The Image before the Weapon

A Critical History of the Distinction between Combatant and Civilian

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CORNELL UNIVERSITY PRESS ITHACA AND LONDON

First published 2011 by Cornell University Press
Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Kinsella, Helen
The image before the weapon : a critical history of the distinction between combatant and civilian / Helen M. Kinsella.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-8014-4903-1 (cloth : alk. paper)
1. Combatants and noncombatants (International law) I. Title.
KZ6515.K56 2011
341.6'7—dc22 2010052642

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Cloth printing 10 9 8 7 6 5 4 3 2 1

This book contains a revised version of "Discourses of Difference: Civilians, Combatants, and Compliance with the Laws of War," *Review of International Studies* 31, no. S1 (2005): 163–85, reprinted with the permission of Cambridge University Press, and "Gendering Grotius," *Political Theory* 34, no. 2 (2006): 161–91, reprinted with the permission of Sage Publications.

For my ever-lovin' family:
roots mansion that's where we'll be.

For my father:
Who taught me that I could and expected that I would.

For my son:
Whose participation began when, unbeknownst to me, he decided all the materials collected for what would become this book—papers, notes, files, drafts, and so forth—needed to be re-sorted according to his unique two-year-old logic. He continues to astound me in every way.

Acknowledgments

Friends and family are a solace and a delight, a formidable redoubt against the common miseries and elations of writing. This first book is a testament to their fortitude and patience, as well as to their admonitions and stern encouragements. It would be folly to believe I can thank them sufficiently for their interest in and support of this book, or for the love and kindness they have shared. So, let this appear as simply the first of many expressions of gratitude.

Thank you to...

...my professors at the University of Minnesota-Minneapolis who created a community marked by such intellectual and personal generosity: Mary Dietz, Lisa Disch, Bud Duvall, Sally Kenney, Richard Price, and Kathryn Sikkink.

...Bob Hammarberg and Dan Kelliher for putting it all in perspective.

...faculty and students of the University of Minnesota-Minneapolis, University of Wisconsin-Madison, and Stanford University MacArthur Consortium Interdisciplinary Program on Peace and International Co-operation for an introduction to the joys of interdisciplinary research and community.

...Adam Sitze, in whose debt I will happily, and hopefully, ever remain. And to Adam and Mary Strunk for a visit that brought immeasurable comfort.

...the writing group, Rachel Estroff and Rene Wilson, led by Lisa Disch.

...readers of incomparable merit and spirit: Kristin Fitzgerald, Petrice Flowers, Bahar Rumelli, and Ann Towns.

...Diane Elam and Kim Savo, whose critical gaze corrected more than a few errors.

...Anne Orford and Sarah Sewall, who arrived at a perfect time.

...Carol Cohn; the Boston Consortium on Gender, Security, and Human Rights; the Women and Public Policy Program; and the Belfer Center for Science and International Affairs at the John F. Kennedy School of Government, Harvard University.

...cohorts at the Center for International Security and Cooperation, who cared for Matthew and me with such grace and humor, especially Tarak Barkawi, Alex Downes, Page Fortna, Elizabeth Gardner, Ron and Laura Hassner, Tracy Hill, Colin Kahl, Lien-Hang Nguyen, Tonya Putnam, Scott Sagan, Karthika Sasikumar, and Carola Weil.

...Lynn Eden for everything and more.

...Terrell Carver, Kevin Kinneavy, Jo Lee, Patricia Owens, V. Spike Peterson, Laura Sjoberg, Joe Soss, Maria Stern, Ann Tickner, Mary Vavrus, Jolie von Suhr, and Marysia Zalewski for being there when called.

...Ann Shaffer for her precision, intelligence, and enthusiasm.

...the indomitable women of Hillington Green; you rock!

...Mark, doxology.

...Jess Clayton, Meredith Keller, and Julie F. Nemer for their discerning read.

...my colleagues at the Department of Political Science, University of Wisconsin-Madison, for their generous support and kind encouragement. And, for reading a version of this, I am indebted to Mark Copelovitch, Jimmy Casas Klausen, Nils Ringe (good effort!), Howard Schweber, Nadav Shelef, and Scott Straus.

