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Challenges in the Interpretation and Application of the Principle of Distinction During Ground Operations in Urban Areas

Colonel Noam Neuman

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Challenges in the Interpretation and Application of the Principle of Distinction During Ground Operations in Urban Areas

Colonel Noam Neuman*

ABSTRACT

This Article focuses on the tension between the often-referred-to articulation of the principle of distinction, as reflected in Additional Protocol I, and four practices that have been continuously employed in ground operations by most if not all of the world's militaries: masking, firing warning shots, breaching structures, and maneuvering with heavy machinery. These practices may very well result in incidental harm to civilians or incidental damage to civilian objects, yet they are either directed at an object that is not necessarily a military objective or they are not directed at any object or person at all. In light of the sheer universality of these practices for many decades—both before and after the conclusion of Additional Protocol I—this Article proposes four preliminary lines of thought that may help in gaining a better understanding of Additional Protocol I's provisions as well as their application in ground operations.

* Immediate Past Head, International Law Department, Military Advocate General's Corps, Israel Defense Forces (IDF) (2011-2017). LLB, Bar Ilan University, Israel; MA, Philosophy, Bar Ilan University, Israel; LLM, U.S. Judge Advocate General Legal Center and School, Charlottesville, Virginia; MA, Political Science, Haifa University, Israel; Graduate, IDF Command and Staff College and Israel National Defense College. This Article is based on remarks delivered at the 11th Annual Minerva/ICRC International Conference on International Humanitarian Law in November 2016 and the 2nd IDF International Conference on the Law of Armed Conflict, held in April 2017. The opinions and conclusions in this Article do not necessarily represent the views of the IDF or the Government of Israel. Many thanks to Guy Keinan and Ben Wahlhaus for their comments and suggestions.

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I. INTRODUCTION

When we talk about military operations and the Law of Armed Conflict (LOAC)—also known as International Humanitarian Law (IHL)—we usually think about targeting, and what we normally have in mind during such discussions are aerial attacks. We put much less focus on ground maneuvers and the methods they involve, although they raise some very interesting legal issues. This is understandable, because the revolution in military affairs,¹ together with the increased use of platforms such as drones and “smart” precision weapons,² has led to a major change in the nature of warfare: a modern Western military can nowadays do much of the fighting from afar.

One notable result of this state of affairs has been a change in the focus of international lawyers—the law of targeting has become the main area of interest for scholars and practitioners alike, and questions such as “What is a military objective?”; “What is direct participation in hostilities?”; “What precautions can feasibly be taken

1. See, e.g., Michael J. Mazarr, *THE REVOLUTION IN MILITARY AFFAIRS: A FRAMEWORK FOR DEFENSE PLANNING* (June 10, 1994); Andrew Latham, *Warfare Transformed: A Braudelian Perspective on the "Revolution in Military Affairs"*, 8 EUR. J. INT'L REL. 231, 231 (2002).

2. For a description of the nature of precision attack—including precision technologies and the combat environment in which it occurs—and the relationship between precision attack and international humanitarian law, see, for example, Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445 (2005).

before striking a target?"; and "How do we apply the rule of proportionality when conducting attacks?" have largely come to occupy LOAC discourse.

However, ground operations in urban areas, especially when conducted in high-intensity conditions³ (hereinafter Urban Operations), are becoming increasingly common again for states around the world, and especially so for those fighting in places like Syria, Iraq, Lebanon, Gaza, Afghanistan, Georgia, and across Africa.⁴ It is therefore important to revive, revisit, and expand the discussions concerning Urban Operations and the legal challenges they raise.

Urban Operations are certainly different than other types of operations. They require soldiers to maneuver slowly and gradually, relying first and foremost on rifles, grenades, tanks, and artillery. If the maneuvering takes place (as it often does) in areas still controlled by the adversary, those who are maneuvering generally face a significant operational disadvantage: ambushes in close-quarter combat, snipers, booby traps, antitank missiles, explosive ordnances, and a significantly enhanced "fog of war" are just a few of the challenges they must struggle with.⁵ Most importantly for lawyers, however, these kinds of operations raise some intriguing questions about the way we understand some of the most basic rules of LOAC.

This Article, based on presentations given at the 11th Annual Minerva/ICRC International Conference on International Humanitarian Law in November 2016, and the 2nd IDF International Conference on LOAC in April 2017, focuses on the application of the principle of distinction. To this end, Part II begins by outlining four examples of military practices common to militaries around the world that are considered essential in Urban Operations: masking, firing warning shots, breaching structures, and maneuvering with heavy

3. For the definition of the term "ground operations in urban terrain which are conducted under high-intensity conditions," see U.S. DEP'T OF THE ARMY, FM 3-06.11 (FM 90-10-1), COMBINED ARMS OPERATIONS IN URBAN TERRAIN 1-3 (2002) [hereinafter FM 3-06.11] ("These conditions include combat actions against a determined enemy occupying prepared positions or conducting planned attacks. UO [Urban Operations] under high-intensity conditions require the coordinated application of the full combat power of the joint combined arms team. Infantry units must be prepared at all times to conduct violent combat under conditions of high-intensity UO . . .").

4. See, e.g., LOUIS A. DIMARCO, CONCRETE HELL: URBAN WARFARE FROM STALINGRAD TO IRAQ (2012). In this book, DiMarco surveys historical trends in urban combat since World War II, providing insights into the nature of urban combat from tactical, operational, and strategic viewpoints.

5. For a description of Urban Operations and their characteristics, see generally FM 3-06.11, *supra* note 3; see also U.S. MARINE CORPS, MCRP 12-10B.1 (formerly MCWP 3-35.3), MILITARY OPERATIONS ON URBANIZED TERRAIN (2016) [hereinafter MCRP 12-10B.1]; JOINT CHIEFS OF STAFF, JOINT PUB. 3-06, JOINT URBAN OPERATIONS (Nov. 20, 2013) [hereinafter JOINT PUB. 3-06]; U.S. ARMY WAR COLL., SOLDIERS IN CITIES: MILITARY OPERATIONS ON URBAN TERRAIN (Michael C. Dersch, ed., 2001).

machinery.⁶ A common feature of all these practices is that their objective is not the destruction of an object or the killing of a person but the achievement of a specific military benefit as an integral part of carrying out the military mission (be it conquering a certain territory, clearing an area of enemy forces, or simply advancing forward). Another common feature of these practices—especially crucial for lawyers—is that they often involve some damage or harm to objects or persons that are not necessarily lawful targets.

