis of a voluntary choice by civilians to assemble within or in proximity of a military objective in order to shield it from attack. Some commentators take the view that if civilians freely choose to become “human shields,” a belligerent party may disregard the risk of collateral damage in relation to such civilians.¹⁴² Others argue that such voluntary choice on the part of civilians is immaterial to a proportionality analysis and that such civilians retain the

139. Protocol I, *supra* note 8, art. 51(5)(b).

140. Robert D. Sloane, *Puzzles of Proportion and the “Reasonable Military Commander”: Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT’L SEC. J. 299, 321 (2015) (noting that “the core of the principle [of proportionality] is a directive to weigh incommensurables.”).

141. Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT’L CRIM. JUST. 310, 316 (2007).

142. DINSTEIN, CONFLICT, *supra* note 135, at 153; Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT’L L. 53, 116–17 (2015).

full extent of protection afforded to civilians under the law of war.¹⁴³ The advisors would be able to take a stand on this controversy. Another example of indeterminacy arising from the proportionality requirement, which the instructions could address, concerns the degree of risk to their own lives that soldiers should be expected to assume in order to minimize civilian casualties.¹⁴⁴

The instructions could also provide concrete examples regarding the application of the proportionality standard, pronouncing on the relative weight of competing interests. For example, in view of an extensive record demonstrating that rockets fired by Palestinian armed groups at Israel pose a limited threat to Israeli civilians, the advisors could take the view that an aerial attack aimed at destroying a reservoir of twenty rockets would not meet the proportionality requirement if it is expected to result in the killing of five civilians. Similarly, the advisors could opine that an attack targeting an enemy tank would generally fail the proportionality test if it is expected to cause the death of ten civilians. The instructions could also indicate that the destruction of a power plant would violate the requirement of proportionality even if the plant is considered a military object, if the attack is likely to result in the death of numerous civilians who depend on the electricity produced by the plant for the supply of drinking water. The examples contained in the instructions may, at the advisors' discretion, rely on the jurisprudence of international or national tribunals.¹⁴⁵

Because the principle of proportionality depends on the weighing of incommensurables, any attempt to capture this principle using examples containing precise figures necessarily presupposes certain margins of arbitrariness. The purpose of the examples would not be to delineate the precise boundaries separating the proportionate from the disproportionate, as proportionality defies such precision. Rather, the examples are a necessary means to promote compliance with the principle of proportionality *as far as possible*.

143. DPH Study, *supra* note 131, at 57.

144. Blum, *On a Differential Law of War*, *supra* note 42, at 190 (observing various unresolved questions arising in relation to the principle of proportionality).

145. For an example of such jurisprudence, see *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment and Opinion, ¶¶ 386–87 (Int'l Crim. Trib. For the Former Yugoslavia) (Dec. 5, 2003).

Going back to one of the examples above, when it emerges from the instructions to reality, the tank that is surrounded by ten civilians may present an imminent threat to the lives of many soldiers. An effort on the part of a military commander to draw analogies from examples provided by the advisors to the circumstances surrounding contemplated attacks would often be encumbered by the over-simplification of the former in relation to the latter. Yet in many cases it would be difficult for a warring party to make a plausible argument reconciling an attack with the principle of proportionality in view of the examples provided by the advisors.

D. The Advisory Regime and the Principle of Equality in the Law of War

A fundamental principle of the law of war is the equal application of the law (“principle of equality”).¹⁴⁶ This principle mandates “the uniform and generic treatment of all belligerents on the battlefield according to the same rules and principles . . . [law of war] obligations bind all parties equally, regardless of the type of war they fight, the justness of their respective causes, or the disparities in power and capabilities between them.”¹⁴⁷ The advisory regime would play an important role in the enhancement of the principle of equality, as it would restrict the liberty of various international law compliance agents to apply the standards of the law of war differently from one situation to the next, based on political considerations and depending on the identity of the belligerents involved.

At the same time, under the terms of the advisory regime, states that subscribed to that regime would be subject to differentiated application of the norms of the law of war, depending on each state’s choice of advisory panel. All states would be granted equal opportunity to subscribe to the advisory regime and to opt, through the selection of a panel, for any of the interpretive approaches to the law of war available under the advisory regime. Allowing all states to freely select any of the panels operating under the advisory regime, however, would not make the advisory regime cost-free as far as its effect on the principle

146. Blum, *On a Differential Law of War*, *supra* note 42, at 165 (“The current system of the laws of war, or as they are otherwise known, international humanitarian law, builds on the principle of the equal application of the law.”).

147. *Id.*

of equality is concerned. Panels sharing a general interpretive approach toward the law of war may nevertheless provide divergent interpretations of certain norms. Therefore, various states that through the selection of different panels opted for the moderate LoAC vision, with a view to securing the broadest permission to exercise force available under the advisory regime, would likely be subjected to differentiated application of certain norms of the law of war. This aspect of the advisory regime raises equality concerns.

To allay such concerns, a party to an armed conflict should be given an opportunity to replace the panel it initially selected with the panel advising its adversary. After a panel advising an operating state has determined that the state is a party to an armed conflict, any other operating state that is a party to that conflict would be allowed within seven days to substitute that panel for the one it had initially selected. A choice by a state to substitute one panel for another would also apply to the instructions issued by the panels. This would represent an exception to the rule precluding a state from selecting a panel after the panel had published the instructions.

E. The Oversight Role of the International Advisors

The guidance provided by the instructions would be augmented by an oversight mechanism, by which the advisory panels would monitor compliance of operating states with the law of war. If, based on the information available to it, an advisory panel is concerned that a particular action taken by an operating state may be inconsistent with the law of war, it would initiate a *post facto* review of such action. The purpose of such review would be to determine whether the conduct in question was contrary to the law of war and to further clarify the norms of the law of war pertaining to such conduct. This Section will delineate the framework for the *post facto* review process and address secrecy concerns on the part of operating states, which might encumber the review process.

1. The *Post Facto* Review Process

At the outset of the *post facto* review process, the panel would present the operating state with a detailed account of the information available to the advisors, an explanation of why this information raises concern regarding inconsistency between the conduct of the state and the law of war, and a request that the

state respond to such concerns. The state's response would have to include a detailed account of the circumstances that, according to the state, surrounded the conduct in question. The panel would also be able to request specific information that would assist the advisors in their review.

The panel would assess the factual statements made by the state against information available to it from any source the panel deems reliable, including other states, media outlets, NGOs, and private individuals. The experience of other U.N. fact-finding bodies suggests that such information would include, among others, "interviews with victims and witnesses . . . written submissions and other documentation from a wide range of sources, including eyewitnesses, affidavits, medical reports, expert weapons analyses, satellite imagery, video film footage and other photographic evidence from incident sites and injury documentation."¹⁴⁸

Upon completion of its review process, the panel would issue *observations* containing a reasoned determination of whether the conduct of the state has been consistent with the law of war. In its observations, the panel would be bound by its own interpretation of the law laid out in the instructions. The panel would also have the opportunity to elaborate on the legal guidance provided by existing instructions, and to provide guidance with regard to norms of the law of war that are yet to be addressed by the instructions.

