WHACKING† UNARMED WOMEN: GAPS IN THE LAW OF ARMED CONFLICT

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When from 'ouse to 'ouse you're 'unting
you must always work in pairs -
It 'alves the gain, but safer you will find -
For a single man gets bottled on them twisty-wisty stairs
An' a woman comes and clobs 'im from be'ind.

Rudyard Kipling, *Loot*[1]

In recent years, legal commentators have begun to write on women in war: usually as the civilian victims of belligerent forces,[2] sometimes as military victims of discrimination within their own armed forces.[3] Very little has been written about women as belligerents.[4] What has been written does not focus on the legal problems conventional forces face when women are "unprivileged belligerents"[5] who fail to comply with law of war requirements for combatant status.[6] These problems can become acute when conventional forces are en-

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† THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Joseph P. Pickett et al. eds., 4th ed. 2000) ("'Whack'. . . *slang*, to kill deliberately; murder").

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1. RUDYARD KIPLING, COMPLETE VERSE 407 (definitive ed., Anchor Press 1989) (1940).

2. *See, e.g.*, Christine Chinkin, *Women: The Forgotten Victims of Armed Conflict?*, *in* THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 23 (Helen Durham & Timothy L.H. McCormack eds., 1999).

3. *E.g.*, LINDA BIRD FRANCKE, GROUND ZERO: THE GENDER WARS IN THE MILITARY (1997).

4. *See* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 103 n.6 (2d. ed. 2000) for a listing of only three surveys concerning women as belligerents.

5. This term was first used by Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 1951 BRIT. Y.B. INT'L L. 321, 345.

6. L. C. Green summarizes the scope of the Forth Hague Convention regulations applicable to international conflicts as follows, "Its purview extends to armies, militia units and volunteer forces, provided they are commanded by a person responsible for his subordinates, have a fixed distinctive emblem recognizable at a distance, carry their arms openly and conduct their operations in accordance with the laws and customs of war." GREEN, *supra* note 4, at 35-36. Article 1(4) of Protocol I Additional to the Geneva Conventions extends protection to otherwise unqualified combatants participating in internal wars that are intended to exercise a people's right to self-determination. *Id.* at 61. However, the obligation to distinguish between combatants and civilians remains. *Id.* at 356.

gaged in "Small Wars"[7] where unarmed women often serve as auxiliaries to their unconventional opponents. Although legal sources have been remarkably silent about these problems, a number of examples are available. I have selected two involving unarmed women: one from Northern Ireland involving the British Army, and one from Somalia involving the American Army.

SCENARIO 1: AIDING AND ABETTING IN NORTHERN IRELAND

In August 1969, riots broke out in Londonderry, Northern Ireland when Protestant Apprentice Boys clashed with the Catholic residents of the city's Bogside neighborhood. When the police were unable to restrain the rioters, the Army was called in to maintain order and remained on the scene as political violence spread to Belfast and to the rest of the province. Although the Army sought to remain neutral, subsequent internment of suspected supporters of the Catholic Nationalist community's Provisional IRA, without the concurrent internment of Protestant Unionist Red Hand commandos, increased tension. "Bloody Sunday" (January 30, 1972), when Army paratroopers fired on an illegal parade, killing 13 people (7 of them under the age of 19) and injuring another 13, effectively alienated Nationalist support for the Army. An Irish journalist described the consequences:

> It was not only gunmen with whom the soldiers had to deal. Women, too, could be a major problem. In most areas their early warning system for the approach of any stranger meant a general stand-to with the banging of dustbin [trash can] lids and the blowing of whistles. Hundreds of women could gather very fast and become a dangerous menace to a small patrol. . . .
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> . . .Of course the soldiers also got caught in 'public relations ambushes'—the sort of 'come on' calls which would lead them blundering into old ladies or invalids in wheelchairs.[8]

Did these unarmed women, acting in support of groups seeking to destabilize the government, constitute unprivileged belligerents who could claim some protection from international law? Certainly they could not claim combatancy status (nor could their imprisoned IRA allies who sought but failed to achieve POW status). If such incidents took place where the British Army could claim the status of an Occupying Power, international law would provide for punishment by internment or imprisonment, keeping in mind "that local inhabitants owe no allegiance to the occupant, and any punishment must be proportionate to the offence."[9] If the women were to face criminal sanctions, they would presumably be charged with some minor offense—disturbing the peace, or interference with the police in the performance of their duties—and would be punished accordingly. The "Yellow Card" that each British soldier carried, permitting his

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7. The phrase is borrowed from British Major Charles E. Callwell's classic treatise. C. E. CALLWELL, SMALL WARS: THEIR PRINCIPLES & PRACTICE (new ed., rev. 1899), and its U.S. Marine Corps' counterpart, SMALL WARS MANUAL, UNITED STATES MARINE CORPS 1940.