...Roger Haydon, Christian Reus-Smit, and Ward Thomas for providing clarity.

Every other expression of gratitude will be over drinks and dessert—Matthew's buying!

Abbreviations

AAAS	American Academy of Arts and Sciences (United States)
AID	Agency for International Development (United States)
ALN	Armée de Libération Nationale, Army of National Liberation (Algeria)
CCW	Committee on the Conduct of War (U.S. Congress)
CEBs	Comunidades Eclesiales de Base, Christian Base Communities (Latin America)
CEH	Comisión para el Esclarecimiento Histórico, Historical Clarification Commission (Guatemala)
CIA	Central Intelligence Agency (United States)
CIIDH	Centro Internacional para Investigaciones en Derechos Humanos, International Center for the Investigation of Human Rights (Guatemala)
CONAVIGUA	Coordinadora Nacional de Viudas de Guatemala, National Coordination of Guatemalan Widows (Guatemala)
CUC	Comité de Unidad Campesina, Peasant Unity Committee (Guatemala)
EGP	Ejército Guerrillero de los Pobres, Guerrilla Army of the Poor (Guatemala)
FDR	Frente Democrático Revolucionario, Revolutionary Democratic Front (El Salvador)
FLN	Front de Libération Nationale, National Liberation Front (Algeria)
FMLN	Frente Farabundo Martí para la Liberación Nacional, Farabundo Martí National Liberation Front (El Salvador)
GAM	Grupo de Apoyo Mutuo, Mutual Support Group (Guatemala)
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGO	intergovernmental organization
ISAF	International Security Assistance Force
LWP	*The Law of War and Peace* (*De jure belli ac pacis libri tres*), by Hugo Grotius (Amsterdam, 1625)

MINUGUA	United Nations Verification Mission in Guatemala
NACLA	North American Congress on Latin America
NATO	North Atlantic Treaty Organization
NGO	nongovernmental organization
NOAB	*The New Oxford Annotated Bible* (New York, 1973).
OAS	Organisation de l'Armée Secrète, Organization of the Secret Army (France in Algeria)
OAU	Organization of African Unity
OEF	Operation Enduring Freedom (United States in Afghanistan)
ONUSAL	United Nations Observer Mission in El Salvador
ORDEN	Organización Democrática Nacionalista, Nationalist Democratic Organization (El Salvador)
ORPA	Organización Revolucionario del Pueblo en Armas, Organization of People in Arms (Guatemala)
PACs	patrullas de autodefensa civil, civil defense patrols (Guatemala)
PLO	Palestine Liberation Organization (Palestine)
REMHI	Proyecto Interdiocesano, Recuperación de la Memoria Histórica, Recovery of the Historic Memory (Guatemala)
SJC	Socorro Júridico Cristiano, Christian Legal Assistance (El Salvador)
SWAPO	South West Africa People's Organization (South Africa)
UN	United Nations
UNICEF	United Nations Children's Fund
URNG	Unidad Revolucionaria Nacional Guatemalteca, Guatemalan National Revolutionary Unity (Guatemala)
USSR	Union of Socialist Soviet Republics, Soviet Union

Contents

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GENDER, INNOCENCE, AND CIVILIZATION

Law is a rule or measure of action by which one is led to an action or restrained from acting. The word law (lex) is derived from ligare, to bind, because it binds one to act.... [Therefore] a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it.

—Thomas Aquinas, *Summa Theologica,* Question 90

Since the start of the ground wars in Afghanistan (2001) and in Iraq (2003), the distinction between combatant and civilian has remained a significant referent of engagement and standard of judgment guiding the operational strategy of the U.S. military and allies. In 2001, referring to operations in Afghanistan, General Richard Myers said, "the last thing we want are any civilian casualties. So we plan every military target with great care."[1] Charles Allen, deputy general counsel for the U.S. Department of Defense, stated in an interview on December 16, 2002, "with regard to the global war on terrorism, wherever it may reach, the law of armed conflict certainly does apply...in the sense of the principle of distinction."[2] Active military operations in both Afghanistan and Iraq conformed to the laws of war insofar as targeting decisions were evaluated with regard to the distinction to be made between combatant and civilian.