Drawing on the practice of other U.N. fact-finding bodies, the panel would base its factual findings on a "reasonable grounds" standard of proof.¹⁴⁹ The panel would conclude that there are reasonable grounds establishing a factual finding "whenever it was satisfied that it had obtained a reliable body of information, consistent with other material, based on which a reasonable and

148. U.N. Human Rights Council, Independent Comm. of Inquiry established pursuant to Human Rights Council resolution S-21/1, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, para. 14, A/HRC/29/CRP.4 (June 24, 2015) [hereinafter Gaza Report].

149. U.N. Human Rights Council, Comm. of Inquiry on Human Rights in the Democratic People's Republic of Korea, Report of the Comm. of Inquiry on Human Rights in the Democratic People's Republic of Korea, para. 22, A/HRC/25/63 (Feb. 7, 2014) [hereinafter Korea Report]; Gaza Report, *supra* note 148, ¶ 19.

ordinarily prudent person would have reason to believe"¹⁵⁰ the accuracy of such finding.

The instructions and the observations would combine to form the entire body of legal guidance provided by the advisors. The observations may also contain operative recommendations regarding acts that an operating state should take or refrain from taking in order to cease an ongoing violation of the law of war.

The protections against adjudicative measures extended to an operating state and its agents under the advisory regime would apply unless such measures concern conduct that the observations considered contrary to the law of war. A finding by the panel of a violation by an operating state of a particular norm of the law of war would allow adjudicative measures against the state and its agents to the extent that such proceedings pursue allegations that closely relate to the violation found by the panel. Protections against adjudicative measures would also be removed in relation to conduct that the advisors could not effectively review because of withholding of information by the state on national security grounds.¹⁵¹ Hence, the *post facto* review mechanism would function as a filter for adjudicative enforcement measures pursued against an operating state or its agents by the various law of war compliance agents.

Granting the various law of war compliance agents the discretion to determine whether adjudicative enforcement measures directed at a particular state or its agents are consistent with the instructions would provide little protection for a state's choice to follow the law of war as interpreted by the panel. Factual findings by various compliance agents, as well as their understanding of the content of the instructions, might be affected by a desire to promote a humanitarian agenda that departs from the interpretive approach of the instructions as well as by a far less noble political agenda. Therefore, using the *post facto* review of the panel as a filter for enforcement measures undertaken by the various compliance agents would be essential for the credibility of the bargain that underlies the advisory regime.

150. Korea Report, *supra* note 149, ¶ 22. See also Gaza Report, *supra* note 148, ¶ 19.

151. See *infra* Part III.E.2.

2. The *Post Facto* Review Process and National Security Information

An operating state would be required by the terms of the advisory regime to comply with requests for information submitted by the panel in relation to its *post facto* review efforts. This soft law obligation would admit a single exception. Secrecy concerns loom large, and resistance on the part of states to release information that they believe implicates their national security, which often encumbers national as well as international judicial proceedings, would also affect the *post facto* review process conducted by the panel. The extent of state sensitivity to this issue is exemplified by the language of the Rome Statute of the International Criminal Court (“Rome Statute”), which singles out national security concerns as the only explicit exception to the duty of member states to comply with requests by the International Criminal Court (ICC) for evidentiary assistance.¹⁵²

In view of political feasibility considerations, states should not be required to provide the international advisors with information that they believe would implicate their national security. The protections against adjudicative measures granted to an operating state and its agents under the advisory regime would not apply, however, to conduct that the panel determined could not be effectively reviewed because of the withholding of information by the state on national security grounds. Moreover, the advisors would maintain discretion to terminate a state’s participation in the advisory regime if the state repeatedly invoked the national security exemption, citing concerns that the advisors believe to be without foundation.

A measure modeled after an existing practice set forth by the Rome Statute could allay, if not entirely resolve, the challenge to the review process presented by national security concerns. Article 93 of the Rome Statute lays out the obligations of member states in complying with ICC requests for assistance in investigations and prosecutions.¹⁵³ Article 93(4) provides that “a State Party may deny a request for assistance, in whole or in

152. Rome Statute of the International Criminal Court, art. 93(4), July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute]; COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1582 (Otto Triffterer ed., 2008) (observing that Article 93(4) of the Rome Statute “is the only explicit reason for denial in the Statute.”).

153. Rome Statute, *supra* note 152, art. 93.

part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.”¹⁵⁴ The national security exemption contained in Article 93(4) is subject to the provisions of Article 72 of the Rome Statute, which requires that a state invoking this exemption engage in extensive discourse with the ICC in order to provide the parties to the proceeding as much information as possible.¹⁵⁵ Such discourse may result in an “agreement on conditions under which the assistance could be provided, including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute.”¹⁵⁶

It is widely agreed that “the final decision on whether to disclose national security information rests essentially with the State and not the Court.”¹⁵⁷ Under no circumstances may the ICC issue an order requiring a state to disclose information in its possession that in the opinion of the state implicates its national security interests.¹⁵⁸ It appears, however, that the drafters of the Rome Statute have envisaged that the intensive discourse requirement would encumber any attempt by a state to cite bogus national security concerns in reliance on the national security exemption, and would serve to narrow the scope of undisclosed materials held by a state invoking the exemption in good faith.

The advisory regime would require that if a state invokes national security concerns with regard to information requested by the panel, the two must engage in a discourse of the type envisaged by the Rome Statute, “to resolve the matter by cooperative means.”¹⁵⁹ Such discourse, encouraged by the incentive for states to retain the protections afforded under the advisory regime,

154. *Id.*, art. 93(4).

155. *Id.*, art. 72.

156. *Id.*

157. RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 68 (2002).

158. Matthias Neuner, *The Power of International Criminal Tribunals to Produce Evidence*, in NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE 163, 188 (Herwig Roggemann & Petar Sarcevic eds., 2002) (noting that “if the State possesses the document, it makes the final decision as to whether national security concerns prevent disclosure. The judges of the ICC cannot simply overrule this decision and compel the State to produce the document.”).

159. Rome Statute, *supra* note 152, art. 72(1)(5).

would often result in an agreement that would allow the provision of information to the advisors in a redacted or summarized form that would enable the advisors to proceed with an effective review process.

