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## Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity

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# Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity

*Richard D. Rosen\**

## ABSTRACT

*Protocol I to the Geneva Conventions of 1949 and the interpretation given to it by many in the international community (e.g., UN, NGOs, media) provide perverse incentives to terrorist and insurgent groups to shield their military activities behind civilians and their property. In other words, the law governing targeting is fundamentally defective; it allows terrorist and insurgent groups to gain strategic and tactical advantages through their own noncompliance with the law and their adversaries' observance of it. The consequence has been increasing noncompliance with the law and growing civilian casualties. This Article proposes structural changes to the law governing targeting and attitudinal changes by those who interpret it to ensure that civilians receive adequate security from armed attack.*

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“Soldiers are made to be killed,’ as Napoleon once said; that is why war is hell. But even if we take our standpoint in hell, we can still say that no one else [but soldiers are] made to be killed. This distinction is the basis of the rules of war.”<sup>1</sup>

## I. INTRODUCTION

While General Sherman’s simple adage that “war is hell”<sup>2</sup> is axiomatic, it is also indisputable that the ravages of war should be reserved for the soldiers who wage it.<sup>3</sup> Those who take no active part in conflict—civilians and as well as combatants who can or will no longer fight—should be spared, to the utmost extent, the horrors of battle. The protection of noncombatants, especially civilians, is the primary purpose of the law of war.<sup>4</sup>

1. MICHAEL WALZER, *JUST AND UNJUST WARS* 136 (1977) (footnote omitted).

2. JOHN F. MARSZALEK, *SHERMAN: A SOLDIER’S PASSION FOR ORDER* 476 (1993).

3. I do not mean to minimize the tremendous harm war inflicts even on those who willingly fight it. “[W]hat is most hideous about war is its waste: destruction of goods and homes, waste of life and hope and that dream of individual dignity we cherish . . . . A country’s treasure is in its young men, and their loss is terrible beyond measure because it is irreparable.” ANTON MYRER, *ONCE AN EAGLE* 739 (1968).

4. MICHAEL IGNATIEFF, *THE WARRIOR’S HONOR* 119–20 (1998); see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 23 (2002) (noting that the “best single benchmark” for determining whether a nation has observed the rule of law is “the number of innocent civilians—of whatever nationality—who are killed, injured, or whose human rights are violated”); Ellen L. Lutz, *Understanding Human Rights Violations in Armed Conflict*, in *HUMAN RIGHTS AND CONFLICT* 23, 25–26 (Julie A. Mertus & Jeffrey W. Helsing eds., 2006); Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1026 (2007).

Although I prefer the terms “law of war” and “law of armed conflict,” I use them interchangeably with the more fashionable expression—“international humanitarian law.” See David E. Graham, *The Law of Armed Conflict and the War on Terrorism*, in *ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS* 331, 331 (Richard B. Jaques ed., 2006) (arguing the absence of a definitive explanation for the use of the term “international humanitarian law”); Adam Roberts, *Implementation of the Laws of War in Late-Twentieth Century Conflicts*, in *THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM* 359, 381 (Michael N. Schmitt & Leslie C. Green eds., 1998) (arguing the term “law of war” is preferable to “international humanitarian law” because of “the need to place more emphasis on the idea that this body of law is intensely practical . . . ; that its origins are as much military as diplomatic; and that its implementation can have consequences which are for the most part compatible with the interests of those applying it”). In any event, all of the terms deal with the conduct of military operations (*jus in bello*) as opposed to “the legality of a state’s recourse to force” (*jus ad bellum*). See Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1, 13–14 (Dieter Fleck ed., 2d ed. 2008) (highlighting the difference between what international

Few disagree with this fundamental principal.<sup>5</sup> Most nations recognize that while “[b]elligerent armies are entitled to try to win their wars, . . . they are not entitled to do anything that is or seems to them necessary to win.”<sup>6</sup> More problematic is discerning the means by which the principle is realized. Unfortunately, some parties to international armed conflicts, acting with the inadvertent (if not tacit) support of many in the international community—including, at times, the United Nations (UN), non-governmental organizations (NGOs), and the press—have chosen to interpret and implement international humanitarian law in such a manner as to intensify, rather than diminish, the collateral effects of war.<sup>7</sup> The path they have taken is leading to more—not less—civilian casualties.<sup>8</sup>

Before 1977, rules governing the conduct of military operations predominantly came from customary international law and the relatively specific restrictions contained in the Hague Regulations of 1907.<sup>9</sup> In 1969, the International Committee of the Red Cross (ICRC) initiated an ambitious process to codify and expand the law of war, particularly the law protecting noncombatants during international armed conflicts.<sup>10</sup> After convening two conferences of government experts in 1971 and 1972, the ICRC proposed two draft protocols to the Geneva Conventions, one applying to international armed conflicts and the other dealing with conflicts of a non-international character.<sup>11</sup>

From 1974 to 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts met in four sessions in Geneva, Switzerland, to consider the ICRC's draft protocols.<sup>12</sup> The

humanitarian law addresses (the way force can be used) and what it does not (whether force can be used)).

5. See Mika Nishimura Hayashi, *The Principle of Civilian Protection and Contemporary Armed Conflict*, in *THE LAW OF ARMED CONFLICT* 105, 114 (Howard M. Hensel ed., 2005).

6. WALZER, *supra* note 1, at 131; cf. W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 71–76 (1990) (describing the confrontations between Western nations and developing nations at the Conference of Government Experts regarding airpower).

7. See *infra* Part IV.

8. See *infra* Part IV.

9. See George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 1 (1991).

10. Charles L. Cantrell, *Humanitarian Law in Armed Conflict: The Third Diplomatic Conference*, 61 MARQ. L. REV. 253, 258 (1977).

11. *Id.* at 258–60; Parks, *supra* note 6, at 75. Copies of the ICRC's draft protocols appear in INT'L COMM. OF THE RED CROSS [ICRC], 1 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS GENEVA (1974–1977), pt. III (1978) [hereinafter OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE].

12. Parks, *supra* note 6, at 76.

Conferences culminated in the approval of the Additional Protocols to the Geneva Conventions of 1949.<sup>13</sup>

Participants in the Diplomatic Conference included national delegations as well as representatives of several “national liberation movements.”<sup>14</sup> Not all conference participants were motivated by a selfless desire to protect civilians from the devastation wrought by war. Many delegations, particularly those from so-called third world nations and with assistance from the Soviet bloc, fiercely advocated for the development of targeting restrictions that would negate the military superiority of Western nations, most notably the United States and Israel.<sup>15</sup> They were successful.<sup>16</sup> Protocol I shifts responsibility for protecting civilians from the effects of combat from the defending force—which has control over the civilian population—to the attacker,<sup>17</sup> thereby creating perverse incentives for nations with less-developed armed forces to use civilians to shield their military operations. The Protocol also virtually eliminates the requirement that combatants distinguish themselves from the civilian population,<sup>18</sup> thus degrading an essential element of civilian

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 17512, available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument> [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 17513, available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument> [hereinafter Protocol II].

The four Geneva Conventions of 1949 are as follows: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 970, available at <http://www.icrc.org/ihl.nsf/FULL/365?OpenDocument>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 971, available at <http://www.icrc.org/ihl.nsf/FULL/370?OpenDocument>; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 972, available at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 973, available at <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>.

14. R.R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L.J. 1, 9–10 (1975). Only national delegations could vote. *Id.* at 10.

15. David P. Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. INT'L L. 77, 84 (1975); Parks, *supra* note 6, at 218; Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169, 184–85, 189 (2003); Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 123 (1985); see *infra* notes 204–05, 246–54, and accompanying text.

16. Protocol I, *supra* note 13.

17. Parks, *supra* note 6, at 62. The term “attacker” does not mean “aggressor.” A nation can attack an adversary as a defensive measure. Protocol I, *supra* note 13, art. 49(1). For example, if the Taliban militia assaults a unit of the U.S. Army in Afghanistan, the Army unit’s act of firing back constitutes an attack.

18. Protocol I, *supra* note 13, art. 44(3).

immunity—the ability to discriminate between combatants and civilians.

Protocol I reaches beyond potential conflicts between military powers and less-developed nations. It also purports to establish a targeting regime applicable to the international war on terror,<sup>19</sup> and it encourages members of insurgent and terrorist organizations to blend into the civilian population and to conduct their military operations from civilian communities. Thus, Protocol I places the burden of avoiding civilian casualties on those responding militarily to insurgent and terrorist groups.<sup>20</sup>

Because of Protocol I's basic flaws, some states, particularly those with militaries that actually engage in combat (e.g., the United States and Israel),<sup>21</sup> have refused to ratify the treaty.<sup>22</sup> Traditionally, a state that is not a party to a treaty is not bound by it; express consent is usually required to bind a state to a treaty.<sup>23</sup> Some in the international community, however, have sought "to circumvent" the express consent requirement by asserting that the restrictions contained in Protocol I constitute customary international law, which is binding on nonparty states.<sup>24</sup> While beliefs about what

19. Judge Abraham D. Sofaer, Legal Adviser, U.S. Dep't of State, The Position of United States on Current Law of War Agreements, Remarks to the Sixth Annual American Red Cross-Washington College of Law Conference on International Law (Jan. 22, 1987), in *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, 460, 463–65 (1987) [collection hereinafter *Sixth Annual Red Cross Conference*].

20. Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 456 (2002); Rabkin, *supra* note 15, at 194–95; Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 79 (2005).

21. Daniel Bethlehem, *The Methodological Framework of the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3, 6–7 (Elizabeth Wilmschurst & Susan Breau eds., 2007).

22. *Id.* at 7.

23. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty does not create either obligations or rights for a third State without its consent."); see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 256 (2d ed. 2007).

24. Bethlehem, *supra* note 21, at 8; Jeremy Rabkin, *The Fantasy World of International Law: The Criticism of Israel Has Been Disproportionate*, WEEKLY STANDARD, Aug. 21, 2006, <http://weeklystandard.com/Content/Public/Articles/000/000/012/580outtca.asp>; Open Letter from U.S. Dep't of State to Jakob Kellenberger, President, ICRC, U.S. Initial Reactions to ICRC Study on Customary International Law (Nov. 3, 2006), available at <http://web.archive.org/web/20071219121312/http://www.state.gov/s/l/rls/82630.htm>. See generally Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW (Malcolm D. Evans ed., 2003) (arguing that when an obligation in a treaty is or becomes "general customary law, the non-party

the law ought to be (*lex ferenda*) rather than what it actually is (*lex lata*) may be dismissed as wishful thinking,<sup>25</sup> such beliefs do have ramifications.

With the establishment of the International Criminal Court, soldiers are subject to war crimes prosecution for violations of customary international law<sup>26</sup> whether or not their nations are parties to Protocol I.<sup>27</sup> Equally troubling is the fact that many in the international community—including the UN, NGOs, and the media—focus reflexively, and nearly exclusively, on their perceptions of the legality of the conduct of Western nations (i.e., the United States and Israel).<sup>28</sup>

In the early 1960s, comedian Bill Cosby performed a routine called “Toss of the Coin” in which he imagined what would happen if a referee tossed a coin at the commencement of every war, with the

state may be bound by the same substantive obligation” under customary international law).

