I. INTRODUCTION

International Humanitarian Law (IHL) influences U.S. national security policy in many ways. Most obviously, the United States may voluntarily accept constraints by ratifying a treaty, implementing necessary changes, and abiding by judicial interpretations of that treaty contrary to executive or
And absent persistent objection, the United States is also bound by customary IHL as well. This Essay suggests more attention also be paid to a third way in which IHL shapes U.S. national security policy. Even that IHL, which the United States does not accept and may even affirmatively reject, sometimes guides U.S. national security policy. If other countries accept particular IHL treaties, treaty interpretations, or customs that diverge from the United States’ approach, the United States may alter its national security practices. This Essay seeks to describe the international ecosystem in which states engage divergent IHL preferences. Specifically, this Essay focuses on the substantive areas in which divergence with the United States occurs, the constraints other states may deploy to impose or reflect their IHL preferences, and the likely U.S. responses.

Part I of this Essay provides some broad categories to highlight the significance and ubiquity of IHL divergence. This part first explores some broad differences in the existence, typology, and scope of armed conflicts with particular reference to the War on Terror. It then moves to the debate over the potential interaction between IHL and International Human Rights Law. This part also looks at disagreements about permissible means and methods of warfare and concludes with a discussion of varied approaches to legitimate targets during armed conflicts. This part notes that divergence across states may result from differing interpretations and applications of shared IHL and International Human Rights treaties, incomplete state membership in IHL treaties, and inconsistent understandings of the existence and content of customary international law.

Part III then identifies the mechanisms by which states can manifest their non-binding preferences for a divergent approach to IHL and the significance of such possible constraints. In so doing, this Essay uses recent

2. See id. § 102 cmt. d.
3. Acknowledgment of divergence is not a claim about American exceptionalism to or exemptionalism from IHL, but rather recognition that states have different material interests, cultures, and historical experiences that influence their approach to this body of law. Anu Bradford & Eric A. Posner, Universal Exceptionalism in International Law, 52 Harv. Int’l L.J. 1, 3 (2011).
examples of other states implementing their IHL preferences in such a way as to shape U.S. national security options. For instance, IHL divergence may impede interoperability with allied states. Foreign militaries may decline to assist with or participate in joint operations that the United States considers lawful. Other states may also limit their engagement with perceived illegality by restricting the United States’ territorial access. They can curtail overflight rights, basing rights, or other operational capabilities. Similarly, they may decline to share or otherwise cooperate on intelligence gathering and assessment if they believe such information will facilitate illegal behavior. In addition, when they have concerns about the legality of detention and prosecution practices, states can interfere with the United States’ national security goals by restricting access to individuals.

This Essay concludes in Part IV by dissecting the United States’ options for coping with potential IHL divergence and identifying the costs and limitations of various strategies. One approach is to minimize the political blowback of particular IHL choices through secrecy and obfuscation. Minimizing knowledge of its activities or that of its allies may prevent other states from refusing to allow or participate in controversial behavior. Another approach is to use legal precommitments to avoid the legal constraints identified in Part III. Expansive status of forces agreements, extradition treaties, and the like can raise the costs to allies of protesting or prohibiting certain IHL choices. When the United States is particularly committed to a behavior or interpretation, it may also expend significant political or economic capital to sway its allies. Such persuasion might be a defense of the legitimacy of its actions, occur in the form of carrots with generous monetary and security packages, or occur in the form of sticks by withholding or cutting off desired resources and relationships.

In other cases, the United States may abandon its IHL approach and harmonize out of deference to an ally. Even the specter of frayed international relations or poor public opinion may encourage the United States to invest in developing alternate strategies or interpretations more in line with other countries’ views of IHL. This Essay also notes that the United States may continue to use its existing interpretations and maintain its preferred behavior. But even then, divergence may shape U.S. national security policy by encouraging it to find new partners for particular activities or forcing it to go it alone on activities and procurement for which it would prefer to have support.
II. INTERNATIONAL HUMANITARIAN LAW DIVERGENCE

The international system has no universal arbiter. States may reject IHL and International Human Rights Law treaties entirely, and the creation of binding custom from those treaties is by no means assured. States may also choose to be bound by treaties and international courts or find themselves bound by custom. But even when bound, states often determine the applicability and interpretation of those treaty provisions or customs. This capacity to make unilateral IHL choices is particularly strong for the United States as a powerful state that is largely exempt from binding rulings by international criminal and human rights courts. Such a system necessarily allows for the possibility of divergence even when all states agree that some International Law governs a situation.

The possible existence of any armed conflict raises the potential of divergent applications and interpretations of IHL as states may disagree about how to categorize the facts on the ground, the governing bodies of law, and how to apply those laws to the facts. In the post-9/11 world, IHL divergence has emerged as an increasingly pressing issue where the United States views itself enmeshed in a War on Terror. The United States has struggled to interpret and apply IHL and other bodies of law to its activities around the globe and often its determinations have not been met with universal support from other states.

This section identifies four categories of potential high profile divergence: the existence and typology of armed conflicts; the interaction of IHL and International Human Rights Law; means and methods; and targeting and proportionality practices. In describing these categories, this section uses representative examples to demonstrate the ongoing, real world existence of IHL divergence. For instance, to determine the relevant bodies of governing law, states must now assess whether the United States and its allies were and are involved in an armed conflict solely in geographic locations like Afghanistan, which contain “hot battlefields,” or whether such

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5. See Mark D. Kielsgard, War on the International Criminal Court, 8 N.Y. CITY L. REV. 1, 2 (2005) (noting that the U.S. has taken “extraordinary steps” to exempt itself form the International Criminal Court’s jurisdiction).

conflicts extend to wherever terrorists aligned with the War on Terror go. Where armed conflicts exist, should they be categorized as international or non-international armed conflicts? What role, if any, should International Human Rights Law play in governing these situations? When the United States uses force in these situations, is the use of particular weapons, like landmines or cluster bombs, or particular targets such as war-sustaining activities properly considered lawful? What role, if any, may other states play in assisting with or participating in such endeavors? This section shows that the official U.S. answers to such questions may diverge, sometimes quite significantly, from that of other states.

A. Determination of Existence, Type, and Geographic Scope of Armed Conflict

One threshold possibility for divergence involves the determination of whether IHL should be invoked at all. When IHL is applicable, it provides a legal framework to help determine the answers to all sorts of difficult questions regarding the treatment of persons and property. IHL provides a distinctive method to approach issues like who may be targeted and when; who may be detained and for how long; what types of weapons may be used; and what actions constitute criminal offenses and how criminal proceedings should occur. While it sometimes yields the same or similar answers to legal questions as a law enforcement or human rights framework, it often provides a more robust authority to use force and to detain.7

The Geneva Conventions, with universal ratification, provide significant guidance as to the legal trigger for the application of IHL—an armed conflict.8 In some situations, reaching consensus on the existence of an


armed conflict is quite easy, but in others, states may disagree on how to interpret the relevant language and how to apply it to facts on the ground. Relatedly, states will also determine what kind of armed conflict exists and the geographic scope of the conflict. This determination will tell them which parts of IHL govern and when other bodies of law must be consulted instead.

In the wake of 9/11, the United States has engaged in a number of military actions against al-Qaeda and its affiliates and has now classified such activities as part of an armed conflict governed by IHL. In *Hamdan v. Rumsfeld*, the U.S. Supreme Court held that the United States is embroiled in a non-international armed conflict with al-Qaeda in Afghanistan. While the Supreme Court has not explicitly spoken as to whether such reasoning also applies to the use of force in places like Pakistan, Yemen, Somalia, and Libya, the Obama administration has publicized a basic legal framework that describes the United States as being in an armed conflict with al-Qaeda governed by IHL. The United States government also concluded that such conflict was not “restricted solely to ‘hot’ battlefields like Afghanistan” and permissible targets in that conflict seemingly take the conflict with them wherever they go.