Part III then surveys the legal questions raised by the four practices and considers them through several prisms: the meaning of “attack” under LOAC; the notion of “military objective”; the prohibition on indiscriminate attacks; and the prohibition on destroying the enemy’s property unless imperatively demanded by the necessities of war. The analysis in this Part uses Additional

6. Although these practices are common during ground operations in virtually all militaries, the vast majority of militaries have not released their doctrine, manuals and standard operating procedures (SOP) due to classification concerns. Accordingly, providing references for these practices and their rationale is subject to what little public information there is. Unclassified publications of the US military, regularly referred to throughout this article, served especially useful in this regard. In addition, videos of military exercises and trainings published on the internet provide a glimpse into the doctrines of many militaries around the world when conducting operations in urban terrain. See, e.g., AirSource Military, *Army Soldiers Breach Buildings*, YOUTUBE (Aug. 25, 2014), <http://youtu.be/lffY06o2P5Q> [<https://perma.cc/U3RF-PNHS>] (archived Feb. 4, 2018); Artuz Sheva TV, *IDF Paratroopers Train Urban Warfare*, YOUTUBE (Jul. 14, 2014), <http://youtu.be/-XXa2S6BRNI> [<https://perma.cc/U7F5-WCE6>] (archived Feb. 4, 2018); Cody Bowman, *Combat Engineer Urban Breaching Germany*, YOUTUBE (Oct. 8, 2015), <https://youtu.be/BQ4u1NyivDI> [<https://perma.cc/Q6ME-C5P2>] (archived Feb. 4, 2018); Daily Military Defense & Archive, *US and Canadian Soldiers Breaching Door with Shotguns*, YOUTUBE (July 24, 2015), <https://youtu.be/Pmt8NyvJgY> [<https://perma.cc/N5QE-4RDQ>] (archived Feb. 4, 2018); Martin Digranes, *The Norwegian Army: Urban Warfare Training*, YOUTUBE (Apr. 7, 2014), <http://youtu.be/Xvez5IDIOW8> [<https://perma.cc/H65M-88MW>] (archived Feb. 4, 2018); Forces TV, *British Army Preparing for Future Urban Conflict*, YOUTUBE (Mar. 15, 2016), <http://youtu.be/TORYz-GxU8c> [<https://perma.cc/DNK5-LG3K>] (archived Feb. 4, 2018); Foxtrot Alpha, *British Army Training at Trident Juncture 2015*, YOUTUBE (Nov. 24, 2015), <https://youtu.be/5dHdEXGHAXQ> [<https://perma.cc/X5LW-AY22>] (archived Feb. 4, 2018); Military Videos Daily, *U.S. Marines Mobility and Assault Company Conduct Urban Demolition Breach Training*, YOUTUBE (May 23, 2016), <https://youtu.be/AufywNkuSqI> [<https://perma.cc/8FU7-JZVC>] (archived Feb. 4, 2018); NATO Prepares for Urban War, YOUTUBE (May 27, 2007), <https://youtu.be/GTvQmItSO-k> [<https://perma.cc/UXC8-37V4>] (archived Feb. 4, 2018) (original broadcast by CBS Newsworld); nbakewell06, *USMC Urban Breaching Water Charge*, YOUTUBE (July 10, 2011), <http://youtu.be/Bw6EH95htYg> [<https://perma.cc/3SNJ-ZG4T>] (archived Feb. 4, 2018); nbakewell06, *USMC Oval Charge Wall Breach*, YOUTUBE (July 8, 2011), <https://youtu.be/slTVRfrPJzo> [<https://perma.cc/L3DS-9VKG>] (archived Feb. 4, 2018); WarLeaks, *US Marines Japan Self Defence Forces & Australian Army in Heavy Intense Urban Combat Action Training*, YOUTUBE (Aug. 9, 2016), http://youtu.be/mV_17SUrtj0 [<https://perma.cc/E26S-VWJH>] (archived Feb. 4, 2018); WarLeaks, *US Marines & French Army Use Famas Assault Rifles in Heavy Urban Combat Firefight Simulation*, YOUTUBE (Aug. 6, 2016), <http://youtu.be/-aVNTPTeU1A> [<https://perma.cc/RDN7-8RCJ>] (archived Feb. 4, 2018).

Protocol I to the Geneva Conventions⁷ (hereinafter Additional Protocol I, or API) as a point of reference. As is well known, not all countries are parties to API,⁸ and there is significant disagreement regarding the customary nature of some of its provisions.⁹ Nevertheless, as the majority of states in the world are party to API, and since its provisions regarding the principle of distinction are often referred to, one should strive to reconcile these provisions with common practices that have been and are still being employed by militaries around the world. Accordingly, Part III proceeds under the assumption that practices which have been universally employed before, during, and after the negotiation of API cannot be unlawful as a matter of customary international law, since custom can only emerge following the accumulation of general practice and *opinio juris*.¹⁰ Part IV concludes.

II. OPERATIONAL CHALLENGES AND COMMON PRACTICES IN URBAN OPERATIONS

More than 2,500 years ago, the famous Chinese general Sun Tzu declared that “the worst policy is to attack cities. Attack cities only when there is no alternative.”¹¹ The same advice is reflected in the doctrine of numerous armies and in the theories of military

7. See generally Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

8. The United States and Israel, for example, are not among the 174 state parties to Additional Protocol I. *Treaties, States Parties and Commentaries*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=Xpages_NORMStatesParties&xp_treatySelected=470 (last visited Feb. 23, 2018) [<https://perma.cc/RNZ9-VH5K>] (archived Feb. 4, 2018).

9. The United States, for instance, recognizes only certain aspects of Additional Protocol I as indicative of customary international law. See Martin D. Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 419–431 (1987); see generally George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1 (1991).

10. Article 38(1) of the Statute of the International Court of Justice defines custom as “evidence of a general practice accepted as law”. See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945). It is of course hypothetically possible that API differs from customary international law in this regard and sets additional requirements that parties to API must adhere to. Such an argument, however, would lead to the conclusion that most if not all parties to API—comprising most of the world’s states—are continuously in violation of API’s “version” of distinction. For sake of brevity, this article leaves this question open and does not address it.