25. See INT’L LAW ASS’N, FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 56 (2000), available at <http://www.ila-hq.org/download.cfm/docid/D21F40F5-2892-484E-96F8694BF7FEC3A4> (distinguishing *lex ferenda* and *lex lata*) [hereinafter FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW]; Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 761 (2001) (distinguishing *lex ferenda* and *lex lata*).

26. Rome Statute of the International Criminal Court art. 21(1)(b), U.N. Doc A/CONF.183/9 (July 17, 1998), available at <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter Rome Statute]; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 91–92 (2d ed. 2004).

27. Rome Statute, *supra* note 26, arts. 12, 89(1); see W. Chadwick Austin & Antony Barone Kolenc, *Who’s Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT’L L. 291, 335–44 (2006) (discussing U.S. adversaries’ use of the ICC as a “method” of warfare); Rabkin, *supra* note 15, at 203–05. Similarly problematic is the prospect of the trial of soldiers for war crimes by other nations purporting to exercise universal jurisdiction. See Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT’L L. 149, 150–51 (2006) (“Unlike other bases of jurisdiction in international law, universal jurisdiction requires no territorial or national nexus to the alleged act or actors over which a state legitimately may claim legal authority.”); see also Yoram Dinstein, *The Universality Principle and War Crimes*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 17, 26–30 (Michael N. Schmitt & Leslie C. Green eds., 1998) (describing the operation of universal jurisdiction for war crimes).

28. See, e.g., Austin & Kolenc, *supra* note 27, at 305–06; Alan Baker, *Legal and Tactical Dilemmas Inherent in Fighting Terror: Experience of the Israeli Army in Jenin and Bethlehem (April–May 2002)*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, *supra* note 4, at 273, 282; Gross, *supra* note 20, at 447, 467; Michael Y. Kieval, *Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law*, 26 MICH. J. INT’L L. 869, 896–98 (2005); Rabkin, *supra* note 24; Reynolds, *supra* note 20, at 35; C.B. Shotwell, *Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War*, 4 U.S.A.F. ACAD. J. LEGAL STUD. 15, 34–35 (1993); see also MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 23 (2004) (noting the sensitivity of liberal democracies to the “broader network of states and international bodies, whose views must be taken into account”).



winner of the toss deciding the rules under which the conflict would be fought.<sup>29</sup> The coin toss would be similar to the coin toss conducted before a football game, in which the winner of the toss decides whether it will kick-off or receive, or whether it will defend a particular goal to begin the game.<sup>30</sup> One example Cosby uses is a coin toss at the beginning of the American Revolutionary War. The British lose the toss and the Americans set the rules of the war; during the war, the Americans “will wear any color clothes that they want to; shoot from behind the rocks, the trees, and everywhere; and [the British] must wear red and march in a straight line.”<sup>31</sup>

Protocol I and its application by the international community place Western nations (particularly the United States and Israel) fighting insurgent and terrorist organizations (e.g., al-Qaeda, Hezbollah, Hamas)<sup>32</sup> on the losing side of the coin toss. The insurgents and terrorists set the rules of the conflict. Namely, the insurgents and terrorists will dress any way they want and conduct their military operations from civilian population centers, while their enemies must either surrender; or—in the course of shooting back—kill or wound civilians and destroy civilians’ objects, thereby incurring the opprobrium of the international community; or attack with ground forces and suffer considerable combat losses, thereby losing vital domestic support.<sup>33</sup>

In short, Protocol I provides a powerful incentive for insurgents and terrorist organizations to rely on their enemies’ observance of the law of war. It creates a “win-win-win” situation for such groups: either their adversaries avoid striking them altogether out of fear of causing civilian casualties (win); or they attack them, cause civilian casualties, and suffer international condemnation (win); or they forego air power and artillery and attack using ground troops, thereby incurring much greater casualties and the loss of their public’s support for the conflict (win).

29. BILL COSBY, *Toss of the Coin*, on BILL COSBY IS A VERY FUNNY FELLOW RIGHT! (Warner Bros. Records 1963).

30. NFL Rules Digest: Coin Toss, <http://www.nfl.com/rulebook/cointoss> (last visited Mar. 22, 2009).

31. COSBY, *supra* note 29.

32. See U.S. DEP’T OF STATE PUBLICATION, OFF. OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2007, at 267 (2008), available at <http://www.state.gov/documents/organization/105904.pdf>.

33. See, e.g., John F. Burns, *Two American Civilians Killed by Fake Iraqi Policemen*, N.Y. TIMES, Mar. 11, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9507E3DC123EF932A25750C0A9629C8B63>; *Hospitals Face Catastrophe as Israeli Firestorm Is Unleashed*, TIMES (London), Dec. 29, 2008, available at [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article5409283.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article5409283.ece).

Admittedly, democracies must often fight wars “with one hand tied behind [their] back[s],”<sup>34</sup> and they must recognize that adherence to the law of war is not based upon strict reciprocity.<sup>35</sup> Nevertheless, the current law governing targeting is fundamentally defective. It affords parties to international armed conflicts strategic<sup>36</sup> and tactical<sup>37</sup> advantages from the combination of their own noncompliance with the law of war and their adversaries’ observance of the law. Nations should not be placed at a strategic or tactical disadvantage for following international humanitarian law or for their enemies’ failure to do so.<sup>38</sup> Otherwise, the consequence will be increasing noncompliance with the law<sup>39</sup> and growing civilian casualties.<sup>40</sup> International humanitarian law must be based upon at least some reciprocal restraints and not on rules applicable only to one side of the conflict. Equally imperative, the international community must re-direct its attention and disapproval to those who

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34. HCJ 5100/94 Pub. Comm. Against Torture v. Israel [1999] IsrSC 53(4) 817, ¶ 39, available at [http://www.law.yale.edu/documents/pdf/Public\\_Committee\\_Against\\_Torture.pdf](http://www.law.yale.edu/documents/pdf/Public_Committee_Against_Torture.pdf).

35. *Id.* (“This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it.”); see also Richemond, *supra* note 4, at 1023.

36. The strategic level of war is that level at which a nation (or group of nations) determines national or multinational objectives for the overall conflict and develops and uses national resources to achieve those objectives. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0: JOINT OPERATIONS, at II-2 (2008), available at [http://www.fas.org/irp/doddir/dod/jp3\\_0.pdf](http://www.fas.org/irp/doddir/dod/jp3_0.pdf) [hereinafter JP 3-0]. An insurgent or terrorist organization’s endeavor to use—over time—international agencies, NGOs, and the media to portray its adversary as indifferent to international humanitarian law in order to undermine the adversary’s domestic and international support could be deemed part of its strategy in a conflict. See, e.g., *infra* notes 407–14 (explaining that Iraq’s use of civilian casualties to force curtailment of bombing of Baghdad during 1991 Persian Gulf War). For simplicity, I have intentionally omitted the “operational level of war.” See JP 3-0, *supra*, at II-2.

37. The tactical level of war focuses on battles and engagements of normally short duration to achieve military objectives. A battle is generally made up of a series of engagements between belligerents. JP 3-0, *supra* note 36, at II-2–II-3. For example, an insurgent or terrorist organization’s effort to force an adversary to commit ground troops in a particular engagement or battle (e.g., Jenin) in order to increase the adversary’s casualties occurs at the tactical level of war. See *infra* notes 425–26 and accompanying text (describing the PLO’s use of civilians in the Battle of Jenin to force an Israeli ground assault).

38. Douglas H. Fischer, Comment, *Human Shields, Homicides, and House Fires: How a Domestic Law Analogy Can Guide International Law Regarding Human Shield Tactics in Armed Conflict*, 57 AM. U. L. REV. 479, 491 (2007). Protocol I deems as perfidious those acts that lead an adversary to believe that it is obliged to accord protection under the rules of international law with an intent to betray that confidence. Protocol I, *supra* note 13, art. 37(1).

39. See Samuel Vincent Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT’L L. 249, 272 (2006).

40. Reynolds, *supra* note 20, at 76.

intentionally place noncombatants in danger to achieve military and political objectives; if it fails to do so, it serves as an “enabler” for those who deliberately place civilians at risk.

After reviewing the development of the law of noncombatant immunity before 1977, this Article describes the genesis and creation of Protocol I and its applicability to current conflicts. The Article next addresses insurgent and terrorist organizations’ use of their adversaries’ compliance with international law—especially the dictates of Protocol I and its interpretation by the international community—as an instrument of war to achieve political and military objectives. Finally, this Article proposes a reformulation of the balance in international humanitarian law to ensure that it does not provide an incentive for such groups, as well as other belligerents, to use civilians to shield their military operations.

This Article addresses the Hague Law’s regulation of the methods and means of military operations. By contrast, the law dealing with the protection of noncombatants (e.g., civilians) and combatants rendered *hors de combat* who fall into a belligerent’s hands constitutes Geneva Law.<sup>41</sup> This Article does not discuss the manner in which nations ought to treat civilians and enemy combatants who fall into their hands.<sup>42</sup> Significantly, Hague Law differs from Geneva Law in one fundamental respect: a nation that captures enemy combatants—including insurgents and terrorists—has absolute control over those whom it detains; it alone determines their fate.<sup>43</sup> Nothing prevents or excuses a nation’s unqualified adherence to the law of war.<sup>44</sup> On the other hand, insurgents generally and terrorists specifically decide where to engage in

41. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 31 (2d ed. 2000); HÉCTOR OLÁSULO, *UNLAWFUL ATTACKS IN COMBAT SITUATIONS* 1–2 (2008). Some have deemed the distinction between Hague law and Geneva law to be anachronistic given the fact Protocol I deals with the means and methods of warfare—a subject previously reserved to the Hague Regulations. See Orna Ben-Naftali & Keren R. Michaeli, “We Must Not Make a Scarecrow of the Law”: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 *CORNELL INT’L L.J.* 233, 253–54 (2003). Of course, a number of nations, including the United States and Israel, have not ratified the Protocol and continue to be bound by the Hague Regulations and customary international law. Nevertheless, this Article uses the labels as a matter of convenience to distinguish the obligations of nations in conducting war from their duties with respect to those who fall into their hands.

42. See Derek Jinks, *The Declining Significance of POW Status*, 45 *HARV. INT’L L.J.* 367, 396 (2004).

43. Parks, *supra* note 6, at 181–82; see also OLÁSULO, *supra* note 41, at 2 (“States have lesser concerns in accepting limitations on the mechanisms to react against external threats than in accepting limitations on the mechanisms to deal with internal threats arising in their own territory.”).

