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Shoot First, Ask Questions Later: Double-Tapping under the Laws of War

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SHOOT FIRST, ASK QUESTIONS LATER: DOUBLE-TAPPING UNDER THE LAWS OF WAR

Stephen W. Simpson*

I.	INTRODUCTION	751
II.	THE USE AND JUSTIFICATION OF DOUBLE-TAPPING	753
A.	<i>Killing the Wounded: From Waterloo to the Gulf War</i>	753
B.	<i>Double-Tapping during the Second Gulf War</i>	755
1.	Thunder Run	755
2.	Shooting the Wounded in Fallujah	756
III.	HISTORY AND APPLICABILITY OF THE LAWS OF WAR	758
A.	<i>Prohibitions on Unnecessary Suffering and Protections for the Wounded</i>	759
1.	The Lieber Code	759
2.	The Geneva Conventions	760
3.	Preventing Unnecessary Suffering in War	762
a.	<i>St. Petersburg Declaration of 1868</i>	762
b.	<i>The Hague Conventions of 1899 and 1907</i>	763
B.	<i>Modern Protections for the Wounded and Sick</i>	764
C.	<i>Protections for the Dead</i>	766
D.	<i>The Principle of Distinction</i>	767
E.	<i>The Prohibition of Perfidy</i>	768
IV.	DOUBLE-TAPPING IN CONTEXT: THUNDER RUN AND FALLUJAH	769
A.	<i>Determination of Status as a Mark of Legitimacy</i>	771
1.	The Resolution of Doubt as to Status	772
a.	<i>Resolving Doubt in Favor of Protection</i>	772
b.	<i>Resolving Doubt in Relation to Danger</i>	773
V.	CONCLUSION	774

I. INTRODUCTION

In urban combat, it is said that there are two kinds of people on the battlefield—marksmen and targets.¹ In this article, I wish to address an issue im-

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portant to both parties: double-tapping. Simply stated, double-tapping is the practice of shooting into bodies that appear dead or wounded to ensure that they are, in fact, dead. While the laws of war do not expressly prohibit the practice, they do limit it—offering protection for the wounded and dead while enabling soldiers to protect themselves by shooting those still engaged in hostilities.

The realities of war have never reflected a chess match, where parties to a conflict, clad in their respective colors, meet upon a predetermined field of battle and operate according to predetermined rules. Rather, the parties involved in a conflict color the style and substance of battle regardless of the existence of treaties, laws, codes, or customs. Until recently, the laws of war were only enforceable insofar as states possessed the will and desire to prosecute their own combatants.² Parties mostly refrained from violating the laws of war for fear of reprisal.³ Where the identity and political structure of the enemy is less than clear, however, these enforcement mechanisms fail to create any incentive to follow the laws of war. Today, the uniformed, organized, and politically accountable armies of the more-developed world frequently encounter non-uniformed, unaccountable, and often unidentifiable bands of combatants.⁴

Without enforcement mechanisms policing one party to a conflict, the question of whether countries like the United States may violate the laws of war in reprisal presents a difficult question. David Hume once wrote, “[a]nd were a civilized nation engaged with barbarians, who observed no rules of war, the former must also suspend their observance of them, where they no longer serve to any purpose; and must render every action or recounter as bloody and pernicious as possible to the first aggressors.”⁵ While Hume’s exhortation to resort to unrestricted violence may seem simple enough, it assumes complete knowledge of who is the aggressor and who is engaged in battle. This categorization is a central question in determining whether double-tapping violates the laws of war and a question often faced by many soldiers in combat.

This article will discuss the history and purpose of double-tapping and the laws of war it implicates, focusing on the protections offered to the dead and

¹ MICHAEL T. HALL & MICHAEL T. KENNEDY, *MOUT TRAINING 75TH REGIMENT: THE URBAN AREA DURING SUPPORT MISSIONS 541, 550* (Mar. 30, 2000), <http://www.rand.org/publications/CF/CF162/CF162.app.pdf>.

² See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3317. This clause requires the signatory parties to enact legislation necessary to provide effective penal sanctions and to bring persons who have committed grave breaches before their own courts for punishment. *Id.*

³ See Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT’L L. 205, 205 (1977).

⁴ This is not to say that this type of warfare is a modern development. Guerilla-style warfare is well-documented throughout history. Examples come from as early as the Second Punic War (218-210 B.C.), where Roman dictator Fabius Maximus’s employed guerilla tactics against the oncoming armies of Hannibal.

⁵ DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* 20 (Open Court Publ’g Co. 1930) (1777).

wounded through the Geneva Conventions and the International Committee of the Red Cross Rules.

Specifically, I will begin by describing some historical examples of the use of double-tapping and briefly discuss the justifications for such uses. In Part III I will analyze the current laws of war related to double-tapping and their historical precursors. These laws include the protections afforded the wounded and dead, the principle of distinction, and the prohibition on perfidy. Finally, Part IV will analyze the legality of double-tapping in context, focusing on two events where American forces fired on wounded or dead Iraqi troops during the Second Gulf War.

II. THE USE AND JUSTIFICATION OF DOUBLE-TAPPING

Double-tapping is the practice of firing into bodies, regardless of their current participation in hostilities, for the purpose of making sure the targets are dead. Although this practice takes place almost exclusively with gunfire in the modern world, this was not always the case. While not necessarily called "double-tapping," the practice of making sure that an enemy on the ground is dead is a long-standing practice in the history of warfare. Double-tapping has been used throughout history for many reasons: tactics, fear, hatred, safety, economics, and mercy.

A. *Killing the Wounded: From Waterloo to the Gulf War*

While the laws of war have offered significantly more protections to the wounded, sick, and dead over time, double-tapping, or rudimentary versions of it, has remained in constant practice. The following examples of killing the wounded illustrate the practice before and after the invention of modern weaponry and the formulation of the modern laws of war.

While fighting the French at Waterloo, British troops commonly struck at bodies lying on the ground.⁶ One British colonel stated that, "[w]hen charging at Waterloo, a French trumpeter was passed lying on the ground. Few of the regiment forbore to have a slash at the fallen enemy, as they galloped past."⁷ The French were not innocent of the practice either. In his memoirs, John Kincaid recounted how the French troops would pause in retreat only to stab wounded troops: "[i]t made me mad to see the [French], in their retreat, stooping and stabbing at our wounded men. How I wished that I had been blessed with Omnipotent power for a moment, that I might have blighted them."⁸

During the Twentieth Century, the use of double-tapping persisted, notwithstanding the increasing accuracy and effectiveness of modern weapons.

⁶ CHARLES DALTON, *THE WATERLOO ROLL CALL* 53 (1890).

⁷ *Id.* The colonel continued, "I did not slash at him . . . [the trumpeter] slashed at me!" *Id.*

⁸ JOHN KINCAID, *ADVENTURES IN THE RIFLE BRIGADE AND RANDOM SHOTS OF A RIFLEMAN* 169 (1981).

In World War I, both the Axis and Allied powers used bayonets to stab enemies on the ground as they advanced to protect their flanks.