F. Grounds for Termination of the Advisory Regime

It would be unrealistic to expect that the advisory regime completely resolves the problem of non-compliance with the law of war, and such expectation cannot become a condition for the continued application of the regime in an armed conflict. To prevent states from exploiting the advisory regime, however, conduct by an operating state that demonstrates clear lack of commitment to follow the legal guidance provided by the panel should constitute grounds for termination by the panel of the state's participation in the advisory regime. Such conduct could take three forms: (a) the operating state openly declines to abide by the panel's interpretation of the law of war, laid out in the instructions or observations; (b) the operating state repeatedly acts in a manner that is clearly inconsistent with the legal guidance provided in the instructions and observations. This article proposes to allow the panel discretion in determining the number of acts contrary to its interpretation of the law of war that indicates clear lack of commitment to follow the normative guidance provided by the panel and hence warrants the termination of the advisory regime; (c) an act of the operating state, carried out with the approval of the highest political or military echelons, that is clearly inconsistent with the panel's interpretation of the law of war and amounts to a particularly egregious violation of the law of war. Here too, the advisors should have the discretion to determine whether a single violation of the law of war, in view of its gravity, attests to clear lack of commitment by the state to abide by the legal guidance provided by the panel.

Additional grounds for the termination by a panel of the advisory regime would arise from failure by an operating state to abide by its soft law obligations with regard to the conduct of the *post facto* review. Hence, the advisory regime would be terminated under the following circumstances: (a) the operating state refuses to provide the advisors with information in a manner that clearly and repeatedly deviates from the terms of the advisory regime, or (b) the operating state obstructs the *post facto* review process through the intimidation of witnesses, destruction of evidence, etc.

IV. THE LEGAL BASIS FOR THE ADVISORY REGIME AND THE REACH OF SC POWERS

This Part will demonstrate that the powers of the SC to act by way of legislative resolutions accommodate the establishment by the SC of the proposed advisory regime, including the protections against adjudicative enforcement measures provided to an operating state and its agents under the advisory regime. This Part will also elaborate on the scope and significance of these protections. Finally, it will examine the extent of protections against economic sanctions that could be afforded to states under the advisory regime.

A. Legislative SC Resolutions

The proposed advisory regime could, in theory, be introduced by means of a new multilateral treaty. Any effort, however, to agree upon a mechanism for the interpretation of the law of war is likely to be viewed by states as a renegotiation of current international humanitarian treaties. Therefore, the prohibitive costs of renegotiating multilateral treaties¹⁶⁰ would also greatly encumber the effort to establish an advisory regime that is grounded in treaty law. In the absence of a realistic treaty-based path for the introduction of the advisory regime, the legal protections from adjudicative enforcement measures granted to states and their agents under this regime can be secured only through SC action. This article therefore proposes establishing the advisory regime through the exercise of SC powers.

The U.N. Charter assigns "primary responsibility for the maintenance of international peace and security"¹⁶¹ to the SC. To enable the SC to carry out this responsibility, the Charter vests in the SC, acting under Chapter VII of the Charter, the power to issue resolutions that are legally binding on all states, and to take the necessary measures to compel states to abide by their legal obligations under such resolutions.¹⁶² The SC can exercise Chapter VII powers only after having determined, pursu-

160. Blum, *Bilateralism, Multilateralism*, *supra* note 3, at 353; Cohen, *Rules and Standards*, *supra* note 3, at 60; CRAWFORD, *supra* note 3, at 208.

161. U.N. Charter, art. 24.

162. U.N. Charter, arts. 25, 39, 41-42.

ant to Article 39 of the Charter, the existence of a threat to international peace and security, breach of the peace, or act of aggression.¹⁶³

The SC construed its authority under Chapter VII as not being restricted to threats emanating from a particular situation or conflict,¹⁶⁴ allowing it to maintain international peace and security also by means of “legislative resolutions,”¹⁶⁵ which set forth “global norms”¹⁶⁶ of international law applicable for an indefinite

163. U.N. Charter, art. 39.

164. Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275, 283 (2008) (observing that SC Resolution 1373, which concerned counterterrorism measures, and Resolution 1540, which aimed to prevent the proliferation of weapons of mass destruction, were innovative because “[r]ather than issuing commands to deal with a discrete conflict, they create obligations of a sort usually found only in treaties. They create law for all states in a general issue area, without setting any time limit or conditions for terminating the obligations.”); Eric Rosand, *The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2005) (observing that the adoption by the SC of Resolutions 1373 and 1540 “has been described as ‘global legislating’—as distinguished from taking decisions, which impose binding obligations that relate to a particular dispute or situation. . . .”); *id.* at 547–48 (noting that resolutions 1373 and 1540 responded “not to a specific situation or threat but to one of a global nature. Additionally . . . both use the Council’s authority under Chapter VII of the U.N. Charter to impose far-reaching binding obligations on all States. . . . In doing so, both resolutions seek to establish global norms.”); José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874 (2003) (observing that the counterterrorism resolutions adopted by the SC “present the clearest examples of that body’s new ‘legislative’ phase. In this case, the Council is no longer responding with discrete action directed at a particular state because of a concrete threat to the peace arising from a specific incident.”); Sumon Dantiki, *Power Through Process: An Administrative Law Framework for United Nations Legislative Resolutions*, 40 GEO. J. INT'L L. 655 (2009) (“Resolution 1373 was not merely a use of the Council’s authority to address a specific instance or entity that posed an international threat but was a binding legal directive for nation-states to alter their domestic legal processes in response to the nonspecific and ongoing threat of transnational terrorism.”); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 902 (2002).

165. Dantiki, *supra* note 164, at 655–56 (“Resolution 1373 was the first of a new category of legislative resolutions. Such resolutions share two features. First, like all Chapter VII Security Council resolutions, they are binding upon states, superseding even treaty obligations. Second, legislative resolutions compel states to alter their domestic laws without limiting the change to a specific crisis or entity.”).

166. Rosand, *supra* note 164, at 547.

period of time.¹⁶⁷ This broad construction of its authority was first pronounced by the SC in Resolution 1373, adopted in the wake of the September 11, 2001 terrorist attacks, which required all states to pursue a wide range of counter-terrorism efforts.¹⁶⁸ All states were legally obligated by the terms of this resolution to criminalize terrorist financing activities, freeze terrorist funds, prohibit support of terrorist groups, reform immigration and asylum procedures, share intelligence information, and deny safe haven to terrorists.¹⁶⁹ In 2004, the SC proceeded to adopt Resolution 1540, which requires all states to take a wide range of measures, including domestic legislation, to prevent the proliferation of weapons of mass destruction (WMD) and, in particular, to ensure that such weapons are not acquired by non-state actors.¹⁷⁰

Resolutions 1373 and 1540 departed from previous SC practice, which confined its use of Chapter VII powers to responding to threats to international peace and security emanating from specific situations.¹⁷¹ As noted by one commentator, these resolutions “were not merely directed at a particular terrorist act, but at all future acts of terrorism.”¹⁷² These resolutions imposed far-reaching binding obligations on all states, “subject to no geographic or temporal limitation”¹⁷³ in terms of the threat addressed. The SC response to nonspecific threats of terrorism and WMD proliferation amounted to the regulation of “a general issue area,”¹⁷⁴ with the SC assuming the role of a “global legislator”¹⁷⁵ that enunciates “new binding rules of international law—rather than mere commands relating to a particular situation.”¹⁷⁶

167. Johnstone, *supra* note 164, at 283.

168. S.C. Res. 1373, ¶¶ 1–2, U.N. Doc. S/RES/1373 (Sep. 28, 2001).

169. *Id.*

170. S.C. Res. 1540, ¶¶ 1–3, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

171. Rosand, *supra* note 164, at 567–68.

172. *Id.* at 568.