44. See Richard D. Rosen, *America’s Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, 5 *GEO. J.L. & PUB. POL’Y* 113 (2007).

combat; they alone decide whether to fight from civilian areas or use civilians as shields.<sup>45</sup>

## II. THE DEVELOPMENT OF CIVILIAN IMMUNITY UNDER THE LAW OF WAR

### A. *The Law Before the Hague Regulations of 1907*

The notion of constraints on the use of force in armed conflict is not new.<sup>46</sup> “Virtually all cultures throughout history have exercised restraint and rules of engagement at some level.”<sup>47</sup> The Chinese, Egyptians, Indians, Babylonians, Hebrews, Greeks, Romans, and Moslems all recognized the need to limit the effects of war.<sup>48</sup> The Christian Peace of God (*Pax Dei*) movement in the late tenth and early eleventh centuries protected non-combatants from harm.<sup>49</sup> Writing in the sixteenth century, Spanish theologian Franciscus de Vitoria argued: “[I]t is never the right to slay the guiltless, even as an indirect and unintended result, except when there is no other means

45. Jones, *supra* note 39, at 271–72; see Parks, *supra* note 6, at 28–29 (discussing which parties are responsible for protecting civilian populations from attack).

46. PAUL CHRISTOPHER, *THE ETHICS OF WAR AND PEACE* 8 (3d ed. 2003).

47. Reynolds, *supra* note 20, at 3–4; see SAHR CONWAY-LANZ, *COLLATERAL DAMAGE: AMERICANS, NONCOMBATANT IMMUNITY, AND ATROCITY AFTER WORLD WAR II* 3 (2006) (providing examples); Leslie Green, *What Is—Why Is There—the Law of War?*, in *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM* 141, 145–57 (Michael N. Schmitt & Leslie C. Green eds., 1998) (providing examples).

48. CHRISTOPHER, *supra* note 46, at 8–12; Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 *NAVAL L. REV.* 176, 182–85 (2000); see also COLM MCKEOGH, *INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR 2* (2002) (describing ancient Celtic, Hebrew, Greek, and Roman philosophies of preserving innocents in battle); Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 *AM. U. J. INT’L L. & POL’Y* 117, 118 (1986) (describing ancient Eastern, first-millennium Muslim and Christian, and Shakespearean appeals to limit the destructive power of war). Professor Solf cites Caliph Abu Bakr, who admonished the first Moslem Arab Army invading Christian Syria in 634 “to learn certain rules by heart”:

Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives.

*Id.* (quoting M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 102 (1955)).

49. CHRISTOPHER, *supra* note 46, at 48; JACQUES LE GOFF, *MEDIEVAL CIVILIZATION* 57, 308 (Julia Barrow trans., Basil Blackwell Ltd. 1988) (1964); Robert John Araujo & John A. Lucal, *A Forerunner for International Organizations: The Holy See and the Community of Christendom—With Special Emphasis on The Medieval Papacy*, 20 *J.L. & RELIGION* 305, 333 (2004).

of carrying on the operations of a just war."<sup>50</sup> Vitoria included children, women, clerics and members of religious orders, farmers, and foreigners or guests "sojourning" in enemy territory among those considered guiltless.<sup>51</sup>

Similarly, in the seventeenth century, Dutch jurist Hugo Grotius contended moral justice demands that one take care, as far as possible, to prevent even the accidental death of innocent persons during war.<sup>52</sup> The innocent, according to Grotius, are women, children, old men, persons whose occupations are solely religious or concerned with letters, merchants, farmers, prisoners of war, and holders of religious office.<sup>53</sup> Seventeenth century Swiss philosopher and diplomat Emmerich de Vattel likewise asserted that, while a state has the "right to make use of all the means necessary to attain" the objectives of a just war, the right extends only "to those means which are necessary to attain that end."<sup>54</sup> Vattel recognized that a belligerent state had "rights" over women, children, feeble old men, and the sick because the laws of war counted those groups among the enemy; however, he maintained that—provided that those groups did not offer resistance—the state had "no right to maltreat or otherwise offer violence to them, much less to put them to death."<sup>55</sup>

50. FRANCISCUS DE VITORIA, *DE INDIS ET DE IVRE BELLI REFLECTIONES* 179 (John Pawley Bate trans., Oceana Publ'ns 1964) (1557); see also Solf, *supra* note 48, at 119 (presenting Vitoria's argument). But see Richemond, *supra* note 4, at 1028 (explaining problems with the idea of "justly" killing non-combatants).

51. DE VITORIA, *supra* note 50, at 178–79; see also CHRISTOPHER, *supra* note 46, at 55–56.

52. 3 HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 733 (Francis W. Kelsey trans., Oceana Publ'ns 1964) (1646); see also CHRISTOPHER, *supra* note 46, at 91–92; Richemond, *supra* note 4, at 1018 (citing Grotius). Grotius distinguished between what was permissible in war, that is, "that which is done with impunity, although not without moral wrong," from "that which is free from moral wrong even if virtue would enjoin not to do it." 3 GROTIUS, *supra*, at 641. Thus, while the act would be morally unjust, a nation has the legal right to kill and injure all who are in the territory of the enemy, *id.* at 646, including infants, women, captives, those who wish to or have surrendered, and hostages. *Id.* at 648–51; see also Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 396 (1993) (highlighting Grotius's legal acquiescence of killing innocents in certain situations); Green, *supra* note 47, at 155 (pointing out Grotius's conflicting philosophies of the lawfulness of violence against innocents in war and its moral repugnancy).

53. 3 GROTIUS, *supra* note 52, at 733–40. Like Vitoria, Grotius also believed that innocents might be lawfully attacked to achieve the war's end. *Id.* at 646–51.

54. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 279 (Charles G. Fenwick trans., Carnegie Inst. of Washington 1916) (1785). Like Grotius, Vattel also drew a distinction between "what is just, proper, and irreprehensible in war, and what is merely permissible and may be done by Nations with impunity." *Id.*

55. *Id.* at 282. Vattel stated that the "same rule applies to ministers of public worship and to men of letters and other persons whose manner of life is wholly apart from the profession of arms." *Id.* at 283. Vattel noted: "There is to-day no Nation in any degree civilized which does not observe this rule of justice and humanity." *Id.* at 282–83.

The first real effort to codify these constraints did not occur until the mid-nineteenth century during the American Civil War. In 1863, a German-American jurist and political philosopher, Dr. Francis Lieber, prepared on behalf of President Abraham Lincoln a code governing the conduct of Union forces.<sup>56</sup> The Lieber Code established the basis for later international conventions on the laws of war at Brussels in 1874 and at The Hague in 1899 and 1907.<sup>57</sup>

Lieber believed that the concept of “military necessity” permits the direct destruction of enemy forces as well as the obstruction of “ways and channels” of travel and communication, the “withholding of sustenance or means of life,” and “the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army.”<sup>58</sup> On the other hand, Lieber also recognized that “[m]en who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.”<sup>59</sup> In this regard, military necessity did not include cruelty—“that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.”<sup>60</sup> Nor did military necessity include “any act of hostility which makes the return to peace unnecessarily difficult.”<sup>61</sup>

In several articles, Lieber specifically delimited violence against civilians.<sup>62</sup> While conceding that, as citizens of a hostile state, civilians may be subjected to the “hardships of war,”<sup>63</sup> Lieber nevertheless stated the need to distinguish between “private individual[s] belonging to a hostile country and the hostile country itself, with its men in arms.”<sup>64</sup> Thus, “the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit,”<sup>65</sup> and “[p]rivate citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a

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56. Greenwood, *supra* note 4, at 21.

57. DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT* 3 (1973).

58. FRANCIS LIEBER, WAR DEPARTMENT, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* art. 15 (1863), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [hereinafter LIEBER CODE].

59. *Id.*

60. *Id.* art. 16.

61. *Id.*

62. *Id.* arts. 22–25.

63. *Id.* art. 21.

64. *Id.* art. 22.

65. *Id.*

vigorous war.”<sup>66</sup> Only “uncivilized people” fail to protect civilians;<sup>67</sup> for civilized countries, protection is the rule.<sup>68</sup>

Influenced in part by the Lieber Code, Russian Czar Alexander II initiated in 1874 a meeting of delegates of fifteen European nations to consider a draft international agreement on the laws and customs of war.<sup>69</sup> Meeting in Brussels in July 1874, the delegates adopted the draft with few changes.<sup>70</sup> The Brussels Declaration, although never ratified,<sup>71</sup> was a precursor to the Hague Regulations, parts of which still govern the conduct of military operations today.<sup>72</sup> The Declaration stated that “[t]he laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.”<sup>73</sup> In addition, the Declaration immunized “[o]pen towns, agglomerations of dwellings, or villages which are not defended” from bombardment or attack,<sup>74</sup> and required that, if such places were

66. *Id.* art. 23.

67. *Id.* art. 24.

68. *Id.* art. 25.

69. SCHINDLER & TOMAN, *supra* note 57, at 47. In 1868, the Czar convened a conference at St. Petersburg to forbid bullets under a certain size that either contained an “explosive or . . . fulminating or inflammable substances,” deeming such projectiles to be inhumane. GREEN, *supra* note 41, at 31. The resulting document was the Declaration of St. Petersburg, which banned the “employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.” Declaration of St. Petersburg, Nov. 29, 1868, 1 AM. J. INT’L L. 95, 95 (Supp. 1907) [hereinafter Declaration of St. Petersburg]. Importantly, the Declaration acknowledged the principle of distinction—see Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143, 149 (2001)—stating that the “only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.” Declaration of St. Petersburg, *supra*, at 95.

In August 1864, delegates from the governments of several European and American states met at a diplomatic conference in Geneva, Switzerland, to consider a convention to improve the conditions of those wounded in war; the resulting document was the Geneva Convention for the Amelioration of the Wounded Armies in the Field of 1864. ICRC, International Humanitarian Law—Treaties & Documents, Convention for the Amelioration of the Wounded Armies in the Field of 1864—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/120?OpenDocument> (last visited Mar. 22, 2009); see also GREEN, *supra* note 41, at 30. The United States is a party to the Convention. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 13.

70. SCHINDLER & TOMAN, *supra* note 57, at 25.

71. *Id.*; 1 JAMES BROWN SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 23 (1909) (noting that the delegates to the Brussels Conferences were not authorized to bind their governments).

72. Greenwood, *supra* note 4, at 24; WILLIAM I. HULL, THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW 214 (Kraus Reprint Co. 1970) (1908).

73. Project of an International Declaration Concerning the Laws and Customs of War art. 12, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, available at <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>.

74. *Id.* art. 15.

defended, the commander of the attacking forces give notice of any bombardment except in cases of an assault.<sup>75</sup>

The Declaration also established that those recognized as belligerents were entitled to engage in hostilities and to prisoner of war status if captured. It noted that the laws, rights, and duties of war apply not only to armies but also to militia and volunteer corps provided that they fulfill the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.<sup>76</sup>

In addition, the Declaration gave protected status to the population of an unoccupied territory "who, on the approach of the enemy, spontaneously take[s] up arms to resist the invading troops without having had time to organize themselves" (*a levee en mass*).<sup>77</sup>

Finally, and of equal significance, the delegates executed a Final Protocol recognizing the limits imposed by international law on the means and methods of war, which is the underlying basis for contemporary international humanitarian law:

It had been unanimously declared that the progress of civilization should have the effect of alleviating, as far as possible, the calamities of war; and that the only legitimate objective which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary suffering.<sup>78</sup>

75. *Id.* art. 16.