8. DESMOND HAMILL, PIG IN THE MIDDLE: THE ARMY IN NORTHERN IRELAND 1969-1984 76 (1985).

9. GREEN, *supra* note 4, at 263.

use of deadly force, would not apply in such circumstances.[10] Similar Yellow Card provisions limiting the use of deadly force to self-defense were to become part of U.S. military doctrine in operations other than war.[11]

The United States military's Standing Rules of Engagement for U.S. Forces define national, collective, unit, and individual self-defense.[12] The Army Manual that explains the Rules of Engagement definitions notes that individual soldiers have the right to defend themselves and other U.S. forces from a hostile act or intent, the "threat of *imminent* use of force by a foreign force or terrorist unit against the United States, U.S. Forces, or other designated persons and property. When hostile intent is present, the right exists to use *proportional force* in self-defense to deter, neutralize, or destroy the threat."[13] In this regard, the Barlow incident, which occurred in Belfast in 1973, is instructive:

> In one incident . . . a young soldier [Barlow] got separated from his patrol by a group of angry women. They took his rifle and twenty rounds of ammunition, calmed him down a bit by telling him that he would be all right, and kept him isolated until an IRA gunman was able to get there and shoot him. The *Belfast Telegraph* thought the incident reminiscent of tribal behaviour in more uncivilized parts of the world: "Gary Barlow was a brave young man, he died honouring the orders of his superior officers, he played the rules of his Yellow Card right to the end. Even as he was being mauled he did not forget to uphold the name of the British Army, for considering the terrible circumstances, he still did not open fire."[14]

Should Barlow have, after warning the unarmed women (which he presumably did), resorted to deadly force when they tried to relieve him of his weapon? The law of armed conflict offers no explicit answer but articulates three general principles for judging the legitimacy of a belligerent's acts: military necessity, proportionality, and humanity.[15] Necessity is defined in the aggregate, as justifying those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.[16] These criterion, clearly intended to evaluate command responsibility, simply cannot be applied to an individual soldier in Barlow's situation. The second principle, intended to regulate weapons and targeting, has no apparent application in Barlow's case. Similarly the third, which requires that "[t]he anticipated loss of life . . . must not be *excessive* in relation to the *concrete and direct* military advantage to be gained," is inappropriate in this context.[17] The U.S. Army's expert on the law of armed conflict recently published a stinging attack

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10. MARK URBAN, BIG BOYS' RULES: THE SECRET STRUGGLE AGAINST THE IRA 71 (1992).

11. INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GENERAL'S SCHOOL, OPERATIONAL LAW HANDBOOK, JA 422, 84-95 (Mike O. Lacey & Brian J. Bill eds., 2001) [hereinafter, OPERATIONAL LAW HANDBOOK].

12. *Id.* at 79, 91 (reprinting unclassified portions of the CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01.A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES Encl. A (Jan 15., 2000) and the March 31, 1995 Military Rules of Engagement regarding the UN's peacekeeping operation in Haiti).

13. Id. at 79.

14. HAMILL, *supra* note 8, at 137 (quoting the *Belfast Telegraph*).

15. A. P. V. ROGERS, LAW ON THE BATTLEFIELD 3-7, 14-19 (1996).

16. *Id.* at 4-5.

17. OPERATIONAL LAW HANDBOOK, *supra* note 11, at 8.

on the U.S. Rules of Engagement which, he claims, did not adequately inform individual soldiers of their rights to self defense.[18] Although the article limits its analysis to U.S. practice, we can say with certainty that an American soldier in Barlow's situation might make the same fatal mistake.

SCENARIO 2: SUSPICION OF BELLIGERENCY IN SOMALIA[19]

The President of Somalia, Said Barre, was overthrown in 1991. In April 1992 the Security Council authorized the United Nations Operation in Somalia (UNOSOM), intended to monitor a cease fire between warring clans and to provide humanitarian aid. As lawlessness increased, the UN mandate was modified in August 1992 to permit the use of force to protect humanitarian aid. By November 1992, the security situation had deteriorated so badly that security for UNOSOM was turned over to the Unified Task Force, an international coalition, which included U.S. soldiers and Marines.[20] The warlords stopped fighting in the Spring of 1993, the Marines were withdrawn, the U.S. Army became the reserve force, and an international force, UNOSOM II, was increased. Retired Admiral Jonathan Howe, who headed the UN Mission in Mogadishu (Somalia's capital city) decided that arresting a powerful clan leader, Mohamed Farrah Aidid, and trying him for war crimes would enable the other clans to share power with Aidid's clan. The arresting force, composed of Army Rangers and members of the Delta Force ("The D-boys"), a detachment of Army Special Operations, failed to capture Aidid and were trapped in the center of the city. An intense firefight ensued:

> Closer to the wrecked helicopter, a woman kept running out into the alley, screaming and pointing toward the house at the southeast corner of the intersection where many of the wounded had been moved. No one shot at her. She was unarmed. But every time she stepped back behind cover a wicked torrent of fire would be unleashed where she pointed. After she'd done this twice, one of the D-boys behind the tail of *Super Six One* [the wrecked helicopter] said, "If that bitch comes back, I'm going to shoot her."
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> Captain Coultrop nodded his approval. She did, and the D-boy shot her down on the street.
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> Then there was the woman in a blue turban, a powerful woman with thick arms and legs who came sprinting across the road carrying a heavy basket in both arms . . . Every Ranger at the intersection blasted her . . . First she stumbled, but kept on going. Then, as more rounds hit her, she fell and RPGs [rocket-propelled grenades] spilled out her basket onto the street.[21]

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18. W. Hays Parks, *Deadly Force is Authorized*, 127 PROC. U.S. NAVAL INST. 32 (Jan. 2001).