173. Alvarez, *supra* note 164, at 874. *See also*, Rosand, *supra* note 164, at 569 (observing that “neither Resolution 1373 nor Resolution 1540 contains an explicit or implicit time limitation.”); Szasz, *supra* note 164, at 902.

174. Johnstone, *supra* note 164, at 283.

175. Rosand, *supra* note 164, at 572 (observing that “with the adoption of resolutions such as 1373 and 1540, one could argue that the Charter has once again evolved to allow the Council to act as a ‘global legislator’ under certain circumstances.”).

176. Szasz, *supra* note 164, at 902.

Resolution 1373 was adopted less than a month after the September 11th attacks, and can be explained by a sense of solidarity throughout the international community with the United States, which proposed it.¹⁷⁷ By contrast, Resolution 1540 was adopted in 2004, despite political tension between SC members arising from the invasion of Iraq by the U.S. and its allies.¹⁷⁸ Therefore, “unlike 1373, Resolution 1540 was not motivated by broad international sympathy for an American-led security agenda and demonstrates that legislative resolutions occur outside extreme political circumstances.”¹⁷⁹

The SC enjoys a vast discretion in determining the scope of its own authority.¹⁸⁰ The bulk of authority has acknowledged the lawfulness of SC legislative resolutions,¹⁸¹ proposing improvements in the decision-making process of the SC, which would enhance the legitimacy of such resolutions.¹⁸² It has been noted that “Security Council legislative resolutions show great promise to complement existing treaty regimes and better address pressing international challenges.”¹⁸³ Commentators have proposed expanding the use of legislative resolutions beyond counter-terrorism and WMD non-proliferation efforts to a wide range of threats to international peace and security.¹⁸⁴

177. Dantiki, *supra* note 164, at 662.

178. *Id.* at 662.

179. *Id.* at 662–63.

180. Johnstone, *supra* note 164, at 299 (“Articles 24 and 25 [of the U.N. Charter], and Chapter VII confer broad authority on the Council to take whatever measures it deems necessary to maintain and restore international peace and security.”).

181. *Id.* (observing with regard to Resolutions 1373 and 1540, “no evident legal rule prohibits [the SC] from acting in a legislative . . . manner.”); Alvarez, *supra* note 164, at 886; Szasz, *supra* note 164, at 904–05.

182. Johnstone, *supra* note 164, at 275; Alvarez, *supra* note 164, at 888.

183. Dantiki, *supra* note 164, at 657. *See also* Szasz, *supra* note 164, at 905 (observing the “pioneering nature” of Resolution 1373, Szasz submits, “[n]ow that this door has been opened . . . it seems likely to constitute a precedent for further legislative activities. If used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium.”); Alvarez, *supra* note 164, at 887 (observing, “it may sometimes be necessary for Council members to use their exclusive legislative capacity to short-circuit arduous international treaty negotiations.”).

184. Szasz, *supra* note 164, at 904 (advocating further adoption by the SC of “legislative resolutions” to impose a comprehensive nuclear test ban, and submitting that “[t]he Council might even consider extreme violations of human

The SC took the view that its responsibility to maintain international peace and security extends to the prevention of widespread violations of the law of war.¹⁸⁵ Pursuant to Article 39 of the Charter, it determined that such violations amounted to a threat to international peace and security.¹⁸⁶ This view allows the SC to use its Chapter VII powers to lay out the normative framework for the operation of the advisory regime. The advisory regime would reduce the risk that indeterminacy in the law of war results in military operations pursued by a state based on extremely permissive interpretations of this body of law, viewed by most of the international community as violations of the law of war. The significance of indeterminacy in the law as a facilitator of state conduct that most of the international community would consider a violation of the law of war depends largely on the link between such indeterminacy and the self-interest that guides the interpretation of the law by a state. The advisory regime would do away with this link as an engine of non-compliance, insulating the interpretation of indeterminate norms from loyalties extrinsic to the law. Moreover, the sway of the proposed advisory regime in enhancing compliance with the law of war extends beyond the problem of indeterminacy in the law, as the regime establishes an incentive structure that increases the compliance pull of the law of war in general.

The SC resolution introducing the advisory regime would provide for the establishment of the advisory panels under Article 29 of the U.N. Charter, which authorizes the SC to “establish such subsidiary organs as it deems necessary for the performance of its functions.”¹⁸⁷ The resolution would then proceed to lay out the terms of the advisory regime, including the process

rights or humanitarian law, or massive assaults on the international environment, to constitute unacceptable threats to the peace, and legislate accordingly.”); Shirley V. Scott, *Climate Change and Peak Oil as Threats to International Peace and Security: Is it Time for the Security Council to Legislate?*, 9 MELB. J. INT'L L. 495, 496, 507 (2008) (relying on SC Resolutions 1373 and 1540 to suggest the possibility of SC environmental legislation in response to the threat presented by climate change).

185. S.C. Res. 808, preamble, U.N. Doc. S/RES/808 (Feb. 22, 1993).

186. *Id.* See also James D. Fry, *The UN Security Council and the Law of Armed Conflict: Amity or Enmity?*, 38 GEO. WASH. INT'L L. REV. 327, 329 (2006) (noting that “Security Council Resolution 808, dealing with Serbian violence in Bosnia and Croatia, states that violations of international humanitarian law are themselves a threat to international peace and security.”).

187. U.N. Charter, art. 29.

for the appointment of members of the advisory panels and for the selection of panels by the various states; the functions of the advisory panels (i.e., issuing instructions and carrying out the *post facto* review) and guidelines for the performance of these functions; the soft law obligations that a state would have to undertake in order to subscribe to the advisory regime; the protections against enforcement measures granted to a state under the advisory regime; and the grounds for termination of the advisory regime in relation to a particular state.