76. *Id.* art. 9.

77. *Id.* art. 10. By comparison, the Lieber Code characterized persons who engage in hostilities without being part of an organized army and who, "without sharing continuously in the war, [participate] with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers" as highway robbers or pirates. LIEBER CODE, *supra* note 58, art. 82. The Code also denied POW status to persons "who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads or canals, or of robbing or destroying the mail, or of cutting the telegraph wires." *Id.* art. 84. This is inconsistent with Protocol I, which deems civilians who take a direct part in hostilities to be subject to attack only for as long as they engage in such activities. Protocol I, *supra* note 13, art. 51(3); *see also infra* notes 319–27 and accompanying text.

78. Final Protocol of Brussels Conference, Aug. 27, 1874, in SCHINDLER & TOMAN, *supra* note 57, at 25, 25 [hereinafter Final Protocol of Brussels Conference]. The author of the Brussels Conference, Czar Alexander II, viewed its accomplishments in humanitarian terms:

The importance of this declaration consists in this: for the first time, an international agreement concerning the laws of war was to be established, really compulsory for the armies of modern states and designed to protect



The conferees expressed the conviction that by revising the laws and general usages of war or by defining them with greater precision, they ensured that war "would involve less suffering, [and] would be less liable to those aggravations produced by uncertain, unforeseen events, and the passions excited by the struggle."<sup>79</sup>

Following the issuance of the Brussels Declaration, the Institute of International Law undertook to study the document, using it as a basis for its own guide to the laws of war: the Oxford Manual.<sup>80</sup> In drafting the Manual, the Institute was careful not to seek innovations in the law but to codify "the accepted ideas of our age so far as is practicable."<sup>81</sup> The Institute believed that a judicious set of positive rules would eliminate uncertainty on the battlefield and enhance military discipline.<sup>82</sup>

The Oxford Manual described the international legal constraints on the conduct of war. Only acts of violence between the armed forces of belligerent states are permitted (and even those acts are not unlimited<sup>83</sup>), and persons who are not members of the armed forces must "abstain from such acts."<sup>84</sup> Moreover, the Manual expressly

inoffensive, peaceable, and unarmed people from the useless cruelties of warfare and from the evils of invasion which are not required by imperious military necessities.

HULL, *supra* note 72, at 215 (quoting statement by M. de Martens of Russia at 1899 Hague International Peace Conference).

79. Final Protocol of Brussels Conference, *supra* note 78.

80. Laws of War on Land (Oxford Manual) (1880), in SCHINDLER & TOMAN, *supra* note 57, at 35, 36.

81. *Id.*

82. *Id.*

83. *Id.* art. 4 ("The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy.")

84. *Id.* art. 1. The Manual defined members of an armed force with language similar to that in the Brussels Declaration:

The armed forces of a State includes:

1. The army properly so called, including the militia;
2. The national guards, *landsturm*, free corps, and other bodies which fulfill the three following conditions:
  - (a) That they are under the direction of a responsible chief;
  - (b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps;
  - (c) That they carry arms openly.
- ...
4. The inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organize themselves.

*Id.* art. 2. Moreover, under the Manual, "[e]very belligerent armed force is bound to conform to the laws of war." *Id.* art. 3.

forbade the maltreatment of “inoffensive populations”<sup>85</sup> and recognized constraints on military operations, including the prohibition against striking undefended places or destroying property not demanded by “an imperative necessary of war.”<sup>86</sup> Conversely, the Manual acknowledged the right of belligerents to bombard fortresses or places in which the enemy is entrenched.<sup>87</sup>

The Brussels Declaration and the Oxford Manual set the stage for the first major international convention held at The Hague with the goal of limiting the means and methods of war.<sup>88</sup>

## B. *The Hague Regulations*

### 1. Genesis

Perhaps inspired by the legacy of his grandfather<sup>89</sup> and expressly motivated by a desire to limit the accelerating pace of military expenditures,<sup>90</sup> on August 24, 1898, Czar Nicholas II of Russia called for an international peace conference for the purpose of “insuring to all peoples the benefits of a real and durable peace, and, above all, of putting an end to the progressive development of the present armaments.”<sup>91</sup> On January 11, 1899, the Czar’s Foreign Secretary, Count Mouravieff, issued a circular expanding the subjects to be discussed at the conference.<sup>92</sup> The Count noted that, in spite of the favorable reception the Czar’s proposal had received, several powers had since “undertaken fresh armaments, striving to increase further their military forces.”<sup>93</sup> Consequently, the principal objects of the conference were to seek, “without delay,” limits on military

85. *Id.* art. 7.

86. *Id.* art. 32.

87. *Id.*

88. UK MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 9 (2004) [hereinafter *UK MANUAL*]; GREEN, *supra* note 41, at 33; 1 SCOTT, *supra* note 71, at 23, 525–28.

89. See JOSEPH H. CHOATE, *THE TWO HAGUE CONFERENCES* 3–5 (1913); 1 SCOTT, *supra* note 71, at 39 (noting that the Czar may have been “inspired by the traditions of his imperial house”).

90. SCHINDLER & TOMAN, *supra* note 57, at 49. The Czar was, at the time, seeking to avoid replacing his antiquated artillery with a new and expensive one. HULL, *supra* note 72, at 2; see also Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 *HARV. INT’L L.J.* 49, 69–70 (1994) (noting that “the Czar’s sudden embrace of pacifism was a ruse to enlist public opinion to support measures that would help Russia overcome its military weakness”).

91. Count Boris Mouravieff, Rescript of the Russian Emperor (Aug. 24, 1898), in 2 SCOTT, *supra* note 71, at 1, 1.

92. CHOATE, *supra* note 89, at 6.

93. Count Boris Mouravieff, Russian Circular (Jan. 11, 1899), in 2 SCOTT, *supra* note 71, at 3, 3.

expenditures and to discuss means of preventing armed conflicts.<sup>94</sup> The conference was also to include a revision of “the Declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels.”<sup>95</sup>

To avoid holding the conference in “the capital of one of the Great Powers, where so many political interests [were] centered,”<sup>96</sup> participating governments accepted the invitation of the Queen of the Netherlands to hold the conference in her “residence city, The Hague.”<sup>97</sup> Membership in the conference was generally limited to those nations represented at the Russian Court—some twenty-six of the world’s then fifty-nine countries.<sup>98</sup>

Meeting from May 18, 1899,<sup>99</sup> to July 21, 1899, the delegates failed to reach agreement on the underlying purpose for the conference—arms control;<sup>100</sup> however, they did adopt three conventions, including regulations concerning the laws and customs of war on land.<sup>101</sup> The United States was a signatory to the convention, ratifying it on April 9, 1902.<sup>102</sup>

Delegates to the 1899 conference envisioned that a second conference would soon follow,<sup>103</sup> but two conflicts—the Boer War and the Russo-Japanese War—delayed the follow-on meetings. In 1904, with Russia still at war with Japan, the Inter-Parliamentary Union,

94. *Id.* at 3–4.

95. *Id.* at 4.

96. *Id.* at 5.

97. HULL, *supra* note 72, at 6.

98. *Id.* at 10. Several nations that did not have representatives at the Russian Court were also invited (e.g., Luxembourg, Montenegro, Siam). *Id.*

99. The conferees selected May 18, 1899, as the date on which to begin the conference in honor of Czar Nicolas II’s birthday. CHOATE, *supra* note 89, at 7.

100. CHOATE, *supra* note 89, at 9–11; SCHINDLER & TOMAN, *supra* note 57, at 49.

101. CHOATE, *supra* note 89, at 13; SCHINDLER & TOMAN, *supra* note 57, at 49. The conference also agreed upon a Convention for the Pacific Settlement of International Disputes, in 2 SCOTT, *supra* note 71, at 81, a Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 23, 1864, in 2 SCOTT, *supra* note 71, at 143, a declaration to prohibit for five years the launching of projectiles and explosives from balloons or by other similar new methods, Declaration Concerning Launching of Projectiles and Explosive from Balloons, in 2 SCOTT, *supra* note 71, at 153, a declaration prohibiting the use of projectiles for the purpose of diffusing asphyxiating or deleterious gases, Declaration Concerning Asphyxiating Gases, in 2 SCOTT, *supra* note 71, at 155, and a declaration forbidding the use of bullets that expand or flatten easily in the human body, Declaration Concerning Expanding Bullets, in 2 SCOTT, *supra* note 71, at 157.

102. Convention (II) with Certain Powers Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, available at [http://avalon.law.yale.edu/19th\\_century/hague02.asp](http://avalon.law.yale.edu/19th_century/hague02.asp) [hereinafter Hague Convention No. II]; ICRC, International Humanitarian Law—State Parties/Signatories, Convention II, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=150&ps=P> (last visited Mar. 22, 2009) (citing April 9, 1902 as the date of ratification).

103. Final Act of the International Peace Conference of 1899, in 2 SCOTT, *supra* note 71, at 63, 79; CHOATE, *supra* note 89, at 49–50; SCHINDLER & TOMAN, *supra* note 57, at 49.

meeting in St. Louis, appealed to President Theodore Roosevelt to convene a second international conference.<sup>104</sup> Thereafter, President Roosevelt directed his Secretary of State, John Hay, to send a circular calling for a second conference to the signatory nations of the 1899 Convention.<sup>105</sup> After the Russo-Japanese War ended, Russia reassumed responsibility for convening a second conference and greatly expanded the number of invitee nations.<sup>106</sup> Included as part of the program was a proposal to “complete[ ] and define[ ], so as to remove all misapprehensions,” the laws and customs of war on land.<sup>107</sup>

The second international peace conference met at The Hague from June 15, 1904, through October 18, 1904.<sup>108</sup> It created ten new conventions and revised the three conventions adopted during the first conference, including the convention pertaining to the laws and customs of war on land—Hague Convention No. IV.<sup>109</sup>

“Seventeen of the states that ratified the 1899 Conventions did not ratify the 1907 version,” and thereby remain bound by the earlier regulations.<sup>110</sup> States that signed and ratified both Conventions are bound by the 1907 Convention.<sup>111</sup> The United States is a party to

104. 1 SCOTT, *supra* note 71, at 90–91.

105. HULL, *supra* note 72, at 3–5; *see also* CHOATE, *supra* note 89, at 50 (discussing the letter). *See generally* Letter from John Hay, U.S. Sec’y of State, to the Representative of the United States Accredited to Each of the Governments Signatories to the Acts of the Hague Conference, 1899 (Oct. 21, 1904), *in* 2 SCOTT, *supra* note 71, at 168.