11. SUN TZU, *THE ART OF WAR* 78 (Samuel B. Griffith trans., N.Y., Oxford Univ. Press 1982) (n.p., n.d.)

strategists.¹² The reason is obvious: the urban battlefield generally consists of man-made constructions intertwined with a high population density, which gives the defending force—that is well-acquainted with the area and able to thoroughly prepare for the arrival of the attacking force—a decisive military advantage.¹³

Buildings, for example, can provide cover and concealment, limit the fields of observation and fire, and make it harder for the attacking force to utilize mechanized or armored forces. Fighting in the urban terrain also means that there are multiple surface areas from which the enemy may direct attacks: for the infantry soldier moving through an urban neighborhood, adversaries may attack from within and from on top of buildings, as well as from subterranean positions.¹⁴ Urban infrastructure, moreover, allows the defending forces to predict, or even intentionally channel, the movement of advancing forces, since the options for movement may be restricted to pre-existing roads and other routes. For instance, adversaries may lay mines, improvised explosive devices, and other explosives, as well as prepare ambushes, on the expected routes of travel. Additionally, conventional air-strikes, close-air support, and the use of certain weapons are of limited effectiveness in Urban Operations.¹⁵ It is

12. See, e.g., SCOTT GERWEHR & RUSSELL W. GLENN, *THE ART OF DARKNESS: DECEPTION AND URBAN OPERATIONS* 10 (2000) ("U.S. Army doctrine has heretofore advocated avoiding operations in urban terrain when possible, reflecting an awareness of the challenges posed by such an environment."); Alexandre Vautravers, *Military Operations in Urban Areas*, 92 INT. REV. RED CROSS 437 (2010) ("Throughout history, armies have been reluctant to fight in cities and conduct siege operations. Fighting in such conditions is generally devastating and costly."); George J. Mordica II, *It's a Dirty Business, but Somebody Has to Do It*, CALL NEWSLETTER No. 99-16, Nov. 23, 1999, <https://www.globalsecurity.org/military/library/report/1999/99-16/chap1.htm> [<https://perma.cc/4GK4-C6BY>] (archived Feb. 5, 2018).

13. One important lesson learned by the Soviet Union from the World War II experience, for example, was that urban warfare heavily favors the defense—Soviet tacticians argued that to capture and hold a city, the attacker requires an advantage in terms of number of forces of at least 4:1 (some said 6:1). See, e.g., OLGA OLIKER, *RUSSIA'S CHECHEN WARS 1994-2000: LESSONS FROM URBAN COMBAT* 6 (2001). In reality, at the battle against ISIS to liberate Mosul, it has taken 100,000 Iraqi forces (including the Kurdish peshmerga soldiery) almost a year to kill or drive out from Mosul the estimated 5,000 ISIS operatives. See Bing West, *Urban Warfare, Then and Now*, THE ATLANTIC (June 30, 2017), <https://www.theatlantic.com/international/archive/2017/06/urban-warfare-hue-mosul/532173/> [<https://perma.cc/384S-9XM4>] (archived Feb. 5, 2018).

14. A recent example of using subterranean tactics may be found in the 2014 conflict between the IDF and Hamas and other armed groups in Gaza. See STATE OF ISRAEL, *THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS* 40–45 (2014) [hereinafter 2014 GAZA CONFLICT]; see also RAPHAEL S. COHEN ET AL., *FROM CAST LEAD TO PROTECTIVE EDGE: LESSONS FROM ISRAEL'S WARS IN GAZA* (2017). For an analysis of the motivations behind Hamas's decision to construct the tunnels network and the level of its effectiveness both strategically and tactically, see, for example, Nicole J. Watkins & Alena M. James, *Digging into Israel: The Sophisticated Tunneling Network of Hamas*, 9 J. STRATEGIC SEC. 84 (2016).

15. See, e.g., Doug Richardson & Linda Richardson, *The Vertical Battlefield*, 29 ARMADA INT'L 1 (2005) ("Conventional air strikes are of limited effectiveness in cities,

therefore not surprising that Urban Operations regularly involve higher casualty rates to the attacking force,¹⁶ heavy damage to the surroundings,¹⁷ and high civilian casualties.¹⁸

Despite entreaties to avoid Urban Operations, it appears that the number of armed conflicts being fought in urban terrain is on the

partly because of the greater risks of collateral damage and partly because of terrain features. Urban canyons reduce the ability of aircraft to maneuver, and so make them more vulnerable to attack by air defence artillery and missiles hidden on high buildings. The combination of high-rise buildings and low cloud further reduces the effective above ground level (AGL) operating area, while aircraft silhouetted against overcast skies are easy targets . . . Tanks, artillery and missile batteries are at a similar disadvantage, designed for firing at targets at a distance and on the flat. Closely packed buildings deny conventional weapons adequate range and lines of sight, while limits on gun elevation and depression create areas that are safe from fire - for instance in basements and in tall buildings. Other disadvantages are subtler. Night vision goggles and thermal sights may be dazzled by city lights, fires and background illumination. Reduction in visibility can similarly degrade the performance of weapons sensors and laser- or optically-guided weapons."); see also RUSSELL W. GLENN, *COMBAT IN HELL: A CONSIDERATION OF CONSTRAINED URBAN WARFARE* 10 (1996) ("A weapon may have a minimum arming distance too great for close targets. Some systems also have 'dead space' . . . Height and proximity of buildings cause further dead space problems . . . Building can similarly interfere with aircraft engagements . . . Terrain characteristics not only tend to neutralize firepower advantages; they also increase the probability of inadvertent noncombatant casualties due to munitions impacts on other than-intended targets."); 2014 GAZA CONFLICT, *supra* note 14, at 150–55.

16. A contemporary example can be found at the battle against ISIS to liberate Mosul. Six months into this operation, the head of U.S. Central Command, Lt. Gen. Joseph Votel said: "[T]his is the most significant urban combat to take place since World War II . . . It is tough and brutal"; adding that until then 774 Iraqi troops were killed, and 4,600 wounded, highlighting the difficulty of fighting in a densely populated city where the militants have had several years to build up complex defenses. See Jim Michaels, *Iraqi forces in Mosul see deadliest urban combat since World War II*, USA TODAY (Mar. 29, 2017), <https://www.usatoday.com/story/news/world/2017/03/29/united-states-mosul-isis-deadly-combat-world-war-ii/99787764/> [https://perma.cc/Q53W-UQVP] (archived Feb. 5, 2018).