During an advance on the battlefield, some British battalions had the deliberate policy of bayoneting the wounded enemy *en passant* to neutralise them. And there are reliable reports that wounded, and wound-faking, enemy soldiers fired at the backs of advancing British soldiers. There are also personal accounts by soldiers of both sides of bayoneting unarmed POW's, in and behind the lines, although this was rarely admitted officially by either side.⁹

Double-tapping continued in the Second World War, practiced by all the parties to the conflict. The German, Soviet, Japanese, British, and American troops all utilized the practice to ensure that those enemy soldiers who appeared to be dead on the battlefield were actually dead. The practice was apparently so common for the Soviets that one observer wrote the following: "Killing captured and often wounded Germans was so pervasive that it raises the question of whether it was an inherent, spontaneous characteristic of the Russians, who dominated the field armies, or part of a systematic policy by the Soviet Communists to encourage resistance and maintain control over the Red Army."¹⁰

Accounts from the front lines against Japan show that the Japanese commonly fired into dead or wounded soldiers on the battlefield. One such account tells the following story:

They had been ambushed, two of his companions were killed at once, he and the third had run for the cover they never reached as the Japs dropped them with fire on the way. He had then seen the Japs shoot again, bayonet the three dead men, and then start for him. He played dead, so they shot him and passed on.¹¹

After World War II and the subsequent ratification of the 1949 Geneva Conventions, the practice was still evident throughout the world. Long-time American veterans have reported that the practice is more common than the

⁹ David Payne, *The Cult of the Bayonet in the British Army on the Western Front in the Great War* (2005), <http://www.westernfront.co.uk/thegreatwar/articles/research/britishbayonet.htm>.

¹⁰ RUSSELL STOLFI, *HITLER'S PANZERS EAST: WORLD WAR II REINTERPRETED* 91 (1993). Quoting from American and German battlefield reports, Stolfi cites the several examples of Soviet practices during World War II. See *id.* "German prisoners . . . mishandled by Russians . . . other prisoners bestially murdered. Investigation to follow." *Id.* "[E]ven wounded German soldiers who had fallen into Russian hands in a counterattack were murdered by stab wounds in the back." *Id.*

¹¹ RUSSELL CARTWRIGHT STROUP, *Letter of June 24, 1944*, in *LETTERS FROM THE PACIFIC: A COMBAT CHAPLAIN IN WORLD WAR II* (2000).

military would like to admit.¹² “[Gary] Solis, a former Marine lieutenant colonel who teaches the law of war at West Point and has written two books on Marine war crimes in Vietnam, said he believes the practice of ‘double-tapping’ fighters ‘just to make sure’ they are dead is a common practice among . . . Marines in Iraq.”¹³

Solis also noted that West Point professors have tried to impress upon cadets that “finishing off” wounded enemies was unacceptable, regardless of whether the wounded is a prisoner of war or an enemy combatant.¹⁴ In the Second Gulf War, several examples of double-tapping occurred, two of which will be described in detail in the following section. American and British forces chose to double-tap the dead, wounded, and those who appeared to surrender during certain battlefield situations. Where Iraqi soldiers “continue[d] to use deception, . . . dress[ed] in civilian clothes or pretend[ed] to surrender, and then unexpectedly pull[ed] out a gun and start[ed] shooting” the American and British forces would double-tap.¹⁵

B. *Double-Tapping during the Second Gulf War*

1. Thunder Run

Evidence that the practice persists today comes from the April 5, 2003, American invasion of Baghdad—an operation called “Thunder Run.”¹⁶ During the advance into the city, one reporter, David Zucchini, was embedded with Task Force 4-64 of the 2nd Brigade, 3rd Infantry Division (Mechanized). He described the push to Baghdad, compiled reports of the brigade commanders involved in the battle, and wrote about the problems American forces encountered because of their uncertainty about the status of dead and wounded Iraqi soldiers.¹⁷

On April 4, 2003, brigade commander Colonel David Perkins summoned Army Lieutenant Colonel Eric Schwartz and told him that he was to attack Baghdad the next morning.¹⁸ This was surprising because no American troops had set foot into the Iraqi capital yet, the original plan of attack had called for an airborne assault, and his armored divisions had trained for desert

¹² Darrin Mortenson, *Pendleton Marine investigated for killing wounded prisoner in Fallujah*, N.C. TIMES, Nov. 16, 2004, at A1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Retired Brig. Gen. David Grange, *Grange: Iraqis fight with ‘economy of force,’* Mar. 25, 2003, <http://www.cnn.com/2003/US/03/25/sprj.iqr.general.grange/>.

¹⁶ Thomas E. Ricks, *Old-Style Battles Are Giving Way to ‘Checkpoint War,’* WASH. POST, Apr. 6, 2003, at A26.

¹⁷ David Zucchini, *The Thunder Run: Are You Kidding Sir?*, L.A. TIMES, Dec. 7, 2003, at 18.

¹⁸ *Id.*

combat, not urban warfare.¹⁹ The next morning, however, Schwartz advanced toward the city, a prelude to a three-day battle for the capital.²⁰

The race to Baghdad created mass confusion among the Iraqi soldiers.²¹ At first, many unsuspecting combatants were surprised and easily gunned down.²² After the initial shock, however, the Iraqi forces began to organize.²³ A tank near the front of the column was disabled at a highway interchange, stopping the entire column on the highway.²⁴ After the column was forced to slow down, Zucchini reported that “[f]ighters who appeared to be dead or wounded were suddenly leaping up and firing at the backs of American vehicles. Schwartz ordered his gunners to ‘double-tap,’ to shoot anybody they saw moving near a weapon.”²⁵ Schwartz commented on the practice after the battle, stating that “[i]f it was a confirmed kill, they’d let it go [I]f it wasn’t, they’d tap it again. We were checking our work.”²⁶

2. Shooting the Wounded in Fallujah

In addition to Thunder Run, another example of the use of double-tapping by American soldiers in Iraq gained much attention in the press. On November 13, 2004, NBC News correspondent Kevin Sites, embedded in the Third Battalion, First Regiment of the First Marine Division, videotaped an American soldier as he shot an Iraqi prisoner in a Fallujah mosque.²⁷ Mr. Sites reported that Iraqi soldiers fired upon a different Marine unit a day earlier from the same mosque.²⁸ That unit stormed the mosque, killed ten men, and wounded five others.²⁹ According to the first unit, the combatants were armed with rocket-propelled grenades and AK-47 rifles.³⁰ After the marines attacked the mosque, they tended to the wounded and rejoined the effort to take Fallujah from insurgents.³¹

The next day Mr. Sites and his unit came upon the mosque, entered it with a video camera, and recorded an American soldier shouting obscenities in

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Associated Press, *TV Report Says Marine Shot Prisoner*, N.Y. TIMES, Nov. 16, 2004, at A12.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

the background.³² The American soldier yelled that one of the Iraqis in the mosque was pretending to be dead.³³ The video showed the American soldier pointing his rifle at the Iraqi on the floor, and, although the video went dark, a shot can be heard in the background.³⁴ The blacked-out portion was later revealed to some members of the network pool, showing that the American soldier hit the combatant in the upper body.³⁵ Blood spatters appeared on the wall behind him and the combatant's body went limp.³⁶

