

CAPTURED IN THE NEWS: PRISONERS' WORDS AND IMAGES AS LAWFUL WEAPONS OF WAR

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INTRODUCTION

Ukraine in 2022, like many warring nations before it, made public use of media of Russian prisoners in its custody, with some detainees speaking on camera to express their reality of the current conflict.¹

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1. Ukrainian officials have allowed journalists access to some detention centers, permitting interviews and videotaping of Russian detainees; some videos reveal

This practice has garnered criticism, with the most serious from the International Committee of the Red Cross (ICRC). Not only has the ICRC declared such practice an unlawful violation of the Geneva Conventions, it has also exerted pressure on social media companies to prevent posting of such content on their platforms. This dangerous ICRC advocacy has occurred despite that such practice is lawful (and despite the fact that social media companies are not bound by the Conventions).²

This article demonstrates why the ICRC's legal position regarding public dissemination of wartime captives is wrong, and instead constitutes advocacy of the ICRC's desired *lex ferenda*. It also argues that such an unsound and inaccurate legal interpretation threatens, at least in theory, the efficacy of the entire body of the law of war, the legal regime the ICRC claims Ukraine to have contravened. The following analysis underscores that non-humiliating media (photographs, videos, audio recordings) of wartime detainees constitute a relatively long-standing method of lawful cognitive warfare that remain lawful today, even if detainees are identifiable within said media.

This tactic, and its legality, are particularly important for the government of Ukraine, given that Ukraine is fighting an existential, defensive war against a brutal and powerful rogue state that battles vociferously on the propaganda (influence) front.³ Not only does Ukraine's adherence to the law—specifically, the legal regime that governs the conduct of hostilities and outlines the protections owed to those caught up in battle—directly affect Ukrainian legitimacy and soft power. This adherence and hence soft power translate into increasing (or decreasing, if legitimacy is weakened) hard power in the long run, as explained below. Hence legal criticism, particularly by the preeminent ICRC, of Ukraine's means and methods of war is no trivial matter.

In even greater context, the illegal war Russia is waging against Ukraine at the time of this article is not simply a war of survival as a nation-state for Ukraine. It is also a frontal assault against the rules-based international legal order. Specifically, Russia launched this armed conflict in 2022 (continuing illegal conflict that began in 2014) in direct contravention of the peremptory norm against use of force, as

blurred-out detainee faces making them unidentifiable, and others depict identifiable detainees. *See infra* Part II.

2. *See infra* Part II.

3. *See infra* Part I.

well as in clear violation of the United Nations Charter.⁴ In the same vein of unlawfulness, Russia's operational and tactical pursuit of this unlawful war of aggression echoes the conflict's overarching *jus ad bellum* illegality: Russia is fighting an illegal war by frequently using illegal methods, ignoring some of the most basic precepts of the laws and customs of war.⁵ Perpetrating atrocity crimes that range from widespread direct missile attacks against civilians to torture and extrajudicial killings of detainees, Russia continues to unapologetically disregard applicable norms, treaties, customary law, and morality itself.⁶ The context for this article is Russia's illegal war, illegally fought, in part to destroy the centrality of legality itself.

To reiterate, it is clear from Russia's conduct that for Ukraine and the international community, this is a war not simply for the country's existence as an independent nation-state (as serious as that struggle is). It is a conflict over the continued viability of the rules-based international legal order in general.⁷ In this clash, Ukraine stands on the other side of Russia's disregard of the rule of law, both figuratively and literally. Ukraine has, with mounting success, successfully parlayed its tragic and very real status as the victim of Russian unlawful aggression into international moral support. Its legitimacy as the country in the moral right undergirds the enormous, and enormously vital, tangible

4. See James A. Green, Christian Henderson & Tom Ruys, *Russia's Attack on Ukraine and the Jus Ad Bellum*, 9 J. ON USE OF FORCE & INT'L L. 4–30 (2022).

5. See Adil Ahmad Haque, *Symposium on Ukraine and the International Order: An Unlawful War*, 116 AM. J. INT'L L. 155 (2022) (clarifying the war's illegality). See generally Green, et al., *supra* note 4 (discussing Russia's illegal acts of aggression); *infra* Part III.

6. See Press Release, UN Hum. Rts. Off. of the High Comm'r, UN Commission has Found an Array of War Crimes, Violations of Human Rights and International Humanitarian Law have been Committed in Ukraine, U.N. Press Release A/77/553 (Oct. 18, 2022), <https://www.ohchr.org/en/press-releases/2022/10/un-commission-has-found-array-war-crimes-violations-human-rights-and>; Media Note, U.S. Dep't of State, Accountability for War Crimes and Other Atrocities in Ukraine: Recent Reporting on Unjust Detentions and Disappearances in Kherson Oblast, (Nov. 18, 2022), <https://www.state.gov/accountability-for-war-crimes-and-other-atrocities-in-ukraine-recent-reporting-on-unjust-detentions-and-disappearances-in-kherson-oblast/>; Tim Mak, *There have been 50,000 Alleged War Crimes in Ukraine. We Worked to Solve One*, NAT'L PUB. RADIO (Dec. 10, 2022, 9:18 AM), <https://www.npr.org/2022/12/10/1138710652/russian-war-crimes-ukraine-investigation>.

7. See Oona A. Hathaway, *International Law Goes to War in Ukraine: The Legal Pushback to Russia's Invasion*, FOREIGN AFFS. (Mar. 15, 2022), <https://www.foreignaffairs.com/articles/ukraine/2022-03-15/international-law-goes-war-ukraine>; Timothy Snyder, *Ukraine Holds the Future: The War Between Democracy and Nihilism*, FOREIGN AFFS. (Sep. Oct. 2022), <https://www.foreignaffairs.com/ukraine/ukraine-war-democracy-nihilism-timothy-snyder>.

logistical and monetary international support provided to it— without which Ukraine cannot survive.⁸

However, the international flow of munitions and funding that has bolstered Ukraine’s chances for short and long-term battlefield success is not provided solely due to Ukraine’s victim status under the United Nations Charter and the *jus ad bellum* in general. International support from the European Union and many individual nations not only reinforces international law’s prohibition against the use of force for territorial gain,⁹ a prohibition that Russia flagrantly violated when it launched the current phase of this conflict (echoing its 2014 violations).¹⁰

This support is also tied to Ukraine’s adherence to and hence support of the rule of law in other areas, such as Ukraine’s own conduct on the battlefield and its respect for the legal regime governing that battlefield and prisoners captured on it. Indeed, Ukraine is using its own adherence to that law to win both success on the battlefield and strategic success in the legitimacy realm. This is natural, given that Ukraine’s legitimacy as a worthy recipient of moral and tangible

8. See Jonathon Masters & Will Merrow, *How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts*, COUNCIL ON FOREIGN RELS. (Dec. 16, 2022, 3:57 PM), <https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts> (highlighting the vast amounts of Western aid provided to Ukraine); Jeffrey Cimmino & Shelby Magid, *Tanks Are Vital but Ukraine Will Need Much More to Defeat Putin’s Russia*, ATL. COUNCIL (Jan. 25, 2023), <https://www.atlantic-council.org/blogs/ukrainealert/tanks-are-vital-but-ukraine-will-need-much-more-to-defeat-putins-russia/> (noting the criticality of Western military aid to Ukraine).

9. U.N. Charter art. 2, ¶ 4. The general prohibition against the use of force on the global stage is both a conventional norm as well as a rule of customary international law and a peremptory norm. The United Nations Charter, Article 2, paragraph 4 provides, “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” *Id.*; see *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 187–190 (June 27); see generally Oliver Dörr, *Use of Force, Prohibition of*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. (Oxford Univ. Press ed. 2023) (tracing the history and evolution of this prohibition); see also *infra* Part II.

10. See John B. Bellinger III, *How Russia’s Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELS. (Feb. 28, 2022, 2:25 PM), <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law> (Russia also violated the international law prohibition on use of force in 2014 when it invaded and annexed Crimea); Green, et al., *supra* note 4, at 4–30; Claus Kress, *On the Principle of Non-Use of Force in Current International Law*, JUST SEC. (Sept. 30, 2019), <https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/>.

support is largely based on its adherence to law on all fronts.¹¹ Given the inherent link between law and legitimacy, Ukraine is being judged by the world for its legal commitments, and in particular for purposes of this article, it is being judged for its dedication to the legal rules regulating the battlefield: the *jus in bello*, also known as the law of armed conflict, law (or laws) of war, and international humanitarian law.¹²

In this arena, the international community observes Russia's war crimes with horror and routinely condemns them, while looking to Ukraine for compliance. Compliance strengthens the legitimacy of Ukraine's armed resistance, which engenders greater international moral and logistical support. Ukraine's adherence, contrasted with Russia's gross violations of the law of armed conflict, further strengthens Ukraine's standing as the "must win" party to the conflict in the eyes of most of the international community.

Furthermore, Ukraine's adherence to the *jus in bello* reinforces the efficacy and value of that legal paradigm itself. Simply put, if Ukraine can achieve success while following the law, the law itself is strengthened in terms of legitimacy and global acceptance. If a party fighting an enemy that blatantly disregards the laws of war wins while adhering to that same body of law, the law wins. Importantly, the greater the acceptance of this body of law *writ large*, the greater the

11. See generally Joshua Rudolph & Norman L. Eisen, *Ukraine's Anti-Corruption Fight Can Overcome US Skeptics*, JUST SEC. (Nov. 10, 2022), <https://www.just-security.org/84076/ukraines-anti-corruption-fight-can-overcome-us-skeptics/> (Ukraine's ability to keep domestic corruption in check is also critical to maintaining international support.); Joshua Rudolph & Norman L. Eisen, *Ukrainian Recovery Funding Must be Tied to Anti-Corruption*, BROOKINGS (Oct. 24, 2022), <https://www.brookings.edu/blog/up-front/2022/10/24/ukrainian-recovery-funding-must-be-tied-to-anti-corruption/>; Edward Wong & Michael Crowley, *Ukraine Corruption Scandal Stokes Long-Standing Aid Concerns in U.S.*, SEATTLE TIMES (Jan. 27, 2023, 12:25 PM), <https://www.seattletimes.com/nation-world/ukraine-corruption-scandal-stokes-long-standing-aid-concerns-in-u-s/> (describing international concern regarding incidents of corruption within Ukrainian government).

12. The law of armed conflict—the *jus in bello*, or the laws and customs of war—is also known as international humanitarian law or the law of war as well as the laws and customs of war. This article primarily uses law of armed conflict or law of war to refer to the *jus in bello*, that body of law regulating the means and methods of war and protection of those caught up in war, as those are the labels most often employed within U.S. military doctrine (and the label "international humanitarian law" in "law washing" by diminishing the death and destruction aspect of military necessity). See generally U.S. DEP'T OF DEF., LAW OF WAR MANUAL (2016) [hereinafter DOD LAW OF WAR MANUAL] (acknowledging these terms though including within "the law of war" both *jus ad bellum* and the *jus in bello*).

world moves toward reducing suffering in war, which is the primary goal of the operative legal regime, the *jus in bello*'s laws of war.¹³

Therefore, all instances of Ukraine's non-compliance with the *jus in bello* (the law of armed conflict as primarily referred to in this article) are potentially dangerous, and on many levels. Violations risk delegitimizing Ukraine in the eyes of their international supporters, thus risking the critical supply of logistical and monetary assistance. Non-compliance, at least systemic non-compliance, risks Ukraine's chances of strategic and tactical success in the war, as both are dependent on international support.¹⁴ Thus law of war violations jeopardize the rule of law itself, given the nature of Ukraine's defensive war against Russia as a war in defense of international law and the post-World War II international order it supports.

Hence any claim that Ukraine is violating the law of armed conflict must be carefully examined and considered. It bears noting that the law of armed conflict anticipates that violations of its rules will always occur in war.¹⁵ While this law requires states to work to prevent such violations, it recognizes that violations will occur, and therefore imposes obligations to suppress and punish the perpetrators.¹⁶ As they are for all states at war, the accountability measures Ukraine takes in response to inevitable law of war violations committed by its forces is a strong indicator of its commitment to the *jus in bello* and the international rules-based order this legal regime is part of. Also, accountability itself concomitantly manifests compliance with the law, given that accountability is required by the law of armed conflict.

Yet before accountability can be evaluated, the existence of violations must be established, and this is where this article finds room

13. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 3, ¶¶ 226, 443 (July 8) (separate opinion by Weeramantry, J.) (emphasizing that the development of the laws and customs of war "represented the effort of the human conscience to mitigate in some measure the brutalities and dreadful sufferings of war.").

14. Violations of the law of armed conflict, including serious violations that are considered war crimes, are always committed in war. However, both the systematic nature of such violations (implying accepted policy endorsed by senior leadership) as well as the extent of accountability for such violations (investigations and appropriate prosecutions constitute obligations of the law of armed conflict) indicate lack of commitment to the *jus in bello* and in general to the rule of law; See generally Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309, 320–21 (2020) (describing vital need for accountability as means of ensuring general compliance).