106. Letter from Baron Roman Rosen, Russian Ambassador, to the U.S. Sec’y of State (Apr. 12, 1906), *in* 2 SCOTT, *supra* note 71, at 175, 175–80 [hereinafter Rosen Letter]. Forty-four states sent delegates to the conference. *Id.* at 179–80 & n.1 (listing the States invited to participate in the conference and noting those who declined); *see also* HULL, *supra* note 72, at 13–15 (discussing the magnitude of the attendance of the conference).

107. Rosen Letter, *supra* note 106, at 176.

108. HULL, *supra* note 72, at 40.

109. SCHINDLER & TOMAN, *supra* note 57, at 49, 57; ICRC, International Humanitarian Law—Treaties & Documents, Convention IV Respecting the Laws and Customs of War on Land—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/195?OpenDocument> (last visited Mar. 22, 2009).

110. SCHINDLER & TOMAN, *supra* note 57, at 57; *see also* Convention (IV) Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, *available at* [http://avalon.law.yale.edu/20th\\_century/hague04.asp](http://avalon.law.yale.edu/20th_century/hague04.asp) [hereinafter Hague Convention No. IV] (“The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.”). Those seventeen states are Argentina, Bulgaria, Chile, Columbia, Ecuador, Greece, Italy, Korea, Montenegro, Paraguay, Persia, Peru, Serbia, Spain, Turkey, Uruguay, and Venezuela. ICRC, International Humanitarian Law—Treaties & Documents, Convention II with Respect to the Laws and Customs of War on Land—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/150?OpenDocument> (last visited Mar. 22, 2009).

111. Hague Convention No. IV, *supra* note 110, art. 4; *see also* SCHINDLER & TOMAN, *supra* note 57, at 57.

both Conventions;<sup>112</sup> Israel has not ratified either Convention.<sup>113</sup> In any event, the Hague Convention IV is considered to embody the rules of customary international law, and is thereby binding on all states.<sup>114</sup>

## 2. Key Provisions

Consistent with the Brussels Declaration of 1874 and the Oxford Manual of 1880, the Hague Regulations restrict the prisoner-of-war protections of the Convention to those combatants who separate themselves from the civilian population—namely, members of armies as well as militia and volunteer corps who (1) are commanded by a person responsible for his subordinates, (2) have a fixed distinctive emblem recognizable at a distance, (3) carry their arms openly, and (4) conduct their operations in accordance with the laws and customs of war.<sup>115</sup> The Regulations also recognize the protected status of the *levee en mass*.<sup>116</sup>

The Regulations also restrict the means and methods of conducting war, noting: “The right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>117</sup> Specifically, the Regulations forbid perfidious and treacherous acts and ban certain weapons causing unnecessary suffering,<sup>118</sup> prohibit the attack or bombardment

112. Hague Convention No. IV, *supra* note 110; *see supra* note 110 and accompanying text.

113. *See* ICRC, International Humanitarian Law, State Parties, Convention (II), <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=150&ps=P> (last visited Mar. 22, 2009); ICRC, International Humanitarian Law, State Parties, Convention (IV), <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=195&ps=P> (last visited Mar. 22, 2009).

114. SCHINDLER & TOMAN, *supra* note 57, at 57 (citing the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East).

115. Hague Convention No. IV, *supra* note 110, annex, art. 1.

116. *Id.* annex, art. 2.

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

*Id.*

117. *Id.* annex, art. 22.

118. *Id.* annex, art. 23.

In addition to the prohibitions provided by special Conventions, it is especially forbidden—

- (a.) To employ poison or poisoned weapons;
- (b.) To kill or wound treacherously individuals belonging to the hostile nation or army;

of undefended towns, villages, dwellings, or buildings;<sup>119</sup> and, where such places are defended, require belligerents to take "all necessary steps . . . to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes."<sup>120</sup> The Regulations also impose upon the officer in command of an attacking force a duty to give notice, except in cases of assault, before commencing a bombardment on a defended place.<sup>121</sup>

Finally, the delegates to the Hague Peace Conferences understood that the laws and customs of war they codified were necessarily incomplete.<sup>122</sup> To deal with such gaps, the delegates adopted a provision suggested by Russian delegate Frederic de Martens in the preamble of the 1899 Hague Convention and then

(c.) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

(d.) To declare that no quarter will be given;

(e.) To employ arms, projectiles, or material calculated to cause unnecessary suffering;

(f.) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g.) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

(h.) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

*Id.*

119. *Id.* annex, art. 25. Article 1 of the Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 51, contains a similar prohibition.

120. Hague Convention No. IV, *supra* note 110, annex, art. 27. The belligerent occupying a place under siege has the duty of indicating the presence of protected "buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand." *Id.*

121. *Id.* annex, art. 26.

122. *See id.* pmbl.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants. It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice.

*Id.*

replicated it, with minor modifications, in the 1907 Convention.<sup>123</sup> Known as the “Martens Clause,” it states:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>124</sup>

Importantly, while the Hague Regulations clearly serve humanitarian purposes,<sup>125</sup> they also create reciprocal responsibilities, thus giving no military advantage to any belligerent.<sup>126</sup> The Hague Regulations preclude a military commander from attacking or

123. See A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 7 (2d ed. 2004) (“The purpose of the [Martens Clause] was not only to confirm the continuance of customary law, but also to prevent arguments that because a particular activity had not been prohibited in a treaty it was lawful.”) (footnote omitted); see also GREEN, *supra* note 41, at 34 (noting that both the 1899 and 1907 Conventions contains an “all-participation clause, rendering its application null should any of the belligerents in a conflict not be a party to the relevant Convention”); Antonio Cassese, *The Martens Clause: Simply Half a Loaf or Pie in the Sky?*, 11 EUR. J. INT’L L. 187, 187 (2000), available at <http://ejil.oxfordjournals.org/cgi/reprint/11/1/187> (noting the various interpretations of the clause in legal literature).

124. Hague Convention No. IV., *supra* note 110, pmbl. The “Martens Clause” 1899 Hague Convention reads:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Hague Convention No. II, *supra* note 102, pmbl; see also Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM J. INT’L L. 78, 80–82 (2000) (discussing uses of the Martens Clauses in modern international humanitarian law).

125. See 1 SCOTT, *supra* note 71, at 537. The Hague articles dealing with the methods of operations

are designed to restrict, as far as possible, the hardship of war to actual combatants and to the public property of the belligerents. The purpose of war is no longer to produce submission by the wanton destruction of noncombatants and private property; but to crush resistance of the enemy in arms, and to subject national property to destruction or to enemy use in order to exhaust the means of resistance.

*Id.*

126. See Parks, *supra* note 6, at 15 (“The law of war succeeds only insofar as it does not provide, or appear to provide, an opportunity for one party to gain a tactical advantage over another.”); *id.* at 62 (noting that if the “belligerent undertakes activities that violate the provisions of the convention related to special protection,” such as taking shelter in a property protected for its cultural or religious value, then the cultural object will lose its protection).

bombarding towns, villages, dwellings, or buildings *only* if they are undefended.<sup>127</sup> An enemy armed force cannot situate its facilities or forces in civilian areas and expect that the law of armed conflict will prevent them from being attacked. Indeed, under the Hague regime, the responsibility for collateral civilian casualties rests with the nation using civilian areas for military facilities or operations.<sup>128</sup>

### C. From Hague to Protocol I

The Hague Regulations of 1907 represented the last successful effort by the international community to agree upon a comprehensive set of rules governing the methods and means of actual military operations until the 1977 Additional Protocols to the Geneva Conventions.<sup>129</sup> The delegates to the 1907 Hague Peace Conference recommended the “assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding conference.”<sup>130</sup> Eight years later, however, many of the participating states were engaged in the World War I; consequently, the Third Peace Conference never took place.<sup>131</sup>

#### 1. Geneva Gas Protocol of 1925

Following World War I, the victorious allies reaffirmed in the Treaty of Versailles the Hague Regulations’ proscription against the use of poison gas and prohibited Germany from manufacturing or importing such materiel or related devices.<sup>132</sup> A similar effort to

127. Hague Convention No. IV, *supra* note 110, annex, art. 25.

128. Parks, *supra* note 6, at 18, 62.

129. ICRC, International Humanitarian Law—Treaties and Documents, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument> (last visited Mar. 22, 2009); ICRC, International Humanitarian Law—Treaties and Documents, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument> (last visited Mar. 22, 2009).

130. Final Act and Conventions of the Second International Peace Conference, Oct. 18, 1907, 3 Martens Nouveau Recueil (ser. 3) 323, 205 Consol. T.S. 216, *in* 2 SCOTT, *supra* note 71, at 257, 289.

131. GREEN, *supra* note 41, at 36.

132. Treaty of Peace Between the Allied and Associated Powers of Germany (Treaty of Versailles) art. 171, June 28, 1919, T.S. No. 4, 2 Bevans 43, *available at* <http://www.firstworldwar.com/source/versailles159-213.htm> (“The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany. The same applies to materials specially intended for the manufacture, storage and use of the said products or devices.”); *see* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, *available at* <http://www.icrc.org/ihl.nsf/FULL/280?OpenDocument> [hereinafter Geneva Gas Protocol].



codify the prohibition against the use of poison gas occurred during the Washington Disarmament Conference of 1922.<sup>133</sup> The United States ratified the resulting treaty, but it never entered into force because the treaty required ratification of all drafting states and one of them, France, objected to other parts of the treaty.<sup>134</sup> The parties to the 1925 Geneva Conference for the Supervision of the International Traffic in Arms approved a protocol prohibiting the use of “asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices” in war and “agreed to extend th[e] prohibition to the use of bacteriological methods of warfare.”<sup>135</sup> Known as the Geneva Gas Protocol of 1925, the agreement entered into force on February 8, 1928.<sup>136</sup> The United States did not ratify the treaty, however, until January 22, 1975.<sup>137</sup>

133. Washington Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare art. V, Feb. 6, 1922, 25 L.N.T.S. 202, 2 Hudson 794, available at <http://www1.umn.edu/humanrts/instree/1922a.htm> [hereinafter Washington Treaty].

The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties.

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto.

*Id.*

134. *Id.* art. VI; Noone, *supra* note 48, at 201–02.

135. Geneva Gas Protocol, *supra* note 132; see also Noone, *supra* note 48, at 202.

136. ICRC, International Humanitarian Law—Treaties and Documents, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/280?OpenDocument> (last visited Mar. 22, 2009).

137. ICRC, International Humanitarian Law—Treaties and Documents, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare—State Parties, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=280&ps=P> (last visited Mar. 22, 2009). In ratifying the Protocol, the United States declared its understanding that the Protocol does not apply to riot control agents or chemical herbicides, but that the use of such agents would nevertheless be restricted. UK MANUAL, *supra* note 88, at 11; see also Exec. Order No. 11,850, 40 Fed. Reg. 16,187 (April 8, 1975).