17. In the battles of United States in Al-Fallujah Iraq (2004), for example, experts estimate that although the US forces had specific intelligence about insurgent locations inside the city and took several steps to spare civilians and civilian objectives (including canceling the majority of the preplanned attack due to concern for civilian casualties and using mainly precision missiles), the city suffered heavy damage to its infrastructures. According to one source, between seven thousand and ten thousand of the city's 39,000 buildings were destroyed; while according to another source, of the roughly 50,000 buildings in Al-Fallujah, only about half still stand after the battle. See William Head, *The Battles of Al-Fallujah: Urban Warfare and the Growth of Air Power*, 60 AIR POWER HIST. 32, 47 (2003); Colin H. Kahl, *How We Fight*, 85 FOREIGN AFF. 83, 93 (2006).

18. In the nine-month battle against ISIS to liberate Mosul, for example, intelligence reports estimate that more than 40,000 civilians were killed. See Patrick Cockburn, *The massacre of Mosul: 40,000 feared dead in battle to take back city from ISIS as scale of civilian casualties revealed*, INDEPENDENT (July 19, 2017), <http://www.independent.co.uk/news/world/middle-east/mosul-massacre-battle-isis-iraqi-city-civilian-casualties-killed-deaths-fighting-forces-islamic-state-a7848781.html> [https://perma.cc/7QA2-E7RH] (archived Feb. 5, 2018).

rise¹⁹ and that armies are increasing their preparation and training for such fights.²⁰ Furthermore, several researchers have concluded that current military doctrines are simply insufficient for dealing with current Urban Operations²¹ and have recommended developing new doctrines and capabilities for dealing with their varying conditions.²² Consequently, it is becoming exceedingly crucial to

19. The main reason for this rise is that typical non-state actor adversaries have become highly aware of the tactical and strategic advantages of drawing the conflict into their urban centers in order, *inter alia*, to be able to counter the adversary's military superiority including by creating the perception of violations of international law—a practice termed "lawfare," or using the law as substitute for traditional military means to achieve a war-fighting objective. *See, e.g.*, Charles J. Dunlap, Jr., *Lawfare Today . . . and Tomorrow*, in 87 INT'L L. STUD. 315 (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger eds., 2011); Laurie R. Blank, *Lawfare and The Israeli-Palestine Predicament: Finding Facts but Missing the Law*, 43 CASE W. RES. J. INT'L L. 279 (2010); Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683 (2009) (describing the way terrorist and insurgent groups gain strategic and tactical advantages through their own noncompliance with the law and their adversaries' observance of it). This practice was evidenced, for example, by the tactics of ISIS in Iraq, as well as in a Hamas urban combat manual and training aid recovered by IDF forces during the 2014 Gaza Conflict. *See* 2014 GAZA CONFLICT, *supra* note 14, at 152–54.

20. *See, e.g.*, Raul Dancel, *Singapore offers drones, urban warfare training ground, aid to help Philippines fight militants in Marawi*, STRAITS TIMES (July 19, 2017), <http://www.straitstimes.com/asia/se-asia/singapore-offers-saf-assistance-to-philippines-in-fight-against-terrorism> [<https://perma.cc/N2ZP-Q9QQ>] (archived Feb. 5, 2018); Ellis Grp., *21st Century Urban Operations: Infrastructure Impact on Military Operations*, 100 MARINE CORPS GAZETTE 21 (2016) ("The traditional view of bypassing and isolating urban areas is no longer a viable course of action because the urban areas are where the problems lie . . . If we espouse the Marine Corps as a 'crisis response force,' we must recognize that we will be most likely employed in the urban littorals because that is where the root (people and issues) of the crisis lies."); Walter F. Ulrich, *The German Army and Urban Operations*, MILITARY SIMULATION & TRAINING MAG. (Feb. 10, 2015), <https://militarysimulation.training/land/german-army-urban-operations> [<https://perma.cc/Q5VL-JXLX>] (archived Feb. 5, 2018).

21. A study conducted in 1996 by Russell Glenn from RAND cooperation, for example, concludes that current United States army doctrine is not sufficient for fighting in build-up areas and as a result it will consume any force that fights unprepared. Therefore, he suggests several recommendations and potential remedies for identified vulnerabilities. *See* GLENN, *supra* note 15. Additionally, in 2003 a NATO study group concluded that although it is likely that NATO forces in 2020 will have to conduct Urban Operations, present NATO capabilities for operating in urban areas are essentially those of World War II; therefore, it is essential to develop a range of capabilities for dealing with the varying conditions of operations in urban areas. *See* RESEARCH AND TECHNOLOGY ORGANIZATION, URBAN OPERATIONS IN THE YEAR 2020 (2003) [hereinafter NATO RTO]; *see also*, Ellis Grp., *supra* note 20 ("To be successful, we need to change our view of the urban littorals and how approach it. It is not two separate things to be tackled in isolation. It must be viewed as a whole, and we must start preparing ourselves to deal with the entire problem.").

22. *See, e.g.*, Robert F. Hahn II & Bonnie Jezior, *Urban Warfare and the Urban Warfighter of 2025*, 29 PARAMETERS 74 (1999); Jason Sherman, *Advisory panel calls for new army capabilities, inventory retrofit for future fight in megacities*, SITREP (Nov. 12, 2017), <https://insidedefense.com/daily-news/advisory-panel-calls-new-army-capabilities-inventory-retrofit-future-fight-megacities> [<https://perma.cc/LZ32-QVTU>] (archived Feb. 5, 2018) ("[T]he Army needs to take action to bolster capabilities to fight

discuss the legal aspects involving such operations in order to aid in finding solutions to current challenges in accordance with the LOAC. As a way of exemplifying these challenges, four military practices prevalent in Urban Operations will now be discussed.

A. Masking

Throughout history, militaries have used masking tactics to confuse and deceive their enemies,²³ providing commanders with additional means to meet the imperatives of the battle. Such tactics were used to degrade the enemy's ability to identify the movement of forces, conceal friendly forces, deceive the enemy into thinking forces were in a different location, and degrade or outright defeat infrared and laser systems used to designate targets or identify tanks.²⁴

The use of masking tactics is especially crucial during Urban Operations, when there is no alternative but to cross "kill zones," such as streets, alleys, and parks, which are natural spaces to be exploited by the enemy. In such cases, the area must be crossed as quickly as possible, usually only after specific actions have been applied, including deploying smoke screens from hand grenades or from shells fired from mortars or artillery platforms.²⁵

While masking means are not typically directed at civilians or civilian structures, using them in urban terrain likely entails some damage to the surroundings or to persons in the area. While effects vary in accordance with the weapon and munitions used, it is common for them to cause some harm to nearby persons, as a result of their kinetic effects; to cause illness or temporary difficulties with breathing, especially if the person exposed to the smoke is near the source of emission or if the smoke penetrates relatively closed structures; and even to produce embers or ash that may cause burns

in megacities and should lobby Pentagon leaders to adopt defense planning scenarios that include dense-urban area operations as an initial step toward laying the groundwork for potential weapon system programs needed for these missions"); NATO RTO *supra* note 21.