After the incident and an accompanying firestorm of controversy, the United States military began an investigation into the shooting.³⁷ According to the Pentagon, the inquiry focused on whether the "marine believed he was acting in self-defense when he yelled that the Iraqi was only pretending to be dead and fired at the prone body."³⁸ Investigators concluded that there was insufficient evidence to charge the marine and that it was possible that the marine thought his life was in danger.³⁹ The reporter wrote an open letter to the Marine Corps several days after the incident stating that "[o]bserving all of this as an experienced war reporter who always bore in mind the dark perils of this conflict, even knowing the possibilities of mitigating circumstances—it appeared to me very plainly that something was not right."⁴⁰

While many questioned the actions of this particular marine and his unit, it is necessary to detail some of the background regarding the assault on Fallujah with respect to the practices of the combatants. Many sources reported

³² *Id.*

³³ *Id.* See also Tom Bowman, *Videotape reveals war's impact*, BALT. SUN, Nov. 17, 2004, at 4A ("'He's (expletive) faking he's dead!' 'Yeah, he's breathing,' another Marine is heard saying.").

³⁴ Associated Press, *supra* note 27.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Eric Schmitt, *Bodies of 4 Iraqis Flown to U.S. For Autopsies in Fallujah Inquiry*, N.Y. TIMES, Nov. 20, 2004, at A9.

³⁸ *Id.*

³⁹ Andrew Buncombe, *Marine Who Shot Dead Wounded Iraqi on Video to Escape Charges in Fallujah Will Not Be Prosecuted*, THE INDEPENDENT (London), Feb. 25, 2005, at 27.

⁴⁰ *Id.* For other commentary and reports of the incident see Thomas J. Raleigh, *A Lesson in War and Humanity*, WASH. POST, Dec. 25, 2004, at A29; Evan Wright, *Dead-Check in Fallujah*, VILLAGE VOICE, Nov. 30, 2004, at 22; Nick Fusco, *Marines Doing the Dirty Work*, JOURNAL NEWS, Jan. 7, 2005, at 4B; Jeremy Iggers, *The Ethics of War; Reflecting on Iraq in Years to Come, the World Will Likely Ask of Us: Did We Know? Did We Care? Did We Speak Out?*, STAR TRIB. (Minneapolis), Feb. 6, 2005, at 1AA ("Marines call executing wounded combatants 'dead-checking.'"); Sgt. Jay T. Blass, *Time to Present Reality*, ARMY TIMES, Dec. 13, 2004, at 53; William Bryant, *Soldiers Have to Kill or be Killed*, ROANOKE TIMES & WORLD NEWS, Dec. 2, 2004, at B7.

that insurgents used mosques to launch attacks, faked surrender, pretended to be injured, and booby-trapped their own dead.⁴¹

These examples of double-tapping evidence some of the reasons why soldiers engage in the practice. They could be acting out of mercy,⁴² vengeance, caution, or strategy. The framework within which an act of double-tapping occurs is very important, as some uses may be legitimate while others a violation of the laws of war. The history and current usage provide an important benchmark within which to view the practice and provide important examples of why the practice exists and how soldiers employ it in the field.

It is interesting to note that while the laws of war have become increasingly complex, the practice of double-tapping has not appeared to wane. Most likely, this failure is not necessarily the result of an ineffective legal regime. Rather, it probably results from the realities of policing and enforcing a battlefield tactic practiced by individual soldiers which, depending on the specific circumstances of a confrontation, may or may not be legitimate. The nature of the battlefield confrontation and its effect on the legitimacy of the practice are addressed below.⁴³

III. HISTORY AND APPLICABILITY OF THE LAWS OF WAR

“The law of war recognizes that the purpose of the military in wartime is killing people and breaking things. It seems to me that killing people and breaking things has given way to feeding people and fixing things.”⁴⁴

In this section I will first describe the historical bases for the modern laws of war related to double-tapping, including protections for the wounded and sick and prohibitions on unnecessary suffering. Next, I will analyze the modern laws of war related to double-tapping: protections for the wounded and sick, respect for the dead, the principle of distinction, and the prohibition on

⁴¹ See, e.g., Rowan Scarborough, *Marine Charged in Killing of Iraqis*, WASH. TIMES, Feb. 14, 2005, at A1; Dennis Rogers, *War's Tales Need Telling*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 8, 2004, at B1 (pointing out that booby-trapped bodies are not unheard of in warfare as American soldiers encountered them in Korea, Vietnam, the first Gulf War, and in Afghanistan); Amanda Ripley et al., *A Shot Seen Round The World; A Marine Fires on a Wounded Man in a Fallujah Mosque, and the World Asks: Was it a War Crime?*, TIME, Nov. 29, 2004, at 38 (“This strain of war may be unimaginable to civilians Stateside, but it is nevertheless what the troops are trained to manage.”).

⁴² See, e.g., Edmund Sanders, *Mercy and Murder at Issue in Iraq Death*, L.A. TIMES, Nov. 5, 2004, at A1. Sanders described an incident where two American soldiers shot an Iraqi teenager who was severely wounded. *Id.* The soldiers “watched him moan and writhe in pain until they could stand it no longer.” *Id.* They then shot the man out of mercy. *Id.*

⁴³ See *infra* Section IV.

⁴⁴ Maj. Lisa L. Turner & Maj. Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 11 (2001) (citing W. Darrell Phillips, Int’l and Operations Law Div., Lecture at Air Force Judge Advocate General School, Maxwell Air Force Base, Ala.).

perfidy. Finally, I will briefly address the status of unlawful combatants as they relate to double-tapping.

A. *Prohibitions on Unnecessary Suffering and Protections for the Wounded*

Necessary to an analysis of the laws of war applicable to double-tapping is a brief understanding of their beginnings. Shooting into a wounded person implicates both the protection of the wounded and sick and, to a lesser degree, the prohibitions on unnecessary suffering. Focusing specifically on these two concerns, the following section describes early efforts to protect the wounded through the Lieber Code and the Geneva Conventions and efforts to reduce the suffering in war made through the St. Petersburg Declaration and the Hague Conventions of 1899 and 1907.

1. The Lieber Code

Flagrant violations of then customary laws of war during the United States Civil War fueled the development of the first codification of the modern laws of war, embodied in the Lieber Code.⁴⁵ The structure of the Lieber Code was simple, but, as Lieber himself stated, was “pregnant and weighty like some stumpy Dutch woman when in the family way with coming twins.”⁴⁶ Commissioned in 1863 by President Lincoln, the Code was a survey of the customary laws of war by Dr. Francis Lieber. After its completion, President Lincoln issued the Code as General Order Number 100 to govern the conduct of United States forces during the war.⁴⁷ Interestingly, the Code was subsequently adopted by Great Britain, France, and Prussia to govern their armies.⁴⁸

Although praised for its humane nature, the Lieber Code suffered from an almost “open-ended definition of military necessity.”⁴⁹ For example, under military necessity, the Code validated such practices as the starvation of civilians and the bombardment of civilians without warning.⁵⁰ Noting that the Lie-

⁴⁵ See RICHARD S. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 1 (1983) [hereinafter “LIEBER CODE”]. President Abraham Lincoln officially signed the Lieber Code for use of the Union Army in April 1863. *Id.*

⁴⁶ *Id.* at 21.