Yet some other states have been reluctant to characterize the War on Terror as an armed conflict governed by IHL. Many important allies maintain that the geographic scope of the al-Qaeda armed conflict is limited to “hot battlefields” like those in Afghanistan. In their own fights against wounded of a belligerent fall into enemy hands). An occupation can also trigger the application of the Geneva Conventions. Protocol I, *supra*, art. 1, at 7; Geneva Convention 1949, *supra*, art. 2.


terror, such states do not apply IHL outside of their operations in Afghanistan.\textsuperscript{15} While most European governments have not been publicly critical of the U.S. approach,\textsuperscript{16} they have likely expressed “behind the scenes” criticism directly to the United States.\textsuperscript{17} Similarly, many states hold a much more limited interpretation of who counts as being part of or sufficiently aligned with al-Qaeda to count as part of the armed conflict justifying an expansion of the conflict outside Afghanistan and Pakistan.\textsuperscript{18} While states have by no means taken a unified, public stance on the body of law governing lethal action and the requirements for detention outside hot battlefields, the weight of international bodies,\textsuperscript{19} global public opinion, and legal scholarship rejecting the application of IHL under current conditions\textsuperscript{20} make it probable that at least some states implicitly share this view.

While the War on Terror presents the most recent and salient example in this area, other examples of divergence over conflict classification exist. For instance, the United States signed but never ratified Additional Protocol I (API) to the Geneva Convention.\textsuperscript{21} Although the United States accepts many of its provisions as customary international law,\textsuperscript{22} the Reagan Administration ultimately rejected Article 1, Section 4’s elevation of wars of national

\begin{itemize}
  \item \textsuperscript{15} Sassoli, supra note 7, at 56.
  \item \textsuperscript{17} Anthony Dworkin, \textit{Obama’s Drone Attacks: How the EU Should Respond}, EUROPEAN COUNCIL ON FOREIGN RELATIONS (June 19, 2012), http://www.ecfr.eu/article/commentary_obamas_drone_attacks_how_the_eu_should_respond.
  \item \textsuperscript{18} Gabor Rona, \textit{Debate (Round 1): The ‘Lutte’ Against Terrorism}, JUST SECURITY (Sept. 30, 2013, 3:38 PM), http://justsecurity.org/1378/lutte-terrorism/.
  \item \textsuperscript{20} See Dworkin, supra note 17.
\end{itemize}
liberation to the status of international armed conflicts,\(^23\) because it believed this provision would unduly grant immunity for belligerent acts.\(^24\) Yet over 177 other countries have ratified AP\(^1\),\(^25\) including most NATO members,\(^26\) creating the potential for divergence over conflict classification and the applicable body of law for certain conflicts.\(^27\)

B. Interaction of IHL and International Human Rights Law

The interaction of IHL and International Human Rights Law presents another area where states may fundamentally disagree. In situations regarding the use of force or detention, states may believe one body of law applies to the exclusion of the other or that both must apply, requiring consideration of how they fit together and how to resolve potential conflicts.\(^28\) In recent years, this potential conflict has emerged in the context of extraordinary rendition and interrogation methods;\(^29\) indefinite detention; the conditions of detention at Guantanamo and Bagram; appropriate venues and procedural protections for prosecutions;\(^30\) and the use of drone strikes.\(^31\)

In recent years, the United States has favored the exclusive or strong application of IHL to situations arising under conditions that it regards as

\(^{23}\) Article 1, Section 4 includes as international armed conflicts those “in which people[] are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.” Protocol I, supra note 8, art. 1, § 4, at 7.

\(^{24}\) Reagan Letter, reprinted in 82 AM. J. INT’L L., supra note 21, at 910–12; Sofaer, supra note 21, at 785. The Reagan Administration also opposed Article 43 and 44’s provisions for POW status for irregular military fighters as it believed they would unhelpfully elevate the status of groups using terrorist tactics. Reagan Letter, reprinted in 82 AM. J. INT’L L., supra note 21, at 911; Sofaer, supra note 21, at 786.

\(^{25}\) Protocol I, supra note 8; see also text accompanying note 8.


\(^{27}\) See infra Part IV.B for a discussion of how the United States finessed this potential divergence.

\(^{28}\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9).


part of an armed conflict. The United States has ratified many of the major UN human rights treaties, and it acknowledges that human rights law based on customary international law binds the U.S. at all times, including during armed conflict. But it generally contends that when an armed conflict exists, the body of IHL serves as lex specialis exclusively occupying the entire field. For instance, it has responded to human rights bodies inquiring about targeted killings by declaring, “the issue was not within the competence of human rights law,” and it reiterated this position during various domestic lawsuits. Speaking more broadly, it told the United Nations that human rights treaties like the International Convention on Civil and Political Rights do not mandate the extraterritorial application of human rights. Thus, when IHL applies, but does not provide a definitive answer to a specific legal question, the United States believes human rights law ought not be viewed as providing a binding answer for extraterritorial activities.

In contrast, looking at the same or similar factual situations, many of our allies support either the co-applicability or exclusive application of human rights. For instance, in ruling on the legality of targeted killing, the Israeli High Court explicitly and extensively integrated human rights into its analysis.

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35. See id. at 54 n.5.  
ruling. In Britain, the United Kingdom High Court recently ruled that International Human Rights Law, rather than IHL, provides the legal authority to detain individuals during a non-international armed conflict. Thus, IHL does not displace the European Convention on Human Rights during armed conflicts under *lex specialis* nor does it displace domestic law. Some of the law governing our allies goes even further. For instance, the European Court of Human Rights seems to view human rights law as *lex specialis* in non-international armed conflicts rather than looking to IHL.

**C. Means and Methods**

Legitimate means and methods of warfare present another area of potential divergence. Basic IHL principles prohibiting unnecessary suffering and indiscriminate attacks govern all states. Even though they are universally agreed upon, these broad prohibitions still require individualized state assessment of whether a given weapon satisfies those criteria. IHL also contains several treaties creating *per se* bans on specific weapons such as those on expanding bullets, blinding lasers, landmines, and cluster munitions. Depending on the terms of the treaty and underlying reservations, such prohibited weapons might be impermissible at all times for all uses, whereas others, such as hollow point rounds or tear gas, might be prohibited during all armed conflicts but allowed in law enforcement

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41. *Id.*
45. *Id.* at xxiii.
scenarios.\textsuperscript{46} Sometimes state divergence arises from incomplete membership in international prohibitions. For instance, the United States has not ratified two major weapons treaties, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti Personnel Mines and on Their Destruction (Landmine Ban); and the Cluster Bomb Ban.\textsuperscript{47} As of 2014, 161 countries ratified the Landmine Ban, rendering the United States a lone holdout among NATO states.\textsuperscript{48} While the United States has not used landmines in recent conflicts, that decision is a matter of policy subject to unilateral reversal.\textsuperscript{49} Meanwhile, the United States used cluster munitions in 2001 to 2002 in Afghanistan, 2003 in Iraq, and possibly in Yemen in 2009.\textsuperscript{50} Yet eighty-four countries have ratified the Cluster Bomb Ban, including important allies Afghanistan, Australia, France, Germany, Iraq, Spain, and the United Kingdom.\textsuperscript{51}

Other times, the divergence arises from differing interpretations and approaches to shared treaties. Protocol III to the Convention on Conventional Weapons prohibits the use of air delivered incendiary weapons against military objectives when located within a concentration of civilians and the use of non-air delivered incendiary weapons except when the military objective is clearly separated from the concentration of civilians.\textsuperscript{52}


\textsuperscript{49} U.S. Landmine Policy, U.S. Dep't of State, http://www.state.gov/t/pm/wra/c11735.htm (last visited Jan. 9, 2014); see United States: Lagging on Landmine Ban, supra note 48.


Along with 108 other states, the United States ratified this Protocol, but in doing so reserved the “right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons.” Relatedly, when the United States confirmed usage of white phosphorus in the Battle of Fallujah, other states may have viewed such usage as illegal and at the very least would view their own state’s participation in an identical act to be prohibited given their lack of similar declarations.

Historical analogues exist and future disagreements seem likely as well. For instance, during the Vietnam War, the United States’ use of Agent Orange and other herbicides as defoliants drew accusations of illegality from other countries. One might also easily imagine that in the future the United States will opt out of weapon treaties that many of its allies will have joined. For instance, the United States seems enthusiastic about developing fully autonomous weapons, whereas the European Parliament recently adopted a resolution calling for a ban on “the development, procurement and export of possible future fully automatic weapons.”


55. Sources within the military recount using White Phosphorus not merely for marking and screening, but as a “potent psychological weapon against the insurgents in trench lines” and the military “fired ‘shake and bake’ missions at the insurgents.” James T. Cobb et al., The Fight in Fallujah, FIELD ARTILLERY, Mar.-Apr. 2005, at 22, 26.