On March 26, 1975, the Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (BWC), Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, entered into force. Among other things, it obligates parties “not to develop, produce, stockpile, or otherwise acquire or retain (1) microbial or other biological agents or toxins of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes.” *Id.* art. 1. On April 29, 1997, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800, entered into force. It bans the use, development, production, stockpiling, and transfer of chemical weapons, and requires

## 2. Hague Air Rules of 1923

The Washington Disarmament Conference of 1922 also adopted a resolution to appoint a commission of jurists to prepare rules relating to aerial warfare and rules concerning the use of radio in time of war.<sup>138</sup> Composed of representatives of six nations, including the United States, the Commission met from December 1922 to February 1923 at The Hague and prepared far-reaching rules of air warfare as well as rules for the control of radio in time of war.<sup>139</sup> The draft rules constituted a radical departure from the customary laws of armed conflict and were never ratified.<sup>140</sup>

The Commission's draft forbade "[a]ny air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants."<sup>141</sup> The draft identified military objectives—that is, "objective[s] whereof the total or partial destruction would constitute an obvious military advantage for the belligerent"<sup>142</sup>—as the only legitimate targets of air attacks.<sup>143</sup> The Commission attempted to delineate an exhaustive list of legitimate military objectives:

Such bombardment is legitimate only when directed exclusively against the following objectives: military forces, military works, military establishments or depots, manufacturing plants constituting important and well-known centres for the production of arms, ammunition or characterized military supplies, lines of communication or of transport which are used for military purposes.<sup>144</sup>

The draft rules also proscribed the "bombardment of cities, towns, villages, habitations[,] and building[s] . . . not situated in the immediate vicinity of the operations of the land forces."<sup>145</sup> Even if military objectives were situated in such places as cities and towns, the rules outlawed bombing if an "undiscriminating bombardment of

that all existing stocks of chemical weapons be destroyed within 10 years. *Id.* art. V(8). The United States ratified both conventions.

138. ICRC, International Humanitarian Law—Treaties and Documents, Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/275?OpenDocument> (last visited Mar. 22, 2009) [hereinafter Hague Air Rules Introduction].

139. *Id.*; see also Jochnick & Normand, *supra* note 90, at 83–84.

140. Parks, *supra* note 6, at 30–31; see also Hague Air Rules Introduction, *supra* note 138.

141. Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Drafted by a Commission of Jurists at the Hague, Dec. 1922–Feb. 1923 art. 22, Feb. 19, 1923, available at <http://www.icrc.org/ihl.nsf/FULL/275?OpenDocument> [hereinafter Hague Air Rules].

142. *Id.* art. 24(1).

143. *Id.*

144. *Id.* art. 24(2).

145. *Id.* art. 24(3).

the civil population would result therefrom.”<sup>146</sup> The Commission’s draft permitted aerial attacks on land forces in the immediate vicinity of cities, towns, villages, habitations, and buildings “provided there is a reasonable presumption that the military concentration is important enough to justify the bombardment, taking into account the danger to which the civil population will thus be exposed.”<sup>147</sup>

Like the Hague Regulations, the draft air warfare rules required commanders “to spare, as far as possible, buildings dedicated to public worship, art, science, and charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are gathered, provided that such buildings, objectives[,] and places are not being used at the same time for military purposes.”<sup>148</sup> The burden was on the defender to mark properly such places.<sup>149</sup> Similar provisions protected monuments of “great historic value.”<sup>150</sup>

The draft rules (excuse the pun) never got off the ground.<sup>151</sup> Unlike the diplomats who prepared the Hague Regulations, the Commission members lacked “adequate appreciation of the political, economic, and military realities underlying wartime practices.”<sup>152</sup> In addition, as Hays Parks notes, the draft rules assumed—perhaps wrongly—that lawful targets in populated areas should be protected from attack and that “responsibility for avoidance of collateral civilian casualties or damage to civilian objects should be shifted to the attacker.”<sup>153</sup> As a consequence, not one nation adopted the Hague

146. *Id.*

147. *Id.* art. 24(4).

148. *Id.* art. 25.

149. *Id.*

150. *Id.* art. 26.

151. Hague Air Rules Introduction, *supra* note 138.

152. Jochnick & Normand, *supra* note 90, at 84.

The majority of commissioners had little or no technical acquaintance with the art and practice of war. Some seemed inclined to believe that the course of war, even when great national emotions were aroused, might be guided by a code of rules previously agreed upon. They did not appear to realize that at any time the code of accepted rules of warfare is based almost entirely on past experience . . . .

Parks, *supra* note 6, at 31 (quoting William Rodgers, *The Laws of War Concerning Aviation and Radio*, 17 AM. J. INT’L L. 629, 633 (1923)). The same lack of expertise plagued the delegates who drafted the Additional Protocols. *Id.* at 76.

153. *Id.* at 28. The rules

tilt[ed] the scale too much in favor of the target state. In areas outside the combat zone, the target state could gain some immunity for what would otherwise be lawful military objectives by simply surrounding them with civilians. Near the front, the target state could simply prohibit civilians from leaving.

H. Wayne Elliott, *Open Cities and (Un)Defended Places*, ARMY LAW., Apr. 1995, at 44. Professor Hersch Lauterpacht observed after World War II that the Hague Air Rules

Air Rules,<sup>154</sup> and the international community ignored them during World War II.<sup>155</sup>

### 3. Geneva Conventions of 1949

Although primarily concerned with the treatment of civilians and combatants rendered *hors de combat* who fall into a belligerent's hands,<sup>156</sup> the Geneva Conventions of 1949 have important implications for the conduct of military operations generally and of targeting specifically. The 1949 Conventions arose out of the horrors of World War II<sup>157</sup> and the demonstrated inadequacy of previous treaty regimes.<sup>158</sup>

The 1929 Geneva Prisoner of War (POW) Convention replaced the 1907 Hague POW Regulations<sup>159</sup> and consequently carried forward the definitions of combatants entitled to protected status.<sup>160</sup> The Geneva POW Convention of 1949, which superseded the 1929 Convention, broadened somewhat the Hague definition of lawful combatants to include "members of . . . organized resistance movements, . . . operating in or outside their own territory, even if this territory is occupied," provided they (1) are commanded by a person responsible for his subordinates, (2) have a fixed distinctive sign recognizable at a distance, (3) carry their arms openly, and (4) conduct their operations in accordance with the laws and customs of war.<sup>161</sup>

assumed—incorrectly, as events proved—that governments would accept or act upon a rule which would make it possible for the belligerent to gain immunity for objectives of the highest military value by resorting to the device of placing them in centres of population outside the zone of military operations.

Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 367 (1952).

154. Parks, *supra* note 6, at 31 (referring to the rules as an "immediate and total failure").

155. Greenwood, *supra* note 4, at 25; *see also* Elliott, *supra* note 153, at 45; David Kaye, Book Review, 97 AM. J. INT'L L. 229, 231 (2003) (reviewing WARD THOMAS, *THE ETHICS OF DESTRUCTION: NORMS AND FORCE IN INTERNATIONAL RELATIONS* (2001)) (noting that the 1923 Hague Air Rules "never achieved the status of binding law or even normative consensus").

156. *See supra* notes 41–44 and accompanying text.

157. Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 9 (2006).

158. *See* Walter Gary Sharp, Jr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 119–20 (1996).

159. UK MANUAL, *supra* note 88, at 10–12.

160. Convention Relative to the Treatment of Prisoners of War art. 1, July 27, 1929, 47 Stat. 2021, T.S. No. 846, available at <http://www.icrc.org/ihl.nsf/FULL/305?OpenDocument>; *see also supra* notes 115–16 and accompanying text.

161. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 13, art. 4(A)(2).

Unlike earlier Geneva Conventions, which were concerned with combatants,<sup>162</sup> the fourth Geneva Convention of 1949<sup>163</sup> focuses on the protection of civilians from the effects of war.<sup>164</sup> The impetus for developing protections for civilians under the aegis of the Geneva Conventions came from the Final Act of the Diplomatic Conference—approving the 1929 POW Convention. The Conference adopted the unanimous resolutions of its two Commissions, that “an exhaustive study should be made with a view to the conclusion of an international Convention regarding the condition and protection of civilians of enemy nationality in the territory of a belligerent or in territory occupied by a belligerent.”<sup>165</sup>

In 1934, the ICRC developed draft rules to extend the protections of the 1929 Convention to civilian internees.<sup>166</sup> The Fifteenth International Conference of the Red Cross meeting in Tokyo in 1934 approved the draft, which “was to have been submitted to a diplomatic conference scheduled for 1940.”<sup>167</sup> With the commencement of the World War II in 1939, however, the conference never took place.<sup>168</sup>

Following World War II, in 1948, the Seventeenth International Conference of the Red Cross meeting in Stockholm, Sweden, produced a draft convention for the protection of civilians.<sup>169</sup> The Stockholm draft came before the 1949 Geneva Diplomatic Conference convened

162. ICRC, International Humanitarian Documents, Convention (IV) Relative to the Protection of Civilian Persons in Time of War; Geneva—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/380?OpenDocument> (last visited Mar. 22, 2009); see also Lauterpacht, *supra* note 153, at 360.

163. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 13.

164. GREEN, *supra* note 41, at 43; Baxter, *supra* note 14, at 2.

165. Final Act of the Diplomatic Conference, July 27, 1929, 26 Martens Nouveau Recueil (ser. 2) 258, available at <http://www.icrc.org/ihl.nsf/FULL/295?OpenDocument>.

166. See ICRC, International Humanitarian Law—Treaties and Documents, Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who Are on Territory Belonging to or Occupied by a Belligerent; Tokyo, 1934—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/320?OpenDocument> (last visited Mar. 22, 2009).

167. Fact Sheet, ICRC, The Development of International Humanitarian Law, Sept. 2006, available at [http://kmc.redcross.org/News/FACTSHEET\\_IHLDevelopment.pdf](http://kmc.redcross.org/News/FACTSHEET_IHLDevelopment.pdf).

168. *Id.*

169. See David Morris Phillips, *The Unexplored Option: Jewish Settlements in a Palestinian State*, 25 PENN. ST. INT'L L. REV. 75, 159–60 (2006) (noting that the Stockholm draft was based upon an earlier draft from a 1947 ICRC Convention of Government Experts).

in April 1949,<sup>170</sup> and the Conference—taking into account the experiences of World War II<sup>171</sup>—approved the Convention.<sup>172</sup>

While the Convention mainly deals with the treatment of civilians who fall into a belligerent's hands (e.g., by military occupation), several of its provisions impose restrictions on targeting so as to prevent harm to civilians as well as the wounded and sick. For example, the Convention provides for the creation of hospital, safety, and neutralized zones where the wounded, the sick, and civilians may be sheltered from attack.<sup>173</sup> Moreover, it prohibits attacks on hospitals and medical conveyances, supplies, and personnel.<sup>174</sup> In the case of sieges, the Convention encourages parties to the conflict "to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas."<sup>175</sup>

The Convention makes clear, however, that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations."<sup>176</sup> In other words, a belligerent

170. *Id.* at 159; François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHI. J. INT'L L. 191, 195–96 (2004); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MIL. L. REV. 40, 76 (2002).