⁴⁷ See W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 7 (1990).

⁴⁸ See Daniel Smith, *New Protections for Victims of International Armed Conflicts: The Proposed Codification of Protocol II by the United States*, 120 MIL. L. REV. 59, 63 (1988). This international acceptance and adoption proved to be auspicious, as Lieber had previously boasted “that General Order No. 100 ‘will do honor to our country’ and it ‘will be adopted as a basis for similar works by the English, French and Germans.’” *Id.* (citing Letter from F. Lieber to General Halleck (May 29, 1863) in Lieber's Papers, Huntington Library, San Marino, California).

⁴⁹ See Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 66-67 (1994).

⁵⁰ HARTIGAN, *supra* note 45, arts. 15, 17, 19, 21.

ber Code happened to validate the practices of the Union Army, Confederate Secretary of War James Seddon proclaimed the Lieber Code “a barbarous system of warfare under the pretext of military necessity.”⁵¹

In protecting the wounded, Article 60 of the Code contained an obligation for one party to a conflict to give its enemy quarter.⁵² As with the rest of the Code, the obligation to give quarter was limited by military necessity. Article 60 declared that “a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.”⁵³ Although the obligation to take in the wounded did contain the caveat for military necessity, Article 61 acted to provide some minimal protection to “disabled” soldiers against attack.⁵⁴ Specifically, Article 61 offered protection against those who gave no quarter, stating that “[t]roops that give no quarter have no right to kill enemies already disabled on the ground.”⁵⁵

2. The Geneva Conventions

The birth of the Geneva Conventions dates back to 1859, shortly after the Swiss, inspired by a businessman's account of sick and wounded soldiers in France, created the International Committee of the Red Cross.⁵⁶ In 1864, the ICRC created the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.⁵⁷ Article 6 of this Convention stated that “[w]ounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.”⁵⁸ The Convention also provided for the protection of medical facilities and medical and religious personnel.⁵⁹ The protections afforded to armies on land in the Convention of 1864 were extended to maritime warfare in 1899.⁶⁰

The Convention of 1864 was amended in 1906, adding the notion that the wounded shall be “respected,” a notion only implicit in the 1864 Conven-

⁵¹ *Id.* at 123.

⁵² *Id.* art. 60.

⁵³ *Id.* art. 60.

⁵⁴ *See id.* art. 61.

⁵⁵ *Id.* art. 61.

⁵⁶ Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59, 62 (2003).

⁵⁷ *See* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 1 Bevans 7 [hereinafter “Geneva Convention of 1864”]; G.I.A.D. Draper, *The Development of International Humanitarian Law, in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 67, 70 (Jean Pictet ed., 1988).

⁵⁸ *See* Geneva Convention of 1864, *supra* note 57, art. 6.

⁵⁹ *See id.*, arts. 1, 2, 6.

⁶⁰ Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899, 32 Stat. 1827, 1 Bevans 263.

tion's requirement that the wounded be "cared for."⁶¹ The 1906 amendments also extended protections beyond officers and soldiers to "other persons officially attached to the armies."⁶² The 1907 Hague Regulations added protections for prisoners of war, civilians, and neutral persons.⁶³

The experiences of the seven million prisoners of war taken in World War I revealed the shortcomings of the Hague Regulations—especially its regulation of the conditions of captivity. In order to address these shortcomings, the ICRC created the Convention Relative to the Treatment of Prisoners of War in 1929.⁶⁴ In the same year, the ICRC further amended the protections for the wounded and sick. While the Convention of 1864 obligated parties to care for the wounded and the Convention of 1906 added the obligation to respect the wounded, the Convention of 1929 added the obligation to treat the wounded with humanity.⁶⁵

Just as World War I revealed the shortcomings of the Hague Regulations in regulating the treatment of prisoners of war and noncombatants, the horrors of World War II revealed the weaknesses of the Geneva Conventions. The conclusion of World War II brought the revision and codification of the four Geneva Conventions in 1949.⁶⁶ Following their adoption, it soon became apparent that the character of war was beginning to change. Technological advancements, guerilla warfare, and growing numbers of civil wars all showed the partial inadequacy of the Geneva Conventions. In order to address these problems, the ICRC invited states to supplement the Geneva Conventions. These new provisions are embodied in Additional Protocols I and II.⁶⁷ Protocol I ad-

⁶¹ See Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field, art. 1, July 6, 1906, 35 Stat. 1885, 1 Bevans 516, 521 [hereinafter "Geneva Convention of 1906"]. Immediately thereafter, this Convention was extended to maritime warfare in the Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371, 1 Bevans 694.

⁶² See Geneva Convention of 1906, *supra* note 61, art. 1.

⁶³ See 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, 36 Stat. 2277, 1 Bevans 631 [hereinafter "Hague Regulations IV"]; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654.

⁶⁴ Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932.

⁶⁵ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, art. 1, July 27, 1929, 47 Stat. 2074, 2 Bevans 965.

⁶⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter "Geneva I"]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁶⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125

dresses the Protection of Victims of International Armed Conflicts while Protocol II addresses the Protection of Victims of Non-International Armed Conflicts. Although the United States and many others are not parties to these Protocols, the International Committee of the Red Cross recently completed a comprehensive study of customary international law and found that most of the Additional Protocols are now customary international law.⁶⁸ Among these rules, the principle of distinction between combatant and civilian,⁶⁹ the obligation to provide quarter and to safeguard an enemy *hors de combat*,⁷⁰ the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*,⁷¹ the obligation to account for missing persons,⁷² and the prohibition on perfidy are all customary international law.⁷³

3. Preventing Unnecessary Suffering in War

International attempts at limiting the amount of unnecessary suffering in war led to two important agreements: The St. Petersburg Declaration of 1868⁷⁴ and the Hague Convention of 1907.⁷⁵ Both of these instruments reflected international efforts to control unnecessary suffering during wartime.

a. *St. Petersburg Declaration of 1868*

Czar Alexander II of Russia called for a conference in St. Petersburg to “alleviate as much as possible the calamities of war.”⁷⁶ Railing against the use of “arms which uselessly aggravate the sufferings of disabled men,”⁷⁷ the Declaration did little more than prohibit the use of exploding bullets, an unreliable

U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

⁶⁸ Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 187-88 (2005).

⁶⁹ *Id.* at 187.

⁷⁰ *Id.* at 188.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Declaration Renouncing the Use, in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, reprinted in THE LAWS OF ARMED CONFLICTS 101 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

⁷⁵ Hague Regulations IV, *supra* note 63.

⁷⁶ See Declaration Renouncing the Use, in Time of War of Explosive Projectiles Under 400 Grammes Weight, *supra* note 74.