D. Targeting and Proportionality

The use of force against individuals or property might be permissible under either IHL or a law enforcement and human rights framework, but as mentioned above, these frameworks might lead to different answers in specific situations. Moreover, even if states agree that IHL governs a particular situation, they might still disagree as to whether a particular target is permissible under that agreed upon body of law. Such disagreements might arise over the legitimacy of the chosen target or over the potential for impermissibly high collateral damage.

Take, for example, the difference between members and non-members of API regarding what constitutes a legitimate target. Many states use a narrow interpretation of Article 52 of API, which strictly limits attacks to military objectives and defines them as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”59 Yet the United States seems60 to employ a broad “war-fighting/war-sustaining effort” interpretation of military objective.61 While substantial overlap exists in what states view as military objectives under API,62 the U.S. interpretation would allow attacks on the “[e]conomic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability . . .”63 States, including many of our current allies, following the widely respected San Remo Manual have definitively rejected this view.64

Divergence can also emerge from the questionable lawful use of permissible weapons. In other words, some weapons are not per se

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59. Protocol I, supra note 8, art. 52.
61. ANNOTATED SUPPLEMENT, supra note 60.
63. ANNOTATED SUPPLEMENT, supra note 60, at 403.
64. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA 114 (Louise Donsald-Beck ed., 1995); Yoram Dinstein, Legitimate Military Objectives Under the Current Jus in Bello, 78 INT’L L. STUD. SER. U.S. NAVAL WAR C. 139, 146 (2003).
unlawful, but states may use them to violate distinction or proportionality principles embedded in customary international law and in the Geneva Conventions. For instance, the United States maintains that its use of missiles via drone strikes satisfies the IHL principle of proportionality while the affected country, Pakistan, disagrees.\(^{65}\) Other countries have also expressed concerns about potential proportionality problems arising from drone strikes.\(^{66}\)

In conclusion, this section presents a brief introduction to the main substantive areas of existing and potential IHL divergence. Divergence has, or is likely to arise, across a variety of issues emerging during the War on Terror and other modern day conflicts such as: cyber warfare;\(^{67}\) the existence of an occupation and its attendant protections;\(^{68}\) the conditions of detention like the permissibility of force feeding;\(^{69}\) the use of explosive weapons in densely populated areas;\(^{70}\) and the classification of and protections for human shields,\(^{71}\) private military contractors, and non-military government

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67. See TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBERWARFARE, Part II (Michael N. Schmitt ed., 2013).


69. ARCHICK, supra note 30, at 22 (noting the European Parliament’s concern about force feeding at Guantanamo).

70. Preventing Human Suffering from the Use of Explosive Weapons in Populated Areas—the INEW Call, INT’L NETWORK ON EXPLOSIVE WEAPONS (INEW), http://www.inew.org/about-inew/inew-call-commentary (last visited Nov. 14, 2014); see also Acknowledging the Harm, INEW, http://www.inew.org/acknowledgements (last visited Nov. 14, 2014) (providing a compilation of policy statements by states and U.N. actors recognizing the harm caused by explosive weapons and supporting measures to address the problem).

actors like the CIA.\textsuperscript{72} Divergence is simply inevitable in a world with new armed conflicts, new technologies, varied state preferences, and no centralized authority for conclusively resolving state-based differences.

III. CONSTRAINTS

But why should scholars and states care about divergent IHL approaches and preferences? This Essay suggests that allied states with different IHL approaches may influence and constrain even without formally binding the United States. Part III identifies four important categories by which states’ actions to adhere to their own perspective on IHL can hamper the United States’ implementation of its national security policy and IHL preferences. First, divergence can impede interoperability of coalition forces. Accommodating various state militaries’ interpretations of permissible activities can complicate combined operations. Second, other states can avoid sanctioning or participating in perceived illegality by limiting the United States’ ability to conduct air or ground operations in its sovereign territory. Denying territorial access raises the cost of divergent IHL approaches even if it does not foreclose them. Third, states can decline to share intelligence when they believe the United States will use that information to conduct activities based on interpretations or approaches to IHL with which they disagree. Attaining comparable intelligence by other means can be difficult or even impossible. Fourth, IHL divergence can narrow access to individuals that the United States wishes to detain. States may refuse to transfer or extradite persons if they think the United States will subject them or allow them to be subjected to violations of IHL or applicable human rights law. What follows is a discussion of these various categories, why they matter, and some recent examples of how IHL divergence has hampered the pursuit of U.S. national security goals.

A. Military Interoperability

When the United States engages in military operations, it often does so with other states—and in the cases of the Gulf War, Afghanistan, and the more recent Iraq war, large coalitions of other states. In such circumstances, interoperability or the “ability of U.S. . . . units to operate side by side or

\textsuperscript{72} Wexler, \textit{supra} note 11, at 61, 74.
embedded with allied or partner military units across the full range of military operations” can be essential to the success of such endeavors.\(^{73}\) Full interoperability provides material benefits in terms of adding resources like manpower, expertise, and technology, but also perception based benefits in terms of adding legitimacy and evidence of consensus to a particular operation. Harmonization of various militaries, including on IHL issues, facilitates interoperability,\(^ {74}\) whereas divergence can complicate or scuttle specific operations, as commanders must accommodate different approaches.\(^ {75}\)

The permissibility of specific weapons provides an excellent example of how divergence can create interoperability issues. For instance, at least thirty-six state parties to the Landmine Ban have stated they “will not participate in planning and implementation of activities related to [anti-personnel mine use] in joint operations . . . .”\(^ {76}\) Some states limit this to “‘active’ or ‘direct’ participation,” while others reject operations if “its military forces derive direct military benefit from [anti-personnel] mine use.”\(^ {77}\) What happens if the United States, as a non-state party to the Ottawa Convention, wants to use landmines as a defensive perimeter while engaged in a combined operation? Some states would abstain from the planning and emplacement, while others must also refuse any part of the operation because they could benefit from the perimeter.\(^ {78}\)

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\(^{74}\) See Myron Hura et al., *INTEROPERABILITY: A CONTINUING CHALLENGE IN COALITION AIR OPERATIONS 7* (RAND Corp. 2000) (explaining the broad concept of interoperability).


\(^{77}\) Id.

\(^{78}\) OFFICE OF THE JUDGE ADVOCATE GENERAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS 5A-1 (2001), available at http://fichl.org/uploads/media/Canadian_LOAC_Manual_2001_English.pdf (suggesting that if a U.S. commander directs the combined forces, he may order the use of mines; whereas the Canadian forces could not be involved in planning or emplacement, nor could a Canadian Commander of a combined force request that Americans use them). Australia, the Czech Republic, and the United Kingdom made similar declarations to the treaty, but Spain did not. Stuart Maslen, *ANTI-PERSONNEL MINES UNDER*
While the landmines example is largely hypothetical, the Cluster Munition Ban might impose more significant interoperability issues. Article 21 of the Cluster Munition Ban obligates state parties to encourage non-state parties to join, promote its norms, and make their “best efforts to discourage [non-party] States . . . from using cluster munitions.” While Article 21(3) explicitly allows “States Parties, their military personnel or nationals, [to] engage in military cooperation and operations with [non-Party] States . . . that might engage in activities prohibited to a State Party,” Article 21(4) still precludes state parties from stockpiling, transferring, using, or “request[ing] the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.” And Article 1 obligates state parties to “never under any circumstances” assist with prohibited acts.

As a result, several state parties, including Norway and the United Kingdom, successfully requested that the United States remove stockpiled cluster munitions from their territories. The more significant interoperability issues might arise from the prohibition on assistance. While states have disagreed about the appropriate interaction of Article 21 and Article 1, at least seventeen state parties and signatories take a very strong position precluding any assistance for prohibited activities. Thus, if the United States wants to use cluster munitions during coalition operations, it must ascertain and accommodate varied views about what would constitute permissible participation. Appropriate deference to other states’ preferences here can seriously heighten the complexity of already dangerous operations.

Weapons are only one of many examples where divergence can create interoperability issues. Take the aforementioned difference between the

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81. Id. art. 21, ¶¶ 3–4.
82. Id. art. 1, ¶ 1.
United States and members of API and Additional Protocol II (APII)\(^85\) as to the legitimacy of targeting war-sustaining enterprises and individuals who participate in them. What would happen if during the War on Terror the United States wanted to target narco-traffickers in Afghanistan with links to the Taliban?\(^86\) The United States might define such targets as people engaging in war-sustaining activities, but others might reasonably believe they do not satisfy a more narrow understanding of API and APII. If NATO commanders\(^87\) or the Afghanistan government determined the impermissibility of such targets, how would it affect combined operations?\(^88\) These states might refuse to engage in targeting, and it might also affect other coalition activities, such as intelligence sharing and defensive protections.