B. Protection Against Criminal Adjudicative Measures

The advisory regime would protect the agents of the operating state from criminal prosecution concerning conduct carried out by such agents in relation to an armed conflict. Such protections would extend to criminal proceedings before the ICC or any other international criminal tribunal, and to proceedings before any foreign national court, regardless of the basis for jurisdiction invoked by such foreign court. The terms of the advisory regime would not preclude the operating state from exercising its own criminal jurisdiction over its agents. The protections against criminal prosecution available to the agents of the operating state under the advisory regime would be removed with respect to conduct that the advisory panel deemed, based on its *post facto* review, to be in violation of the law of war.

A violation by a state of the law of war does not necessarily amount to criminal conduct on the part of individuals acting on behalf of the state. The advisory panel would not examine whether conduct by agents of the state fulfilled the elements of particular crimes recognized under international law. Rather, the review by the panel of the legality of the conduct of the state under the law of war would act as a preliminary filter for future criminal proceedings undertaken by national or international courts.

Tying the liberty of courts to try agents of an operating state for international crimes committed in an armed conflict to the violation of the law of war does not, in itself, grant any immunity to perpetrators of international crimes. War crimes are grave violations of the law of war. Furthermore, acts amounting to crimes against humanity or to the crime of genocide also violate

the law of war, when committed in relation to an armed conflict.¹⁸⁸

Many international lawyers, however, would view the advisory regime as ceding a certain amount of international criminal justice. In many cases, the norms of the law of war that are binding upon states are either identical or very similar to the factual elements of war crimes.¹⁸⁹ Hence, conduct that is not viewed as a violation of the law of war under the interpretive approach of the moderate LoAC vision would in many cases amount to a war crime under an interpretive approach that leans toward the IHL vision. Under the terms of the advisory regime, the liberty of any court, other than those of the operating state, to adjudicate allegations that agents of the operating state committed war crimes, or any other international crimes, would be contingent upon determination by the advisory panel that the operating state violated the law of war. The panel would examine the existence of such a violation based on the interpretive approach of the moderate LoAC vision. Hence, from the perspective of lawyers adhering to the IHL vision, the advisory regime would, in some cases, make perpetrators of international crimes immune from criminal prosecutions.

Can the SC compel the ICC and national courts engaged in the enforcement of international criminal law to defer to the interpretive views of the advisory panels, even if such deference spells, in the view of such judicial authorities, impunity for perpetrators of international crimes? The answer appears to be affirmative. Noting the power of the SC, acting under Chapter VII of the U.N. Charter, to grant immunity to perpetrators of international crimes as a means of supporting peace agreements that provide for national amnesty, Scott Lyons explains:

If the Security Council decides via a resolution that respecting an amnesty agreement for crimes against humanity is needed for peace and security, it can use Chapter VII powers to impose

188. Compare the definition of genocide and crimes against humanity, contained in the Rome Statute, with the Statute's definition of war crimes. Rome Statute, *supra* note 152, arts. 6–8.

189. For example, the principle of distinction in the law of war holds that attacks must not be directed against civilians unless, and for such time, as they take a direct part in hostilities. Protocol I, *supra* note 8, arts. 48, 51. The Rome Statute provides that “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” constitutes a war crime. Rome Statute, *supra* note 152, art. 8(2)(b)(i).

a binding obligation to carry out this decision on all 193 member States of the U.N. . . . The binding resolution would effectively prevent States from exercising jurisdiction. . . .¹⁹⁰

Protections against foreign criminal prosecutions granted by the SC to nationals of certain states have also amounted to *ex ante* immunity.¹⁹¹ SC Resolution 1497 provides that troops contributed to peacekeeping forces in Liberia by a state that is not a party to the Rome Statute “shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of or related to [their service] in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.”¹⁹² Similarly, SC Resolution 1593 vested contributing states with exclusive jurisdiction over their nationals for all “alleged acts or omissions arising out of or related to operations in Sudan.”¹⁹³ Addressing this SC practice, Leila Sadat observed that “even the territorial state has been deprived of jurisdiction, and even if the contributing state declines to investigate allegations of war crimes.”¹⁹⁴

The authority of the SC to restrict the enforcement of international criminal law extends also to the ICC. Article 16 of the Rome Statute authorizes the SC, acting in the exercise of its Chapter VII powers, to suspend ICC jurisdiction for a twelve-month period and to renew such suspension by subsequent resolutions for further twelve-month periods.¹⁹⁵ It has been noted that Article 16 is ill-suited to support peace agreements that grant amnesty to perpetrators of international crimes, as “[a] twelve-month delay with possible failure to renew does not provide any permanence that an amnesty provision would need for negotiated peace.”¹⁹⁶ The time limit in the suspension of ICC jurisdiction under Article 16 would also make it difficult to use this

190. Scott W. Lyons, *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict*, 47 WAKE FOREST L. REV. 799, 838 (2012).

191. Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1032 (2006) (observing that “the recent practice of the Security Council has been to accept (at least in some cases), language in Council resolutions that may immunize nationals of certain countries from prosecution for the commission of *jus cogens* crimes.”).

192. S.C. Res. 1497, ¶ 7, U.N. Doc. S/RES/1497 (Aug. 1, 2003).

193. S.C. Res. 1593, ¶ 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

194. Sadat, *supra* note 191, at 1032.

195. Rome Statute, *supra* note 152, art.16.

196. Lyons, *supra* note 190, at 838.

Article to restrict ICC adjudication in accordance with the terms of the advisory regime.

The SC, however, may exercise its Chapter VII powers outside the scope of Article 16 to permanently restrict or terminate ICC jurisdiction in relation to particular situations.¹⁹⁷ The ICC exercises the delegated territorial and nationality jurisdiction of states that are parties to the Rome Statute.¹⁹⁸ The broad power of the SC to direct the conduct of states in the exercise of its Chapter VII powers thus extends to the ICC, making the ICC bound by SC Chapter VII resolutions that mandate ICC inaction in particular situations.¹⁹⁹

Note that the immunity granted to certain troops under SC Resolutions 1497 and 1593 was not limited to prosecution in the courts of foreign *states*. These resolutions also permanently precluded the exercise of ICC jurisdiction over crimes committed by such troops.²⁰⁰ It has been noted that “Resolution 1497 did not defer the ICC jurisdiction; it terminated it.”²⁰¹ Resolution 1497 thus “departed from Article 16 of the Rome Statute governing the exercise of the Security Council’s deferral powers.”²⁰²

In addition to the power of the SC to directly restrict ICC jurisdiction, the SC may also exercise its Chapter VII powers to preclude ICC proceedings indirectly. The capacity of the ICC to pursue criminal investigations and prosecutions depends en-

197. *Id.* at 838–39.

198. *Id.* at 839.