⁷⁷ *Id.*

weapon which was fast becoming obsolete.⁷⁸ The famed prohibition against unnecessary suffering could be overridden by military necessity.⁷⁹ Just as in the Lieber Code, this exception was a vague and undefined term that effectively swallowed the prohibition against unnecessary suffering.⁸⁰

b. The Hague Conventions of 1899 and 1907

The main humanitarian contribution of the Hague Regulations rested in Article 23. The Article contained eight subsections relating to practices that were "especially prohibited." The three provisions most germane to this analysis stated that it was forbidden to "kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion,"⁸¹ it was forbidden to "declare that no quarter will be given,"⁸² and it was prohibited to employ "arms, projectiles, or material calculated to cause unnecessary suffering."⁸³ Article 22 also made a contribution to humanitarian law, declaring that "the right of belligerents to adopt means of injuring the enemy is not unlimited."⁸⁴ Unfortunately, the humanitarian contributions of the Conventions proved to be largely aspirational because of their failure to provide guidelines for interpreting the meaning of either the prohibition against using unlimited means or the prohibition of arms that caused "unnecessary suffering."

While the Hague Conference of 1907 was successful in codifying areas of combat operations related to naval warfare, bombardment, and aerial warfare, Article 23 is most germane to this analysis. The prohibition on killing an enemy

⁷⁸ The bullets were of great danger to the user, and most countries had ceased manufacturing them. See M. W. ROYSE, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE 131-32 (1928). The technology re-emerged, however, with the invention of aerial warfare. In 1923, some of the parties to the St. Petersburg Declaration apparently recognized its new-found value and proposed ending the "permanent" ban in the proposed Hague Rules of Air Warfare, art. XVIII, Feb. 1923. Jochnick & Normand, *supra* note 49, at 66-67. See also Parks, *supra* note 47, at 25-32; Jan Klabbers, *Off Limits? International Law and the Excessive Use of Force*, 7 THEORETICAL INQUIRIES L. 59, 65 (2006). The Hague Rules of Air Warfare can be viewed at http://lawofwar.org/hague_rules_of_air_warfare.htm (last visited Mar. 9, 2006).

⁷⁹ See Jochnick & Normand, *supra* note 49, at 66-67.

⁸⁰ One commentator found that no signatories to the St. Petersburg Declaration found a militarily useful weapon unfit for use because of the suffering it may have caused. See FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 30 (1987).

⁸¹ See Hague Regulations IV, *supra* note 63, art. 23(c).

⁸² *Id.* art. 23(d).

⁸³ *Id.* art. 23(e). In the 1899 Convention, Article 23(e) used the phrase "superfluous injury" instead of "unnecessary suffering" used in the 1907 Convention. See Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 23(e), July 29, 1899, 32 Stat. 1803, ___ Bevans ___. The 1899 version of the Article suffered from the same shortcomings as the 1907 version, that is, "superfluous injury" remained undefined. See *id.*

⁸⁴ Convention With Respect to the Laws and Customs of War on Land, art. XXII, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

that no longer had a means of defense and surrendered is a precursor to ICRC Rule 47, which would give protection to these same attackers and others recognized *hors de combat*.⁸⁵

B. *Modern Protections for the Wounded and Sick*

As the laws of war relate to double-tapping, the most important consideration lies in the protections afforded the wounded. The Lieber Code of 1863 and the Geneva Convention of 1864 both contained general protections for the care of the wounded and sick. Articles 60 and 61 of the Lieber Code gave the basic rules for giving quarter to the enemy.⁸⁶ Article 60 stated that it was against the modern law of war to not give quarter, but, in "great straits, when his own salvation makes it impossible to cumber himself with prisoners" a commander can direct his troops to not give quarter.⁸⁷ The 1864 Geneva Convention provided that "[w]ounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong."⁸⁸ The 1906 revision added the idea of respect for the wounded, and the 1929 revision protected the wounded and sick with "four imperatives which had . . . defined the inviolability of the wounded:" respect, protection, humane treatment and care.⁸⁹ The 1949 Conference left these four imperatives intact.⁹⁰

The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field sets out the current protections for the wounded.⁹¹ Specifically, it states that "[m]embers of the armed forces and other persons specifically mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances."⁹² The Article continues, "[a]ny attempts upon their lives, or violence to their persons, shall be strictly prohibited."⁹³

On its face, this Article forbids double-tapping a soldier who falls within the category of wounded or sick. Shooting wounded combatants would clearly be a violation of the Article's proscription on "attempts upon their lives."⁹⁴ The difficulty, however, is in trying to determine if a combatant is wounded and deserves the protections afforded by the Convention.

⁸⁵ See *infra* notes 100-103 and accompanying text.

⁸⁶ See LIEBER CODE, *supra* note 45, arts. 60-61.

⁸⁷ *Id.*

⁸⁸ Geneva Convention of 1864, *supra* note 57, art. 6.

⁸⁹ See JEAN S. PICTET, COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 134-35 (1952).

⁹⁰ See *id.*

⁹¹ Geneva I, *supra* note 66, art. 12.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *id.*

In Pictet's Commentary on the Convention, he stated that "[n]o attempt has ever been made in the Geneva Convention to define what is meant by a 'wounded or sick' combatant."⁹⁵ Pictet further emphasized that any attempt to define the severity of wounds or sickness that would trigger protection would be futile.⁹⁶ Doing so "would thereby open the door to every kind of misinterpretation and abuse."⁹⁷ For Pictet, deciding whether an attacker was sufficiently wounded or sick for the purposes of protection was a matter of "common sense and good faith."⁹⁸ The key deciding factor was whether combatants had put down their weapons and had ceased to fight "as a consequence of what they themselves think about their health."⁹⁹

Further guidance on defining whether a combatant is wounded or sick can be found in the International Committee of the Red Cross's recent study on customary international humanitarian law. In Rule 47, the ICRC states that any attack on a person recognized *hors de combat* is prohibited.¹⁰⁰ A person *hors de combat* is "anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness."¹⁰¹ In order to be *hors de combat*, a person must also "abstain[] from any hostile act and [] not attempt to escape."¹⁰² This definition invites two interrelated questions. First, what does the term "recognised" mean on the battlefield, and second, how does one tell if a combatant is truly "defenceless."

As to the first question, Rule 47 includes three categories of people who are *hors de combat*: anyone who is in the power of an adverse party; anyone who is defenseless because of unconsciousness, shipwreck, wounds or sickness; or anyone who clearly expresses an intention to surrender.¹⁰³ Of these three categories, it may be assumed that the second and third were not meant to overlap entirely. In other words, those who are wounded and do not continue to fight do not have to express a clear intent to surrender in order to be recognized as *hors de combat*. Moreover, because the category containing the wounded also includes those who are unconscious, any clear expression requirement cannot logically apply to the second category. As wounded combatants may not be able to manifest a clear intent to surrender due to their physical conditions, a duty must attach to the attacking party to "recognise" combatants *hors de combat* as a result of their wounds in certain cases.