23. For a historical perspective from as early as 2000 B.C., see U.S. DEP'T OF THE ARMY FM 3-50, SMOKE OPERATIONS 5-6 (1990) [hereinafter FM 3-50].

24. See, e.g., *id.* at 9-10; NATO RTO, *supra* note 21, at D-21 ("Counter-measures may include . . . multi-spectral screening smoke to prevent laser and/or electro-optical target designation . . .").

25. See, e.g., U.S. DEP'T OF THE ARMY, FM 3-21.75 (FM 21-75), THE WARRIOR ETHOS AND SOLDIER COMBAT SKILLS 8-1 (2008) [hereinafter FM 3-21.75] ("Open areas . . . should be avoided. They are natural kill zones for enemy, crew-served weapons, or snipers. They can be crossed safely if the individual applies certain fundamentals, including using smoke from hand grenades or smoke pots to conceal movement."); see also FM 3-06.11, *supra* note 3, at 3-1 ("Smoke, suppressive fires, and cover and concealment should be used to hide movement."); MCRP 12-10B.A, *supra* note 5, at 2-17, 2-21 ("Tank and AAV generated smoke may be useful in concealing the location and movement of assaulting forces . . . When attacking in unrestricted visibility, units should use smoke to conceal movement.").

upon contact. Masking therefore is an activity that may cause damage to objects or persons not defined as lawful targets.

B. Firing Warning Shots

Warning shots are shots fired with the intent of warning someone of a future action and bringing them to act in a certain way, without directly harming them.²⁶ In Urban Operations, the use of warning shots can be instrumental in saving civilian lives.²⁷

A common scenario where warning shots are employed is one where a military force has established a roadblock in a city in order to control unidentified traffic, and an unknown vehicle is speeding in the direction of the force. If a soldier manning the roadblock is not reasonably certain that the approaching vehicle is a suicide car bomb,²⁸ he or she might fire a warning shot to the side of the vehicle, into the road and then towards the front of the car, as part of a possible escalation procedure in the applicable rules of engagement, with the intention of causing the vehicle to slow down, turn around, or stop.

Warning shots may also be fired in a final attempt, following previous verbal warnings, to cause civilians to evacuate in anticipation of an impending attack in their vicinity. For example, advancing forces may want to enter a civilian compound in order to capture a militant or neutralize a military target located within it, and despite numerous verbal warnings provided to the inhabitants of

26. See, e.g., INT'L INST. OF HUMANITARIAN L., RULES OF ENGAGEMENT HANDBOOK 35 (2009).

27. Lieutenant General Mark Evans, who served in the Australian Army as Chief of Joint Operations from 2008 to 2011, explains that because of the difficulty of identifying the combatants within the civilian population in military operations conducted in densely populated areas, it is important to use warning shots since "too many non-combatants who moved around the operational area in Iraq and Afghanistan were shot because they failed to heed or understand warnings. In these instances, warning shots would have perhaps provided them with a moment for comprehension." See Mark Evans, *The Challenges of Military Operations in Densely Populated Areas: An Australian Perspective*, 5 MILITARY & STRATEGIC AFF. (SPECIAL ISSUE) 89 (2014). For an explanation how warning shots were also part of a technique called escalation of force used in Iraq by the United States Army whose aim was to help preventing civilian casualties while still providing security for the forces, see Adam J. Tiffen, *How The Rules Of Engagement Save Lives In Combat*, TASK & PURPOSE (Aug. 22, 2014) <http://taskandpurpose.com/rules-engagement-save-lives-combat/> [<https://perma.cc/873S-3Z6V>] (archived Feb. 5, 2018).

28. The use of suicide vehicles has become common in some Urban Operations, including the campaign against ISIS in Iraq and Syria. See, e.g., Mark Thompson, *The Fight for Mosul: Kamikaze 2.0*, TIME (Oct 19, 2016), <http://time.com/4535914/mosul-iraq-suicide-video/> [<https://perma.cc/ZW2K-W46D>] (archived Feb. 5, 2018) ("Two of every three [martyrdom operations] in Iraq, Libya and Syria] involved car bombs, as opposed to individuals wearing explosive belts or vests. There's military logic to ISIS suicide bombers' choice of what in military lingo is called the "platform" to deliver death: vehicles are faster and can carry more explosives.").

this civilian compound, they have not evacuated. Intelligence estimations indicate that the inhabitants may be under the false impression that the advancing forces do not actually intend to enter the compound and that no fighting will actually take place. After exhausting all those avenues, in an effort to encourage evacuation without causing substantial harm to people or property, the commander may consider firing a very small explosive into an open area adjacent to the compound, or even firing towards an external wall surrounding the compound in a way that would not penetrate any structures.

In these examples and others, warning shots might eventually be directed at an object that has not yet been determined a lawful target.

C. Breaching Structures

Wall or door breaching²⁹ is a very common combat task in urban areas³⁰ and is employed for three main purposes: First, gaining quick entry to a building in order to quickly overwhelm and subdue any enemy forces within the structure before they can mount resistance.³¹ Second, moving between buildings through the walls while avoiding using existing doors or windows due to concerns about booby traps and ambushes, as well as to avoid having to move through exposed areas external to the buildings.³² And finally, creating loopholes for

29. This is also referred to as "tactical breaching," as opposed to the more general term "breaching", which may refer to a larger military operation designed to breach an adversary's defenses. For an explanation of such tactical breaching, see Stephen Kalin, *Iraqi army learns Ramadi's lessons in U.S.-led coalition training*, REUTERS (Jan. 28, 2016), <http://www.reuters.com/article/us-mideast-crisis-iraq-training/iraqi-army-learns-ramadis-lessons-in-u-s-led-coalition-training-idUSKCN0V61C3> [<https://perma.cc/XBF2-4P9V>] (archived Feb. 4, 2018) (explaining how such tactical breaching was taught in 2016 by the U.S.-led coalition forces to the Iraqi forces, based on the lessons they have learned from the challenges in Ramadi, Tikrit, Sinjar and Baiji).