199. *Id.* at 838–39 (observing that “the Security Council arguably could decide that it is not bound by temporal limitations imposed by outside treaty obligations and could bind the ICC because the ICC exercises the delegated territorial and nationality jurisdiction of State parties.”); *id.* at 840 (noting that “the Security Council can likely decide to recognize a domestic amnesty agreement and make it binding upon both States and the ICC under its same specified legal powers.”).

200. Ademola Abass, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 *TEX. INT’L L.J.* 263, 268 (2005) (observing that “Resolution 1497 purports to preclude the ICC, on a permanent basis, from investigating or prosecuting any crimes committed by personnel serving as part of the Multinational Force in Liberia or a U.N. operation when such persons are contributed by nonparties to the Rome Statute.”). See also Sadat, *supra* note 191, at 1032, n. 357 (noting that the language of Resolution 1497, which concerns the exclusive jurisdiction of contributing states, “is substantially identical to Resolution 1593.”).

201. Abass, *supra* note 200, at 272.

202. *Id.*

tirely on the cooperation of states with the Court. Such cooperation includes, among other things, the surrender of individuals to the custody of the Court.²⁰³ Acting under Chapter VII, the SC may proscribe states from assisting ICC proceedings that do not respect the immunities granted under the proposed advisory regime.²⁰⁴ Under Article 103 of the U.N. Charter, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”²⁰⁵ It was thus observed that “[w]hile the Rome Statute creates a treaty-based obligation to turn in those indicted to the ICC, the supremacy clause of Article 103 of the U.N. Charter creates a superseding obligation. . . . The obligations created by the Security Council using Chapter VII powers would trump the conflicting commitments to the ICC. . . .”²⁰⁶

C. Protections Against Non-Criminal Adjudicative Measures

The advisory regime would preclude adjudicative enforcement measures taken against the operating state in relation to its military operations before any judicial authority other than the operating state’s own courts. The advisory regime would also protect the agents of the state from civil proceedings pursued in relation to such operations before any foreign court. Such protections, grounded in the exercise by the SC of its binding powers under Chapter VII of the U.N. Charter, would be removed with respect to conduct that the advisory panel has determined, based on its *post facto* review, to be in violation of the law of war.

203. For a general account of the ICC’s dependence on state cooperation, see Olympia Bekou & Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 INT’L COMP. L.Q. 49, 60–61 (2007) (“The ICC will not be effective unless States circumvent the lack of any real supranational enforcement system by cooperating with the ICC. Practically speaking, investigations would be extremely difficult, and, in essence, no trial can take place at the ICC if States do not provide assistance. No trial can take place without the defendant being surrendered by States to the custody of the Court. . . .”).

204. Lyons, *supra* note 190, at 839 (noting that “the Security Council could obligate all members of the U.N. to support the amnesty agreement and therefore preclude handing over to the ICC those potentially responsible for crimes against humanity.”).

205. U.N. Charter, art. 103.

206. Lyons, *supra* note 190, at 839.

States and their agents already enjoy far-reaching protections against foreign civil proceedings under the doctrine of foreign state immunity. In *Germany v. Italy*,²⁰⁷ the ICJ concluded that customary international law grants a state complete immunity from civil claims brought against the state before the courts of other states in relation to the conduct of its armed forces in the course of armed conflict.²⁰⁸ This immunity from proceedings before foreign national courts is not affected by the gravity of the allegations against the state or the *jus cogens* status of the norms breached.²⁰⁹

The judgment of the ICJ in *Germany v. Italy* concerned only claims brought against the state itself.²¹⁰ The prevailing view within the international community is that state immunity before foreign national courts generally extends to civil claims brought against individuals acting on behalf of the state, such as members of the armed forces of a state or their political superiors.²¹¹ National courts, however, disagree on whether the agents of a state enjoy immunity before foreign national courts also with regard to civil claims alleging violation of *jus cogens* norms. In *Jones v. The Kingdom of Saudi Arabia*, the English House of Lords held that individuals acting as agents of the state enjoy the full extent of immunity conferred under customary international law upon the state itself, which is not affected by the *jus cogens* status of the norms allegedly violated.²¹² This view was also taken by the United States Court of Appeals for the Second Circuit.²¹³ By contrast, the U.S. Court of Appeals for the Fourth Circuit construed customary international law to support the conclusion that “officials from other countries are not entitled to foreign official immunity for *jus cogens* violations,

207. Jurisdictional Immunities of the State (Ger. v. Italy, Greece Intervening), 2012 I.C.J. Rep. 143 (Feb. 3).

208. *Id.* ¶¶ 77–78.

209. *Id.* ¶¶ 91, 97.

210. *Id.* ¶¶ 37–39 (stipulating the subject-matter of the dispute).

211. *Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012) (embracing “the international law principle that sovereign immunity, which belongs to a foreign state, extends to an individual *official* acting on behalf of that foreign state.”); *Jones v. The Kingdom of Saudi Arabia*, House of Lords, [2007] 1 AC 270, ¶¶ 10, 13.

212. *Id.* ¶ 85.

213. *Rosenberg v. Pasha*, 577 Fed. Appx. 22, 23 (2d Cir. 2014) (citing *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009)).

even if the acts were performed in [their] official capacity.”²¹⁴ One commentator has noted that “the split that has developed surrounding the *jus cogens* exception to immunity in U.S. circuit courts may itself reflect the state of uncertainty in customary international law and among foreign national precedents on this question. . . .”²¹⁵ The protection against civil proceedings before foreign courts available to the agents of an operating state under the terms of the advisory regime would apply to the extent that, in the view of a foreign court, such proceedings are not already precluded under the doctrine of foreign state immunity.

The protections against non-criminal adjudication extended to an operating state under the advisory regime would be more significant in relation to proceedings before regional international human rights courts, such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). Both courts have adjudicated claims of human rights violations brought by individuals against states in relation to military operations that were part of hostilities amounting to a non-international armed conflict.²¹⁶

214. *Yousuf v. Samantar*, *supra* note 211, at 777.

215. Christopher D. Totten, *The Adjudication of Foreign Official Immunity Determinations in the United States Post-Samantar: A Circuit Split and Its Implications*, 26 DUKE J. COMP. & INT'L L. 517, 543 (2016).