⁹⁵ PICTET, *supra* note 89, at 136.

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ *See id.*

⁹⁹ *Id.*

¹⁰⁰ Henckaerts, *supra* note 68, at 203.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

Placing the burden of recognition on the attacking party is consistent with Article 12 of the Geneva Convention for the Wounded and Sick.¹⁰⁴ Article 12 requires that an attacking party act affirmatively to protect the wounded. As Pictet explained in his commentaries, "[t]here is a positive, as well as a negative, obligation: the wounded and sick must be given such medical care as their condition requires."¹⁰⁵

To be protected as a combatant *hors de combat*, the attacking party must also determine that the wounded combatant is defenseless.¹⁰⁶ While there may be many simple cases,¹⁰⁷ there are situations in which suicide bombers and booby-traps abound.¹⁰⁸ If an enemy uses these tactics, determining whether a combatant is defenseless can be a deadly game. When and how a party is supposed to make the determination and recognize that a combatant is *hors de combat* is a question that Pictet would say is answerable only by "common sense and good faith."¹⁰⁹

C. *Protections for the Dead*

Double-tapping also implicates the protections afforded the dead in the Geneva Conventions. Article 15 of the first Geneva Convention requires parties to a conflict to "search for the dead and prevent their being despoiled."¹¹⁰ Article 16 provides additional measures meant to ensure respect for and protection of the dead. These measures include procedures for identification¹¹¹ and reporting requirements.¹¹² Double-tapping may run afoul of these provisions insofar as firing more bullets into a corpse to ensure that the person is in fact dead may needlessly damage a corpse in contravention of Article 15. In fact, it may needlessly damage a corpse to the point where it is not possible to identify the person in contravention of Article 16.

While not directly related to double-tapping, Article 17 helps to illustrate the breadth of protection offered the dead by the Conventions. Specifically, Article 17 addresses the procedures for disposal of the dead.¹¹³ If circum-

¹⁰⁴ Geneva I, *supra* note 66, art. 12.

¹⁰⁵ PICTET, *supra* note 89, at 137.

¹⁰⁶ See Henckaerts, *supra* note 68, at 203.

¹⁰⁷ Rule 47 includes combatants who are unconscious. *Id.* Setting aside concerns about perfidy, this serves as an example of a simple case of recognition.

¹⁰⁸ See Grange, *supra* note 15 and accompanying text.

¹⁰⁹ See PICTET, *supra* note 89, at 136.

¹¹⁰ Geneva I, *supra* note 66, art. 15.

¹¹¹ *Id.* art. 16 ("Parties to the conflict shall record as soon as possible, in respect of each . . . dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.").

¹¹² *Id.* ("Parties to the conflict shall prepare and forward to each other through the . . . bureau, certificates of death or duly authenticated lists of the dead.").

¹¹³ *Id.* art. 17 ("They shall further ensure that the dead are honorably interred.").

stances permit, this Article calls for a medical examination to confirm the death and to help establish identity.¹¹⁴ It limits the use of cremation for the disposal of the dead to certain circumstances that must be declared.¹¹⁵ Article 17 also calls for parties to inter the dead, if possible, by their nationalities, to establish an "Official Graves Registration Service" to aid in properly maintaining and marking graves so that they may always be found, to aid in exhumation for identification purposes, and to aid repatriation.¹¹⁶

D. *The Principle of Distinction*

A party may intentionally attack any combatant or civilian who takes a direct part in hostilities. A civilian cannot be a subject of double-tapping if he or she has not entered into hostilities.¹¹⁷ The ICRC rules state that Parties shall distinguish between the civilian population and military targets and shall direct their operations only against military targets.¹¹⁸ As firing once into a civilian who is not engaged in hostilities would violate this basic stricture, firing twice clearly does.

Combatants, however, are legitimate subjects of double-tapping provided they are not recognized as *hors de combat*. To distinguish between combatants who are still engaged in combat, who are wounded, and who are dead is to determine whether a combatant remains a legitimate target or now possesses a protected status. Combatants who are engaged in hostilities are military objectives and subject to the practice of double-tapping.¹¹⁹ Once a combatant ceases hostilities by virtue of being captured, by wounds or sickness, or by surrender they become persons *hors de combat* and are no longer legitimate subjects of double-tapping.¹²⁰

In light of the present situation in the United States regarding "enemy combatants," "detainees," and others suspected of operating with terrorist organizations it is necessary to briefly broach double-tapping with respect to those in this status. The status of the "unlawful" or "unprivileged" combatant has recently spurred much scholarly and popular debate.¹²¹ The debate rages on

¹¹⁴ *Id.*

¹¹⁵ The circumstances are limited to "imperative needs of hygiene" or for "motives based on the religion of the deceased." *Id.*

¹¹⁶ *Id.*

¹¹⁷ Henckaerts, *supra* note 68, at 198, Rule 6.

¹¹⁸ *Id.* at 198, Rule 1.

¹¹⁹ *Id.* at 198, Rules 3, 4, 7.

¹²⁰ *Id.* at 198, Rule 1; Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience Monitoring Internal Armed Conflicts*, 9 AM. U.J. INT'L L. & POL'Y 49, 75 (1993).

¹²¹ See, e.g., George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127 (2003); Joshua S. Clover, Comment, *Re-*

despite the fact that no treaty of international humanitarian law refers to the category.¹²² For the purposes of this analysis, however, distinctions between lawful and unlawful combatants need not be made. While the distinction may be important for claiming prisoner of war status, it is much less important for determining the lawfulness of the use of double-tapping against them.¹²³

According to ICRC Rule 47, any "attacking person" can be recognized as *hors de combat*.¹²⁴ This status would shield them from further attack, provided that the wounded attackers are not participating in hostilities.¹²⁵ The double-tapping of a combatant, lawful or unlawful, who is wounded but still engages in hostilities is legitimate under the laws of war.

E. *The Prohibition of Perfidy*

The prohibition of perfidy in warfare presents an important consideration with respect to classification. The Lieber Code proclaimed that the common law of war allowed for capital punishment when one made clandestine or treacherous attempts to injure an enemy because "they are so dangerous, and it is so difficult to guard against them."¹²⁶ The Hague Regulations continued to outlaw treachery, declaring that "it is especially forbidden to . . . kill or wound treacherously individuals belonging to the hostile nation."¹²⁷

A party to a conflict commits perfidy by "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."¹²⁸ Specifically, ICRC Rule 80 prohibits attaching booby-traps to persons entitled to special protection under international

member, We're The Good Guys": The Classification and Trial of the Guantanamo Bay Detainees, 45 S. TEX. L. REV. 351 (2004); David B. Rivkin, Jr. et al, *It's Not Torture, and They Aren't Lawful Combatants*, WASH. POST, Jan. 11, 2003, at A19.

¹²² Knut Dormann, *The Legal Situation of "unlawful/unprivileged combatants,"* 85 INT'L REV. OF THE RED CROSS 46 (Mar. 2003).