30. See, e.g., U.S. DEPT OF THE ARMY, FM 3-34.2 (FM 90-13-1), COMBINED-ARMS BREACHING OPERATIONS (2002).

31. See, e.g., FM 3-21.75, *supra* note 25, at 8-8 ("Blow or cut breach holes through walls to allow you to enter a building. Such entrances are safer than doors, because doors are easily booby trapped, and should be avoided, unless you conduct an explosive breach on the door."); FM 3-06.11, *supra* note 3, at 3-19 ("Breachholes and mouseholes are blown or cut through a wall so soldiers can enter a building . . . These are safer entrances than doors . . .")

32. See, e.g., *High-Intensity Urban Combat Tactics*, SPECIAL TACTICS, <https://specialtactics.me/home/2017/7/23/high-intensity-urban-combat-tactics-xbe8n-n3ra7> (last visited Feb. 23, 2018) [<https://perma.cc/M92N-Q2QC>] (archived Feb. 4, 2018) ("Both sides will also avoid using doors if possible and instead use explosives, heavy shells or armored vehicles to 'mouse-hole' through walls. Military units might want to study World War II battles to relearn many 'dirty tricks' of urban combat that have not been used for decades."); NATO RTO, *supra* note 21, at iii ("The Study Group then identified an emerging overarching approach to urban operations that holds the promise of leading to significantly improved capabilities. The more traditional approaches to improving urban capabilities are focused at the tactical, single-Service

weapons positions or for allowing hand grenades to be thrown into defended structures.³³

For example, a military force operating in an urban area will often need to enter a house in order to execute a military mission, and they might use explosive, ballistic, thermal, or mechanical methods in order to quickly open the door and enter the house. Likewise, a soldier might create loopholes in a house, causing damage to it in the process, in order to create a weapons position.

In many cases, such breaching techniques are directed at an object that has not been positively identified as a military objective under the LOAC. Oftentimes, no information exists about the house that would allow for defining it as a “military objective.” Nevertheless, and although they are frequently applied against civilian objects *per se*, breaching tactics appear in countless military doctrines as an important and integral part of urban warfare, and they have been³⁴ and are being³⁵ used on a constant basis.

D. *Maneuvering with Heavy Machinery*

One cannot move an armed force through an urban area—no matter the size of the force—without causing some damage to the surroundings. This is especially the case when infantry soldiers are maneuvering through and within the urban terrain while using heavy machinery.

When tanks move through a neighborhood, for example, they are likely to cause damage to the roads due to their weight and may even render them unsuitable for ordinary use. Moreover, when a tank maneuvers through a narrow street or close to walls—as occasionally it must do, in order to be protected from enemy antitank missiles—it

level. These aim to help tactical forces better cope with the conditions of uncertainty, close proximity to the enemy and vulnerability that characterise tactical engagements. Initiatives include improved personal protection, wall breaching techniques, etc.”).

33. Although windows might be good fighting positions, sometimes there is a military necessity to create a hole in the wall for weapons positions (especially machine guns), or to allow hand grenades to be thrown into defended structures. The position regularly needs to be camouflaged, by knocking other holes in the wall, making it difficult for the enemy to determine which hole the fire is coming from. *See, e.g.,* FM 3-06.11 *supra* note 3, at 3-47 to 3-49, 3-52, 7-15 to 7-16.

34. In September 1944, for example, intensive urban combat took place between German and Allied forces, during which attackers moved from house to house by blowing holes in the walls (internal and external) and ceilings so that the advancing infantrymen would not have to expose themselves to enemy fire in the streets. *See* ALFRED M. BECK ET AL., *THE CORPS OF ENGINEERS: THE WAR AGAINST GERMANY* 384–85 (1985).

35. For interesting demonstrations how such breaching tactics are being implemented during trainings in the U.S. Marines Corps, see, for example, III MEF Marines, *How to Breach Like a Marine*, YOUTUBE (July 7, 2015), <https://www.youtube.com/watch?v=3r0JBCVsBIO> [https://perma.cc/3UNB-J54Z] (archived Feb. 19, 2018); Bridget Bosch, *Breaching and Entering*, YOUTUBE (Apr. 12, 2016), <https://www.youtube.com/watch?v=gHvPEQMukpk> [https://perma.cc/CX57-2XQN] (archived Feb. 19, 2018).

will probably cause substantial damage along the way, such as by scraping walls and breaking windows. In such cases, the heavy machinery used is not “directed” at anything, but some damage is caused by maneuvering and advancing through the urban terrain.

III. LEGAL QUESTIONS AND CHALLENGES

The four practices surveyed have several common characteristics:

- (1) they are conventional practices employed by militaries in their attempt to accomplish the military mission;
- (2) they are not “directed” at any specific object, or are directed at an object that is not necessarily a “military objective”; and
- (3) they may very well result in incidental harm or damage, which cannot always be anticipated.

These features raise questions with respect to the principle of distinction,³⁶ which is one of the two “cardinal” principles of the LOAC.³⁷ According to its often-referred-to articulation in API, this principle strictly limits attacks to military objectives, prohibits directing attacks against civilians or civilian objects,³⁸ and proscribes “indiscriminate attacks,” which include attacks not directed at a specific military objective or the employment of a method or means of combat that cannot be directed at a specific military objective.³⁹ The tension between this articulation and the four practices surveyed is readily apparent: although the practices may very well result in harm or damage, which is sometimes incidental and sometimes deliberate, they are either directed at an object that is not necessarily a military objective or they are not directed at any object or person at all. Can this tension be reconciled?

As already stated above, it is difficult to conclude that the four practices are unlawful. They have been continuously employed for

36. This article considers only the principle of distinction and deliberately sets aside other possible legal obligations under the LOAC. The ensuing analysis is based on the assumption that such obligations have been satisfied in each and every case: all feasible precautions have been taken, no proportionality concerns arise, all the weapons employed are lawful, and so on.

37. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶ 78, 83 (July 8).

38. See, e.g., PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., *MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE* 83–88 (2009) [hereinafter *HPCR COMMENTARY*]; TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 110–12 (Michael N. Schmitt ed., Cambridge Univ. Press 2013) [hereinafter *TALLINN MANUAL*].

39. The prohibition is based on Article 51(4) of Additional Protocol I, which will be discussed below in more detail. See Additional Protocol I, *supra* note 7, art. 51(4).

many decades by most if not all of the world's militaries—including those of the United States, Great Britain, Germany, Canada, Norway, Israel, Japan, France, and Australia. This generality of practice does not allow one to conclude that customary international law prohibits employing these practices. Moreover, assuming, as one should, that these militaries are law abiding, it seems reasonable to suggest that they consider these practices to be in accordance with the LOAC. Nevertheless, there seemingly remains some tension between these practices and the often-referred-to articulation of distinction under API.