15. See *id.* at 319–21 (explaining the law of armed conflict's prevent, suppress, and punish accountability trifecta).

16. See *id.* at 319.

for greater consideration and analysis. The credibility of allegations of violations of the law of armed conflict must be critically assessed, because almost all allegations of violations of the law of armed conflict are delegitimizing, particularly if the violations seem to constitute state policy (versus action by rogue individual state actors). Because of such delegitimizing effect, lodging allegations of war crimes and other law of war violations can even constitute a cheap means of war itself—false claims of war crimes are lobbed as weapons of lawfare in efforts to weaken legitimacy of the party claimed to be in violation.¹⁷

Due to these dynamics, when the ICRC or others claim that Ukraine is violating a particular law of armed conflict provision, Ukraine's legitimacy is potentially harmed. This has follow-on detrimental consequences for international support, thus potentially jeopardizing Ukraine's long-term success. Hence such claims must be seriously examined and challenged when appropriate. Furthermore, claims of illegality bring potentially negative ramifications for the health and efficacy of the legal paradigm itself, particularly if the supposed rule at issue is being applied in a way that does not comport with the international community's moral (and common) sense. Finally, if a rule of the law of armed conflict is interpreted as unnecessarily hamstringing a party at war from achieving legitimate ends, it will likely be disregarded, thus discrediting the entire legal paradigm.

Specifically, as mentioned above, this article explores the claim that Ukraine is violating the law of armed conflict by misusing its war captives in the information warfare component of its armed conflict with Russia through public dissemination, largely through social media, of prisoner pictures, statements, and videos.¹⁸ It analyzes whether, for example, the legality of Ukraine's hypothetical publication of a video of a Russian prisoner of war's voluntary statement urging his fellow Russians to disbelieve Russian propaganda about the war.

This article explains the law of armed conflict's awkward regulation in this area by analyzing the competing interpretations of the specific Geneva Convention treaty provision dealing with protecting prisoners against public curiosity.¹⁹ It reveals an ICRC approach that

17. See generally Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. INT'L L. 255, 255–77 (2010); cf. Sergei Kuznetsov, *Ukraine to Probe POWs Dispute as War Crimes Blame Game Erupts Again*, POLITICO (Nov. 21, 2022, 3:15 PM), <https://www.politico.eu/article/ukraine-russia-probe-shooting-war-crimes-blame-game-volodymyr-zelenskyy/>.

18. See *infra* Part II.B.

19. See *infra* Part II.B.

prophylactically prohibits the publication of all detainee images and statements, or at least all images and statements in which the prisoner is identifiable; the ICRC has inconsistently articulated both interpretations. This article explains why such an expression of the *lex lata* is wrong, and questions whether such an expansive interpretation—one based on a desire for the state of the law to be something that it is not—delegitimizes the legal regime itself.²⁰

This article conducts this analysis by first contextualizing the information operations environment of the legal rules regarding a detaining power's public sharing of detainee images and statements. Part I briefly highlights the growing criticality of propaganda in war due to technological advancement such as the spread of social media. It notes the legitimacy effects of influencing public opinion and places wartime propaganda efforts into a cognitive warfare analytical framework. It then sketches the historical practice of using enemy prisoners as tools of cognitive warfare through the ancient practice of public parades.

Part II analyzes the law of armed conflict treaty provision most relevant to an assessment of the legality of warring States' use of media of wartime detainees, focusing on the use of Russian prisoners of war by Ukraine in its information operations campaigns. It highlights the ICRC's preeminent role regarding the Geneva Conventions and the law of armed conflict in general, in order to show why ICRC attempts to change the meaning of treaty provisions must be carefully monitored and challenged. It then analyzes why the current ICRC approach to publication of detainee photos is an articulation of the *lex ferenda*, being marketed to the world as the *lex lata*. This article concludes by highlighting that this analysis implicates the balance between military necessity and humanity that forms the foundational crux of the law of armed conflict and should be challenged.

I. PRISONERS AT WAR, NOT JUST OF WAR: WEAPONS OF LEGITIMACY IN THE COGNITIVE BATTLESPACE

*"We need to remember what it means to say that compliance with international law legitimates."*²¹

20. See *infra* Part II.B.

21. DAVID KENNEDY, OF WAR AND LAW 8 (2006) ("It means, of course, that killing maiming, humiliating, wounding people is legally privileged, authorized, permitted, and justified"). Cf. David Kennedy, *Modern War and Modern Law*, 12

As highlighted above, the Russian war of aggression against Ukraine is an existential contest for Ukraine, and for the international legal order. It is also a war being about and through law,²² and one in which the law itself is employed as a weapon to weaken one's adversary.²³ As such, it is a war that demands serious evaluation of relevant law of armed conflict rules, to ensure that leading interpretations make sense in light of the object and purpose of the law and in recognition that the virtual battle for legitimacy often turns on perceived legality and illegality of action.

Besides setting the geopolitical context as done in above in this article's introduction, this article starts such an evaluation by sketching the relevant doctrinal and social-cognitive landscape upon which these battles over meaning are fought—where information warfare and lawfare have been and are being waged.²⁴ The legality and morality of, as this article's leading example, Ukraine allowing videos of willing Russian prisoners of war in their custody to be shared on social media can only be fully understood in view of Ukraine's existential struggle against an aggressor state at a time when the battle for legitimacy is both crucial for battlefield and strategic success, a battle that is on steroids due to powerful communications technology and savviness regarding the manipulation of popular opinion during war.²⁵

INT'L LEGAL THEORY 55, 61 (2006) ("International law has become the metric for debating the legitimacy of military action.") [hereinafter *Modern War*].

22. See *Modern War*, *supra* note 21, at 58 ("Law has infiltrated the military profession, and become, for parties on all sides of even the most asymmetric confrontations, a political and ethical vocabulary for marking legitimate power and justifiable death.").

23. See Mark Voyger, *Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations*, 4 J. ON BALTIC SEC. 1, 1–8 (2018) (summarizing Russia's use of law as part of its hegemonic history and current war against Ukraine while noting that, "Russian lawfare is the domain that intertwines with, and supports, Russian information warfare, thus providing the (quasi)-legal justification for Russia's propaganda claims and aggressive actions.").

24. See, e.g., Rand Waltzman, *The Role of Today's VRE and Considerations for Cognitive Warfare*, NATO (Nov. 18, 2022), <https://www.act.nato.int/articles/cognitive-warfare-considerations> (describing the cognitive space).

25. See Eric De Brabandere, *Propaganda*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶ 1 (2019) (defining propaganda as "a method of communication, by State organs or individuals, aimed at influencing and manipulating the behaviour of people in a certain predefined way.").

A. The Cognitive Battlespace: Information, Narrative, and Influence

As noted previously, the Russian war of aggression against Ukraine has raged in Ukrainian cities, villages, and fields.²⁶ It is also a conflict raging in the psychological realm, with both sides wielding weapons of information and narrative in a contest for moral and legal legitimacy,²⁷ often through legal justifications for contested actions.²⁸ Such virtual battles are supercharged with the ease and reach of social media.²⁹ These information and narrative-based efforts to influence public opinion are so powerful that their effects can shape actual physical battles, as well as set the stage for them.³⁰

26. See, e.g., *Shelling Kills at Least 10 in Kherson, a Ukrainian City the Russians Abandoned*, NPR: EUROPE (Dec. 24, 2022, 1:48 PM), <https://www.npr.org/2022/12/24/1145443678/ukraine-kherson-deadly-shelling-russians>.

27. See Stuart A. Thompson & Davey Alba, *Fact and Mythmaking Blend in Ukraine's Information War*, N.Y. TIMES (Mar. 8, 2022), <https://www.nytimes.com/2022/03/03/technology/ukraine-war-misinfo.html> (detailing Russian lies in “the information war over the invasion of Ukraine” while noting Ukraine also engages in wartime propaganda dissemination through social media); Megan Specia, *‘Like a Weapon’: Ukrainians Use Social Media to Stir Resistance*, N.Y. TIMES (Apr. 5, 2022), <https://www.nytimes.com/2022/03/25/world/europe/ukraine-war-social-media.html> (chronicling Ukrainian activists’ use of social media to disseminate war’s effects).

28. See Voyger, *supra* note 23, at 1 (noting “the prominent role of Russia’s information-related and cyber warfare” in Ukraine conflict); Ronald Suny, *The Ukraine Conflict Is a War of Narratives – and Putin’s is Crumbling*, CONVERSATION (Oct. 27, 2022, 8:27 AM), <https://theconversation.com/the-ukraine-conflict-is-a-war-of-narratives-and-putins-is-crumbling-192811> (describing the battle of narratives in Ukraine conflict); Vivian S. Walker, *“Glory to the Heroes:” Ukraine’s War for Narrative Credibility*, UNIV. OF S. CAL. CTR. ON PUB. DIPL. (Mar. 21, 2022), <https://uscpublicdiplomacy.org/blog/glory-heroes-ukraine%E2%80%99s-war-narrative-credibility>; *Ukrainian President Volodymyr Zelensky’s Remarks to Congress*, CNN (Dec. 22, 2022), <https://www.cnn.com/2022/12/22/politics/zelensky-congress-address-transcript/index.html> (President Zelensky of Ukraine addressing the American people stated that, “[a]nd it gives me good reason to share with you our first, first joint victory. We defeated Russia in the battle for minds of the world.”).

29. See Henning Lahmann, *Protecting the Global Information Space in Times of Armed Conflict*, 102 INT’L REV. RED CROSS 1227, 1227–48 (2021) (available at <https://international-review.icrc.org/sites/default/files/reviews-pdf/2022-01/protecting-the-global-information-space-in-times-of-armed-conflict-915.pdf>). See generally Dapo Akande, et al., *Oxford Statement on International Law Protections in Cyberspace: The Regulation of Information Operations and Activities*, JUST SEC. (Jun. 2, 2021), <https://www.justsecurity.org/76742/oxford-statement-on-international-law-protections-in-cyberspace-the-regulation-of-information-operations-and-activities/> (finding that social media and search engine algorithms have “dangerously amplified the reach of false, misleading, and violent content”).

30. See generally Peter Dickinson, *Putin’s New Ukraine Essay Reveals Imperial Ambitions*, ATL. COUNCIL (Jul. 15, 2021), <https://www.atlantic-council.org/blogs/ukrainealert/putins-new-ukraine-essay-reflects-imperial->

Tactics to achieve influence effects fall under a general information rubric and are referred to using various labels—such as information operations,³¹ influence operations,³² cognitive warfare,³³ and cognitive domain operations.³⁴ Regardless the classification, the battle for legitimacy³⁵ and hence for power (often with compliance with the law as legitimator) in the Russia versus Ukraine conflict seemingly could not be greater.³⁶ This contest involves a staggering amount of

ambitions/; *Extracts from Putin's Speech on Ukraine*, Reuters (Feb. 21, 2022), <https://www.reuters.com/world/europe/extracts-putins-speech-ukraine-2022-02-21/>.

31. See DEP'T OF DEF. JOINT PUBL'N 3-13, INFORMATION OPERATIONS ix (2014) (available at https://irp.fas.org/doddir/dod/jp3_13.pdf) (defining for the U.S. Department of Defense information operations “as the integrated employment, during military operations, of [information-related capabilities (IRCs)] in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting our own”).

32. See *Information Operations*, RAND CORP. <https://www.rand.org/topics/information-operations.html> (last visited Mar. 22, 2023) (RAND defines conflates both information and influence operations, stating that: “[i]nformation operations and warfare, also known as influence operations, includes the collection of tactical information about an adversary as well as the dissemination of propaganda in pursuit of a competitive advantage over an opponent”).

33. See Tzu-Chieh Hung & Tzu-Wei Hung, *How China's Cognitive Warfare Works: A Frontline Perspective of Taiwan's Anti-Disinformation Wars*, 7 J. GLOB. SEC. STUDS. 2 (2022) (defining cognitive warfare as “activities undertaken to manipulate environmental stimuli to control the mental states and behaviors of enemies as well as followers in both hot and cold wars.”).

34. See generally NATHAN BEAUCHAMP-MUSTAFAGA & MICHAEL S. CHASE, BORROWING A BOAT OUT TO SEA: THE CHINESE MILITARY'S USE OF SOCIAL MEDIA FOR INFLUENCE OPERATIONS (Johns Hopkins Foreign Pol'y Inst. 2019), https://www.fpi.sais-jhu.edu/_files/ugd/b976eb_ad85a42f248a48c7b0cb2906f6398e71.pdf (detailing China's growing dominance in cognitive domain operations).

35. The Department of Defense has recently added three additional principles of war to the traditional list of nine, to now include legitimacy. See DEP'T OF DEF. JOINT PUBL'N 3-0, JOINT OPERATIONS ix, A-4 (Oct. 22, 2018), https://irp.fas.org/doddir/dod/jp3_0.pdf (“Legitimacy . . . is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences. These audiences will include our national leadership and domestic population, governments, and civilian population in the OA, and nations and organizations around the world.”).