216. In the *Las Palmeras Case*, the Inter-American Court of Human Rights (IACtHR) scrutinized the exercise of lethal force by the Colombian military. *Las Palmeras v. Colombia*, Preliminary Objections, ¶ 2, Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000). The Court did not dispute the conclusion of the Inter-American Commission of Human Rights that the actions of the Colombian military were committed in the course of a non-international armed conflict between Colombia and guerrilla forces, but nonetheless asserted its competence to adjudicate claims regarding violations of the American Convention on Human Rights “in times of peace or armed conflict.” *Id.* ¶¶ 29, 32. Similarly, in *Bamaca Velasquez v. Guatemala*, the Court adjudicated claims of human rights violations committed by the armed forces of Guatemala against guerrilla combatants in the course of a non-international armed conflict. *Case of Bamaca Velasquez v. Guat.*, ¶ 121(b) Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000). See also analysis in Michele D’Avolio, *Regional Human Rights Courts and Internal Armed Conflicts*, 2 INTERCULTURAL HUM. RTS. L. REV. 249, 305–06 (2007). The European Court of Human Rights (ECtHR) scrutinized the conduct of aerial bombardments by the Russian military in Chechnya, resulting in injury to civilians. *Isayeva, Yusupova and Bazayeva v. Russia*, 41 Eur. Ct. H.R. 847 (2005); *Isayeva v. Russia*, 41 Eur. Ct. H.R. 791 (2005). Although the ECtHR did not pronounce whether or not the actions of the Russian military were committed in the course of a non-international armed conflict, the existence of such a conflict could hardly be disputed in view of the scale and intensity of

The legal guidance provided under the advisory regime would be limited to the law of war. Yet, protections from international adjudication granted to a state under the advisory regime must be informed by the relationship between the law of war and international human rights law. Elaborating on this relationship, the ICJ concluded:

[T]he protection offered by human rights conventions does not cease in case of armed conflict. . . . As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.²¹⁷

In cases of concurrent applicability of human rights law and the law of war, the latter prevails as *lex specialis*, taking precedent over the former to the extent that the content of the law of war departs from that of human rights law.²¹⁸ The supremacy of the law of war as *lex specialis* extends, among others, to all cases of death, bodily injury, and destruction of property resulting from hostilities.

The advisory panels should not be required to provide legal guidance beyond the law of war, since such requirement would significantly encumber efforts by the panels to draft the instructions in a timely manner. The extent of protection against proceedings before international courts provided to an operating state under the advisory regime would correspond with the subject matter of the legal guidance provided by the panels.

Hence, the pronouncement by the advisory panel that an operating state is a party to an armed conflict would restrict the jurisdiction of international courts to adjudicate the conduct of the state in such conflict to acts pronounced by the panel as a viola-

hostilities between Russian armed forces and Chechen guerrilla forces. See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 753–54 (2005) (observing that the hostilities in Chechnya met the definition of an armed conflict).

217. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9) [hereinafter Wall Advisory Opinion].

218. *Id.* See also Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2482 (2008).

tion of the law of war. An international human rights court, however, would be able to inquire with the advisory panel whether alleged violations of international human rights law by the operating state fall outside the purview of the law of war and are therefore “exclusively matters of human rights law.”²¹⁹ An affirmative reply by the advisory panel would allow international adjudication of the allegations against the state, even in the absence of a finding by the panel of a law of war violation.

The jurisprudence of the ECtHR suggests that the authority vested in the SC under the U.N. Charter would accommodate such restriction of the jurisdiction of international courts. In *Behrami and Saramati v. France*,²²⁰ the ECtHR examined the scope of its jurisdiction to scrutinize the conduct of French and Norwegian troops operating as part of a NATO peacekeeping force in Kosovo, pursuant to SC authorization.²²¹ The Court observed that all states that are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are members of the U.N. and that it must therefore construe its jurisdiction under the ECHR in view of Articles 25 and 103 of the U.N. Charter,²²² which establish, respectively, the power of the SC to issue resolutions that are legally binding on all states and the supremacy of the obligations of states under the Charter over all other treaty obligations.²²³ The Court then proceeded to note that “the primary objective of the U.N. is the maintenance of international peace and security,”²²⁴ acknowledged “the imperative nature”²²⁵ of this objective, and considered that under the Charter, the primary responsibility to fulfill it was vested in the SC.²²⁶ The Court therefore bowed to SC authority, concluding that it lacks jurisdiction to scrutinize mili-

219. See *supra* note 217 and accompanying text.

220. *Behrami v. France, Saramati v. France, Germany & Norway*, Apps. No. 71412 & 78166/01 (May 2, 2007) (admissibility decision), <http://hudoc.echr.coe.int/eng?i=001-80830>.

221. S.C. Res. 1244, U.N. Doc S/RES/1244 (June 10, 1999).

222. *Behrami v. France*, *supra* note 220, ¶ 147.

223. U.N. Charter, arts. 25, 103.

224. *Behrami v. France*, *supra* note 220, ¶ 148.

225. *Id.*

226. *Id.*

tary operations conducted by states pursuant to SC authorization.²²⁷ Observing that “the ECtHR demonstrated strong substantive deference towards the U.N. Security Council,”²²⁸ Gráinne de Búrca explained:

The ECtHR positions itself as a specialized regional tribunal established under international law and as part of an international landscape in which the United Nations is the ultimate global forum for transnational cooperation in pursuit of collective security, whose authority should not be open to question by a regional human rights tribunal. . . . On this understanding, the decisions of the Security Council adopted under Chapter VII constitute a singular, hierarchical source of authority which binds and overrides the ECHR and constrains the ECtHR from exercising even indirect jurisdiction over the effects of such decisions.²²⁹

A different approach toward SC authority was taken by the European Court of Justice (ECJ). In *Kadi & Al Barakaat International Foundation v. Council and Commission*,²³⁰ the ECJ annulled anti-terrorism legislation enacted by the European Union, which implemented SC resolutions that required all states to freeze the assets of individuals identified by the resolution as suspected terrorists.²³¹ The ECJ reasoned that the measure mandated by the SC and implemented by the European Union violated fundamental rights protected under EU law.²³² The Court then proceeded to conclude, without distinguishing between the U.N. Charter and other international treaties, that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty,”²³³ and that the European Union is an “autonomous

227. *Id.* ¶ 149. See also Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 17 (2010) (noting that “the heart of the judgment . . . seems to be the ECtHR’s desire to avoid an open conflict with the Security Council and to defer to the ‘organization of universal jurisdiction fulfilling its imperative collective security objective.’”).

228. de Búrca, *supra* note 227, at 27.

229. *Id.* at 28.

230. Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R I-6351.

231. *Id.* ¶ 372. See also S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

232. *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, *supra* note 230, ¶¶ 353, 371.

233. *Id.* ¶ 285.

legal system which is not to be prejudiced by an international agreement.”²³⁴

Gráinne de Búrca observed that “the judgment is striking for its treatment of the U.N. Charter, at least insofar as its relationship to [EU] law was concerned, as no more than any other international treaty.”²³⁵ Yet, the approach taken by the ECJ toward the U.N. Charter cannot be considered in separation from the status of the EU as *sui generis*, an entity that is neither a state nor an international organization. The *Kadi* judgment represents an attempt by the ECJ to define the relationship between EU law and international law in general,²³⁶ “emphasizing the separateness, autonomy, and constitutional priority of the EC legal order over international law.”²³⁷ Hence, the significance of the *Kadi* decision in assessing the reach of SC authority seems to be restricted to the unique circumstances of the European Union as an entity “situated somewhere between an international organization and a constitutional polity,”²³⁸ the ECJ consequently being neither a national court nor an international one.