As this issue is apparently vastly underexplored, it seems premature to provide definitive answers. Four preliminary lines of thought may nevertheless help better understand API's provisions in this regard as well as their application during Urban Operations. These lines of thought include: the notion of "attack"; the definition of "military objectives"; the exact content of the prohibition against indiscriminate attack; and the applicability of Article 23(g) of the Hague Regulations.

A. *The Notion of "Attack"*

Article 52(2) of API stipulates that "attacks shall be limited strictly to military objectives."⁴⁰ The first relevant issue to be explored, therefore, is the notion of "attack": if we determine no attack has occurred, arguably there has been no violation of the principle of distinction under API.

Article 49(1) of API defines "attacks" as "acts of violence against the adversary, whether in offence or in defence."⁴¹ At first glance, it seems that all four examples described above might be considered to be attacks, since they involve "acts of violence" that are, arguably, "against the adversary."

However, it could be argued that if the act is not expected to cause actual harm to a person or an object, then no attack will have occurred.⁴² According to this argument, firing warning shots into the air, or even dropping a bomb in open terrain—which is expected to cause no real damage except for moving sand from one place to another—may not be considered an attack. Likewise, it would seem that actions such as driving tanks through a narrow street are not

40. *Id.* art. 52(2).

41. *Id.* art. 49(1).

42. *See, e.g.,* HPCR COMMENTARY, *supra* note 38, at 114 (explaining both that "[t]he application of the general Rules prohibiting attacks directed against civilians or civilian objects, as well as indiscriminate attacks, is confined to air or missile attacks that entail violent effects, namely, acts resulting in death, injury, damage or destruction," and that "[d]espite the lack of direct authority for this Rule in treaty law, the majority of the Group of Experts concluded that it generally reflects State Practice.").

“attacks” (even though they may cause harm or damage) but, at the most, “military operations,”⁴³ as they are not “acts of violence against the adversary.”⁴⁴

Another possible argument in this regard might be that the term “attack” has different meanings in different parts of API. According to this interpretation, the main meaning is defined in Article 49(1) and includes mainly, although not exclusively, attacks directed against specific objects.⁴⁵ However, there might be specific acts (like masking tactics or firing warning shots), which would not be considered “attacks” for the purpose of applying specific API’s provisions, although they might involve some kinds of use of force against the adversary.⁴⁶ Naturally, the acts that might not be considered “attacks” for the purpose of applying the principle of distinction should be carefully determined, taking into account, *inter alia*, state practice and the object and purpose of API.⁴⁷

43. The UK Manual, for example, points out that the phrase “military operation” has “a wider connotation than ‘attack’ and would include the movement or deployment of armed forces.” See U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.32, at 81 (2004) [hereinafter UK MANUAL]. Likewise, according to INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 at 670 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter ICRC COMMENTARY], “[t]he term ‘military operations’ should be understood to mean any movements, maneuvers and other activities whatsoever carried out by the armed forces with a view to combat.”

44. It is important to note that even if a specific practice—like driving tanks through a narrow street—would not be considered an “attack,” it might nevertheless be regarded as an “operation” and therefore, under Article 48 of Additional Protocol I, must still be directed only against military objectives. Additional Protocol I, *supra* note 7, art. 48. One possible solution might be the one adopted by the Tallinn Manual, which concluded that “only when a cyber operation against civilians or civilian objects (or other protected persons and objects) rises to the level of an attack is it prohibited by the principle of distinction and those rules of the law of armed conflict that derive from the principle.” See TALLINN MANUAL, *supra* note 38, at 112. In any case, it should be noted that Article 48’s reference to military operations is not free of problems and probably does not reflect customary international law. Even the ICRC’s study into customary international humanitarian law, which tends to be quite inclusive and expansive, has refrained from maintaining that operations—as opposed to attacks—must be limited to military objectives. Accordingly, the ICRC’s articulation of distinction focuses on attacks. See generally 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Cambridge Univ. Press 2005).

45. See Additional Protocol I, *supra* note 7, art. 49(1).

46. William Fenrick, for example, claims that the term “attack” for the purposes of Articles 51(5)(b) and 57(2)(a)(1) of Additional Protocol I should have narrower meaning than it has in Article 49(1), since it would be “inappropriate and impractical to classify an operation below divisional or equivalent level as an ‘attack’ for the purpose of these articles.” See William Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 102 (1982).

47. Under the Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1115 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention], a treaty should be interpreted in good faith in accordance with the ordinary meaning given to the term of the treaty in context, and in the light of its object and purpose. Also, Article 31(3) of the Vienna Convention provides that in the

B. *The Definition of "Military Objectives"*

Assuming an action qualifies as an "attack," Article 52(2) requires it to be "limited" strictly to "military objectives."⁴⁸ What does this mean with regard to the lawfulness of the tactics mentioned? Is it really unlawful to use breaching tactics against objects that cannot be clearly identified as "military objectives"? Is it actually a violation of the LOAC to create a smoke screen by using masking shells—which might cause harm to civilians—if the shells are simply thrown into the street as part of the advancement of forces, and not directed specifically against "military objectives"? Should militaries teach their soldiers not to move by breaking through walls, when these walls are not part of a structure which can be identified as a "military objective"?

In certain situations, it might be reasonable to address this problem by widening the definition of "military objectives," so that some of the practices mentioned would be regarded as attacks against "military objectives." Let us consider, for example, a scenario where, in the context of an attack on a military compound of the enemy, soldiers need to create a loophole in a wall so as to position their weapon to carry out the attack. In such a case there might be a reasonable argument that the wall where the hole is to be created is in fact a "military objective," since by its location it makes an effective contribution to military action (in this case, facilitating an attack against the enemy) and, in the circumstances ruling at the time, the action would offer a definite military advantage. Similarly, we might consider the possibility to define an area in which there is a definite military advantage in creating a smoke screen as a "military objective" by location. If it is lawful to use barrage fire in order to prevent the enemy from establishing itself in a particular area, as the ICRC has suggested,⁴⁹ would it not be lawful to use weapons that create a smoke screen in a specific area in order to prevent the enemy from being able to identify one's forces as they move through that location?

process of treaty interpretation, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be considered.