¹²³ The outline of the debate regarding the protections of unlawful versus lawful combatants can be found by comparing Dormann, *supra* note 122, with Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1028 (2004). Dormann relies on the U.S. Military Manual for the Laws of Land Warfare (1956) and textual arguments from the Geneva Conventions to support some protections for enemy combatants. Dormann, *supra* note 122, at 49-51. Callen, on the other hand, finds that unlawful combatants "are not given the specific rights detailed in the Convention." Callen, *supra* this note, at 1071.

¹²⁴ Henckaerts, *supra* note 68, at 203, Rule 47.

¹²⁵ *See id.*

¹²⁶ LIEBER CODE, *supra* note 45, art. 101.

¹²⁷ Hague Regulations IV, *supra* note 63, art. 23(b).

¹²⁸ Protocol I, *supra* note 67, art. 37.

humanitarian law.¹²⁹ Although the United States has not ratified Protocol I, it views the Article 37 and 38 perfidy provisions as customary international law.¹³⁰

IV. DOUBLE-TAPPING IN CONTEXT: THUNDER RUN AND FALLUJAH

During Thunder Run, soldiers on their way to Baghdad described combatants who appeared to be dead or wounded re-engaging American soldiers.¹³¹ In the heat of the battle, it is not surprising that soldiers who observed these actions would begin to shoot into the bodies of those that were wounded or appeared dead. Significant numbers of combatants acted in such a way as to deceive their enemy as to their status. This perfidious conduct violated the laws of war, which resulted in a loss of any protected status.¹³² Assuming that the American forces distinguished between combatants and civilians as they advanced, the people who feigned death or injury were combatants. As combatants without a protected status, they were lawful targets of double-tapping.

Of those who were actually wounded, the question is not as clear. Certainly those wounded combatants who began to re-engage in the battle were legitimate targets.¹³³ Those who were wounded, were defenseless, and did not re-engage in the battle, however, were not eligible targets.¹³⁴ Given perfect knowledge of the status of these wounded, they should have been recognized as soldiers *hors de combat*.¹³⁵ Although they should have been recognized as such, the ICRC's "defenseless" standard is nearly impossible to evaluate during the exigencies of battle.¹³⁶ A soldier cannot be expected to be omniscient under such circumstances, and, given the past practice of the enemy, it is not unreasonable to believe that wounded combatants possessed weapons hidden from the naked eye—such as small arms or booby-traps.

Assuming that the order to double-tap was given after significant numbers of combatants committed perfidious acts, it was legal under Pictet's common sense and good faith standard.¹³⁷ The enemy's ongoing use of deception as to their status made it reasonable to believe that soldiers who appeared wounded were still legitimate targets.

¹²⁹ See Henckaerts, *supra* note 68, at 205, Rule 80.

¹³⁰ UNITED STATES ARMY OPERATIONAL LAW HANDBOOK, 5-2, 5-3 (Manuel E. F. Supervielle et al. eds., 2000).

¹³¹ See Zucchino, *supra* note 17.

¹³² See *supra* notes 126-129 and accompanying text.

¹³³ Henckaerts, *supra* note 68, at 198, 203, Rules 1, 47.

¹³⁴ See *id.* at 203, Rule 47.

¹³⁵ See Goldman, *supra* note 120, at 75.

¹³⁶ See *id.*

¹³⁷ See Pictet, *supra* note 89, at 136.

It is also important to note that the commanding officer ordered his troops to shoot those who were *moving* near a weapon.¹³⁸ While this order may tend to legitimate double-tapping by only ordering its use against combatants who were moving, it is unrealistic to believe that a combatant who falls because of wounds would have fallen anywhere but near his or her weapon. Such a subtle distinction also implicates Pictet's common sense and good faith standard. Presumably, the order applied to those combatants who were moving near a weapon with the implication that they intended to use it. A common sense and good faith interpretation of the order should lead a soldier to avoid shooting those wounded combatants who may have been moving but were not intending to re-engage in hostilities.¹³⁹

Aside from shooting only those who moved near weapons, a general response to perfidious conduct cannot extend to situations where it is clear that a combatant is wounded and ceased hostilities or where a combatant is clearly dead.¹⁴⁰ In operation, this clarity may only be evident in extremely close combat or when one who is wounded can gain protection as *hors de combat* for clearly expressing his or her desire to surrender.¹⁴¹

A general perfidy justification for double-tapping is somewhat troubling from the perspective of the Iraqi forces because it makes protections for wounded soldiers somewhat moot. First, it punishes soldiers who may not be committing perfidy for actions they did not perform. Second, if a soldier is wounded, but the enemy can still engage him or her, there is little reason to surrender or otherwise give up fighting. While choosing to not surrender or fight may not be troubling in and of itself, it may encourage wounded soldiers to utilize make-shift booby traps on their person because of the belief that one will die regardless, harming those who later dispose of the dead.

The situation in Fallujah presents a similar problem. The enemy's pattern of conduct created an expectation that the enemy was engaged in perfidious acts.¹⁴² The soldier who shot the combatants was part of a unit that was recently victimized by a booby-trapped body and there were reports of other incidents where enemies faked wounds or death.¹⁴³

A close review of the facts sheds light on the legality of the soldier's decision to shoot the wounded Iraqi combatants. First, it is important to note that

¹³⁸ See Zucchini, *supra* note 17.

¹³⁹ For example, a soldier should not shoot one who is not moving toward a weapon, but is simply writhing in pain from severe wounds.

¹⁴⁰ This assumes that Pictet's common sense and good faith standard, paired with the duty to protect the wounded in both the Geneva Convention and the ICRC rules would demand recognition of attackers *hors de combat* in clear cases.

¹⁴¹ Henckaerts, *supra* note 68, at 203, Rule 47.

¹⁴² See Grange, *supra* note 15.

¹⁴³ See *supra* note 40 and accompanying text.

the marine in question was not aware that he was being recorded.¹⁴⁴ This supports the notion that the marine's actions were spontaneous and unaffected by the presence of the cameras.

The transcript states that the soldier, upon finding the wounded combatant, shouted "he's faking he's f***ing dead."¹⁴⁵ This indicates that the marine at least perceived a situation where an enemy soldier was planning a perfidious act. Taking into account previous accounts of booby-trapped bodies, this is not an unreasonable belief, but a real concern of many of the soldiers on the ground.

Running counter to this consideration is the journalist's report that there did not appear to be any weapons on the scene and that the man who was allegedly pretending to be dead did not make any sudden movements.¹⁴⁶ Assuming that there may have been a hidden bomb and that the soldier was standing in close proximity to the combatant, the lack of an obvious weapon or any sudden movement did not necessarily dispel any risk of danger.

After the first man was shot, the second man raised his hands and was spared.¹⁴⁷ If the marine actually believed that he was in danger and needed to shoot the first man, his decision to spare the life of the second man seems to be consistent with his initial fear of danger. Once the second man raised his hands, the danger dissipated and the soldier did not shoot him.