In light of potential divergence, states may and often do\(^89\) place national caveats\(^90\) on their forces’ participation in a multinational military operation. National caveats restrict a state’s military force, including where it may operate and what it may do.\(^91\) States will make known or declare some caveats prior to the beginning of a multinational military operation, while commanders may not learn of undeclared but equally binding caveats until a mission is assigned to a particular unit that is precluded from performing

\(^{85}\) See Protocol II, supra note 43, art. 13, ¶ 2.


\(^{88}\) See Whitlock, supra note 87.

\(^{89}\) See VINCENT MORELLI & PAUL BELKIN, CONG. RESEARCH SERV., RL33627, NATO IN AFGHANISTAN: A TEST OF THE TRANSATLANTIC ALLIANCE 10 (2009) (reporting that “almost half the forces in ISAF have some form of caveats”).


that mission.92

The U.S. Armed Forces are required to consider93 and accommodate national caveats, including working within the framework of previously known and declared caveats, and to make the necessary adjustments “when an undeclared caveat arises during the mission planning process.”94 Nevertheless, whether known from the outset or not, caveats have been found to not just impair interoperability, but to imperil military operations and the personnel that participate therein. Again, this has been particularly acute in the NATO’s mission in Afghanistan.95 For instance, there are reports about offensive combat operations that have nearly failed because of states not allowing their troops to take part therein.96 Further, the complications have not been limited to offensive combat operations. For instance, a 2006 attack on a provincial reconstruction team in western Afghanistan shows national caveats have compromised even the “response capability for rescue operations.”97

Many potential interoperability problems are unlikely to arise in practice. Many of the activities discussed in Part II, such as drone strikes and controversial detention practices, would raise significant interoperability concerns for allies if the United States asked them to directly participate. Yet as described in Part IV, the United States often chooses to act alone in conducting the actual military operations, which avoids straining relationships over the attempt to forge consensus and simplifies the planning and execution of operations. But in doing so, the United States loses the benefits of a truly interoperation force.

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95. See MORELLI & BELKIN, supra note 89, at 10–12.
96. See Williams, supra note 94, at 25 n.13.
97. See MORELLI & BELKIN, supra note 89, at 17 (indicating that “[w]hen the PRT was attacked, no NATO combat forces were in the region to protect the ISAF personnel. Other NATO forces that were nearby had caveats prohibiting their use in combat operations. Eventually a British force was found to help end the attack on the PRT.”).
B. Territorial Access

Even when the United States engages in direct military action alone, it often relies on other states for territorial access. States need permission to fly over sovereign territory on the way to an operation and to launch operations from bases located on some other state’s territory. And states may also need permission to enter sovereign states to conduct operations against non-state actors. IHL divergence may cause states to restrict or deny such territorial access. Such denials might be limited to the military operations and underlying IHL behavior with which it disagrees, or they may be more expansive denials as a way to deter or change behavior. Such denials might create “significant logistical challenges”98 or even preclude military operations entirely.

To begin, all states possess sovereign control over their airspace, which includes total autonomy on whether to grant overflight rights.99 Such rights include:

where U.S. air assets can enter and exit another state, what flight path they may take, how high they must fly, what type of planes can be included in the force package, and what sort of missions they can execute. In addition, these constraints include what is called shutter control, or the limits to when and how a transiting aircraft can collect information.100

Overflight rights can be important to achieving national security goals—particularly those that require far away operations. Even single country


100. Zenko, supra note 99.
denials can be problematic because they shut down potential routes, as when Algeria recently denied blanket overflight permission and hampered the United States’ efforts at air-based surveillance of Mali. Use of overflight rights has been essential for various efforts during the War on Terror, including the rendition program.

Overflight denials based on IHL divergence seem to be rare but still within a state’s toolbox for encouraging harmonization. For instance, Ireland recently denied overflight rights for planes believed to be carrying white phosphorus and landmines in violation of Ireland’s international law obligations. WikiLeaks also revealed that the British government limited U.S. reconnaissance flights out of British bases in Cyprus due to concerns of extraordinary rendition and intelligence gathering missions used to pass on information to Lebanon that may use such information for illegal purposes. States have also denied overflight rights to express disapproval for jus ad bellum divergence. For instance, in 1986, France denied the United States overflight rights to conduct airstrikes against Libya. Though the United States wanted to retaliate for an act of terrorism in Berlin, the French believed such action would violate international law.

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101. David Fulghum, *Airlift Chief Points Out Diplomatic, Military, and Modernization Obstacles*, AVIATION WEEK & SPACE TECH., Feb. 28, 2011, at 53, 53 (suggesting that to keep open routes, you must have “a series of countries that all say ‘yes’”).

102. Craig Whitlock, * Algerian Stance Spoils U.S. Strategy for Region*, WASH. POST, Jan. 18, 2013, http://www.washingtonpost.com/world/national-security/algerian-reticence-spoils-us-strategy-for-region/2013/01/18/7a23fbc-617c-11e2-89a2-2eabfad24542_story.html; see also Fulghum, supra note 101, at 53 (making a similar observation that Spain cut off inflight refueling and overflight privileges “because Washington had neglected to ask permission for use of Spanish airspace in long-haul flights to the Middle East. Spanish officials called it a renegotiation with a provision that the U.S. must request overflight permits in advance and provide details concerning the flight.”).


104. OMANOVIC, supra note 99, at 15–16.


107. See Zenko, supra note 99.

108. Id.
ultimately succeeded, but this denial increased “the costs, risks, and length of the [Libyan airstrike] operation.”  

109 Like with interoperability, publicly known examples may be rare because the United States anticipates them and thus does not request overflight rights for divergent IHL practices.  

110 Rather, states seem more likely to use the bundle of basing rights to encourage harmonization or to distance themselves from potentially illegal actions.  

111 Basing rights include:  

[the] number of civilian, military, and contractor personnel at an airbase or post; what access they have to the electromagnetic spectrum; what types of aircraft they can fly; how many sorties they can conduct per day; when those sorties can occur and how long they can last; whether the aircraft can drop bombs on another country and what sort of bombs; and whether they can use lethal force in self-defense.  

112 The United States has been particularly reliant on basing rights to conduct drone strikes and drone surveillance, as it does not currently fly armed drones off aircraft carriers.  

113 Many potential basing countries have declined on the basis of strong domestic opposition to the U.S. IHL interpretations allowing such strikes.  

114 Such opposition has left the United States with limited options regarding basing rights.  

109. Id.  
110. See id. (“[T]he United States assuredly has other tricks in its military bag—advanced capabilities, not yet public, that could be used to bypass the need for overflight rights.”).  
111. LOSTUMBO, supra note 98, at 104 (noting that base access is at risk when the domestic population disagrees “with the stated mission of U.S. forces or their particular actions”). For instance, during Operation Desert Fox, Saudi Arabia and the UAE denied the United States to launch fighter aircrafts from their bases to strike suspected Iraqi WMD infrastructure. Id. at 102.  
112. Zenko, supra note 99.  
United States without a base in Southern Europe or Northern Africa from which to launch armed drones. 117 Similarly, the Philippines has allowed UAVs for aerial surveillance, but refused permission for a base to launch drones to conduct strikes. 118 And some initially sympathetic countries have revoked permission. For instance, Pakistan has cited a lack of IHL compliance to deny CIA operation of drone strikes from a base in Shamsi. 119 Perhaps most notably, if Afghanistan decides to enforce the 2013 defense and security cooperation agreement, the U.S. could “not . . . use Afghan territory or facilities as a launching point for attacks against other countries,” which would deny the U.S. the ability to make drone strikes into northwest Pakistan. 120 Of course, even with these existing limitations, the United States has still engaged in drone warfare, but as explained below in Part I V, it has been significantly costlier than with its first choice of bases.