48. Additional Protocol I, *supra* note 7, art. 52(2).

49. The ICRC Commentary refers to such situation, and concludes that "there can be a little doubt in such a case that the area must be considered as a military objective and treated as such". See ICRC COMMENTARY, *supra* note 43, at 621; see also Int'l L. Assoc. Study Grp. on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT'L L. STUD. 322, 331 (2017) ("It should be noted that in the view of a number of Western States a specific area of land may be a military objective if, because of its location or other reasons specified in Article 52(2) API, its total or partial destruction, capture or neutralization in the circumstances ruling at the time offers definite military advantage.").

Admittedly, widening the definition of “military objectives” may not be possible or reasonable in all cases, and in those cases, the problem remains. At the same time, it does have the potential of taking us further at least in certain, even if somewhat limited, situations.

C. *The Prohibition against Indiscriminate Attacks*

API specifically prohibits “indiscriminate attacks,” which include, under Article 51(4)(a), attacks that are “not directed at a specific military objective.”⁵⁰ It appears that the purpose of this provision was to outlaw attacks intentionally directed at civilians or civilian objects, as well as attacks in which commanders were indifferent to what the attack would strike (or, to use API’s phrasing in Article 51(4)—“strike military objectives and civilians or civilian objects without distinction”).

It is widely accepted that the question of whether a specific attack is indiscriminate may depend on factors such as the nature of the target, the choice of weapons, and meteorological conditions.⁵¹ However, the question remains: How should this prohibition be understood and applied when the aim of the attack is not to “target” anything, but to achieve a specific military benefit? (The purpose of creating smoke screens is preventing the enemy from being able to see one’s forces; the purpose of breaching walls is to enable entry to a building or movement between buildings; and so on.)

A possible solution, which must be further examined, is to distinguish between targeting and other types of military operations. Understanding the prohibition on “not directing an attack at a specific military objective” as requiring each attack to be aimed at a military objective makes sense when targeting is concerned. In cases illustrated by the four practices surveyed above, in which there is no “target” but simply a military purpose or benefit, the argument may seem less convincing. Therefore, it seems necessary to further explore the essential meaning of distinction in such cases.⁵²

50. Additional Protocol I, *supra* note 7, art. 51(4)(a).

51. See, e.g., HPCR COMMENTARY, *supra* note 38, at 94.

52. See, e.g., KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 309 (2003). Referring to the need to “decide on the basis of the essential meaning of the principle of distinction,” Dormann writes, “[t]his principle presupposes the choice of targets and weapons in order to achieve a particular objective that is lawful under humanitarian law and that respects the difference between civilian persons and objects on the one hand, and combatants and military targets on the other.” *Id.* Such treatments of distinction are more nuanced and may be better suited to address different kinds of military operations.

D. *The Applicability of Article 23(g) of the Hague Regulations*

Article 23(g) of the Hague Regulations⁵³ forbids the destruction or seizure of an enemy's property, "unless such destruction or seizure be imperatively demanded by the necessities of war."⁵⁴ This Article can certainly explain incidental and unintentional force, especially concerning acts such as moving tanks through narrow streets, or breaching tactics, when the act is imperatively demanded by the necessities of war (although its wording refers only to property and so it probably cannot justify harm to persons).

However, in order to make use of this argument, the relationship between Article 23(g) of the Hague Regulations and Article 52 of API must be further explored. Can imperative military necessity justify the destruction of an object which is not a "military objective" under Article 52 of API, or would that be considered an indiscriminate attack under API? Do both Articles regulate the same types of activities, or is it possible to draw a distinction between the two?⁵⁵ If so, what is the dividing line? If not, what do we do in the event of a conflict between the two Articles?⁵⁶ These are only some of the questions which must be considered.

53. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, art. 23(g), Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague Regulations].

54. *Id.* art 23(g).

55. See, e.g., Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 B.U. INT'L L.J. 39, 110–14 (2010) ("[D]estroying property and attacking property are two conceptually distinct acts . . . Property destruction is militarily necessary only if it is required for the attainment of a military purpose . . . In other words, military necessity justifies the property's destruction, whereas the property's status as a military objective justifies attacks being directed against it. The acts of destroying property and attacking property are conceptually distinct from each other because the notions of military necessity and military objectives are conceptually distinct from each other.").

56. On one hand, one might argue that in accordance with the principle of *lex posterior derogat priori*, which is expressed in Article 59 of the Vienna Convention on the Law of Treaties, if both articles might be relevant and there is a conflict between them, the latter article must prevail. However, an alternative view still sees Article 23(g) as a valid justification for destruction of civilian property, even in cases where the very same objects may not be attacked under Article 52 of Additional Protocol I. Henderson, for example, argues that "[T]argeting is not the only lawful basis for destruction of civilian property. For example, Article 53 GCIV and Article 23(g) HIVR provide alternative legal bases for destruction of civilian property." See IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 57* (2009).

IV. CONCLUSION

Since Urban Operations are becoming increasingly common in contemporary armed conflicts, it is essential to better understand the legal challenges they raise. One such legal challenge, which this Article focuses on, has to do with the application of the principle of distinction. Four common practices employed in Urban Operations—masking, firing warning shots, breaching structures, and maneuvering with heavy machinery—especially challenge our understanding of distinction, which has been shaped for decades against the backdrop of targeting. These practices are all longstanding, universal, and essential for achieving the military mission, but it appears difficult to reconcile them with a targeting-based interpretation of distinction: they are not necessarily directed at military objectives or at anything at all. In light of the sheer universality of these tactics on the one hand, and the undisputedly customary nature of the principle of distinction on the other hand, it is important that we seriously assess our understanding as to the exact way the principle of distinction needs to be applied during ground operations.

In this regard, this Article has proposed four avenues for further consideration: (1) improving our understanding of the notion of “attacks”; (2) rethinking the scope of “military objective”; (3) reassessing the exact scope of the prohibition on “indiscriminate attacks,” especially when the attack in question is not part of a targeting operation; and (4) revisiting Article 23(g) of the Hague Regulations as well as resolving its relationship with Articles 51(4) and 52 of API.

Commitment to the principle of distinction and to the prohibition against indiscriminate attacks is not in question. Distinction is a cardinal norm of the LOAC, and any consideration of it must be done in light of its importance and unchallenged status in customary international law. At the same time, the prevalent understanding of distinction has proved unsatisfactory in non-targeting contexts. It is possible that no single solution or analysis exists which provide answers to every possible scenario. It is nevertheless crucial to further discuss these issues as Urban Operations resurge on the battlefield, capture a higher place on the agenda of the international community, and force us once more to verify that our interpretation of the law is sufficiently nuanced to cope with what virtually all militaries have been doing for centuries.