36. Influence or information operations are often cited as a tactic employed in “hybrid warfare” or a type of “gray zone” operation; while influence operations can and are conducted in adversarial situations that fall below the threshold for use of force and are not within an ongoing armed conflict, this article is concerned with such operations during armed conflict and thus regulated by the *jus in bello*. See e.g., Arsalan Bilal, *Hybrid Warfare - New Threats, Complexity, and 'Trust' as the Antidote*, NATO REV. (Nov. 30, 2021), <https://www.nato.int/docu/review/articles/2021/11/30/hybrid-warfare-new-threats-complexity-and-trust-as-the-antidote/index.html> (describing both hybrid and gray zone activities as including

money and foreign military hardware provided to Ukraine since the start of the conflict in 2014; a supply of weapons and other aid that exponentially accelerated following Russia's frontal assault in early 2022.³⁷

For Ukraine and its allies, securing this vital international support has meant convincing numerous audiences of both why such aid was needed, and why its lending was and remains simply the right thing to do. Indeed, with President Zelensky of Ukraine regularly addressing foreign audiences since Russia's major assault in early 2022, the battle for the narrative of the war—

Ukraine's position as the nation to sustain and support, with the international order in the balance—could not be more apparent.³⁸ The weapon systems and training provided by global partners, in positive response to such efforts, have hugely bolstered Ukraine's ability to defend itself.³⁹ Future provision of such aid depends on continuing to hold the ground Ukraine and the west have won during the on-going legitimacy battle against Russia and its allies in the information and influence space. Conversely, for Russia, this has corresponded to a need for counternarrative influence operations in attempts to dissuade

information operations and characterizing “information, cognitive and social domains” as “the cornerstone of hybrid warfare.”).

37. See Katelyn Bushnell et al., *A Database of Military, Financial and Humanitarian Aid to Ukraine*, KIEL INST. WORLD ECON. (Dec. 7, 2022), <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/>; Andrian Prokip, *Why International Aid to Ukraine Should be Provided Without Delay*, WILSON CTR. (Dec. 12, 2022), <https://www.wilsoncenter.org/blog-post/why-international-aid-ukraine-should-be-provided-without-delay> (arguing why foreign assistance should be provided to Ukraine). See generally Josep Borrell, *Russia's War Against Ukraine: Where Do We Stand and What can the Future Bring?*, EU EXTERNAL ACTION (Apr. 26, 2022), https://www.eeas.europa.eu/eeas/russia%E2%80%99s-war-against-ukraine-where-do-we-stand-and-what-can-future-bring_en (“Defending Ukraine from Russia's invasion is rejecting the law of the jungle, the notion that ‘might makes right’”).

38. See Zachary B. Wolf, *Zelensky Seizes Moment Before GOP Controls House*, CNN (Dec. 22, 2022, 5:10 PM), <https://www.cnn.com/2022/12/22/politics/zelensky-speech-house-republicans-analysis/index.html> (reporting President Zelensky of Ukraine's address to a joint session of Congress, where he “claimed ‘joint victory’ in what he said was the defeat of Russia in the ‘battle for minds of the world.’”).

39. See Anthony H. Cordesman, *United States Aid to Ukraine: An Investment Whose Benefits Greatly Exceed Its Cost*, CTR. FOR STRATEGIC & INT'L STUDS. (Nov. 21, 2022), <https://www.csis.org/analysis/united-states-aid-ukraine-investment-whose-benefits-greatly-exceed-its-cost>.

domestic populations from supporting such aid,⁴⁰ in addition to the original narratives Russia pushed at the war's onset.⁴¹

What is the best analytical landscape to place tactics in this contest for thoughts, opinions, and for hearts, given that “winning the narrative” during war has a broad scope, is complex in nature, and boasts an ancient lineage?⁴² Dominance in this specific sphere may involve persuading domestic and international audiences of the foundational justness (or wrongness) of the war itself, as well as challenging the righteousness and legality of particular battlefield incidents and tactics.⁴³ Furthermore, as highlighted earlier, this non-kinetic struggle for influence in support of one's side in an armed conflict often involves contests over adherence by the warring parties to the *jus in bello* rules, the laws governing battlefield conduct and the protection of those caught up in war.⁴⁴ Not only are particular incidents of clear violations of the law of armed conflict capitalized upon by adversaries, the meaning of the rules themselves is fought over and exploited for

40. See Steven Lee Myers, *Russia Reactivates Its Trolls and Bots Ahead of Tuesday's Midterms*, N.Y. TIMES (Nov. 6, 2022), <https://www.nytimes.com/2022/11/06/technology/russia-misinformation-midterms.html>.

41. See Thompson & Alba, *supra* note 27; Cao et al., *infra* note 51; Davey Alba, *Russia Has Been Laying Groundwork Online for 'False Flag' Operation, Misinformation Researchers Say*, N.Y. TIMES (Feb. 19, 2022), <https://www.nytimes.com/2022/02/19/business/russia-has-been-laying-groundwork-online-for-a-false-flag-operation-misinformation-researchers-say.html> (detailing Russia's false flag operation in early 2022).

42. See TONE KVERNBekk & OLA BØE-HANSEN, *HOW TO WIN WARS: THE ROLE OF THE WAR NARRATIVE* 215 (2017) (explaining that military theory posits that wars are not won kinetically on the battlefield but rather, “[t]hey are won in people's minds.”).

43. One stark example of a wartime loss in this domain is the U.S. prisoner abuse scandal at the Abu Ghraib prison in Iraq in 2004. The United States lost significant legitimacy in the eyes of many around the globe as it unsuccessfully struggled to contain the media fall-out from revelations of crimes (including torture) against Iraqi detainees and crimes of a systemic nature, while its enemies exploited this scandal to gain adherents and influence. See generally *CID Documents*, AM. CIV. LIBERTIES UNION: TORTURE DATABASE (Feb. 11, 2009), <https://www.aclu.org/sites/default/files/torturefoia/released/021109.html> (providing documents on investigations into the treatment of detainees); George R. Mastroianni, *Looking Back: Understanding Abu Ghraib*, 43 U.S. ARMY WAR COLL. Q.: PARAMETERS 53, 53 (2013) (available at <https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=2896&context=parameters>).

44. See, e.g., DEAN BLAND, *THE ABU GHRAIB SCANDAL: IMPACT ON THE ARMY PROFESSION AND THE INTELLIGENCE PROCESS* 1 (2005) (available at <https://apps.dtic.mil/sti/pdfs/ADA434475.pdf>) (discussing how the Abu Gharib prison scandal adversely impacted the Army profession and intelligence gathering process).

advantage.⁴⁵ Indeed, the law of armed conflict is especially vulnerable to this (as are other bodies of international law) given the law’s ambiguity (at times) and evolving nature—what has been called its “fluidity.”⁴⁶

As noted above, such contests waged for hearts and minds within and regarding on-going armed conflict take place in the framework of, according to military doctrine, “information operations,” a rubric that largely focuses on measures affecting adversarial decision-making. However, an international group of prominent international law experts defines this category more broadly, as including “any coordinated or individual deployment of digital resources for cognitive purposes to change or reinforce attitudes or behaviors of the targeted audience.”⁴⁷

Employing an even wider lens, the measures taken within armed conflict to influence decision-makers and various communities specifically take place in what is called the “socio-cognitive domain.”⁴⁸ This space includes “cultural, political, social and historical features as well as individual interpretation and understanding.”⁴⁹ Hence, the term “cognitive warfare” seems the broadest appropriate analytical aperture for assessing the fit of a law of armed conflict rule within a particular information operation—here, that regarding wartime detainees as psychological weapons in the armed conflict between Ukraine and Russia.⁵⁰ This is the landscape in which wartime detainees are used as messengers: “[i]n cognitive warfare, the human mind becomes the battlefield. The aim is to change not only what people think, but how they

45. See Joop Voetelink, *Reframing Lawfare*, in NL ARMS NETHERLANDS ANNUAL REVIEW OF MILITARY STUDIES, WINNING WITHOUT KILLING 237–54 (Paul A.L. Duchaine & Frans P.B. Osinga eds., 2017); Joel P. Trachtman, *Integrating Lawfare and Warfare*, 39 B.C. INT’L & COMPAR. L. REV. 267, 275–77 (2016).

46. See Voyger, *supra* note 23, at 38 (“[I]nternational law is not carved in stone; because it also develops from the practices of the world’s states, in many ways, it is ultimately what the states make of it. This fluid, interpretative aspect of international law is being used by Russia extensively”); Michael N. Schmitt, *The Law of Cyber Conflict: Quo Vadis 2.0?*, in THE FUTURE LAW OF ARMED CONFLICT 103, 105 (Matthew C. Waxman & Thomas W. Oakley eds., 2022) (characterizing international law as evolutionary, in order that its “normative architecture remains responsive to the context in which it applies” while noting that one mechanism of change is by changing interpretations of extant law).

47. Akande et al., *supra* note 29; Lahmann, *supra* note 29, at 1228 (providing examples of such digital operations, to include interference in England’s 2016 Brexit referendum and U.S. elections in the same year).

48. KVERNBEEK & BØE-HANSEN, *supra* note 42, at 216.

49. *Id.*

50. See Hung & Hung, *supra* note 33, at 2.

think and act.”⁵¹ While there is no concrete consensus regarding a definition of cognitive warfare, the focus of all the leading definitions involves actions aimed at influencing and in some part controlling thoughts.⁵²

The essentiality of success for warring parties in this arena cannot be overstated. While the criticality of cognitive warfare and information operations during, and leading up to, war is certainly not new,⁵³ the intensity, reach, and speed of such measures have reached an unprecedented level due primarily to communications and information technology. There is also greater savvy displayed by all warring sides regarding the need for,⁵⁴ and skill in, spinning facts and using applicable law to gain public support and weaponize the law.⁵⁵

Today, technological advances and the related ascendancy of the information and influence battlefield—and the hearts and minds of civilian audiences as well as of strategic decision-maker—have enhanced the narrative value of prisoners of war and other wartime detainees. Their value has increased because for modern warring parties, success in the psychological sphere has become increasingly as important as winning on the physical, flesh-and-blood battlefield.⁵⁶

51. Kathy Cao et al., *Countering Cognitive Warfare: Awareness and Resilience*, NATO REV. (May 20, 2021), <https://www.nato.int/docu/review/articles/2021/05/20/countering-cognitive-warfare-awareness-and-resilience/index.html>. See also Hung & Hung, *supra* note 33, at 2 (“[A]ctivities undertaken to manipulate environmental stimuli to control the mental states and behaviors of enemies as well as followers in both hot and cold wars.”).

52. See Hung & Hung, *supra* note 33, at 2–3 (comparing and contrasting definitions of cognitive warfare).

53. See, e.g., David Van Dyk, *Themistocles: The Father of Naval Warfare*, CTR. INT’L MAR. SEC. (Aug. 17, 2016), <https://cimsec.org/themistocles-father-naval-warfare/> (recounting Themistocles’ famous information operation against the Persian naval force led by Xerxes at Salamis during the Peloponnesian Wars).

54. For Russia, recognition of the criticality of information dominance and skills in pursuing it and the need for cognitive warfare have been developed through significant practice in manipulating the information battlespace during Russia’s previous aggressive campaigns in Georgia, Chechnya, and the Crimea and Donbas regions of Ukraine. See Voyger, *supra* note 23, at 3.

55. Such appreciation and expertise also flow from studying lessons learned from earlier conflicts around the globe, such as those fought by the Israeli Defense Forces (IDF) against skillful terrorist organizations like Hamas and Hezbollah. See, e.g., JEWISH INST. NAT’L SEC. AFF.’S GEMUNDER CTR. HYBRID WARFARE TASK FORCE, ISRAEL’S NEXT NORTHERN WAR: OPERATIONAL AND LEGAL CHALLENGES (2018) (available at <https://jinsa.org/wp-content/uploads/2018/10/Hybrid-Warfare-TF-October-2018-Report.pdf>) (discussing the weaponization of information and the law in asymmetrical conflicts involving Israel).

56. See Christian Perez & Anjana Nair, *Information Warfare in Russia’s War in Ukraine: The Role of Social Media and Artificial Intelligence in Shaping Global Narratives*, FOREIGN POL’Y (Aug. 22, 2022),

Indeed, today's physical frontlines—too often found in cities and villages, with civilians bearing the brunt of the life and death cost of kinetic war—are intertwined with and are part of the non-physical battlespace: images of brutal destruction are displayed on social media and in the 24-hour news cycle, usually accompanied by targeted messages supporting one side or the other.⁵⁷ Prisoners of war and other detainees are just one part of this comprehensive virtual struggle that continues the kinetic fight on a different plane, in an arena in which parties aim to influence how an assortment of audiences think.