Relatedly, some operations require permission to access the territory where operations will be carried out. Arguably, countries outside of the hot battlefield may need to grant permission for drone strikes or ground operations against non-state actors to avoid sovereignty violations. 121 Some countries, such as Yemen, have willingly provided access. 122 Public and judicial pressure on their legality, however, may cause the withdrawal of such consent, as it happened with Pakistan and its revocation of permission

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116. Shwayder, supra note 114 (citing Micah Zenko, a fellow at the Council on Foreign Relations).
117. Zenko, supra note 99.
119. Shwayder, supra note 114.
120. Micah Zenko, Will Afghanistan Allow U.S. Drone Strikes into Pakistan?, COUNCIL ON FOREIGN RELATIONS (Nov. 21, 2013), http://blogs.cfr.org/zenko/2013/11/21/will-afghanistan-allow-us-drone-strikes-into-pakistan/ (noting that “no other plausible alternative host-nation from which the United States would receive permission to conduct drone strikes into northwest Pakistan” exists and “Armed drones flying from U.S. naval platforms are a few years away, but the distance from the Arabian Sea to the FATA is significant, posing greater operational risk to drones themselves, and also potentially further exacerbating anti-U.S. sentiment in Pakistan by overflying populated areas.”).
for CIA strikes.\footnote{Pakistan and US: Hand-in-Hand on Drone Deaths, AL JAZEERA (Dec. 18, 2013, 12:05 PM), http://www.aljazeera.com/indepth/features/2013/11/pakistan-us-hand-hand-drone-deaths-20131127145212604294.html (noting that former Pakistani ISI chief acknowledged a verbal agreement between the United States and Pakistan on strikes).} If one believes, as the United States seems to, that strikes are important to achieving national security goals, then territorial denial is a significant, and potentially insurmountable, impediment.

C. Intelligence

Intelligence is essential to conducting successful military operations. States must know who and where to protect, strike, detain, and interrogate. Counterterrorism efforts are particularly reliant on quality intelligence in order to disrupt recruitment, financing, and movement and to identify and protect internal targets.\footnote{See James Igoe Walsh, Intelligence-Sharing and United States Counter-Terrorism Policy, in EMERGING TRANSNATIONAL (IN)SECURITY OF GOVERNANCE 44 (Ersel Aydinli ed., 2010).} In the wake of 9/11, the United States viewed the development of a “comprehensive coalition strategy,” including the exchange of terrorist information with allies as a top national security priority.\footnote{ARCHICK, supra note 30, at 3.} Thus, in the last fifteen years, the United States massively expanded cooperation and international intelligence sharing agreements.\footnote{Id.} While the United States keeps many intelligence-based wins secret, some publicly available victories include the French and British provision of information to the United States that prevented airline attacks and facilitated arrests of high-level terrorists.\footnote{Walsh, supra note 124, at 53.}

One area in which intelligence provided by other states has proved particularly helpful is targeted killings.\footnote{Ravi Somaiya, Drone Strike Prompts Suits, Raising Fears for U.S. Allies, N.Y. TIMES, Jan. 30, 2013, http://www.nytimes.com/2013/01/31/world/drone-strike-lawsuit.raises-concerns-on-intelligence-sharing.html?_r=0.} Many European countries likely provide vital intelligence while refusing to officially acknowledge any participation in drone programs.\footnote{Id. (using Britain as an example); Martin Koch, Germany Accused of Aiding US Drone Strikes, DEUTSCHE WELLE (Oct. 22, 2013), http://www.dw.de/germany-accused-of-aiding-us-drone-strikes/a-17177593 (discussing possible German intelligence used for targeting data).} Such intelligence can be especially valuable because those countries may have fewer legal limits on collection
programs than the United States\textsuperscript{130} or closer connections to suspected terrorists.\textsuperscript{131} In one particularly notable example, the combined command of the CIA, M16, and Intelligence Service\textsuperscript{132} used Danish citizen Morten Storm as a double agent in the U.S. operation to help track and kill Anwar al-Aulaqi.\textsuperscript{133}

States may not wish to participate, or perhaps more likely, be known to participate, in such information provision if the actions taken on the basis of that information conflict with their understandings of IHL or human rights law. For instance, while Germany had increased intelligence cooperation with the United States after 9/11,\textsuperscript{134} the 2011 drone killing of a German citizen in Pakistan prompted Germany to limit their information sharing to “intelligence purposes only” that can be used exclusively to arrest suspects and preclude any information to be used for drone strikes.\textsuperscript{135} Denmark may soon engage in similar line drawing, as the Danish public has been intensely debating its role in targeted killing once the media broke the Morten Storm story.\textsuperscript{136}

States may also withhold intelligence from legal proceedings if they believe such proceedings are inconsistent with their understanding of IHL.

\textsuperscript{130} Somaiya, supra note 128 (noting that German and Dutch forces have less stringent limits on cooperating with local Afghani interpreters and thus run more “aggressive electronic interception operations”).

\textsuperscript{131} Holger Stark, Drone Killing Debate: Germany Limits Information Exchange with US Intelligence, SPIEGEL ONLINE INT’L (May 17, 2011, 3:01 PM), http://www.spiegel.de/international/germany/drone-killing-debate-germany-limits-information-exchange-with-us-intelligence-a-762873.html (“More than 30 Islamists from Germany are still in Waziristan. It is only a matter of time before another drone attack claims the lives of German citizens.”).


\textsuperscript{136} Singh & Scholes, supra note 133.
and human rights. For instance, Germany declared it would not provide evidence if the United States sought the death penalty in its criminal case against terrorist Zacharias Moussaoui.137 One could easily imagine similar withholdings for status determination hearings that occur at detention facilities like Guantanamo or Bagram, where allies object either to the potentially indefinite nature of detention or the conditions of confinement. While the absence of foreign intelligence information would not necessarily result in release, it could decrease the legitimacy of such proceedings.

D. Personal Access

During armed conflicts, the United States may seek access to individuals for a variety of reasons. The United States may wish, for instance, to acquire information via interrogations, monitoring conversations, or turning individuals with important connections into government agents.138 It may also wish to detain individuals for incapacitation, deterrence, and disruption purposes.139 Preventing individuals from returning to the battlefield, discouraging others from joining enemy operations, and delaying or thwarting particular plots can all yield tangible national security benefits.

Often, other states come into possession of such persons of interest. This could be because the individuals are located on their territory or because other states encounter them during military or other operations abroad. Even with strong extradition treaties, and certainly in their absence, states may have some discretion as to whether to relinquish persons to the United States.140 In some cases, their own domestic laws may even preclude them from handing over persons to states they find likely to commit illegal

138. Matthew C. Waxman, Administrative Detention of Terrorists: Why Detain, and Detain Whom? 3 J. NAT’L SEC. L. & POL’Y 1, 15 (2009) (“Detention can facilitate such intelligence collection through, most obviously, interrogation, but also through monitoring communications among prisoners or even ‘turning’ terrorist agents and sending them back out as government informants.”).
139. See id. at 14 (discussing the general goals of detention).
140. William Magnuson, The Domestic Politics of International Eradication, 52 VA. J. INT’L L. 839, 875 (2012) (“In the context of extradition, an important consideration is the amount of discretion that states reserve for themselves in the decision whether to extradite an individual.”); see Alan Clarke, Terrorism, Extradition, and the Death Penalty, 29 WM. MITCHELL L. REV. 783, 807 (2003).
acts against them.  

During the War on Terror, states have engaged in some high profile denials of access. As early as November 2001, Spain indicated that it would not extradite suspected terrorists to the United States because of perceived flaws in the military tribunal process. While some other European countries initially transferred prisoners, the allegations surrounding Guantanamo and Abu Gharib led many to refuse to hand over detainees to U.S. forces. In July 2010, the European Court of Human Rights also halted British extradition proceedings given concerns about U.S. detention facilities for suspected terrorists. In 2012, Iraq refused to extradite suspected terrorist Ali Musa Daqduq for a variety of reasons, including skepticism about the U.S. use of military commissions. And like the other categories, the United States may not even ask for access when it would be committed to seeking the death penalty or where Guantanamo would be an option. Such personal access problems may proliferate, as other states seem to be increasingly critical of U.S. detention practices.

141. Magnuson, supra note 140, at 885; Clarke, supra note 140, at 793–94 (reasoning that foreign nations which have abolished the death penalty are increasingly likely to refuse to extradite terrorist suspects to retentions countries).


143. Sibylle Scheipers, Closing Guantanamo: Is Europe Ready?, 51 SURVIVAL 5, 6 (2009). The British also suspended transfers to their new choice, the Afghan authorities, after suspected disappearances. Id. at 8.