D. Protection Against Economic Sanctions

Economic sanctions imposed by the SC in the exercise of its powers under Article 41 of the U.N. Charter typically respond to certain violations of international law. Coercing compliance with international law is also an often-invoked rationale for the imposition by states of unilateral economic sanctions against other states.²³⁹ The fundamental bargain underlying the proposed advisory regime depends on the exercise of SC powers to ensure, as far as possible, that a choice by a state to follow the normative path laid out by the international advisors would not give rise to the adverse consequences that typically attach to violations of the law of war. The credibility of such a bargain, in the eyes of

234. *Id.* ¶ 316.

235. de Búrca, *supra* note 227, at 23.

236. *Id.* at 5 (observing that “the ECJ seized this high-profile moment to send out a strong and clear message about the relationship of EC law to international law. . .”).

237. *Id.* at 7.

238. *Id.* at 5.

239. Cleveland, *supra* note 74, at 4 (noting that “‘unilateral’ economic sanctions, or sanctions imposed without express regional or multilateral authorization, have become one common domestic enforcement mechanism to encourage foreign states to comply with international norms.”).

states, would be diminished if conduct by an operating state that conforms to the instructions resulted in economic sanctions imposed, either by the SC or by individual states, in view of a vision of the law of war that departs from the instructions.

Might an SC resolution establishing the advisory regime stipulate that the SC would not impose economic sanctions to enforce upon an operating state an interpretation of the law of war that proscribes military operations permitted by the instructions? By undertaking such a commitment, the SC would effectively cede a certain extent of its powers under Article 41 of the Charter, allowing the advisory panels to determine, through their instructions and review process, whether the SC may exercise these powers to promote humanitarian interests. The legality of such a restriction on the exercise of SC powers is doubtful. The U.N. Charter vests the ultimate authority in the SC for the maintenance of international peace and security.²⁴⁰ It was observed that the SC does not have the competence to divest itself of this authority by ceding it to another entity or otherwise.²⁴¹ Yet, the resolution establishing the advisory regime could assure states that in considering whether the military actions of an operating state warrant the exercise by the SC of its powers under Article 41 of the Charter, the SC takes into account the content of the instructions.

The exercise of SC powers to ban the imposition by states of *unilateral* economic sanctions aimed at enforcing upon the operating state a vision of the law of war that departs from the instructions is also problematic. Customary international law has not set any limitation upon the range of foreign policy interests that a state may legally advance through the imposition of unilateral economic sanctions.²⁴² The SC may, in the exercise of its

240. U.N. Charter, arts. 24–25.

241. DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS 4–16* (1999). Sarooshi observed that “[t]he Security Council possesses a general competence to delegate its powers to certain entities.” *Id.* at 16. Yet, “[a] delegation of powers does not involve the transfer of a power *in toto*.” *Id.* at 7.

242. Cleveland, *supra* note 74, at 53 (“Customary international law traditionally has allowed states to use economic coercion for a wide range of purposes, and the relatively frequent use of economic sanctions by the United States and other developed nations since World War II makes it difficult to conclude that

powers to maintain international peace and security, prohibit a state from taking measures that international law would otherwise allow. Economic sanctions, however, concern the withholding of assistance and cooperation that would otherwise be rendered *voluntarily* by one state to another, at the former's discretion. Restricting the freedom of states to impose economic sanctions would, at least in part, revise the nature of economic assistance rendered by one state to another from voluntary to involuntary. This would represent a far-reaching interference with the sovereignty of states on the part of the SC, diminishing the political feasibility of the proposed advisory regime.

Moreover, states have resorted to unilateral economic sanctions on various grounds.²⁴³ A state could easily cite motivations other than enforcing its own vision of the law of war (e.g., enforcing compliance with *jus ad bellum*, promoting democracy, a foreign policy interest in promoting a ceasefire) as grounds for imposing unilateral economic sanctions against the operating state in response to military operations by the latter.

The SC, however, may include within the resolution establishing the advisory regime a non-binding clause requesting states to refrain from imposing unilateral economic sanctions on an operating state aimed at promoting humanitarian interests. Such restraint would be requested for as long as the advisory panel takes the view that the conduct of the operating state demonstrates sufficient respect for the advisory regime to justify the continued application of this regime.²⁴⁴ The SC "is valued to the extent that all but a few states believe it serves a useful purpose for the maintenance of peace and security,"²⁴⁵ and it has been

a customary international norm exists against the practice. . . . Nothing in customary international law, therefore, appears to bar the use of economic coercion.").

243. *Id.* at 4 (noting that "Western states traditionally have resorted to restrictions on foreign assistance and trade benefits to promote a range of social goals. . . ."); *id.* at 31 (observing that "the United States has imposed economic sanctions for many years to promote a range of foreign policy objectives, including combating nuclear proliferation, drug and weapons trafficking and terrorism; promoting democracy and human rights; destabilizing hostile regimes; and punishing territorial aggression.").

244. *See supra* Part III.F. (specifying the grounds for termination of the advisory regime).

245. Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 *EURO. J. INT'L L.* 437, 477 (2003).

explicitly designated by the international community as the primary actor in the pursuit of these objectives. Hence, a pronouncement by the SC that unilateral economic sanctions aimed at promoting humanitarian interests would do the humanitarian cause a disservice if imposed concurrently with the application of the advisory regime presumably would go a long way to dissuade Western economic powers from employing such sanctions.

CONCLUSION

Indeterminacy in the law of war exacts a grave humanitarian toll, and it is not likely to be reduced through the conclusion of new humanitarian law treaties. The adverse consequences of this indeterminacy could be mitigated through SC action establishing an international advisory regime and employing the broad powers of the SC to provide incentives for states to voluntarily subscribe to this regime. Such incentives would consist of protection against the potential costs of non-compliance with the law of war, resulting from the interpretive liberties of the various law of war compliance agents. States subscribing to the advisory regime would undertake to follow the interpretation of the law of war laid out by international advisors. Although such undertaking would not be legally binding upon the states, it would go a long way to promote compliance on their part with the legal guidance provided under the advisory regime.

The proposed advisory regime is desirable from a humanitarian perspective because it would enable the SC to leverage the potential costs for a state resulting from current indeterminacy in the law in a manner that would induce states to accept legal restraints on their military operations, which at present they would reject. This regime is intended primarily to allay the adverse consequences of indeterminacy in the law of war. Ultimately, the incentive structure underlying the proposed advisory regime would enhance compliance with the law of war in general.