171. Phillips, *supra* note 169, at 159–60.

172. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 13.

173. *Id.* arts. 14–15.

174. *Id.* arts. 17–23. The Convention requires belligerents, "in so far as military considerations permit, [to] take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air[,] and naval forces in order to obviate the possibility of any hostile action." *Id.* art. 18. Moreover, "[i]n view of the dangers to which hospitals may be exposed by being close to military objectives, [the Convention] recommend[s] that . . . hospitals be situated as far as possible from [military] objectives." *Id.* In this regard, Article 19 removes the immunity of civilian hospitals from attack if "they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded." *Id.* art. 19.

With respect to medical personnel, the Convention requires that:

[i]n occupied territory and in zones of military operations, [medical] personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armband which they shall wear on the left arm while carrying out their duties.

*Id.* art. 20.

175. *Id.* art. 17.

176. *Id.* art. 28. The provision was prompted by instances during World War II in which "belligerents compel[ed] civilians to remain in places of strategic importance (such as railway stations, viaducts, dams, power stations[,] or factories), or to

cannot use its enemy's reliance on the principle of civilian immunity to shield its own forces or military facilities from attack.

The Geneva Conventions have achieved universal acceptance<sup>177</sup> and are recognized as customary international law.<sup>178</sup> Parties to the Convention are bound by it regardless of whether their adversaries are parties or not.<sup>179</sup>

#### 4. Hague Convention on the Protection of Cultural Property of 1954

Although the Hague Regulations required belligerents to take "all necessary steps . . . to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, [and] historic monuments,"<sup>180</sup> the provisions proved inadequate to prevent the loss or destruction of cultural and historic property during World War I.<sup>181</sup> Despite interest, the international community did not adopt a new convention protecting cultural and historic property between the world wars.<sup>182</sup> Both the International Museums Office of the League of Nations and the private conferences held in Bruges in 1931 and 1932 and in Washington in 1933 discussed adoption of a possible draft treaty suggested by Professor Nicholas Roerich of the Roerich Museum of New York.<sup>183</sup> Finally in 1933, the Seventh

accompany military convoys, or again, to serve as a protective screen for the fighting troops." Commentary on Art. 28 of the Geneva Convention (IV) Relative to the Protection of Civilians Time of War, Aug. 12, 1949, available at <http://www.icrc.org/ihl.nsf/COM/380-600033?OpenDocument>; see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 13, art. 83 (prohibiting locating civilian internment camps "in areas particularly exposed to the dangers of war").

177. Press Release, ICRC, A Milestone for International Humanitarian Law (Sept. 22, 2006), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-statement-220906?opendocument> (announcing the four Geneva Conventions of 1949 to be the first in modern history to achieve universal acceptance, having been formally accepted by all 194 states in the world).

178. UK MANUAL, *supra* note 88, at 14; Greenwood, *supra* note 4, at 28; see also Parks, *supra* note 6, at 182 (observing that Geneva law has been relatively successful "because the four Geneva conventions address a situation in which the obligated party is in total control," as compared to Hague law, where defending forces usually have control over the civilian population); *supra* notes 42–43 and accompanying text.

179. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 13, art. 2.

180. Hague Convention No. IV, *supra* note 110, art. 27. The protection did not extend to places used for military purposes. *Id.*

181. Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 257 (2006) (noting that the Hague Regulations only served as a "mechanism for requiring restitution of cultural objects or reparations when the objects could not be returned"); see Treaty of Versailles, *supra* note 132, arts. 245–47 (requiring Germany to return cultural property).

182. Gerstenblith, *supra* note 181, at 257.

183. ICRC, International Humanitarian Law—Treaties and Documents, Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments

International Conference of American States recommended approval of the draft treaty.<sup>184</sup> The Governing Board of the Pan-American Union drew up the treaty, known as the Washington Pact for the Protection of Artistic and Scientific Institutions and of Historic Monuments (Roerich Pact),<sup>185</sup> and twenty-one countries signed and eleven countries ratified the treaty.<sup>186</sup> The Roerich Pact “had little impact during World War II because only nations in the Americas were parties to it.”<sup>187</sup>

The 1954 Hague Convention was predominantly a response to the destruction and looting of cultural property during World War II,<sup>188</sup> and it sought to redress deficiencies in the Hague Regulations.<sup>189</sup> In 1948, the Netherlands presented a proposal for a treaty to protect cultural property to the United Nations Educational, Scientific and Cultural Organization (UNESCO), which, in 1951, set in motion a process to draft a convention to protect cultural property.<sup>190</sup> On May 14, 1954, an international conference of fifty-six

(Roerich Pact)—Introduction, <http://www.icrc.org/ihl.nsf/INTRO/325?OpenDocument> (last visited Mar. 22, 2009).

184. *Id.*

185. *Id.*; Gerstenblith, *supra* note 181, at 257. The Pact deemed “historic monuments, museums, scientific, artistic, educational[,] and cultural institutions . . . as neutral and as such respected and protected by belligerents.” Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) art. 1, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289, available at <http://www.icrc.org/ihl.nsf/FULL/325?OpenDocument>. It required party states to identify such monuments and institutions with “a distinctive flag (red circle with a triple red sphere in the circle on a white background).” *Id.* art. 2. Monuments and institutions lost their protection under the Pact if used for military purposes. *Id.* art. 5; John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190/191 MIL. L. REV. 111, 122–23 (2007).

186. Gerstenblith, *supra* note 181, at 257; Matthew D. Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 158 (2005).

187. Gerstenblith, *supra* note 181, at 257; Anthi Helleni Poulos, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis*, 28 INT’L J. LEGAL INFO. 1, 20 (2000).

188. Gerstenblith, *supra* note 181, at 258.

The largest destruction and displacement of cultural sites and objects known to human history occurred during World War II. German forces ignored the provisions of the Hague Conventions and established a systematic method for plundering and looting art works, particularly in Western Europe, while intentionally and indiscriminately destroying art collections and libraries in Eastern Europe.

*Id.* (footnote omitted); Poulos, *supra* note 187, at 21–30; Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT’L L. 185, 214 (2005).

189. Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT’L L.J. 177, 200 (2007).

190. ICRC International Humanitarian Law—Treaties and Documents, Convention for the Protection of Cultural Property in the Event of Armed Conflict—



states convened at The Hague under the auspices of UNESCO and adopted the Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>191</sup>

The Convention endeavors to safeguard “movable or immovable property of great importance to the cultural heritage of every people,” including such things as monuments, works of art, archaeological sites, manuscripts, books, and scientific collections.<sup>192</sup> It also protects “buildings whose main and effective purpose is to preserve or exhibit the movable cultural property . . . such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property,”<sup>193</sup> as well as “centres containing a large amount of cultural property.”<sup>194</sup> The Convention requires nations to mark their cultural property with a distinctive insignia in order to ensure its recognition during armed conflicts and to open the cultural property to international control.<sup>195</sup>

The Convention immunizes cultural property from attack unless a nation uses cultural property for military purposes.<sup>196</sup> In addition, the Convention makes provision for limited numbers of sanctuaries to

Introduction, <http://www.icrc.org/ihl.nsf/INTRO/400?OpenDocument> (last visited Mar. 22, 2009).

191. Johnson, *supra* note 185, at 125; Poulos, *supra* note 187, at 36. The United States signed the treaty in 1954 but did not ratify it until September 25, 2008. 154 CONG. REC. S9555 (daily ed. Sep. 25, 2008); ICRC International Humanitarian Law—State Signatories, Convention for the Protection of Cultural Property in the Event of Armed Conflict, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=400&ps=S> (last visited Mar. 22, 2009). In ratifying the convention, the Senate expressed its understanding that, “as is true for all civilian objects, the primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.” S. REP. NO. 110-26, at 9 (2008). Israel is also a party to the Convention. ICRC International Humanitarian Law—State Parties, Convention for the Protection of Cultural Property in the Event of Armed Conflict, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=400&ps=P> (last visited Mar. 22, 2009).

192. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1(a), May 14, 1954, 249 U.N.T.S. 240, available at <http://www.icrc.org/ihl.nsf/FULL/400?OpenDocument> [hereinafter Hague Cultural Property Convention].

193. *Id.* art. 1(b).

194. *Id.* art. 1(c).

195. *Id.* art. 10. The Convention forbids use of the distinctive emblem for purposes other than protecting cultural property. *Id.* art. 17.3. The Convention also has measures by which parties may list their cultural property in an International Register of Cultural Property maintained by UNESCO to ensure its protection. *Id.* art. 9; Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict arts. 12–16, May 14, 1954, 249 U.N.T.S. 270, available at <http://www.icomos.org/hague/hague.regulations.html>. In registering cultural property, a party must certify that it is not situated near military objectives or used for military purposes. See Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra*, art. 13.1; Hague Cultural Property Convention, *supra* note 192, art. 8. The Convention grants special protection to cultural property by its entry in the “International Register.” Hague Cultural Property Convention, *supra* note 192, art. 8.6.

196. Hague Cultural Property Convention, *supra* note 192, arts. 9, 11.1.

shelter cultural property if they “are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as . . . an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance[,] or a main line of communication,” and “are not used for military purposes.”<sup>197</sup> The Convention considers centers containing monuments to be used for military purposes whenever “they are used for the movement of military personnel or material, even in transit,” or “whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the centre.”<sup>198</sup>

If a party violates the Convention by situating military objectives near cultural property or by using protected cultural places for military purposes, the opposing party is—for as long as the violation persists—released from its obligation to ensure the immunity of the property.<sup>199</sup> Nevertheless, the Convention requires, whenever possible, that any attack be preceded by a request to discontinue the violation within a reasonable time.<sup>200</sup> Otherwise, a party may withdraw the immunity of cultural property “only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues.”<sup>201</sup>

197. *Id.* art. 8.1.

198. *Id.* art. 8.3. If cultural property is situated near an important military objective, it may nevertheless receive special protection if a party to the Convention asks for protection and “undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom.” *Id.* art. 8.5. The party must prepare for such diversions in times of peace. *Id.*

199. *Id.* art. 11.1.

200. *Id.*

201. *Id.* art. 11.2. Only officers commanding a force the equivalent of a division or larger may determine the existence of such necessity. *Id.* Moreover, “[w]henver circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.” *Id.*

In March 1999, 48 states adopted a Second Protocol to the Hague Convention on Cultural Property, which gives “enhanced protection” to cultural property. See Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999, 38 I.L.M. 769, available at <http://www.icrc.org/ihl.nsf/FULL/590?OpenDocument> [hereinafter Second Protocol to the Hague Convention on Cultural Property]. The First Protocol was enacted as part of the original Convention. The Second Protocol shifts the balance of protecting cultural property by placing the onus on the attacker to ensure the safety of cultural property regardless of whether the defender, who has control of the property, uses the property for military purposes or puts military objectives adjacent to the property. *Id.* arts. 6, 7, 13; Johnson, *supra* note 185, at 131–32. The Protocol also imposes criminal penalties for its violation. Second Protocol to the Hague Convention on Cultural Property, *supra*, arts. 15–21.