IV. RESPONSES

As demonstrated above, IHL divergence can limit cooperation between the United States and other states and sometimes hinder U.S. national security goals. But just as other states can invoke particular consequences to encourage harmonization or distance itself from a specific U.S. IHL position, the United States itself has a range of actions to dampen potential conflicts arising from divergence and to avoid the harsher potential consequences.\textsuperscript{149} This section identifies some of the most prominent strategies, including: secrecy and obfuscation; precommitment and capital expenditures; harmonization; and decreased reliance on diverging states. Such strategies are not exhaustive, mutually exclusive, or equally likely to be deployed. But together these strategies present an important, and often unrecognized, piece of the future of the U.S. national security policy puzzle. While states and militaries have long contemplated the consequences of IHL divergence as a “core function of coalition and multi-national operational planning and execution,”\textsuperscript{150} scholars need to recognize and explore how IHL interacts with national security policy in a dynamic ecosystem where other actors sometimes exert a strong pull on the United States and the United States has a variety of potential responses in return. This is particularly true as the United States further refines its legal positions on a host of thorny IHL issues.\textsuperscript{151} In addition to noting the range of possible responses and providing some real world examples, this section offers some initial thoughts about the conditions under which the United States is likely to use them.

A. Minimization by Secrecy and Obfuscation

To secure the assistance or dampen the objections of other states, the United States can minimize the effects of divergence through secrecy or


149. Its strength likely makes it both more aggressive in advocating for its positions and more likely to succeed in doing so. Bradford & Posner, \textit{supra} note 3, at 8–9.

150. Email from Geoffrey S. Corn, Professor of Law and Presidential Research Professor, South Texas College of Law, to author (Professor Corn’s edits were sent in an attachment to the email, and the edits included this language) (on file with author).

151. Chesney, \textit{supra} note 13, at 170, 175, 177–78.
obfuscation. Lack of information may prevent strong opposition by foreign civil society, international institutions, and foreign government actors. The United States can attempt secrecy or obfuscation with or without the cooperation of others states. In some situations, the United States may keep its activities secret from the affected state itself to avoid disrupting the relationship and facing potential consequences. In other situations, it may obtain the permission or even the involvement of other states as some allies will overlook potential IHL divergence and provide assistance or cooperation if they anticipate no political blowback. By obscuring the involvement of other states in our national security activities, the United States can secure participation or assistance that would otherwise be difficult to maintain.\textsuperscript{152}

For instance, the United States has facilitated other states’ desire to downplay their role in drone strikes outside of hot battlefields.\textsuperscript{153} For years, the United States allowed the Pakistani government to publicly and angrily disavow drone strikes on its territory while it privately allowed them.\textsuperscript{154} The Pakistani government could maintain the position of IHL divergence for its domestic audience while actually maintaining a position consistent with the U.S. approach. Relatedly, despite the vital importance of the German air bases to the U.S. drone program, Germany explicitly asked the United States that its role not be mentioned,\textsuperscript{155} given the widespread public opposition to drone strikes.\textsuperscript{156} Accordingly, the U.S. government has repeatedly


\textsuperscript{153} See also Greg Miller, Brennan Speech Is First Obama Acknowledgement of Use of Armed Drones, WASH. POST, Apr. 30, 2012, http://www.washingtonpost.com/world/national-security/brennan-speech-is-first-obama-acknowledgement-of-use-of-armed-drones/2012/04/30/gIQAq7B4rT_story.html (explaining that the U.S. itself only recently acknowledged its own role in these strikes).

\textsuperscript{154} Miller & Woodward, supra note 152.

\textsuperscript{155} Markus Lüticke, Germany Shies Away from Comment on Possible Role in US Drone War, DEUTSCHE WELLE (June 1, 2013), http://www.dw.de/germany-shies-away-from-comment-on-possible-role-in-us-drone-war/a-16852606?maca=en-aa-pol-863-rdf (observing that “the German Foreign Ministry wrote to the US government asking . . . that Germany not be publicly mentioned as the new AFRICOM home as it would cause “unnecessary public debate””).

emphasized that drones are neither flown nor controlled from U.S. bases in Germany, implicitly backing Germany’s claim that “[i]t has no knowledge of such [drone] operations being planned or carried out by US armed forces.” Similarly, the United States willingly withheld specific information in the face of repeated refusals by the Danish government to discuss its role in the targeting of Anwar al-Aulaqi.

The extraordinary rendition program provides another example in which the United States deployed secrecy and obfuscation to secure and maintain the support of other states in activities that many abroad would view as violating IHL. Recent investigations reveal that as many as fifty-four countries assisted the United States by:

- hosting CIA prisons on their territories;
- detaining, interrogating, torturing, and abusing individuals;
- assisting in the capture and transport of detainees;
- permitting the use of domestic airspace and airports for secret flights transporting detainees;
- providing intelligence leading to the secret detention and extraordinary rendition of individuals;
- and interrogating individuals who were secretly being held in the custody of other governments.

The United States kept this information from foreign publics, and in many instances, from opposing factions in foreign governments, for quite some time.

While this strategy may succeed in the short-term, long-term secret keeping presents more substantial challenges. Between leakers, aggressive

157. Id.
161. See id. (stating that the U.S. has mostly refused to acknowledge its role in these secret renditions).
reporting, compelled disclosure via lawsuits or freedom of information acts, and pressure for voluntary disclosure, states may find its secrets revealed eventually. To give a few quick examples: WikiLeaks exposed memorandums documenting Pakistan’s support for drone strikes; the Washington Post leaked documents of secret prisons in Eastern Europe; government investigations in both Germany and Italy revealed the extent of U.S. extraordinary rendition programs; and strong investigative reporting revealed the use of a German base as the nerve center and the first port of call for all drone strikes. In turn, these leaks and reporting may trigger FOIA requests for even greater access to information. For instance, after Dane Morten Storm disclosed his role in the al-Aulaqi killing to a reporter, the Open Society Justice Initiative filed a formal request for all relevant information and records under Denmark’s Public Records Act and Public Administration Act. Lawsuits, both in the U.S. and abroad, may also unmask the involvement or acquiescence of other countries in the United States’ action that diverges from widely shared IHL norms. Examples include informational reports, public interest litigation, and civil compensation suits in Pakistan regarding drone strikes; criminal lawsuits

164. Miller & Woodward, supra note 152.
168. Wexler, supra note 11, at 19.
169. Singh & Scholes, supra note 133.
170. Open Society Justice Initiative, Time for Denmark to Acknowledge Its Role in CIA’s al-Awlaki Killing, supra note 159 (“They have been filed with the Danish Ministry of Justice, the Danish Security and Intelligence Service, the Ministry of Defence, the Danish Defence Intelligence Service, and the Danish Independent Police Complaints Authority.”).
171. Lesley Wexler, Foreign Drone Suits (draft on file with the author).
filed in the United Kingdom regarding the role of British intelligence officers in drone strikes;\(^{172}\) as well as the al-Aulaqi targeted killing\(^{173}\) and Jeppesen extraordinary rendition suits\(^{174}\) in the United States.\(^{175}\)

**B. Avoidance by Precommitment and Capital Expenditure**

The United States can also contract, persuade, or otherwise negotiate with other states to avoid the negative consequences of divergence. The United States can use legal precommitment to secure privileges, rights, or even IHL convergence before any particular divergence arises.\(^{176}\) In doing so, the United States can substantially raise the cost of other states’ refusal to cooperate, assist, or allow the United States to follow its preferred IHL approach.\(^{177}\) Even after potential divergence arises, the United States can attempt to convince other states of the legitimacy or at least permissibility of its IHL approach.\(^{178}\) The United States’ use of persuasion might come in the form of reasoned explanations of its position or in the form of carrots and sticks.\(^{179}\)

Bilateral or regional agreements to guarantee legal access are a powerful form of precommitment. For instance, the United States may negotiate extensive basing rights prior to the emergence of a particular IHL


\(^{175}\) Wexler, supra note 11, at 16–20.


\(^{177}\) Id. at 243.

\(^{178}\) Id. “[T]he Obama administration approved $10 million in emergency aid to help airlift French troops and provide midair refueling for French aircraft deployed to West Africa . . . .” U.S. Opens a Second Drone Base in Niger, HOMELAND SECURITY NEWS WIRE, Sept. 3, 2014, http://www.homelandsecuritynewswire.com/dr20140903-u-s-opens-a-second-drone-base-in-niger. If states refuse to cooperate or allow the U.S. to follow its preferred IHL approach, the U.S. could revoke similar funding. Id.

disagreement. The United States’ preexisting base rights in Germany have led German legal scholars to conclude that Germany can neither inspect nor shut down the bases where alleged drone activity occurs. Of course, if it wanted to pursue prosecutions, Germany could scrap the governing Status of Forces Agreement, but the political costs of such action are so high that Germany’s response may be limited to a closed-door protest. One might view extradition treaties in the same manner. Such treaties facilitate the exchange of detainees during the War on Terror when states might be less likely to transfer persons if left to make policy-based, case-by-case decisions.