B. Prisoners Have Often Been at, Not Just of, War

The utilization by captors of wartime detainees on the public stage as tools of propaganda and influence is certainly not new. Both in ancient and modern times, captors have exploited prisoners as narrative fodder to signal to internal as well as external audiences.⁵⁸ For example, the ancient Romans led captured enemy soldiers “through the streets of the Roman town or village in celebration of victory, or to entertain the public, and then used for target practice of as a gladiator for the arenas.”⁵⁹ The Greeks, instead of parading captives before killing them, often killed them outright “as a warning to other belligerents.”⁶⁰ Enemy captives were “sometimes brutalized to send a signal” to the enemy: the Byzantine Emperor Basil II blinded every prisoner out of one hundred, save one (who was blinded in only one eye)

<https://foreignpolicy.com/2022/08/22/information-warfare-in-russias-war-in-ukraine/> (detailing the magnitude of social media campaigns engaged in during Russia's war of aggression against Ukraine); Zsolt Haig & Veronika Hajdu, *New Ways in the Cognitive Dimension of Information Operations*, 22 LAND FORCES ACAD. REV. 94, 94–95 (2017) (referring to information as serving a “force multiplier role” during military operations, while noting that, “among the goals of fourth generation warfare winning public support is important and often gets a top priority”).

57. See generally DAVID PATRIKARAKOS, *WAR IN 140 CHARACTERS: HOW SOCIAL MEDIA IS RESHAPING CONFLICT IN THE TWENTY-FIRST CENTURY* (2017); William Marcellino & Michael J. McNerney, *The Will to Fight in the Age of Social Media*, RAND CORP. (Mar. 22, 2022), <https://www.rand.org/blog/2022/03/the-will-to-fight-in-the-age-of-social-media.html> (“[S]ocial media has been there every day, every hour, every minute to document the power of these factors and sometimes amplify their effects.”).

58. Gary Wayne Foster, *THE HANOI MARCH: AMERICAN POWS IN NORTH VIETNAM'S CRUCIBLE*, 111 (2022) (“[a]kin to the grand shows of military parades, a reverse phenomenon with the same motive exists: not the victorious, but rather the defeated are put on public display. There can be no more of a humiliation for a failed force that to be exhibited in submissive formation by the victors.”)

59. ARNOLD KRAMMER, *PRISONERS OF WAR: A REFERENCE HANDBOOK*, 4 (2008) (detailing the brutal and “primitive” Roman treatment of war captives).

60. *Id.* at 3.

and then sent the almost 14,000 blind soldiers back to Macedonia to deter his enemies.⁶¹

Several centuries later, in the Twentieth Century, enemy soldiers in captivity were no longer, for the most part, slaughtered *en masse* as a matter of policy, nor blinded by the thousands and then sent home (though egregious incidents of the slaughter of prisoners litter all major wars up to at least the Second Indochina War, and even persist today, though on a far lesser scale).⁶² While widespread prisoner slaughter has greatly lessened since World War II, prisoners continued to be abused as live propaganda tools, similar to the practices of Romans over two millennia ago. As nations and their militaries—and the law—evolved to generally keep captured enemy service members alive—and also moved away from ancient practices of enslavement—the practice of literally parading captives in front of live public audiences marched on.⁶³

Indeed, it seems that most major conflicts up to and including the Second Indochina War have involved the use of captured enemy soldiers physically paraded in public for purposes of both propaganda and humiliation.⁶⁴ For example, during World War II, “[t]he Japanese

61. *Id.* at 7.

62. *Id.* at Ch. 1 (detailing horrors of captured enemy service members routinely being slaughtered throughout the world wars and other conflagrations). *See, e.g.*, Malachy Browne et al., *Videos Suggest Captive Russian Soldiers Were Killed at Close Range*, N.Y. TIMES (last updated Nov. 22, 2022), <https://www.nytimes.com/2022/11/20/world/europe/russian-soldiers-shot-ukraine.html>.

63. *See generally* KRAMMER, *supra* note 59, at Chapter 2; COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR ¶ 1621 (2020) (available at <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>) [hereinafter ICRC 2020 COMMENTARY ON GC III].

64. Surprisingly, it is difficult to find examples of such use of captured soldiers on either side of the U.S. Civil War; while apparently largely spared from public humiliation, approximately 56,000 Union and Confederate soldiers instead died in captivity during the U.S. Civil War due primarily to disease and malnutrition. *See Civil War in the National Parks*, NAT’L PARK SERV. (last updated Oct. 31, 2022), <https://www.nps.gov/andc/learn/historyculture/civil-war-prisons-in-the-national-parks.htm#:~:text=During%20the%20Civil%20War%2C%20over,of%20these%20died%20in%20captivity>. The abuse of captured Black Union soldiers by the white supremacist Confederacy, however, undoubtedly involved exposing these captives to public humiliation as they were forced back into slavery or otherwise killed. *See* Wynell Burroughs Schamel & Jean West, *The Fight for Equal Rights: A Recruiting Poster for Black Soldiers in the Civil War*, 56 SOC. EDUC., 118, 118 (Elsie Freeman ed., 1992); Caroline Wood Newhall, “Under the Rebel Lash”: Black Prisoners of War in the Confederate South 9 (2020) (Ph.D dissertation, University of North Carolina at Chapel Hill) (noting that the Confederate military treated captive Black soldiers “as recovered property” and that the Confederacy “enslaved the majority of the more than

maintained a policy of submitting allied prisoners of war to violence, insults and public humiliation to impress other peoples of Asia with the superiority of the Japanese race.⁶⁵ This was done through various means, including literal parades, orchestrated by the Japanese military, of enemy prisoners in Burma.⁶⁶ Another means of such physical and very public humiliation in service of propaganda involved transporting American and British prisoners of war to Korea from their places of capture, specifically so the local Korean populations could observe the prisoners working in public: working as they labored in an emaciated, weakened state brought on by Japanese maltreatment.⁶⁷ The Japanese hoped exposing the prisoners in such way to the public would cause Koreans to view westerners with contempt and disgust.⁶⁸ Appropriately, such practices were condemned in the International Military Tribunal for the Far East as serious violations of the law of armed conflict.⁶⁹

The Germans engaged in similar physical exploitation of Allied prisoners of war, parading them past subjugated populations in order to send messages to those witnessing the frightened captives:

Some time in January, 1944, Field Marshal Kesselring, commander-in-chief of the German forces in Italy, ordered the accused who was commander of Rome garrison to hold a parade of several hundreds of British and American prisoners of war in the streets of the Italian capital. This parade, emulating the tradition of the triumphal marches of ancient Rome, was to be

2,270 Black soldiers whom they captured," largely murdering the rest). *See generally Black Soldiers in the U.S. Military During the Civil War*, NAT'L ARCHIVES (last updated Sept. 1, 2017), <https://www.archives.gov/education/lessons/blacks-civil-war#:~:text=Although%20the%20threat%20generally%20restrained,%2C%20TN%2C%20engagement%20of%201864> (discussing the service of black soldiers in the U.S. military during the Civil War).

65. THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, THE TOKYO JUDGMENT, 29 Apr. 1946–12 Nov. 1948, *reprinted in* THE TOKYO WAR CRIMES TRIAL 48, 413, 49, 705–07 (John Pritchard & Sonia Zaide eds., 1981) (available at <https://werle.rewi.hu-berlin.de/tokio.pdf>) [hereinafter TOKYO JUDGMENT] (“[T]he Chief-of-Staff of the Army in Formosa informed the Prisoner of War Information Bureau that he planned to use prisoners of war not only for labor to increase production for war but also ‘as material for education and guidance.’”).

66. *Id.* at 49, 709.

67. *See id.* at 49, 708–09 (“These prisoners had previously been subjected to malnutrition, ill-treatment and neglect”).

68. *See id.*

69. *See generally id.* (describing the condemnation for the violations of the law of armed conflict).

staged to bolster the morale of the Italian population in view of the recent allied landings, not very far from the capital.⁷⁰

A U.S. military commission after the war found the German commander in charge of this parade guilty of the war crime of exposing the prisoners to, *inter alia*, public curiosity: “[t]he march through Rome was a violation of Article 2 . . . of the Geneva Convention which says ‘They’ (prisoners of war) ‘shall at all times be humanely treated and protected particularly against acts of violence, from insults and from public curiosity.’”⁷¹ The judgment explained that:

There can be no doubt that the prisoners of war were exposed to public curiosity. According to the defence witnesses they were protected from insults and violence by the German troops who lined the streets. According to the prosecution witnesses, the German troops failed to protect them from such insults and violence. The court found that the accused in whose care the prisoners were at the time, and who had ordered and attended the march, was guilty of a war crime.⁷²

While the judgment also noted that “[a] film was made of the parade and a great number of photographs taken which appeared in the Italian press under the caption ‘Anglo-Americans enter Rome after all . . . flanked by German bayonets,’” it seems clear from the commission’s albeit limited analysis that the failure of protection from public curiosity was the act of the parade itself.⁷³ The judgment does not point to the photographs as further example of defendant’s failure to protect from public curiosity. However, it seems one could reasonably conclude that public dissemination of photographs of detainees as they were being exposed to public curiosity continued the original such exposure, broadening the magnitude of the original failure.

Such spectacles that transformed prisoners of war into prisoners physically still at war—a propaganda war—seemingly paled (at least regarding sheer magnitude) in comparison to Stalin’s “Great Waltz.”⁷⁴ In order to humiliate a huge chunk of the German Wehrmacht (approximately 60,000 German prisoners) and to “bolster the demoralized spirit” of the Russian people, Stalin marched them all through

70. TRIAL OF LIEUTENANT GENERAL KURT MAELZER (1946), *reprinted in* 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 53, 53 (1949) [hereinafter MAELZER COMMISSION].

71. *Id.* at 54–55.

72. *Id.* at 55.

73. *Id.* at 53, 55.

74. See GARY WAYNE FOSTER, THE HANOI MARCH: AMERICAN POWS IN NORTH VIETNAM’S CRUCIBLE 97 (2022).

Moscow in July, 1944.⁷⁵ He did so after feeding them boiled cabbage so they would defecate upon themselves, exacerbating their humiliation.⁷⁶

Following World War II, the Vietnam War (the Second Indochina War) also bore witness to such public spectacles of hapless prisoners paraded down streets in front of taunting crowds.⁷⁷ This war also revealed far greater use, driven by advancing technology, of photographs and videos of prisoners to drive a public narrative, in addition to the ancient use of physical parades as means of propaganda.⁷⁸

Indeed, the historian Arnold Krammer describes the “media-driven” Vietnam War as changing how the world began viewing prisoners of war—a shift, starting with their own detained personnel, from viewing prisoners with contempt as cowards or traitors, to viewing them with pity and empathy for their humanity.⁷⁹ This “heavily-televised” war, which included numerous incidences of American prisoners of war in the media, “humanized” such prisoners, and allowed the world “to see them as individuals rather than a category of expendable or cowardly soldiers.”⁸⁰ The use of detainees in mass media for propaganda purposes, which began in earnest during this conflict,

75. *Id.*

76. *Id.*

77. *See id.* at 103–11 (describing the incident of July 6, 1966, in which 55 captured American aviators were paraded through Hanoi, Vietnam and brutally assaulted throughout that march). Prisoners of war during the earlier Korean conflict were also forced to march, but it is unclear how exposed these marches were to the Korean public. *See generally Prisoners of War (Korean War)*, DEF. POW/MIA ACCT. AGENCY, <https://dpaa-mil.sites.crmforce.mil/dpaaFamWebInKoreanWar-POW> (last visited Mar. 22, 2022) (detailing the holding of POWs during the Korean War).

78. *See* ICRC 2020 COMMENTARY ON GC III, *supra* note 63. Warring parties were not the only entities publishing detainee photos during armed conflict; even the ICRC has and continues to publish detainee photos in support of various worthy goals. *See, e.g., Listening to Detainees*, INT’L COMM. OF THE RED CROSS (Jan. 6, 2006), (available at <https://www.icrc.org/en/doc/resources/documents/photo-gallery/detention-photos-010606.htm>); Cordula Droege, *GCIII Commentary: Ten Essential Protections for Prisoners of War*, HUMANITARIAN L. & POL’Y (Jul. 23, 2020), <https://Blogs.Icrc.Org/Law-And-Policy/2020/07/23/Gciii-Commentary-Prisoners-Of-War/> (the ICRC seemingly has no problem publishing photos of detainees when supportive of their mission). *See also* W. Hays Parks, *The Gulf War: A Practitioner’s View*, 10 DICK. J. INT’L L. 393, 418 (1992) (noting the ICRC’s publication of detainee photos).

79. *See* KRAMMER, *supra* note 59, at 59–60.