On September 16, 2008, in his capacity as commander of the North Atlantic Treaty Organization–International Security Assistance Force (NATO-ISAF), U.S. Army General David D. McKiernan averred, "NATO and American officials in Afghanistan believe that one civilian casualty is too many."[3] This statement followed the release earlier in the month of a tactical directive reviewing procedures for using lethal force, the singular purpose of which was reducing civilian casualties. Both the directive and the general's statement were in response to widespread condemnation of civilian casualties resulting from an air strike in the province of Herat. A week later, the UN Security Council extended the NATO-ISAF mission in Afghanistan, but only after issuing explicit cautions about moderating civilian

casualties. This followed specific changes in NATO-ISAF and Operation Enduring Freedom (OEF) tactics in Afghanistan in 2007 that included delaying attacks when civilians might be harmed. Furthermore, as Lawrence Wright reported in the June 2008 issue of the *New Yorker,* events of the previous year revealed that even organized networks of violence such as Al Qaeda are not unified in their acceptance of civilian casualties as a necessary normative and strategic dimension of armed conflict. In July 2009, the Taliban, under the directive of Mullah Omar, issued a new code of conduct for the Afghanistan Mujahedeen that specifically instructed them to "do their best to avoid civilian deaths and injuries and damage to civilian property."[4]

These actions suggest that the protection and defense of civilians during armed conflicts are an elemental strategic and normative commitment on the part of the majority of states and organized militaries and insurgencies; moreover, they have been for some time. Beginning with his September 1999 "Report to the Security Council on the Protection of Civilians in Armed Conflict," Kofi Annan, former UN secretary-general and Nobel laureate, repeatedly stated that "the plight of civilians is no longer something which can be neglected, or made secondary, because it complicates political negotiations or interests."[5] The centrality of the civilian was evident in the conduct of the 1999 NATO intervention in Kosovo. General Wesley K. Clark, supreme allied commander of NATO during the Kosovo war, writes, "Both we and the Serbs realized at the onset how critical this issue would be. It was the most pressing drumbeat of the campaign: minimize, if not eliminate, civilian casualties."[6]

Significantly, it is not only the United Nations, the United States, and NATO that, in increasingly rare agreement, hold the principle of protection of and respect for civilians in great regard. Signed and ratified by a diverse array of states, the mandate of the International Criminal Court (ICC) explicitly reiterates the essential distinction between combatant and civilian, criminalizing intentional actions against civilians. In addition, the statutes of both regional criminal tribunals for Rwanda and the former Yugoslavia preceded the ICC in their acceptance of this distinction as definitive of the laws of war. Notably, these institutions were created soon after, or in the midst of, conspicuous transgressions of the laws of war. Consequently, in regard to the protection of and respect for civilians, the striking congruence of political and legal convictions suggests that the civilian is an essential concept and category of international law and international relations and a crucial referent by which conflicts and conduct are judged. Perhaps Alberico Gentili, the seventeenth-century Italian publicist, said it best: "He is foolish who connects the laws of war with the unlawful acts committed in war."[7]

Juridically, formally distinguishing between combatants and civilians is known as the *principle of distinction.* The principle of distinction is one of three

elements composing the principle of discrimination; the other two are distinguishing between civilian objects and military objectives and directing attacks only toward combatants and military objectives. The principle of distinction is a peremptory obligation of international humanitarian law; it requires universal observance from which no derogation is permitted.[8] The principle is expressed in both customary and codified international humanitarian law and, as such, is both a positive and necessary precept for establishing the protection of civilians.[9] Moreover, it is a central category of contemporary human rights and humanitarian discourses. The principle prescribes respect for and protection of civilians in times of armed conflict and "forms the basis of the entire regulation of war."[10]

What does it mean to say that the principle of distinction forms the basis of international humanitarian law? International humanitarian law is the oldest and most highly codified system of international law. It reflects and regulates the customs and practices of war among and, less extensively, within states.[11] In accordance with the formal classification of armed conflicts as either international or non-international, international humanitarian law articulates material and conceptual limitations on the actions of states, militaries, combatants, and noncombatants. As a result, international humanitarian law is a primary referent for the training and disciplining of those entities and, more recently, for the peacekeeping troops of the United Nations.