The United States can also avoid the consequences of divergence by convincing other states that they should adopt its perspective on the use of force and its interpretations of IHL, something it does quite often. Even when the United States does not ratify a treaty or have a specific agreement with a state, it can work behind the scenes to encourage sympathetic understandings of IHL. For API, the United States successfully lobbied its allies to adopt a “fairly consistent body of interpretative statements and reservations, reflecting some of [its] concerns,” including a narrow interpretation of Article 1(4). Thus, even though the United States and its allies might appear to diverge based on treaty membership, the United States locked in a favorable approach to conflict classification. Similarly, WikiLeaks cables revealed the United States engaged in “high-level . . . intervention to ensure that the [cluster munitions] treaty did not harm our ability to operate with NATO allies,” and in particular, suggested favorable interpretations of Article 21’s assistance and cooperation provision

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180. *US Operates Global Drone War from German Base—Ex-Pilot*, supra note 156 (concluding that Germany cannot inspect or close down U.S. bases without violating existing agreements); Pöhle, *supra* note 167 (noting that “[t]he deployment of US troops in Germany has been regulated since the 1950s with the NATO Status of Forces Agreement. Therefore ‘military forces and civilian personnel are allowed to take required measures for the satisfactory fulfillment of its defense obligations on the provided premises.’ And this applies to drone attacks according to US legal interpretation.”).


182. *Id.*


to allies. The United States also uses persuasion in on-the-ground situations, such as when it convinced its NATO allies of the lawfulness of the targeting of Afghan narco-traffickers with links to the Taliban.

The United States may deploy positive or negative incentives to persuade other states to cooperate or not impede United States’ action. In recent years, the United States has demonstrated its willingness to use money as both a carrot and stick to get what it wants from potential allies in the War on Terror. For instance, the United States recently offered Turkey a six billion dollar aid package to overcome its objection to basing and overflight rights. On the flip side, Pakistan’s poor credibility as a national security ally to the United States has led to a major decline in aid requests for Pakistan. Relatedly, it may also engage in a painful tit-for-tat retaliation strategy. During the course of litigation in British courts, the United States threatened to cut off intelligence sharing if Britain disclosed evidence of torture of a British resident released from Guantanamo. As experts suggest, European countries need the United States’ intelligence as much as it needs theirs, and such a threat imposes a risk of real costs.

All that said, precommitments, negotiations, and persuasion sometimes fail, even for a state as powerful and wealthy as the United States. The decision to seek precommitments may require foresight and negotiating leverage that the United States does not always possess. The United States may not know ex ante its position on IHL questions or whether it is going to ratify a specific treaty, and it may not wish to expend the negotiating capital for hypothetical conflicts. Thus, first hand reports suggest that the United States did not negotiate regarding interoperability prior to the opening of the

193. Stark, supra note 131.

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Landmine Ban for ratification.\textsuperscript{194} Even when it attempts negotiations, it may fail. For example, rather than abandon cluster munitions entirely, the United States drafted a Protocol to the Convention on Conventional Weapons consistent with its legal interpretation, but it never gathered sufficient support, and the Protocol did not enter into force.\textsuperscript{195} Even if early negotiation and persuasion succeed, significant foreign government or civil society opposition in response to a highly salient divergence may allow other states to abandon precommitments, force negotiations, or both. Iraq’s 2009 renegotiation of the Status of Forces Agreement, and in particular, provisions over criminal jurisdiction, might be an example.\textsuperscript{196} And softening negotiations with even large amounts of money may fail to persuade, as when Turkey denied basing rights in response to a generous aid package.\textsuperscript{197}

C. Harmonization Through Law or Policy

The hypothesized, threatened, or imposed constraints of other states might also encourage the United States to harmonize its IHL behavior with needed allies. Such harmonization might occur via case-by-case deference, making specific deviations from its preferred course of action. The United States might also take a more substantial step by adopting other countries’ IHL approach as a matter of policy. Most significantly, it could change domestic law, join treaties to more fully align itself with others’ stance on IHL, or both.

Individual assurances that the United States will not seek the death penalty in cases involving detainees provides an example of case-by-case deference to its allies’ belief that human rights jurisprudence still applies during armed conflict. In the 1989 Soering case, the European Court of Human Rights concluded members could not extradite individuals facing the

\textsuperscript{194} STUART MASLEN, ANTI-PERSONNEL MINES UNDER HUMANITARIAN LAW: A VIEW FROM THE VANISHING POINT 115 (2001).

\textsuperscript{195} United States Country Report, supra note 50.


\textsuperscript{197} US Withdraws Six-billion-dollar Aid for Turkey, MIDDLE EAST ONLINE (Mar. 19, 2003), http://www.middle-east-online.com/english/?id=4730.
death penalty to the United States because the individual’s likelihood of experiencing the death row phenomena would be a violation of the Torture Convention.\textsuperscript{198} Though the United States still maintains the death penalty, it has responded to \textit{Soering} by offering individual assurances to countries that it will not seek the death penalty in particular cases in order to gain access to War on Terror detainees.\textsuperscript{199}

As a matter of policy, John Brennan’s 2011 counterterrorism speech outlining limits on the U.S.’s targeted killing program presents a particularly striking instance of harmonization.\textsuperscript{200} While the Obama Administration defended the legality of its broad interpretation of both the battlefield and permissible targets, it also announced that it would voluntarily limit targeted killings to “those cases where officials believe it is necessary to prevent an imminent attack, \textit{in part out of respect for its allies’ sensibilities and to make cooperation easier}.”\textsuperscript{201} While other reasons likely influenced such a decision, the speech offers persuasive evidence that the United States sometimes significantly alters its behavior out of deference to its allies’ perspectives on IHL.\textsuperscript{202} By making such a decision as a matter of policy, the United States maintains a flexible legal doctrine, but does much to allay its allies’ specific concerns and facilitate cooperation.\textsuperscript{203}

The Obama Administration’s new policies on anti-personnel landmines represent another instance of harmonization. In June 2014, the Obama Administration announced that the United States will cease production and acquisition of anti-personnel landmines along with allowing existing stockpiles to expire.\textsuperscript{204} By September 2014, the Obama administration further committed that the United States will conform its behavior to “the

\begin{flushleft}
\textsuperscript{200} See Brennan, supra note 12.
\textsuperscript{201} Dworkin, supra note 17 (emphasis added).
\textsuperscript{202} Id. While appeasing its allies is not the only reason for the U.S.’s limiting its targeting killing program, it does recognize that cooperation with its allies is necessary and the convergence of legal practices is paramount to such cooperation. \textit{Id}.
\textsuperscript{203} Meron, supra note 26, at 681. Relatedly, during the Gulf War, the United States voluntarily followed most of API in order to more easily coordinate rules of engagement with its allies. \textit{Id}.
\end{flushleft}
key requirements” of the landmine ban, including “not assist[ing], encourag[ing] or induc[ing] anyone outside the Korean Peninsula to engage in activity prohibited by the Ottawa Convention” as well as destroying existing stockpiles except those needed for the defense of Korea.\textsuperscript{205} The United States has also recently bound itself to a new legal interpretation of detention policy, which harmonized its position with that of many of its allies.\textsuperscript{206} In the fact sheet to Executive Order 13567, the Obama Administration announced that it would apply Article 75 from API out of a sense of legal obligation.\textsuperscript{207} While this commitment may not change the actual treatment of many detainees,\textsuperscript{208} it will likely increase the integration of international human rights law into “the U.S. domestic law of armed conflict” and enhance its legitimacy in international circles.\textsuperscript{209} The United States may also move in the direction of compliance without ratifying a new treaty or binding itself to a new legal interpretation. In the same fact sheet, the Obama Administration also announced its support for APII and its detention practices during non-international armed conflicts as a discretionary matter and encouraged the Senate to ratify APII.\textsuperscript{210} Such an announcement does not accept APII as customary international law, but it does signal that its provisions will influence executive policy.\textsuperscript{211} In another context, while the United States is unlikely to join the Cluster Munitions Ban, the Department of Defense announced a policy under which it would phase out cluster munitions with a greater than 1% unexploded ordnance rate by 2018.\textsuperscript{212} This policy moves the United States’ behavior into accordance

\begin{itemize}
\item \textsuperscript{208} Nachbar, \textit{supra} note 206, at 204 (noting the Fact Sheet only applies at Guantanamo and that many of the procedures in Article 75 are similar to existing practices).
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Press Release, \textit{supra} note 207; \textit{see} Nachbar, \textit{supra} note 206, at 207.
\item \textsuperscript{211} Nachbar, \textit{supra} note 206, at 208.
\item \textsuperscript{212} \textit{See Memorandum for the Sec’y of the Military Dep’ts, Subject DoD Policy on Cluster Munitions and Unintended Harm to Civilians} (June 19, 2008), \textit{available at} www.defense.gov/news/d20080709empolicy.pdf.
\end{itemize}
with the policy goals of the Cluster Munitions Ban.\textsuperscript{213}