80. *Id.*

seemingly contributed to this surprising effect of humanizing prisoners and earning them greater domestic support within their own countries.⁸¹

Images of prisoners during the Vietnam War may indeed have contributed to a so-called humanizing effect, as publics witnessed their own countrymen in enemy custody. However, most of the American prisoners in Vietnam suffered greatly outside those broadcast images due to inhumane treatment and torture, and it is unclear whether the American public's attitudinal softening would have occurred to the same extent due solely to images, without hearing of such conditions of detention. It is also unclear how many images showed detainees in humiliating fashion; obviously those taken during the infamous Hanoi March fell into this category.⁸² However, it is true that prisoners themselves often desired to have their photographs taken and shown in the media to ensure their status was known to their nations and their families, regardless their circumstances at the time of the photo.⁸³

Warring parties' use of images of their martial captives in broadcast media and newsprint seems, at least after Vietnam and even during it, to overtake reliance on the almost ritualistic use of actual parades and marches in the cognitive warfare space.⁸⁴ Images, voice recordings, and videos became far easier to produce and disseminate, never-mind were vastly more humane, than forced marches in which prisoners were exposed to taunts, ridicule, and physical harm. That is, the virtual surpassed the physical use of prisoners who had long been "prisoners at war," and not just of war.⁸⁵ This physical to virtual transition marked one in the legal arena as well. While physical parades

81. See generally Nora Zamichow, *Stigma of POWs Giving in to Coercion Fades: Psychology: The Lessons Learned in Korea and Vietnam Led to a Change in the Military Code of Conduct to Help Prisoners Survive Their Hardships*, L.A. TIMES (Jan. 22, 1991), <https://www.latimes.com/archives/la-xpm-1991-01-22-mn-835-story.html> (noting the changing attitude toward prisoners of war in the United States stemming in part from seeing American prisoners in custody in the media).

82. See generally FOSTER, *supra* note 74, at 157 (describing the degrading and life-threatening manner of the gauntlet American prisoners were forced to endure).

83. See *id.* at 126–27 (noting how the prisoners on the forced march stared straight at the cameras of foreign journalists, hoping to be recognized back home).

84. See ICRC 2020 COMMENTARY ON GC III, *supra* note 63, at 592 (describing the increasing publication of prisoner images in post-World War II conflicts such as the Iran-Iraq War, and the first Gulf War).

85. See George S. Prugh, *Prisoners at War: The POW Battleground*, 60 DICK. L. REV. 123, 125 (1955) (coining the "prisoner at war" phrase: "[f]or it is now apparent that there is a definite trend backward to the extension of the battlefield into the prisoner of war compound, to making the captive a prisoner at war rather than of war.").

and marches in front of public crowds were seemingly *a priori* immoral and harmful (hence made unlawful by the *jus in bello*), as they intrude on a detainee's honor by viscerally exposing the detainees to the public's intruding gaze, publishing photos and videos of detainees are not in the same *a priori* category. Some harm may result, but plenty of lawful conduct in war is harmful.⁸⁶

The use of prisoner images and words in the narrative battlespace between the warring parties was evident during the first Gulf War in which the United States and its allied coalition partners battled Saddam Hussein and his Iraqi armed forces. Iraq broadcast videos of coalition prisoners as they recited obviously forced confessions, to official U.S. protest.⁸⁷ Later in the armed conflict in Kosovo in 1999, several U.S. service members were captured and then shown on television by their captors.⁸⁸ As a result, "President Clinton, British

86. While the interests balanced by the law of armed conflict are not present domestically, it is interesting to note that those arrested by police on probable cause they committed a crime are often photographed as a matter of standard procedure in the United States, with such "mug shots" released to the public through media publication. There is growing debate, both within U.S. society and as reflected in circuit court decisions, regarding privacy interests implicated in such practices. See Gregory Nathaniel Wolfe, *Smile for the Camera, The World is Going to See that Mug: The Dilemma of Privacy Interests in Mug Shots*, 113 COLUM. L. REV. 2227, 2227–30 (2014) (noting a circuit split regarding privacy interest in and related releasability of mug shots). See also Keri Blakinger, *Mugshots Stay Online Forever. Some Say the Police Should Stop Making Them Public*, MARSHALL PROJECT (Nov. 11, 2021), <https://www.themarshallproject.org/2021/11/11/mugshots-stay-online-forever-some-say-the-police-should-stop-making-them-public> (describing the growing concern regarding privacy interests of those whose photos are taken post-arrest).

87. See Parks, *supra* note 78, at 417 (noting the forced confessions and U.S. protest); Blake Stilwell, *21 Facts About the First Gulf War*, MILITARY.COM (Sept. 17, 2015), <https://www.military.com/undertheradar/2015/09/21-facts-about-the-first-gulf-war> (noting the use of Coalition prisoners in Iraqi propaganda, and providing a video exemplar); *Gulf War POWs Tell of Saddam's Wrath*, ABC NEWS (Mar. 14, 2003), <https://abcnews.go.com/2020/story?id=123740&page=1> ("In the first weeks of the war, the POWs, particularly the television appearances the Iraqis forced them to make, became the symbol of a war that suddenly did not seem so easy and a military that did not seem so invincible."); Nora Zamichow, *Psychology: The Lessons Learned in Korea and Vietnam led to a Change in the Military Code of Conduct to Help Prisoners Survive their Hardships*, L.A. TIMES (Jan. 22, 1991), <https://www.latimes.com/archives/la-xpm-1991-01-22-mn-835-story.html> (noting the forced nature of the confessions by Americans in Iraqi custody in 1991, and relating them to changes in service member code of conduct).

88. See Bradley Graham & Daniel Williams, *U.S. Soldiers in U.N. Force Apparently Captured*, WASH. POST (Apr. 1, 1999), <https://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/prisoners040199.htm>.

Foreign Secretary Robin Cook, and others, protested the showing of the soldiers on television.”⁸⁹

Finally, this brief historical sketch of the use of wartime captives as propaganda or influence tools by their captors, first in the physical realm and later in the virtual plane, would not be complete without mentioning the terrible failures of the U.S. government with regard to detainees in its custody at both Guantanamo Bay, Cuba and the infamous Abu Ghraib prison in Iraq. While grave legal violations regarding inhumane treatment and torture (and evading the rule of law in general, with regard to Guantanamo) are accurately associated with these locations, the use of detainee images in the cognitive warfare aspect of the armed conflict was also an issue with respect to both detention facilities (the Abu Ghraib mistreatment scandal raised more of an issue of how images of such treatment—coupled with the treatment itself—can lead to strategic failure, as well as the need for the public to see such images for accountability purposes.).⁹⁰

II. LEGALITY OF USING PRISONERS IN THE MEDIA

A. Context and Examples

Today the virtual has overcome the physical regarding the continued use of prisoners of war in furthering their captors’ influence objectives in the cognitive domain. As noted above, twentieth century warring parties’ print and broadcast media dissemination of images of wartime detainees slowly, then quickly, surpassed the practice of parading detainees themselves down boulevards as the primary method in which such prisoners were used in the cognitive battlespace to send messages to various audiences. Despite that “[m]ost accounts of

89. Geoffrey S. Corn & Michael L. Smidt, “*To Be or Not to Be, That is the Question*”: *Contemporary Military Operations and the Status of Captured Personnel*, 1999 ARMY LAW. 1, 11 n.84 (1999) (detailing the broadcast and reaction to it of American service members captured by in Operation Allied Force in Kosovo in 1999).

90. See Carol Rosenberg, *The Secret Pentagon Photos of the First Prisoners at Guantanamo Bay*, N.Y. TIMES (Jun. 12, 2022), <https://www.nytimes.com/interactive/2022/06/12/us/guantanamo-bay-pentagon-photos.html> (describing photographs of detainees at the U.S. naval installation at Guantanamo Bay, Cuba, noting that “[t]he practice of managing the visual narrative started the very first day detainees arrived at the base, Jan. 11, 2002.”); Ari Berman, *More Images of Abu Gharib*, CBS NEWS (Aug. 22, 2005), <https://www.cbsnews.com/news/more-images-of-abu-ghraib/> (noting that “[t]he Pentagon originally argued that releasing the [Abu Ghraib] images would violate the Geneva Convention rights of the detainees; a supreme irony considering that the US originally denied these very prisoners Geneva Convention protections.”).

warfare since photography became popular and widespread in the early part of this century have contained such pictures” of captured service members in war,⁹¹ the applicable international law never prohibited such use, nor did such use even raise much concern.⁹² Indeed, the general broadcast of such images was not considered to contravene the Geneva Conventions prior to 1949, nor after; the 1949 modifications to the 1929 conventions did not change to include any mention of such images, focused as it was on the physical treatment of prisoners.⁹³

However, regarding harm to the detainees, one could plausibly argue that some of the twentieth century wartime captive photographs and videos were, while not equivalent, at a minimum caused their own harm additional to that caused by the physical act of parading humiliated prisoners down the boulevards of Moscow and Rome. For example, there were, soon after that spectacle, pictures published of Lieutenant General Kurt Maelzer’s parade of Allied prisoners in Rome.⁹⁴ While his conviction for failing to protect his prisoners from “insult and public curiosity”—in direct violation of the applicable Geneva Convention provision at the time—was based solely on the physical exposure, surely the subsequent publication of parade photos amplified the original harm by exposing the prisoners’ humiliation to a wider audience.⁹⁵

It is worth asking whether the publication of images of detainees in humiliating situations, in conditions that do not involve real-time, simultaneous public exposure, themselves constitute such exposure and therefore equally run afoul of the law. Does release by a warring party of a photo of a wartime captive being beaten in captivity, or sexually traumatized, expose that detainee to prohibited public curiosity? Or would that beating have to occur in public to cross the *jus in bello* legal line? What if the photos are published to bring attention to such inhumane treatment for suppression and accountability purposes?

91. Gordon Risius & Michael A. Meyer, *The Protection of Prisoners of War Against Insults and Public Curiosity*, 295 INT’L REV. RED. CROSS 288, 290 (1993).

92. *See id.* at 291 (“In general, neither the taking of such pictures, nor their publication or transmission, appears to have attracted much protest from any quarter, either on grounds of lack of taste or because they were thought to contravene the Third Geneva Convention.”).

93. *See id.*

94. *See generally* MAELZER COMMISSION, *supra* note 70 (discussing the publication of parade pictures).

95. *Id.* at 55 (though one could argue that public curiosity is limited to real-time, physical exposure and not ethereal, abstract harm).

That is, while of course any inhumane treatment itself is violative of the law, what about the subsequent dissemination of images of said violation—does a warring party also contravene its law of armed conflict obligations by disseminating such images for publication? This is not an imaginary hypothetical: in the 2020 flare-up of the so-called frozen armed conflict between Armenia and Azerbaijan over the ethnic Armenian enclave of Artsakh (Nagorno Karabakh), images and videos swirled on social media of Armenian soldiers, many of them recognizable, being beaten and humiliated in Azeri detention.⁹⁶ Absent such humiliating circumstances, publication of images of detainees, even if identifiable, is not a violation of the Geneva Conventions; however, this is another area of controversy as noted below.

As imagery and mass communication technologies greatly advanced in the late twentieth and continuing in the twenty-first century, this tension between the *jus in bello* law regulating the physical world and the harms caused by warfare in the virtual world have steadily increased. This strain has led directly to today's problematic situation of contrary interpretations of the same law at issue in Lieutenant General Maelzer's World War II case—that regarding exposing detainees to public curiosity.⁹⁷ The ICRC claims a different understanding than the United States and other actual parties to the Geneva Conventions, as explained below. Such interpretive conflicts regarding legal obligations are not helpful for warring parties who in good faith are trying to adhere to the law of armed conflict, and it is incumbent upon those most influential in this area to be honest about the current state of the law.

As this article surveys the current state of the law in this area in the next section, it is helpful to have a few contemporary scenarios in mind for legal evaluation:

- 1) Ukrainian allowance of journalists to film Russian prisoners of war in Ukrainian detention in conditions not depicting any unlawful treatment or humiliation (some footage in which prisoners are identifiable and others in which their faces are

96. See *Azerbaijan: Armenian Prisoners of War Badly Mistreated*, HUM. RTS. WATCH (Dec. 2, 2020, 2:00 PM), <https://www.hrw.org/news/2020/12/02/azerbaijan-armenian-prisoners-war-badly-mistreated> (“[V]ideos depict Azerbaijani captors variously slapping, kicking, and prodding Armenian POWs, and compelling them ... to kiss the Azerbaijani flag, praise Azerbaijani President Ilham Aliyev, swear at Armenian Prime Minister Nikol Pashinyan, and declare that Nagorno-Karabakh is Azerbaijan.”).

97. See generally MAELZER COMMISSION, *supra* note 7070 (discussing exposing detainees to public curiosity).

blurred)⁹⁸ and Ukrainian allowance of journalists to interview Russian prisoners in detention and to publish prisoner statements made during interview;⁹⁹

- 2) Ukrainian release of images of Russian prisoners of war speaking on camera, voluntarily, to express their thoughts on the armed conflict (not depicting any unlawful treatment or humiliation);¹⁰⁰
- 3) Azerbaijan release of images and videos of Armenian prisoners as they are beaten and humiliated.¹⁰¹

B. ICRC Is One Interpretative Source

The law of armed conflict, and specifically the Geneva Conventions, does not categorically prohibit parties engaged in international armed conflict from disseminating photographs, images, and voices of wartime captives in their custody, including over social media.¹⁰² Furthermore, it does not draw any lines regarding the dissemination of either images of clearly identifiable prisoners or of non-identifiable captives if not depicted in degrading or humiliating situations. On the

98. See, e.g., FRANCE 24 English, *Inside a Ukrainian Detention Centre Filled with Russian POW*, YOUTUBE (Oct. 26, 2022), <https://www.youtube.com/watch?v=9-XHuGEMKus>; Anna Fil, 'We were Deceived', *Russian POWs in Ukraine Say*, DEUTSCHE WELLE (June 22, 2022), <https://www.dw.com/en/we-were-deceived-say-russian-prisoners-of-war-in-ukraine/a-62221928> (article noting that the journalists were given access to the detainees on condition that their faces not be shown, hence blurred in this video); Inside Edition, *Ukraine Invites Mothers of Prisoners of War to Pick Them Up*, YOUTUBE (Mar. 3, 2022), <https://www.youtube.com/watch?v=r37jds7hGBY> (video with identifiable Russian prisoners in Ukraine detention facility).