* * *

Nonetheless, at the same time as it serves as one of the foundations of contemporary law and politics, the principle of distinction, taken on its own terms, has proved to be remarkably frail. Contemporary armed conflicts, marked by a "mixture of war, crime and human rights violations," are nasty, brutish, and increasing in duration and devastation.[12] The quintessential characteristic of the majority of these conflicts is the blurring of the distinction between combatant and civilian. The debasement of this distinction poses formidable challenges for the enforcement of international humanitarian law and dramatically discloses its limitations.

Scholars and historians of international humanitarian law agree that the principle of distinction is "recognized as the fundamental principle upon which the entire notion of 'humanity in warfare' rests." Yet it is equally acknowledged as "the most fragile."[13] Indeed, the ragged conflicts in the former Yugoslavia, in Rwanda, and in the Sudan have been scored by the extremity of both the deliberate, determined persecution of civilians and the haphazard, wanton destruction of civilians, resulting from a concerted military strategy or its absence altogether.[14] There is no doubt that these internal conflicts are marked by what many scholars and essayists term a "particular savagery."[15] But to ascribe violations of the

principle of distinction to the location of a war is highly misleading, if not also an effect of a particular conception of civilization. Certainly, sophisticated military technologies in ostensibly less ragged wars render the conceptual distinction equally absurd—if not more so.[16]

In both instances, the most striking result is a consistent and terrifying indifference to the classic distinction between the elemental categories of international humanitarian law—combatant and civilian are to be identified and distinguished at all times. Let me be clear: I do not claim that international humanitarian law outlaws the killing of civilians. That would be a patent misreading of the law. Although the principle of distinction is the predicate of the potential protection of civilians, it is not an obligation of absolute protection. Instead, it confers responsibility on military commanders and their forces, as well as on civilians in positions of authority, to refrain from directly attacking civilians and civilian objects, to take reasonable precautions to avoid and minimize civilian deaths, and to avoid and minimize the destruction of civilian property and objects necessary to civilian survival. The laws of war have admitted the possibility of collateral or unintentional damage since Thomas Aquinas first wrote of an act "beside intention."[17] Thus, it appears that the foundation of international humanitarian law—the principle of distinction—actually *allows* the death of civilians in war and that the robustness of positive and customary law is not reflected in an equally robust compliance.[18]

Is this a paradox? Yes, if *paradox* is defined as an "unresolvable proposition that is true and false at the same time."[19] But, within the increasingly functionalist mapping of the role of laws and norms by scholars attentive to both, a *paradox* is taken to be a simple contradiction that can and should be resolved once behavior is aligned with the norm in question. Indeed, the practical work of international organizations and institutions both rely on and reify this interpretation. For example, consider a discussion of the UN Security Council on the topic of the protection of civilians: insofar "as civilians have become the primary victims and often the very objects of war," the proper response is to encourage and solidify "full compliance with the rules and principles of international law" and to promote, in the words of one participant, no less than the "civilianization of conflict."[20] According to this logic, the appropriate response is to buttress the principle of distinction through increasing compliance and enforcement.

Likewise, regardless of the increasing acknowledgment within international relations of the importance of law to regulate world politics, the paradigmatic approach to the study of international law and international relations is consistently restricted to the study of the dimensions of compliance,[21] which in turn only "implicitly examines the foundations of international institutions and international order."[22] This framing excludes an analysis of the very politics that

informs and produces international institutions and creates international order. In addition, as Martti Koskenniemi observes, this focus on compliance "silently assumes that the political question—what the objectives are—has already been solved."[23] Further, this focus on compliance necessarily presumes that its foundational concepts—the combatant and the civilian—are secure. Ironically it is exactly this presumption that is proved false in the conduct of armed conflicts.