While harmonization is often an option, the United States might view it as too costly in many situations. Ostensibly, the United States’ preferences generally give the perception of serving national interest. Such determinations may sometimes be incorrect as a matter of fact, but it seems fair to assume some degree of rational self-interest here. Thus, a move to harmonize seems particularly unlikely when the perceived costs of change are high. Factors to consider might include: the salience, immediacy, significance of risk, or all three; the lack of fungible alternative approaches in terms of desired outcomes; intense domestic preferences for the status quo; weak or divided foreign preferences for alternatives; the low need for cooperation; and the feasibility of secrecy or obfuscation.

\textbf{D. Decreased Reliance on Diverging Parties}

Finally, the United States may instead decide to maintain its IHL interpretations and behavior, but lessen or eliminate other states’ involvement where the government or public opposes the activity. In some instances this could be accomplished through pre-planning of joint operations with task organization.\textsuperscript{214} This entails the allocation of forces and determining the command and support relationships. In so doing, the United States can account for national caveats and the political goals of other participants in the operation.\textsuperscript{215} The United States could instead choose to cooperate with different state partners with whom it has no or lesser divergence. Lastly, the United States could choose to “go it alone” and eliminate the involvement of other states entirely.

Sometimes the United States can access individuals or information outside the U.S.’s physical territory even without the involvement of reluctant states. In order to forgo the assistance or cooperation of other countries without giving up particular activities, the United States may need


\textsuperscript{215} See U.S. DEP’T OF ARMY, \textit{supra} note 93, at 1–2.
to invest in upgrading technological or intelligence capabilities to render permission for access to physical territory less important. For instance, the United States may be developing capabilities like extended-in-air refueling capacities or enable naval platforms to launch drone strikes to bypass the need for nearby basing or overflight rights. The U.S. may also encourage individuals to leave protected physical territories as when it lured an extraditable Fawaz Yunis from Cyprus onto a U.S. yacht in international waters.

In other situations, going it alone may entail perceived or actual violations of other states’ sovereignty. For example, the United States did not receive state permission or cooperation to militarily extract Manuel Noriega from Panama; seize Benghazi suspect Ahmed Abu Katallah from Libya; forcibly remove Humberto Alvarez-Machain from Mexico; or conduct the Osama Bin Laden raid in Pakistan.

Depending on geographic and technical needs, the United States may not be able to go it alone, but may be able to shift activity to states that share or are sufficiently indifferent to its IHL interpretations. The services of various countries may not be perfectly fungible, but acceptable substitutes sometimes exist, and if need be, the U.S. can fund capacity building. To

216. Zenko, supra note 99.
217. Id. (noting that the U.S. currently lacks this capacity, but may develop it over time).
take one rather extensive operation, after fielding strong European IHL and human rights objections to indefinite detention, extraordinary rendition, and coercive interrogation, the United States eliminated the direct participation of European intelligence and law enforcement; shuttered Eastern European secret prisons; and stopped using European airports for suspect transport.\textsuperscript{224} While these changes raised the costs of treating suspects in its preferred manner,\textsuperscript{225} the United States seems to have shifted the detention practices to U.S. navy ships and secret facilities with more amenable state partners like Somalia and Djibouti.\textsuperscript{226} And on the front end, while many European states were reluctant to share intelligence or basing rights for drone strikes, the United States secured intelligence and overflight rights for drone strikes in countries like Yemen, Somalia, and Afghanistan\textsuperscript{227} and basing rights in countries like Djibouti, Nigeria, Ethiopia, and the Seychelles.\textsuperscript{228} Similarly, the United States’ accession to other countries’ requests to remove stored cluster munitions in their territory\textsuperscript{229} was made significantly easier by the continued ability to stockpile in Afghanistan, Germany, Italy, Japan, Spain, Israel, and Qatar.\textsuperscript{230}

The most notable limits on going it alone or choosing second best partners emerge when legitimacy is important, state capacity is not fungible, and such action endangers other national security or political goals. During armed conflict, as the number of states willing to work with the United States declines, the appearance of consensus and moral condemnation of the enemy also declines. Moving a stockpile of cluster munitions from Norway to Spain may be fairly trivial, but in contrast, the absence of active European participation in detention or drone strikes may send a global message about U.S. behavior. Similarly, the choice of second-best partners who themselves engage in questionable IHL or human rights behavior may hamper legitimacy on those issues as well.\textsuperscript{231} In addition, not all states possess the

\begin{itemize}
\item \textsuperscript{224} Walsh, supra note 124, at 55–56.
\item \textsuperscript{225} Id. at 56.
\item \textsuperscript{226} Open Society Justice Initiative, Time for Denmark to Acknowledge Its Role in CIA’s al-Awlaki Killing, supra note 159, at 21.
\item \textsuperscript{227} Aaron Stein, The First Rule of Drone Club, FOREIGN POL’Y (Feb. 25, 2013), http://www.foreignpolicy.com/articles/2013/02/25/the_first_rule_of_drone_club.
\item \textsuperscript{228} Lüticke, supra note 155.
\item \textsuperscript{229} United States Country Report, supra note 50.
\item \textsuperscript{230} Major Findings, supra note 83.
\item \textsuperscript{231} Joshua Kucera, Where in Central Asia Would the U.S. Put a Drone Base?, EURASIANET.ORG (Feb. 17, 2014, 12:52 AM), http://www.eurasianet.org/node/68053; Miles A. Pomper, Building Anti-
\end{itemize}
same capacities to assist or permit us to achieve our national security goals. For instance, the United States does not currently believe that it can go it alone on counterterrorism intelligence, and states perfectly amenable to the U.S.’s IHL interpretations may lack or have lesser capacities. The decision to go it alone can also risk national security goals. These risks include revealing the existence of new technological capacities and running the risk of reverse engineering. Similarly, violating other states’ sovereignty by conducting intelligence and military operations risks straining important relationships and provoking retaliatory actions like the downing of aircrafts and crews, like what happened to the U2 flying over the Soviet Union in 1960 and a drone flying over Iran in 2011.

V. CONCLUSION

While the United States’ approach to IHL shapes national security policy, this Essay has shown how our allies’ approach to IHL can and will continue to influence our national security policy as well. Recent historical experience demonstrates that neither strong claims about American exceptionalism nor strong claims about international law convergence adequately capture the landscape in which IHL and national security decisions interact. Rather, as new conflicts, technologies, strategies, and perspectives emerge, states engage International Law from different starting places and preferences. The possibility of cooperation in military activities provides states with an opportunity to encounter and determine how to accommodate those varying perspectives. When differences are stark enough, this Essay has shown that our allies have significant sets of tools to avoid complicity in perceived illegality and encourage IHL convergence. Equally important to note, the United States also has a full toolbox to avoid

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232. Anna N. Katherine et al., Challenges to International Counterterrorism Intelligence Sharing, 3 GLOBAL SECURITY STUD. 76, 76 (2012).
233. For instance, our European allies may have much more significant capacity to collect human intelligence and provide more reliable information. Walsh, supra note 124, at 53, 62.
234. Zenko, supra note 99 (“Any U.S. operations in North Africa would have to be of the highest priority to justify the potential revelation of cutting-edge weapons.”).
235. Id.
236. Id.
divergence or its consequences. A serious discussion of IHL and national security policy must include an awareness of these various tools.

This Essay provides a brief descriptive introduction to the existence of IHL convergence and its potential consequences, but much work remains to be done. For instance, what explains the prevalence of divergence between certain states, and do predictable patterns exist? What can states do to effectively encourage acceptance of and compliance with their perspectives? From a more global perspective, should states seek to create mechanisms encouraging convergence, or might the benefits of divergence be undertheorized and undervalued in this setting? This Essay provides some introductory thoughts on some of these questions, and I look forward to developing the answers in future works.