99. CNN, *CNN Producer Describes Interaction with Russian Prisoners of War*, YOUTUBE (Mar. 16, 2022), <https://www.youtube.com/watch?v=iH9NbjtGdKY> (describing Ukrainian use of Russian prisoners as unlawfully "parading them on TV").

100. See TVC News Nigeria, *Dozens of Russian War Prisoners Give Statements at Presser*, YOUTUBE (Mar. 11, 2022), <https://www.youtube.com/watch?v=Z9IkUPdVcW8> (showing identifiable Russian prisoners sitting and speaking to media while in Ukrainian detention); The Sun, *Putin Threw Us into War with No Training like Dogs, Say Captured Russian POWs*, YOUTUBE (May 5, 2022), <https://www.youtube.com/watch?v=rEjqvRzD5Ko> (showing Russian prisoners speaking while in Ukrainian detention, with faces blurred).

101. See *Azerbaijan: Armenian Prisoners of War Badly Mistreated*, *supra* note 96.

102. See DOD LAW OF WAR MANUAL, *supra* note 12, at 515, 549; Corn & Smidt, *supra* note 89, at 10 ("The GPW does not specifically forbid filming or photographing prisoners of war"); cf. Eric Jensen & Sean Watts, *Ukraine Symposium – Doxing Enemy Soldiers and the Law of War*, ARTICLES OF WAR (Oct. 31, 2022), <https://lieber.westpoint.edu/doxing-enemy-soldiers-law-of-war/> (finding that the ICRC's "broad reading of Article 13 should be regarded cautiously").

other hand, humiliating images of identifiable prisoners are seemingly violative of Article 13's duty to protect prisoners of war against public curiosity, as established below.¹⁰³

However, contrary to the nuanced meaning of Article 13's public curiosity provision, the International Committee of the Red Cross has argued—in the current Ukraine war as well in earlier conflicts such as the 1991 Gulf War—for a prophylactic *lex ferenda* interpretation while unfortunately and inaccurately implying it constitutes the *lex lata* (in the hopes of making it so).¹⁰⁴ The ICRC has claimed that the law of armed conflict, specifically through Article 13 of the Third Geneva Convention (GC III), prohibits publication of not only all identifiable prisoner images, but all such images, regardless whether humiliating or not, as well as all recordings.¹⁰⁵ The ICRC's broad and misleading interpretation distorts Article 13 to seemingly prohibit all publication of detainee photographs and videos, including even the publication of voluntary statements made by wartime captives, thereby unmooring this important human treatment protection from its

103. See Risius & Meyer, *supra* note 91, at 292 (concluding that there was no prophylactic legal ban on public release of all detainee images; “[a]lthough few people would consider all photographs of prisoners of war to be objectionable as a matter of principle, most would surely oppose the publication or transmission of pictures of prisoners of war being interrogated under torture . . . Article 13 of the Convention does not draw a clear dividing line between what is acceptable and what is a breach of its provisions” (emphasis added)).

104. See Ramin Mahnad, *Shielding Prisoners of War from Public Curiosity*, HUMANITARIAN L. & POL’Y (June 28, 2022), <https://blogs.icrc.org/law-and-policy/2022/06/28/shielding-prisoners-of-war-from-public-curiosity/> (“[T]he term ‘exposure to public curiosity’ also covers the simple disclosure of images of POWs, recordings of interrogations or private conversations, personal correspondence, and any other private data”); ICRC 2020 COMMENTARY ON GC III, *supra* note 63, at 1624 (“Being exposed to ‘public curiosity’ as a prisoner of war, even when such exposure is not accompanied by insulting remarks or actions, is humiliating in itself and therefore specifically prohibited.”); Parks, *supra* note 78, at 417 (1992) (“The International Committee of the Red Cross protested a photograph . . . claiming that any photograph of a prisoner of war was prohibited by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War”).

105. See ICRC 2020 COMMENTARY ON GC III, *supra* note 60, at 1624; ICRC (@ICRC), TWITTER (Mar. 4, 2022, 10:14 AM), <https://twitter.com/ICRC/status/1499765232704663552> (“Prisoners of war and detainees. The law states they must be protected. This includes from acts of violence, intimidation, and ill-treatment. They also must be treated with dignity, and not exposed to public curiosity – like circulating images on social media”); Leo Benedictus, *Is Sharing Photographs of Prisoners of War Banned by the Geneva Convention?*, FULL FACT (Mar. 16, 2022), <https://fullfact.org/law/prisoners-war-geneva-convention-photographs/> (discussing ICRC and others’ interpretation).

long-standing foundation.¹⁰⁶ While its long explanation of this treaty provision provided in the ICRC's 2020 commentary to GC III is seemingly more nuanced than its various public statements, and seemingly hinges on identifiability, as discussed below, it fails to acknowledge that the law is not settled in this area, and is certainly not what the ICRC claims.¹⁰⁷

This article goes to lengths to highlight and challenge the ICRC's incorrect interpretation not only because it is wrong, but because it is one made by an enormously influential entity with potentially significant implications for Ukraine, as well as for all law-abiding state parties to the Geneva Conventions.¹⁰⁸ Given the ICRC's powerful role in the understanding and application of, and ultimately the efficacy of the law of armed conflict (the attainment of its object and purpose), it is important to clarify the ICRC's place in the legal interpretive hierarchy. While the ICRC possesses important treaty-based mandates regarding the *jus in bello*, and does much good in its self-described role as the "guardian of humanitarian law," its interpretation of the law is not binding on states party to the treaties.¹⁰⁹ While ICRC interpretive

106. There are four 1949 Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950) [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950) [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950) [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950) [hereinafter GC IV].

107. *See* ICRC 2020 COMMENTARY ON GC III, *supra* note 63, at 593.

108. Other States party to the conventions possess positive obligations regarding the enforcement of the Conventions, hence interpretations making long-standing lawful practices violative of GC III raise concern amongst other State parties. *See generally* Marten Zwanenburg, *The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation*, 97 INT'L L. STUDS. 621, 622 (2021) (analyzing whether States parties to the Geneva Conventions have external obligations to "ensure respect" for the Conventions).

109. *See* INT'L COMM. OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 7 (2009) (the ICRC describing its role "tak[ing] measures to ensure respect for, to promote, to reaffirm and even to clarify and develop this body of law."); GC III, *supra* note 106, at arts. 73, 122, 123, 126; GC IV, *supra* note 106, at arts. 76, 109, 137, 140, 143 (GC provisions with mandates for the ICRC to, *inter alia*, visit and track civilian internees and prisoners of war during international armed conflict). *See generally* *What is the ICRC's Role in Developing and Ensuring Respect for IHL?*, ICRC BLOG (Aug. 14, 2017), <https://blogs.icrc.org/ilot/2017/08/14/what-is-the-icrc-s-role-in-developing-and-ensuring-respect-for-ihl/> (last accessed at Mar. 22, 2023) (ICRC self-describing its own role as protecting, promoting and developing international humanitarian law (IHL)).

documents are tremendously helpful to parties to the treaties, courts, and all those endeavoring to understand the law of armed conflict, the ICRC's conclusions are not legally determinative, though extremely influential.¹¹⁰

While not legally binding, the ICRC's interpretations of the *jus in bello* are given great weight by states and the public—and by serious journalists trying to do due diligence (and not aid states in committing violations of the *jus in bello*)—due to this storied organization's legal mandates, long history of involvement with this body of law, tremendous advocacy work, and its prodigious and high quality analytical output.¹¹¹ Therefore careful attention must be paid to ICRC opinions, and not simply for argument's sake. Besides the tactical need to challenge incorrect ICRC opinions, there is a more abstract impetus for doing so, related to the fact that both the underlying premise and the overarching structure of modern law of armed conflict is a balancing act of humanitarian concerns with military necessity.¹¹²

On a greater scale, the ICRC's seemingly thematic emphasis on the former (an understandable habit of placing greater weight on the humanity side of the equation) which necessarily undervalues the latter—through inaccurate interpretation of specific *jus in bello* rules—risks undermining the law's difficult and delicate equipoise. Ignoring or undermining the law of armed conflict's bargain between military necessity and humanity destabilizes the entire legal regime, thus potentially risking achievement of the regime's *raison d'être*: to reduce

110. See John B. Bellinger, III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 445 (2007) (“The Study gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.”). *But see* Statute of the Int'l Ct. of Just., art. 38(1)(d), Jun. 26, 1945, 33 U.S.T.S. 993 (listing as one of guides for the meaning of international law “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”).

111. While closely connected to the law of armed conflict, the International Committee of the Red Cross did not establish this legal paradigm, as claimed by some ICRC scholars. See, e.g., Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, ICRC (Dec. 31, 1998), <https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm> (last visited Mar. 22, 2023) (detailing the “complex function” of ICRC guardianship of the laws of war).

112. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 17 (2d ed. 2010) (“Every single norm of LOIAC is molded by a parallelogram of forces: it confronts an inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula.”).

suffering in war.¹¹³ Tilting a rule's interpretation in the direction of humanity at the expense of military necessity, when the original relationship thus interpretation was more balanced, ultimately does disservice to that very principle of humanity.

This is not the only danger involved when the law of armed conflict is misinterpreted. As emphasized in Part I, compliance with the law of armed conflict plays a pivotal role in today's wars. It is a leading component of cognitive warfare with legitimating and delegitimizing effects, and the ICRC is a leading authority on what is and is not compliance with said law. It is therefore incumbent upon scholars and other experts to carefully scrutinize all ICRC interpretive claims and challenge them when necessary. This article provides such scrutiny regarding the modern use, primarily through social media, by warring parties of images and statements of wartime detainees to demonstrate that state practice and *opinio juris* reveal a pragmatically nuanced and very different, if unsatisfactory, interpretation of the relevant rule than that of the ICRC.

C. *Protecting Those Deprived of Their Liberty in War*

1. *Categories of Wartime Captives*

While this article primarily focuses on measures taken regarding prisoners of war, a brief outline of *jus in bello* detainee categorization is first in order. This law includes other types of wartime captives besides prisoners of war who similarly benefit from the law's humane treatment provisions. The four 1949 Geneva Conventions and their later protocols—the primary foundational documents of today's law of armed conflict—divide wartime detainees into several formal categories, with obligations by state parties contingent upon the relevant detainee category.¹¹⁴

During the paradigmatical international armed conflict of war between or amongst nation-states, epitomized by the current Russia v. Ukraine conflict, these categories include prisoners of war, whose treatment is governed by the Geneva Convention relative to the Treatment of Prisoners of War (GC III); retained personnel, as outlined in Convention (I) for the Amelioration of the Condition of the Wounded

113. See generally W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT'L L. & POLS. 769, 784 (2012) (criticizing the ICRC's "one size fits all" use-of-force formula).

114. See generally DOD LAW OF WAR MANUAL, *supra* note 12, ch. 4 (noting the various classes of persons delineated under the law of war).

and Sick in Armed Forces in the Field (GC I) and whose treatment is the same as prisoners of war under GC III; and civilian internees, whose captivity is governed by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV).¹¹⁵ The *jus in bello* does not provide such formal captive categories in non-international armed conflicts; however, Common Article 3 (CA 3) of the Geneva Conventions¹¹⁶ provides a baseline of required treatment for those detained in such internal wars as well as provides a minimum baseline for treatment in international armed conflicts.¹¹⁷

2. *Humane Treatment*

The overarching mandate of the conventions regarding the treatment of those in the custody of a party to an armed conflict is that of humane treatment from the start of captivity, regardless of category or lack thereof. As stated in the original commentaries to the 1949 conventions (written to memorialize legislative history by explaining drafters' intent), "[t]he requirement that protected persons must at all times be humanely treated is the basic theme of the Geneva Conventions."¹¹⁸ Articulating the basic protections due to those in custody in all armed conflicts, Common Article 3 specifically mandates that "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely."¹¹⁹

What constitutes humane treatment is clarified (inferentially, through prohibitions of specific conduct) through several specific rules in the Conventions. Parades of prisoners as well as the public

115. See GC III, *supra* note 106, at Art. 4 (detailing prisoner of war eligibility); GC I, *supra* note 106, at Art. 28(1) (mandating that retained personnel are to receive the same treatment protections as prisoners of war); GC IV, *supra* note 106, at Art. V (describing convention coverage of protected persons).