19. The incidents are described in MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (1999).

20. The historical narrative is based on Chris Klep & Donna Winslow, *Learning Lessons the Hard Way - Somalia and Srebrenica Compared*, *in* PEACE OPERATIONS BETWEEN WAR AND PEACE 93, 94 (Erwin A. Schmidl ed., 2000).

21. BOWDEN, *supra* note 19, at 217.

Neither of the women were armed. In both cases, the soldiers assumed that the women were giving direct assistance to the enemy. The woman in the blue turban's involvement was established after the fact when her basket spilled. We are not told, but must be expected to assume, that the "torrents of fire" ceased when the first woman was shot. Article 147 of the Third Geneva Convention lists the willful killing of civilians as a "grave breach" which parties to the Convention must punish.[22] The soldiers would respond that the circumstances justified the act. But what if the spilled basket contained infant formula? What if the "torrents of fire" continued? Their commander would probably conclude that, even so, their behavior was reasonable under the circumstances and not punish them. But the Geneva Conventions impose "an obligation upon states to punish what the Conventions describe as 'grave breaches,' even if those states are not parties to the conflict, the offenders and their victims not their nationals, and even though the offenses were committed outside the territorial jurisdiction of the state concerned."[23] At the Nuremberg trials, General Von Leeb was convicted of a war crime for permitting the shooting of civilians who were merely suspected of belligerent acts.[24] Thus, according to the Von Leeb precedent, Captain Coulthrop and his men may be subject to prosecution for war crimes in any country in which they travel. The charge? Shooting unarmed civilian women on mere suspicion. The distinction between mere suspicion and probable cause has long bedeviled U.S. criminal law. It may now create problems in the international law of war as well.

These shooting cases create domestic law problems as well. If the women's deaths could not be objectively justified--by diminished fire or RPG rounds--Captain Coulthop's commander might initiate court-martial action for the suspected war crimes. The Rules for Courts-Martial gives military authorities great discretion in deciding whether to send a case to trial.[25] If there were a trial, the accused might rely on the doctrine of self-defense. The Rules for Courts-Martial's criteria are clearly intended for peacetime homicides: reasonableness of belief, imminent danger, inability to retreat, and the accused must not have been the aggressor or provoked the altercation.[26] The first two criteria would apply on the battlefield, but it is not clear whether the criterion of reasonableness is to be tested objectively ("Would the reasonably prudent soldier under these circumstances have shot these unarmed women?") or subjectively ("Was this soldier at the time he shot these unarmed women acting in good faith although his act was objectively unreasonable?").

The scenarios that I have offered establish that shooting unarmed women may not necessarily be a "grave breach" or constitute the domestic crime of homicide. However, neither international nor domestic law offers soldiers any clear criteria for deciding when such acts would be justified. Traditionally, this gap in the law was unimportant. The international law of war was developed on the assumption that war would be waged between belligerent armies who

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22. GREEN, *supra* note 4, at 286-98.
23. *Id.* at 45.
24. INGRID DETTER DE LUPIS, THE LAW OF WAR 355 (1987).
25. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pts. II-25, II-31, II-41 (2000).
26. *Id.* at pt. IV, art. 118.

met criteria for combatant status.[27] Protection to unprivileged belligerents was based on the premise that they would be acting in opposition to an established state, which would be required to honor its international obligations as it sought to suppress the insurgency: the Northern Ireland scenario. But what if the state has failed, as it did in Somalia? It is generally agreed that UN peacekeeping forces engaged in peace enforcement operations like Somalia are bound by the laws of war.[28] In failed states, however, the UN typically declines to assume the role of an Occupying Power, thus leaving minor offenses, such as those committed by the "dust bin women" in the Belfast scenario unpunished and a constant irritant for peacekeeping forces.[29] Nor is there any published record of belligerent female auxiliaries being punished. If women participate voluntarily as unarmed belligerents in a Small War where there is no civil authority to whom they can be turned over, conventional forces are left with the option of shooting them, and risking prosecution for murder or a "grave breach", or letting them go free and risking further harm. Nowadays, Rudyard Kipling's soldiers should continue to travel in pairs, but one of them should be trained in law.

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27. GEOFFREY BEST, WAR AND LAW SINCE 1945 29 -32 (1994) (tracing the shift of law as regulating the behavior of individuals to regulating the behavior of States); s*ee also* GREEN, *supra* note 4, at 28-30.

28. HILAIRE MCCOUBREY & NIGEL D. WHITE, THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS 153-175 (1996).

29. MICHAEL J. KELLY, RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS: THE SEARCH FOR A LEGAL FRAMEWORK 172-181 (1999) (describing, then criticizing, the UN policy).