* * *

Within armed conflicts the "dividing line between combatants and civilians is frequently blurred"—this is a consistent refrain voiced by both witnesses and participants, and sounded repeatedly throughout the numerous statements and debates within the UN Security Council regarding the protection and treatment of civilians in war.[24] To suggest, as one scholar of international law does, that the definition of the *civilian* (which he calls a "term of art") should be determined within the "context of international and non-international armed conflict" presupposes a clarity of conflict reminiscent of the ideal of set battles.[25] After all, as another international lawyer acknowledges, the empirical and juridical categories of combatant and civilian are "not quite so neatly separable" as implied and were rarely so.[26] Indeed, international humanitarian law itself admits the imprecision of the distinction, stating that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[27] Doubt, then, becomes an integral attribute of the category itself as well as the basis for the injunction to extend the category.

If doubt and indeterminacy are integral and evident characteristics of the categories combatant and civilian and, significantly, of the difference between them, what are the implications for responding to the violation of the principle of distinction? Foremost, the concepts and categories of combatant and civilian cannot be taken as self-evident either within international humanitarian law or in conflicts. Therefore, they must be produced; in other words, the significance and strength of the categories of combatant and civilian are provisional and, as such, must be consistently reiterated to ensure their status and grant them sanctity.[28] Thus, the move toward increasing compliance with and enforcement of international humanitarian law presumes (and necessarily so) that which the atrocities of conflict so brutally belie—that the combatant and civilian are coherent and determinant categories. Put another way, although the laws rest on a seemingly self-evident categorization—you are either one or the other, combatant or civilian—it is not that simple. As any soldier in Baghdad or Herat can attest, errors lead not simply to the deaths of Iraqi and Afghani civilians mistakenly killed but also to the deaths of U.S. soldiers who mistake Iraqi or Afghani combatants for civilians. Even in the laws of war, to which we refer to clarify the difference, the combatant and the civilian are not as distinct as implied.

Consequently, the distinction between combatant and civilian, which should ostensibly mark the triumph of international humanitarian law, instead signals its most radical crisis. While remaining accountable to the evidence of its violation, I specifically engage the challenges raised by the indeterminacy of the principle of distinction. I ask: What is a combatant? What is a civilian? Who is a combatant? Who is a civilian? How do we know? Who is to judge, and on what grounds?

In focusing on the civilian, I alter a primary preoccupation of international humanitarian law—the question of who should be legitimately considered a combatant. I ask, instead, who should be legitimately considered a civilian. Although the concepts of civilian and combatant are irrevocably linked in international humanitarian law, as the concept of the civilian is inseparable from the distinction that should be made between combatants and civilians, it is the combatant who has been its primary subject. Indeed, not until 1949, in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV Geneva Convention), did the civilian formally become a subject of treaty law. And not until 1977, in the Protocols Additional to the 1949 Geneva Conventions, was *civilian* formally defined within international law.[29]

Approached in a conventional way, a civilian (a concept presumed to be so clear that "everyone has an understanding of its meaning") is simply one who is *not* a member of the armed forces.[30] What I find intriguing about the reliance on this negative definition (in which *civilian* is defined through a simple lack of combatancy) is the way that it prohibits consideration of the significance of the concept of civilian itself. How do we begin to understand and effectively respond to the dissolution of the principle of distinction if we lack a prior understanding of the very concept and category that it is said to protect?

I contend that we can no longer ask what difference international humanitarian law makes without also asking *on* what differences international humanitarian law is made. I suggest that the principle of distinction does not so much rest on a categorical difference between combatant and civilian as produce it. The principle of distinction is a relationship that, in Michel Foucault's terms, "puts into operation differences that are, at the same time, its conditions and its results."[31] To understand these differences produced by the principle of distinction, I begin a genealogy of the principle of distinction focusing on the concept of the civilian.

* * *

What would it mean to write a genealogy of the principle of distinction? For one, a genealogy helps us to understand how fixed oppositions (here civilian versus combatant) mask the degree to which their meanings are, in fact, a result

of an established rather than an inherent contrast. Moreover, a genealogy expressly engages the hierarchical interdependence of the opposed terms, whereby the combatant is invested with primacy and thus is responsive to the operation of power.[32] As Foucault succinctly states, a genealogy is a form of history that transforms the "development of a given into a question."[33] A genealogy illustrates how that which is taken to be universally necessary and necessarily universal (here, the civilian) has come to be understood and institutionalized as self-evidently so. It opens the possibilities of rethinking the concept of the civilian and, in turn, of rethinking what we are doing.