116. See GC I–IV, *supra* note 106, at Art 3. Additional Protocol II to the Geneva Conventions provides more specific rules for treatment of those caught up in non-international armed conflicts. See Protocols Additional to the Geneva Conventions of 13 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609 (Jun. 8, 1977) [hereinafter Additional Protocol II].

117. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 114–15, ¶ 220 (June 27).

118. See Convention (III) Relative to the Treatment of Prisoners of War, Geneva, Commentary of 1960, para. 140 (Aug. 12, 1949) [hereinafter ICRC 1960 Commentary to GC III].

119. GC I–IV, *supra* note 6, at Art. 3.

release of prisoner images implicate Article 13, GC III, titled *Humane Treatment*, which reads in its entirety:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.¹²⁰

Article 27 of GC IV provides similar protection for civilians, stating in pertinent part that:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated and shall be protected especially against all acts of violence or threats thereof *and against insults and public curiosity.*¹²¹

3. Exposure to Public Curiosity

The legality of warring parties' public dissemination of prisoner of war photographs, videos, and statements is measured using GC III's Article 13 protection of prisoners of war "*against insults and public curiosity*" (emphasis added)¹²²; as noted above, this identical protection is echoed in GC IV's Article 27 regarding civilians.¹²³ As the authors of the new ICRC 2020 Commentaries to GC III highlight, "[t]he protection against public curiosity is *particularly relevant* in the age of mass media and social media, given the ease with which images and comments can be spread around the world."¹²⁴ (emphasis added)

120. GC III, *supra* note 106, at Art. 13 (emphasis added).

121. GC IV, *supra* note 106, at Art. 27 (emphasis added).

122. GC III, *supra* note 106, at Art. 13.

123. GC IV, *supra* note 106, at Art. 27.

124. Jemma Arman et al., *The Updated ICRC Commentary on the Third Geneva Convention: A New Tool to Protect Prisoners of War in the Twenty-First Century*, 102 INT'L REV. RED CROSS 389, 401 (2020).

But this protection of public curiosity has *always* been relevant, ever since it was first introduced in the 1929 Convention Relative to the Treatment of Prisoners of War, 1949 GC III's direct predecessor.¹²⁵ As reflected in Part I B of this article, physical parades of prisoners of war as public spectacle occurred with barbaric frequency throughout warfare's long history.¹²⁶ It was these physical exposures that prompted this original 1929 protection, and similarly, that of the Italian, Russian, Japanese, and German citizens' gaze upon humiliated Allied prisoners that supported its retention in the 1949 GC III.¹²⁷

Given its primarily corporeal nature, this provision reflects the law of armed conflict's general orientation toward the physical, in contrast to the virtual, world.¹²⁸ Any claimed exposure of prisoners to public curiosity purely through public dissemination of images, whether through broadcast television in the 1960s to social media today, falls in the latter arena, despite the law's awkward fit with such non-physical dynamics.¹²⁹ Yet efforts are on-going to apply the *jus in bello* to cyber activities; the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations concludes, pertaining to this discussion, that detaining powers have legal duties to ensure their networks are not used to "violate the respect or honor owed to prisoners of war;" it specifically includes within that duty a prohibition against "posting information or images on the Internet that could be demeaning or that could subject prisoners of war or interned protected persons to public ridicule or public curiosity"—without defining which images would so constitute such exposure.¹³⁰

125. See Convention Relative to the Treatment of Prisoners of War art. 1, Jul. 27, 1929, 118 L.N.T.S. 343 (entered into force June 19, 1931). The earlier mention of prisoners of war in the 1907 Hague Regulations was without reference to public curiosity or any specific protections. See Hauge Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 539 U.N.T.S. 631 ("They must be humanely treated.").

126. See discussion *infra* Part I.B.

127. See Risius & Meyer, *supra* note 91, at 289–90.

128. See TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (2d ed. 2017); *but see* 521, ¶ 5 (noting that libel and slander of prisoners is prohibited by GC III, though the harm is not a visceral one to prisoners) [hereinafter TALLIN MANUAL].

129. See U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals XV*, 100–01 (1949) ("stating that "A number of war crime trials have involved the *physical ill-treatment of prisoners of war*" and going on immediately to cite the prosecution of German soldiers for exposing detainees to public curiosity through physical means).

130. TALLINN MANUAL, *supra* note 128, at 521 ¶ 5.

As reflected in the Tallin Manual's proposed application of Article 13 to the cyber arena, the law of armed conflict's general bias toward the physical does not mean that Article 13 has no relevance to the publication of prisoner of war images (often accomplished through social media today). It is clear that protecting prisoners from public curiosity is not limited exclusively to actual, real-time physical exposure of prisoners to public viewing, though that seems the original drafters' intent.¹³¹ The modern understanding that this protection goes beyond only physical exposure is linked to the core value originally animating this particular provision. The original 1960 commentary to the Third Geneva Convention explains this obligation as, in particular, safeguarding a prisoner's honor.¹³² It notes that Article 13's mandate of humane treatment requires "protection [that] extends to moral values, such as the moral independence of the prisoner (protection against acts of intimidation) and his honour (protection against insults and public curiosity)."¹³³ Given that a prisoner's honor, and personal dignity, can be impacted by occurrences outside the presence of the prisoner—from online publication of photos to social media tweets to newspaper articles with prisoner images—it seems incontrovertible that the concept of protecting prisoners' honor extends to the reputational and virtual worlds, as well as to the physical. How far this extension reaches, however, is primarily a policy versus a legal issue.

4. When is Publication of Prisoner Images and Statements a Failure to Protect from Public Curiosity?

Given that Article 13 does not expressly provide a "clear dividing line" between conduct that exposes a prisoner to prohibited public curiosity and that which does not, analyzing generally accepted interpretations (as reflected in military manuals, learned writings, etc.) as well as state practice and *opinio juris* are critical to understanding what types of prisoner images are reconcilable with this mandate.¹³⁴ The reality is that there are conflicting interpretations of this provision's application to the virtual realm; indeed, for thirty years experts have lamented the "unsatisfactory state" of the law in this area.¹³⁵

131. See Parks, *supra* note 78, at 418 ("Photographs of prisoners of war, of course, may be used in a way that subjects prisoners of war to the public curiosity prohibited by Article 13.").

132. See ICRC 1960 Commentary to GC III, *supra* note 118, at 503.

133. See *id.* at 141.

134. See Risius & Meyer, *supra* note 91, at 292.

135. See *id.* at 294 (noting that numerous facts should be considered in a case-by-case analysis regarding the legality of prisoner image publication).

To start with, however, there is seeming consensus that Article 13's duty to protect prisoners from public curiosity extends beyond the physical arena to also cover publication of *some* prisoner images, even if the detainee themselves are never actually physically exposed to the public.¹³⁶ As the United Kingdom (UK) notes in its 2007 official interpretation of Article 13, "[i]n 1949, those who drafted the Geneva Conventions probably had in mind that prisoners of war should not be paraded through the streets, exposed to the taunts of the local populations."¹³⁷ It then acknowledges the reality that prisoner images "can be transmitted more or less instantaneously into homes around the world," thereby justifying extending Article 13 to published images of prisoners beyond only prisoners themselves.¹³⁸ The British statement articulates the following interpretation of Article 13's public curiosity protection: "[a]ny image of Prisoners of War (POWs) *as identifiable individuals* should *normally* be regarded as subjecting such individuals to public curiosity and should not be transmitted, published or broadcast."¹³⁹

Despite this presumption of what, for the UK, "normally" constitutes exposure to public curiosity—identifiable images—the UK interpretation does allow for publication of images of *identifiable* prisoners of war when "necessary in the public interest," with the necessity determination seemingly up to the detaining State and the journalist considering such publication.¹⁴⁰ Hence it does not seem that Great Britain believes that publication by a warring State of run of the mill prisoner photos of clearly identifiable prisoners is a violation of Article 13 (or a State providing third parties such as journalists access to prisoners—third parties who will take photos or make videos for

136. See *Public Curiosity in the 1949 Geneva Conventions: The Interpretation Developed by the Government of the United Kingdom of Great Britain and Northern Ireland and the British Red Cross* (Dec. 31, 2007), <https://www.gov.uk/government/publications/public-curiosity-in-the-1949-geneva-conventions-uk-government-and-british-red-cross-interpretation/public-curiosity-in-the-1949-geneva-conventions-the-interpretation-developed-by-the-government-of-the-united-kingdom-of-great-britain-and-northern> [hereinafter *United Kingdom Interpretation*]. The same analysis applies to Article 27, GC IV's similar charge regarding protected interned civilians from public curiosity.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (the British interpretation further provides that, "[w]here the specific circumstances of a case make it necessary in the public interest to reveal the identity of a POW (e.g. because of the person's seniority, or because the person is a fugitive from international justice) great care should be taken to protect the person's human dignity.").

subsequent third party publication). While it believes identifiable photos should only be published, when necessary, the interpretation is written more in the form of policy guidance than one establishing a strict legal line between identifiable versus unidentifiable prisoner images. Otherwise, the UK's interpretation would translate to "when necessary, in the public interest, violate the law;" instead, the UK's interpretation advocates for a default policy norm of non-release of identifiable images, except when public interest supports such release.

What does seem clear regarding the United Kingdom's understanding of Article 13 is that images depicting identifiable prisoners in humiliating circumstances run afoul of the duty to protect prisoners from public curiosity: "[i]mages of POWs individually or in groups in circumstances which undermine their public dignity, should not normally be transmitted, published or broadcast."¹⁴¹ While this interpretation does not distinguish between identifiable and unidentifiable images and instead hinges on the circumstances of undermining public dignity, the next provision makes clear that even when it is appropriate to publish such images, prisoner identities must be protected: "[i]n the exceptional circumstances where such images are transmitted, for example, to bring to public attention serious violations of international humanitarian law, individual identities must be protected."¹⁴²

While the British interpretation fails to define "circumstances which undermine their public dignity," there is seeming overlap between this category of images which would be presumptively violative of the duty to protect against public curiosity, and that of the United States' interpretation of Article 13. Per the 2016 Department of Defense Law of War Manual, "[d]isplaying POWs in a humiliating fashion on television or on the internet would also be prohibited."¹⁴³ This approach is reflected in earlier guidance; a Department of Defense 2003 policy memo provided that, "Article 13 does not per se prohibit photographing EPWs [Enemy Prisoners of War]. It does prohibit photography and video imagery that degrades or humiliates an EPW."¹⁴⁴ Consistent with this interpretation, the U.S. protested Iraqi television broadcasts of Coalition airmen in the first Persian Gulf War after

141. *United Kingdom Interpretation*, *supra* note 136.

142. *Id.*

143. DOD LAW OF WAR MANUAL, *supra* note 12, at 549.

144. See Memorandum of the Assistant Secretary of Defense for Public Affairs, *Subject: Photography of Enemy Prisoners of War* (Feb. 2, 1991), <https://documentafterlives.newmedialab.cuny.edu/content/dod-memo-re-photographing-and-filming-enemy-prisoners-war>.

they'd been subject to inhumane treatment and torture.¹⁴⁵ Several U.S. service members were coerced into making statements critical of the operation they were part of; the United States condemned their “public humiliation” as well as the “apparent unlawful coercion and misuse of the prisoners . . . for propaganda purposes [and] . . . failure to respect their honor and well-being.”¹⁴⁶

While there is some daylight between the United States' interpretation¹⁴⁷ and that of the United Kingdom, both seem to equally interpret Article 13 as prohibiting release of humiliating—that is, circumstances undermining public dignity—images of identifiable prisoners. The U.S. interpretation—that images of identifiable prisoners in non-humiliating poses are copacetic under Article 13—is compatible with long-standing interpretations of that provision. Even the U.K. interpretation makes clear that publication of images of *identifiable* prisoners of war is non-violative of Article 13 when “necessary in the public interest.”¹⁴⁸

This honest interpretation is one that even at least one ICRC legal advisor has previously outlined as the relatively unsettling and rather ambiguous meaning of Article 13 as applied to prisoner images (and by extension to Article 27, GC IV's similar obligation). In 1993 the head ICRC legal advisor to Great Britain, alongside a high-ranking British military officer, published an article (in an ICRC journal) that concluded, “[a]lthough few people would consider all photographs of prisoners of war to be objectionable as a matter of principle, most would surely oppose the publication or transmission of pictures of prisoners of war being interrogated under torture, or cowering on the ground awaiting a further beating from their captors.”¹⁴⁹ This first remark reveals that while not all published prisoner photos were considered *per se* unlawful at that time, some were already considered presumptively violative of Article 13 by 1993. These included images of prisoners being beaten or tortured, as well as images those intended to be humiliating: “Article 13 is contravened where the photographer's

145. See Parks, *supra* note 78, at 418.

146. R. Jeffrey Smith, *7 Purported Allied Fliers Interviewed on Iraqi TV*, WASH. POST (Jan. 21, 1991), <https://www.washingtonpost.com/archive/politics/1991/01/21/7-purported-allied-fliers-interviewed-on-iraqi-tv/078097e2-8298-4b14-a451-beb1df16c61c/>.