A. *Determination of Status as a Mark of Legitimacy*

In Thunder Run, double-tapping became a response to a specific tactic then employed by the enemy. Iraqi soldiers and other combatants began to feign death and attack American troops.¹⁴⁸ This perfidy could only be met by double-tapping. In the second case, however, the American soldier's response is not as clear-cut. Although the marine that fired the fatal shots was not prosecuted, the question still remains whether his actions were justified under the laws of war. Looking at the circumstances of his encounter, he was aware of the deceptive tactics commonly used by the insurgents in Fallujah, and only a day earlier the marine in question had been shot and another soldier in his unit was killed by a booby-trapped body.¹⁴⁹

In the Thunder Run and Fallujah examples, what separates questionable uses of double-tapping from clearly lawful ones is the status of the subjects: combatant, wounded, or dead. A distinction must be made between what may be the actual classification of a person on the battlefield and the split-second

¹⁴⁴ James Glanz & Edward Wong, *Cameraman Details Marine's Role in Mosque Shooting*, N.Y. TIMES, Nov. 22, 2004, at A1.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See sources cited *supra* note 33.

¹⁴⁸ See Grange, *supra* note 15.

¹⁴⁹ See sources cited *supra* note 40.

determination of classifications made by a soldier in combat. The Geneva Conventions specifically state that the wounded must be protected.¹⁵⁰ Therefore, double-tapping wounded combatants who are not participating in hostilities is a violation of the law of war. As for the dead, a classification between combatant and non-combatants is irrelevant because the Geneva Convention's protections extend to all the dead.

1. The Resolution of Doubt as to Status

The realities of the battlefield reinforce Pictet's "common sense and good faith" standard as the best standard for determining when double-tapping is legitimate under the laws of war. If there is a question regarding a person's status, the Geneva Conventions and the ICRC Rules provide little guidance as to how to resolve that doubt. Additional Protocol I states that doubt should be resolved in favor of civilian status when determining whether one is a civilian or a combatant.¹⁵¹ This provision gives no guidance on what constitutes doubt, however, and also does not provide for the resolution of doubts as to combatant status.

The critical categorization that must be made in situations like those in Thunder Run and Fallujah is not between civilian and combatant, but rather between combatant, wounded, and dead. The Geneva Conventions are silent on how soldiers are to resolve doubts about the status of combatants.

a. Resolving Doubt in Favor of Protection

On one hand, the same standard for the resolution of doubts about civilian status should apply to the resolution of combatant versus wounded status. That is, when there is doubt as to whether a combatant is wounded, dead, or still engaged in hostilities, doubt should be resolved in favor of a protected status. A principle that stands for "shoot first, ask questions later" violates the Convention's declaration that the wounded "shall in all circumstances be treated humanely."¹⁵² Unlike the Lieber Code,¹⁵³ the protections afforded to the wounded and sick are not qualified by the dangerousness of the situation or any military necessity standard—they apply to "all circumstances."¹⁵⁴ The Convention also states that "violence to life and person" shall be "prohibited at any time and in any place whatsoever."¹⁵⁵

¹⁵⁰ Geneva I, *supra* note 66, art. 12.

¹⁵¹ Protocol I, *supra* note 67, art. 50.

¹⁵² Geneva I, *supra* note 66, art. 3(1) (emphasis added).

¹⁵³ LIEBER CODE, *supra* note 45, art. 60. ("[A] commander is permitted to . . . give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.")

¹⁵⁴ Geneva I, *supra* note 66, art. 12.

¹⁵⁵ *Id.* art. 3(1).

Pictet stated that each party must protect the enemy wounded as it would its own.¹⁵⁶ “[E]ach belligerent must treat his fallen adversaries as he would the wounded of his own army. This duty falls on every individual.”¹⁵⁷ These comments suggest that a soldier should resolve all doubt in favor of a protected status as he would probably act to assist a wounded friend even if he may have been unsure of his friend's injury. For instance, in the case of a friend, a soldier does not face the possible dangers of not shooting again, rather, the soldier has to decide whether to risk the possibility of danger in giving the potentially wounded friend assistance. In both situations, friend or foe, the attacker must assume risk to aid the potentially wounded person.

Finally, as civilians and wounded soldiers are both protected by the inherent structure of the Geneva Conventions both classes should be protected on a similar basis—especially when a determination is critical to survival. If the standard was not weighed in favor of protection it would enable soldiers to ignore classifications too easily, claiming later that they were simply mistaken. This would violate the spirit and overall purpose of the Convention's protections for the wounded and sick.

b. Resolving Doubt in Relation to Danger

On the other hand, distinguishing between civilian and combatant may be different in character than distinguishing between types of combatants. When confronting combatants, a soldier faces people who are trained to act with lethal force. This means that an encounter with a combatant is simply more life threatening than one with a civilian.

Assuming for a moment that wounded civilians can be identified as such on the battlefield, the risks they present are much reduced from the risks that attackers may pose. This is especially the case when attackers are known to feign wounds or death, or booby-trap dead bodies. As stated above, combatants are trained to act with lethal force. Therefore, it can be argued that combatants should not enjoy a presumption of protection because they are trained to attack, have access to and knowledge of dangerous materials, and are simply more dangerous than the a wounded civilian.

Finally, a textual argument can be made using the interpretive maxim *expressio unis est exclusio alterius*. According to this tool, because Protocol I expressly included a provision for the resolution of doubt when classifying between civilian and combatant,¹⁵⁸ the lack of such a provision in the other classifications means that it was expressly excluded. In other words, doubt should be resolved in favor of a protected status only when classifying a person between combatant and civilian.

¹⁵⁶ PICTET, *supra* note 89, at 137.

¹⁵⁷ *Id.*

¹⁵⁸ See Protocol I, *supra* note 67, art. 50.

While there are many arguments for and against double-tapping, the laws of war clearly protect those who are *hors de combat*. In determining whether an attacker is eligible for this protected status, the laws of war simply cannot create a bright-line rule, especially given the special considerations of each and every conflict. While Pictet's "common sense and good faith" standard may be somewhat vague and difficult to apply, a flexible standard is needed to address the exigencies of battle and to allow soldiers to adequately tailor their tactical responses to specific enemy practices.

V. CONCLUSION

The Laws of War provide precious little guidance for the practice of double-tapping. The most applicable standards involve the classification of different potential targets between civilian and combatant, and, within combatant, between the wounded and the dead. Although the classifications may be clear on paper, they are not always clear on the battlefield.

Just as the situation in Iraq demonstrates, there can be many factors that justify the use of double-tapping. The costs of not double-tapping can be deadly, a soldier only has the benefit of a split-second to decide whether to double-tap the seeming dead or wounded, and the common or individual practice of the enemy are all circumstances that bear on the lawfulness of the act.

The laws of war must apply to and protect both sides of a conflict. While wounded soldiers are offered protection through the laws of war, that protection is lost through acts of perfidy and hostility. While those who are clearly *hors de combat* should remain outside the scope of double-tapping, on a battlefield where perfidy is common, double-tapping can encourage respect for the laws of war and protection from the enemies' deceit. Assuming that a soldier's decision is based on the existence of a reasonable threat, the realities of the battlefield justify the lawfulness of double-tapping.