To begin this project, however, the comfort of preconceived categories must be relinquished and the familiarity of this venerable norm must be made strange—even though either seems like the very last thing we can or should do. Hannah Arendt indicates the reason for this counterintuitive move: "Adherence to conventional, standardized codes of expression and conduct have the socially recognized function of protecting us against reality, that is against the claim on our thinking attention that all events and facts make by virtue of their existence."[34] Perhaps the brutal events of recent armed conflicts have already done both by clearly denoting the breach of the principle of distinction, as Foucault puts it, as a "breach of self-evidence," in which the construction of the principle and its constitutive elements, the combatant and the civilian, can be made visible rather than simply automatic.[35]

What I want to insist upon is that the abrogation of the principle of distinction is also an opening, providing a space for reviewing the principle and its core concepts without retreating to a reflexive, unthinking acceptance of its status and significance. The gravity of this move is matched by the centrality of the principle of distinction itself; what remains evident even in its breach is the importance of the principle as a means of regulating and systematizing interactions among and within states and of establishing individual and international security. It is a protocol of international order.

My point is not that a distinction *cannot* be made; indeed, both practically and juridically, the distinction is made every day. Nor is it that the distinction *should not* be made; on the contrary, the distinction has many purposes and uses. Rather, recognizing the contingent presence of the principle of distinction imposes the question of its origins and emergence, which in turn underscores the intricacy of its form. It suggests that how, when, and for whom the distinction is constituted are precisely what affects if it is made at all.[36] It reminds us that every norm possesses a history, the marks of which remain.

I trace throughout this book a series of discourses—gender, innocence, and civilization—that, like red threads, mark the history of the principle of distinction.[37] It is this series of discourses, each of which is itself composed of a

confluence of political, moral, and legal judgments, that conditions the appearance of the civilian and the combatant and invests the distinction with a seemingly indisputable gravity and authority.

I use here Foucault's concept of a series to denote the relationships among these three discourses. Foucault highlights the diffusion rather than the unity or distinctions of discourses. Put another way, this series is not braided tightly throughout but may unravel and fray as often as it knots at particular historical moments. In his words, "discourses must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be unaware of each other."[38] In this book, I document how these discourses converge at particular junctures to produce the combatant and the civilian, demarcating the difference between them. My historical claim is that, in each of the moments I analyze, this series is a necessary element in the production of the distinction. But I am not risking the transhistorical claim that in each instance the principle appears (or appears only) as an effect of this series. Accordingly, my choice of this series is neither whimsical nor exhaustive; it derives from listening to "popular language in which words... are daily used as political clichés and misused as catchwords."[39]

Perhaps the best example of the power of this series is found in the common metonymy *innocent civilian,* in which *innocent* signifies civilian such that a *guilty civilian* appears oxymoronic. Another example is the equivalence of *women and children* with *civilian* such that all women and children are civilians and that civilians are, in part, women and children. The formidable material effects of these substitutions are captured in a 1982 interview with the spokesman for Guatemalan General José Efraín Ríos Montt. When asked about the massacres of civilians, including women and children, the spokesman replied, "And then it would be said that you were killing innocent people. But they were not innocent, they had sold out to subversion.... No... Guatemalan general could order the death of an innocent."[40] Ríos Montt, who was indicted for his role in the Guatemalan civil war, subsequently confirmed this claim, insisting that "no Guatemalan general could order the death of an innocent."[41]

This invocation of the principle of distinction poignantly illustrates how those denied recognition as civilians were, and would continue to be, massacred without compunction. But surely the statements by Ríos Montt and his spokesman raise more questions than they answer. After all, the two men strategically and sequentially repudiated the marks of the civilian without ever rejecting the centrality of the concept itself. If we were to allow this to claim our thinking attention, might not questions such as these follow: Why were the massacres and deaths of civilians defended with reference to their lack of innocence? Is innocence a necessary attribute of civilians? If so, exactly what is innocence? Or, put