147. The DOD Law of War Manual, though the most comprehensive reference for gleaning U.S. interpretations of the law of armed conflict, itself caveats that its content does not represent the views of the U.S. Government, only that of the Department of Defense. See DOD LAW OF WAR MANUAL, *supra* note 12, at ix.

148. *United Kingdom Interpretation*, *supra* note 136.

149. Risius & Meyer, *supra* note 91, at 292.

intention is to humiliate the prisoner by taking and publishing a picture showing him in degrading circumstances.”¹⁵⁰

The position taken by the U.S. military as to legality of the publication of prisoner images, as well as that of the United Kingdom, are seemingly right in line with this long-standing interpretation of Article 13’s application to prisoner images.¹⁵¹ Indeed, the article authors advocated that a new approach be taken, that of only non-identifiable images as consistent with Article 13, obligations, but clearly stated that this was merely desire for future law and not a representation of the law as it stands.¹⁵²

Yet the ICRC continued, seemingly with increasing frequency over the ensuing decades that culminated in their 2020 complete revision of the ICRC Commentaries to GC III, to insist that publication of all prisoner images were violative of Article 13.¹⁵³ This prophylactic ban—*lex ferenda* in the guise of *lex lata*—has seeped into the lexicon of media outlets as well as academics who carelessly repeat the ICRC’s mantra without engaging in separate research or critical thought.¹⁵⁴ This is one of the dangers of the ICRC advertising an inaccurate picture of Article 13’s contours—it is taken as *the* definitive interpretation of Article 13, given the weight non-experts and experts alike give the ICRC’s account of the law of armed conflict. There are also those that fall into the understandable trap of failing to properly distinguish law from policy.

The new 2020 ICRC Commentary to GC III goes into far greater explanation than the original commentary regarding the protection

150. *Id.* at 293.

151. *See id.* at 295.

152. *See id.*

153. *See* Mahnad, *supra* note 104.

154. *See, e.g.,* Laurie Blank, *Combatant Privileges and Protections*, LIEBER INST. WEST POINT: ARTICLES OF WAR (Mar. 4, 2022), <https://lieber.westpoint.edu/combatant-privileges-and-protections/> (wrongly asserting, without analysis or citations, that “[t]his prohibition extends to the dissemination of photographs, video recordings or images, or any other personal data, such as the photos of the Russian soldiers tweeted and posted online . . . the Third Geneva Convention sets out a bright line rule.”); Noel Whitty, *Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa*, 10 HUM. RTS. L. REV. 689, 700 (2010) (inaccurately concluding that the Geneva Conventions’ protection against public curiosity is “universally interpreted as requiring a ban on photographs or films identifying a detainee’s face” while curiously citing to the 1960 ICRC Commentaries, a document that does not, with respect to Article 13, mention photographs, identifiable faces, or films).

against public curiosity.¹⁵⁵ This may be out of tacit recognition that the ICRC is advocating change to the provision's legal interpretation versus stating the current law. It states in pertinent part that:

In modern conflicts, the prohibition [against public curiosity] also covers, subject to the considerations discussed below, the disclosure of photographic and video images, recordings of interrogations or private conversations or personal correspondence or any other private data, irrespective of which public communication channel is used, including the internet. Although this is seemingly different from being marched through a hostile crowd, such disclosure could still be humiliating and jeopardize the safety of the prisoners' families and of the prisoners themselves once they are released.¹⁵⁶

The Commentary then goes on to seemingly echo much of what the United Kingdom's 2007 policy states, though ratchets up the exception to only when there is "compelling public interest":

Accordingly, any materials that enable individual prisoners to be identified must normally be regarded as subjecting them to public curiosity and, therefore, may not be transmitted, published or broadcast. If there is a compelling public interest in revealing the identity of a prisoner (for instance, owing to their seniority or because they are wanted by justice) or if it is in the prisoner's vital interest to do so (for example, when they go missing), then the materials may exceptionally be released, but only insofar as they respect the prisoner's dignity. In addition, images of prisoners in humiliating or degrading situations may not be transmitted, published or broadcast unless there is a compelling reason of public interest to do so (for instance, to bring serious violations of humanitarian law to public attention) and the images do not disclose the identities of the individuals concerned.¹⁵⁷

Of course there are serious harms that can result from the release of prisoners' and protected persons' images and statements; these are policy issues for detaining powers to weigh in the context of their particular situations at the time.¹⁵⁸ As imposing as such risks may be—though heavily context-dependent—Article 13's protection against

155. See ICRC 2020 COMMENTARY ON GC III, *supra* note 63, at 1621–29 (even inexplicably expanding the protection to dead prisoners).

156. *Id.* at 1625.

157. *Id.* at 1626.

158. See Corn & Smidt, *supra* note 89, at 10–11 (emphasizing there are "significant policy concerns related to using the media to display captured enemy personnel" such as risk to prisoner families).

public curiosity focuses on safeguarding the individual prisoner of war, and does not run to hypothetical risks to family members, or equally hypothetical punishments to be incurred by released prisoners at some point in the future by their home nation, and other bogeymen (unfortunately, risks with precedence) that the ICRC uses to support its expansion of the Convention's public curiosity protection. These are policy considerations and should be viewed as setting the legal contours of the protection against public curiosity. Tellingly, the ICRC's 2020 Commentary to this provision largely lacks examples of state practice and *opinio juris* to support its expansive positions, despite these being needed to evolve Article 13's meaning through customary international law dynamics.¹⁵⁹ Again, the Commentary articulates what the ICRC wishes the law to be and does not reflect the far narrower protection that is the law today.

Returning to the three primary scenarios posited at the beginning of this discussion, it is obvious that the third, the Azerbaijan release of images and videos of Armenian prisoners as they were beaten and humiliated, non-controversially constitutes a violation of Article 13, given the nature of the photos and the intent of those releasing them (humiliating circumstances, identifiable detainees, and publication was not to document war crimes). However, the other scenarios, dealing with Ukraine's practice of allowing journalists to interview, photograph, and film Russian prisoners of war in non-humiliating contexts, without requirement that published images be non-identifiable, does not violate the modern *lex lata* interpretation of Article 13, though it runs afoul of the ICRC's broad *lex ferenda* interpretation.¹⁶⁰

5. Social Media Platforms and Public Curiosity

The 2020 ICRC Commentary to Article 13, in yet another expansive deviation from the original Commentary, expressly addresses itself to the media, despite that in most States media companies are private entities not bound by Article 13 (given that as treaties, the Geneva Conventions obligate States party to them, not private entities). First,

159. See ICRC 2020 COMMENTARY ON GC III, *supra* note 63, n. 25–124 (the footnotes to these paragraphs reflect paucity of same).

160. Indeed, the ICRC's *lex ferenda* 2020 commentary seemingly prohibits even allowing the journalists to view prisoners in the detention facilities to begin with. See *id.* at 1624, 1631 (“Being exposed to ‘public curiosity’ as a prisoner of war, even when such exposure is not accompanied by insulting remarks or actions, is humiliating in itself and therefore specifically prohibited. For the purposes of the present article, ‘public’ should be interpreted as referring to anyone who is not directly involved in handling the prisoners of war, including other members of the Detaining Power.”).

it directs the media to blur or “otherwise obscure” prisoner images and other identifying details.¹⁶¹ It also provides that “[t]he enforcement of the present provision requires that the media fully understand its content and relevance for the protection of prisoners’ dignity and honour.”¹⁶²

Twitter’s formal reaction to the ICRC’s advocacy regarding its expansive interpretation of Article 13’s protection against public curiosity is indicative of the (harmful) impact such advocacy, untethered to the actual state of the law, can have. Essentially, it led to Twitter’s banning of seemingly all prisoner of war content, per the following April 5, 2022, Twitter policy statement:

In the development and enforcement of our rules, we remain focused on enabling public conversation, and protecting the safety of people both online and offline. We are guided by international humanitarian law, specifically Article 13 of Geneva Convention III (on protecting prisoners of war (PoWs) from any physical or psychological abuse or threat thereof, and encompasses a prohibition on humiliating them) and do not want Twitter to be used by state actors to infringe this law. Our work to protect the conversation is informed by consultation with a wide range of trusted partners, including international human rights organizations, to ensure our approach considers the number of factors at play.

To that end, we will now ask government or state affiliated media accounts to remove any media published that features prisoners of war (PoW) under our private information and media policy. We will also add a warning interstitial to media published by government or state affiliated media accounts featuring PoWs, that has a compelling public interest.

Lastly, we will now require the removal of any Tweets, regardless of who posts them, if there is PoW content shared with abusive intent, such as insults, calls for retaliation, mocking/taking pleasure in suffering of PoWs, or for any other behavior that violates the Twitter rules.¹⁶³

This is a “harmful” outcome because warring States may have a public interest in revealing prisoner images, and prisoners themselves may want to express themselves publicly in an identifiable manner.

161. *Id.* at 1627.

162. *Id.* at 1631.

163. Sinéad McSweeney, *Our Ongoing Approach to the War in Ukraine*, TWITTER (Mar. 16, 2022), https://blog.twitter.com/en_us/topics/company/2022/our-ongoing-approach-to-the-war-in-ukraine_

Yet if and when such images are publicly shared, the ICRC and others condemn such States for their dissemination and that condemnation delegitimizes that State. While a careful reading of the verbose explanation in the 2020 Commentary allows for such sharing, the overall tenor and tone of that legal analysis has led even one law of armed conflict expert to claim that there is now a “bright line” in Article 13, when in actuality there is no line, and certainly no bright one.¹⁶⁴

It is also harmful because it represents the culmination of decades of advocacy by the ICRC for this legal interpretation, which suddenly pronounced it as having arrived. Its arrival is only because the ICRC says so, not because the traditional mechanisms for the evolution of such law are present. Such a *fait accompli* is disingenuous, dangerous, and wrong on its face.

CONCLUSION

*“We arrive at the stage where it is my duty to sum up this case to you, but you will bear in mind that whatever I say, I am here only in an advisory capacity. You are the judges of both law and fact in this matter, and although I am qualified to give you legal advice, you are, in fact, your own judges both of law and of fact.”*¹⁶⁵

Legal interpretation during war about the laws regulating war can be a lethal exercise that must be engaged in with extreme caution. Interpretations that paint a party to a conflict as not complying with the law of armed conflict can delegitimize that State, weakening and degrading its war-fighting capabilities. Rigid and formalistic interpretations lacking nuance also jeopardize the corpus of this law, as laws that do not make sense lose valence. Such interpretations are not “responsive to the context in which it applies” and will ultimately not be followed and may lessen the normative valence of adjacent rules.¹⁶⁶

The ICRC’s incorrect interpretation of the Geneva Convention’s obligation on captors to protect prisoners of war (and other detainees) from public curiosity risks such effects. Its campaign to change the

164. *See generally* \ (asserting “bright line” prohibition against dissemination of any photographs of detainees).

165. U.N. War Crimes Comm’n, *Law Reports of Trials of War Criminals XV 1* (1949) (available at https://tile.loc.gov/storage-services/service/l1/l1mlp/Law-Reports_Vol-15/Law-Reports_Vol-15.pdf) (a British judge advocate’s remarks to the military jury during closing arguments of a World War II war crimes trial).

166. Schmitt, *supra* note 46, at 105.

law by asserting inaccurate interpretations must be recognized for what it is, called out, and countered. This example demonstrates that the ICRC's interpretation of the law of armed conflict in general cannot be trusted, given its disingenuous practice of presenting its *lex feranda* as *lex lata*. Here, the ICRC's interpretation, one that seems to prophylactically prohibit the publication of all detainee images and statements, not only changes the object and purpose of that treaty provision – it also ignores state practice, *opinio juris*, and the balance between military necessity and humanity that this provision provides. Yet the ICRC's incorrect position is repeated by experts who should know better – including this author, whose media commentary prompted the research that resulted in this article – as well as by those who should not, due to the ICRC's enormous influence in this arena.¹⁶⁷

From captive allied soldiers paraded in Rome during World War II; to American prisoners of war, such as John McCain, videotaped by the North Vietnamese; to detainees held by the United States seen arriving at Guantanamo Bay, Cuba in orange jumpsuits during the armed conflict waged by the United States against various foreign terrorist organizations: enemy service men and women captured during armed conflict have frequently been transformed into weapons of narrative warfare as their captivity became news along with their images. While the law of armed conflict recognizes these prisoners' humanity while protecting it, the law balances this humanity against military necessity. This is an equipoise that leaves challenging, and at times uncomfortable, issues for policy makers to consider when deciding to publicly disseminate prisoner images. Yet this is the space required by military necessity, particularly in this modern age in which cognitive warfare is a hugely supporting rail to battlefield kinetic engagement.

¹⁶⁷ Aaron Blake, *Why you should think twice before sharing that viral video of an apparent Russian POW*, March 8, 2022, available at <https://www.washingtonpost.com/politics/2022/03/07/russian-pow-videos/> (citing this article's author as seemingly agreeing with the ICRC's incorrect legal interpretation of prisoner exposure).