## III. ADDITIONAL PROTOCOL I TO THE GENEVA CONVENTION OF 1949

A. *Genesis and Drafting Process*

Despite hortatory declarations about the contributions of Additional Protocol I to humanitarian law,<sup>202</sup> even a cursory review of the diplomatic proceedings reveals that many participating states were motivated more by the desire to limit the military power of Western nations—notably the United States and Israel—than by any humanitarian concerns.<sup>203</sup> So-called third world states, backed by several nonaligned countries as well as members of the Soviet bloc, used Protocol I in an attempt to “even the playing field” in their conflicts with the West.<sup>204</sup> Because they were able to garner a vast majority of the voting delegates, these nations largely succeeded in their efforts.<sup>205</sup>

The ICRC began to prepare revisions to the Hague Regulations in the early 1950s.<sup>206</sup> Working from 1953 to 1956 with groups of experts, the ICRC issued Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War in 1956, and introduced the draft rules to the Nineteenth International Red Cross Conference in New Delhi in 1957.<sup>207</sup> The ICRC's draft, known as the Delhi Rules,<sup>208</sup> affirmed the immunity of civilian populations

202. See, e.g., Aldrich, *supra* note 9, at 1

[Additional Protocol I's] contributions to the law were long overdue and, on the whole, are both positive from the humanitarian point of view and practicable from the military point of view. Moreover, it offers the prospect of improved compliance with international humanitarian law, which would greatly benefit the victims of war and would bring the law in action closer to the law in books.

*Id.*; see also Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912, 913 (1987) (“Protocol I indeed resulted from the most serious effort ever undertaken to strengthen the protection of noncombatants from the effects of modern warfare . . . .”); Theodor Meron, Editorial Comment, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 686 (1994) (“Protocol I is undoubtedly a prime humanitarian instrument that may have a significant humanizing influence on warfare.”).

203. See *supra* note 15; *infra* notes 247–54 and accompanying text.

204. See Meyer, *supra* note 69, at 162 (noting that Third World countries were interested in restricting the use of air power); Parks, *supra* note 6, at 74, 165, 218 (same).

205. Parks, *supra* note 6, at 79.

206. Baxter, *supra* note 14, at 3.

207. Jean Pictet, *General Introduction*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at xxix, xxix (Yves Sandoz et al. eds. 1987) [collection hereinafter ICRC COMMENTARY]; Baxter, *supra* note 14, at 3.

208. Roberts, *supra* note 15, at 120.

from attack and limited lawful attacks to military objectives.<sup>209</sup> The rules obligated an attacker to distinguish between civilian and military objectives,<sup>210</sup> and to avoid targeting military objectives where disproportionate harm would befall civilians.<sup>211</sup> The rules required defenders to take steps to ensure that military forces and facilities are not located permanently in towns or other places with large civilian populations.<sup>212</sup> The draft rules also effectively prohibited the use of nuclear weapons where radioactive agents could endanger civilians.<sup>213</sup> The Conference referred the draft rules to governments for consideration, but the recipient governments collectively took no further action.<sup>214</sup>

In 1965, the Twentieth Conference of the International Red Cross meeting in Vienna adopted a resolution urging the ICRC to pursue the development of international humanitarian law with respect to protecting civilians against indiscriminate warfare and to consider "all possible means and to take all appropriate steps, including the creation of a committee of experts, with a view to obtaining a rapid and practical solution of this problem."<sup>215</sup>

The actual initiative for a new international convention addressing the law of war came in May 1968 from the UN-sponsored International Conference on Human Rights in Tehran.<sup>216</sup> The Conference requested the UN Secretary-General, in conjunction with the ICRC, to study

- (a) [s]teps . . . to secure the better application of existing humanitarian international conventions and rules in all armed conflicts[ and]
- (b) [t]he need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts

209. International Committee of the Red Cross, Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, pmbl., art. 1 (1956) available at <http://www.icrc.org/ihl.nsf/FULL/420?OpenDocument>.

210. *Id.* pmbl., arts. 1, 6, 7.

211. *Id.* arts. 8–10.

212. *Id.* art. 11.

213. *Id.* art. 14.

214. Baxter, *supra* note 14, at 3; see also Francois Bugnion, *The International Committee of the Red Cross and Nuclear Weapons: From Hiroshima to the Dawn of the 21st Century*, 87 INT'L REV. RED CROSS 511, 518 (2005) (blaming the rejection of the draft rules on the inclusion of the restrictions on the use of nuclear weapons).

215. ICRC Resolution XXVIII (Vienna 1965), in *Resolutions Adopted by the XXth International Conference of the Red Cross*, 5 INT'L REV. RED CROSS 570, 590 (1965) [hereinafter Resolution XXVIII]. The Conference also declared that the rights of parties to a conflict to adopt means of injuring the enemy is not unlimited; that attacks against the civilian populations are prohibited; and that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, sparing the latter as much as possible. *Id.* at 589. The resolution stated that the general principles of the law of war apply to nuclear and similar weapons. *Id.*

216. Bugnion, *supra* note 170, at 4–5.

and the prohibition and limitation of the use of certain methods and means of warfare.<sup>217</sup>

Six months later, in December 1968, the UN General Assembly adopted Resolution 2444, which invited the Secretary-General to take on the recommendations of the Tehran Conference, including working with the ICRC to develop additional international humanitarian conventions to protect—among other things—noncombatants in armed conflicts.<sup>218</sup> The next year, at its twenty-first meeting in Istanbul, the International Conference of the Red Cross requested that the ICRC work as soon as possible with governments and experts to develop and propose concrete rules to supplement existing humanitarian law.<sup>219</sup>

The ICRC convened a conference of government experts in 1971, drafted two draft protocols to supplement the Geneva Conventions of 1949, and convened a second conference of experts to review the draft protocols in 1972.<sup>220</sup> Following these sessions, the ICRC completed texts of the two protocols and sent them to all governments in June 1973.<sup>221</sup> In July 1973, the ICRC invited all countries that were either state parties to the Geneva Conventions or members of the UN to a diplomatic conference in Geneva the following February in order to consider the draft protocols.<sup>222</sup>

217. Resolution XXIII, Human Rights in Armed Conflicts, International Conference on Human Rights (Tehran, May 12, 1968), available at <http://www.icrc.org/ihl.nsf/FULL/430?OpenDocument>; see also Baxter, *supra* note 14, at 5 (noting that the Conference provided the initiative for the consultation process); Bugnion, *supra* note 170, at 197 (same).

218. Respect for Human Rights in Armed Conflicts, G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7433 (Dec. 19, 1968). The UN General Assembly also affirmed Resolution XXVIII, previously adopted by the Twentieth International Conference of the Red Cross, which recognized limits on the conduct of armed conflict. See Resolution XXVIII, *supra* note 215.

219. ICRC Resolution XIII (Istanbul 1969), in *Resolutions Adopted by the XXIth International Conference of the Red Cross*, 9 INT'L REV. RED CROSS 608, 615–16 (1969).

220. Baxter, *supra* note 14, at 6–9. The UN General Assembly adopted a second resolution on the protection of civilians in armed conflicts on December 9, 1970. Basic Principles for the Protection of Civilian Populations in Armed Conflicts, G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (Dec. 9, 1970); Baxter, *supra* note 14, at 6.

221. Pictet, *supra* note 207, at xxxi.

222. ICRC, *Convocation of the Diplomatic Conference*, 13 INT'L REV. RED CROSS 516, 516–18 (1973). The ICRC invited 155 governments, but the number participating in the Conference varied from 107 to 124. Pictet, *supra* note 207, at xxxiii. The ICRC also invited eleven national liberation movements and fifty-one intergovernmental or non-governmental organizations to participate as observers. *Id.* The total number of delegates was about 700. *Id.* (“The Conference was sub-divided into three main plenary committees, one *ad hoc* committee on ‘conventional weapons’, also plenary, to which were added the Credentials Committee and the Drafting Committee, as well as numerous working groups.”).

The Twenty-second Conference of the International Red Cross, meeting in Tehran, welcomed the decision of the ICRC to convene a diplomatic conference and urged all governments to participate. ICRC Resolution XIII (Tehran 1973), in *Resolutions*

The introduction to the ICRC's Commentary on the Protocols notes that "[d]espite all efforts, it was not possible to entirely avoid *some politics* being brought into the debates."<sup>223</sup> The observation is certainly understated. Although participants made an extensive effort to address humanitarian issues, the conference was replete with political debate and acrimony; many delegations were more interested in advancing national or ideological agendas than humanitarian concerns.<sup>224</sup>

The first Diplomatic Conference met in Geneva from February 20, 1974, to March 29, 1974, and the first national representative to speak "set the tone for the conference."<sup>225</sup> President Ould Dada of Mauritania denounced colonialism and Zionism, praised the Palestinian Liberation Organization (PLO) and other national liberation movements, and urged the Conference to consider the causes of armed conflict—the oppression of the third world.<sup>226</sup>

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*Adopted by the XXIIInd International Conference of the Red Cross, 14 INT'L REV. RED CROSS 19, 30–31 (1974).*

223. Pictet, *supra* note 207, at xxxiv (emphasis added).

224. This Article does not suggest that the promotion of national self-interest at international humanitarian conventions is something unique to the Diplomatic Conferences. It is not. In formulating rules of war, nations have "seemed chiefly guided by the principle of promoting [their] own national policies and positions in the world." Rodgers, *supra* note 152, at 633 (referring to the Hague Conventions and the Hague Air Rules Convention); *see also* James E. Bond, *Amended Article 1 of Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerrilla*, 32 WASH. & LEE L. REV. 65, 67 (1975) (referring to the development of customary international law during the nineteenth century as reflective of the political preferences of the United States and European nations).

Of course, at least with respect to the development of customary international law, a key ingredient is state practice. *See, e.g.*, FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, *supra* note 25, at 8, 26. At the Diplomatic Conferences, however, the United States could be outvoted by any combination of the delegations of Monaco, San Marino, and the Holy See—states that do not field armies, have not fought wars in generations, and have no real impact on the development of the customary law of war. *See* Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 240 (2007) (noting that countries that engage in conflict determine customary international law); *see also* Michael N. Schmitt, *The Law of Targeting*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 131, 132–33 (Elizabeth Wilmshurst & Susan Breau eds., 2007). Moreover, many third world and Soviet bloc nations who have actually engaged in conflict since 1977 have a dismal record of protecting civilians from the effects of war. *See infra* notes 237, 487–93, and accompanying text. If customary international law were based on the practice of these states, the principle of civilian immunity from attack would not exist at all. Finally, to the extent that political or ideological agendas result in treaty provisions that actually frustrate the protection of civilians, the provision should be rejected or ignored.

225. Baxter, *supra* note 14, at 9.

226. Plenary Meeting of the Diplomatic Conference (Plenary Meeting), CDDH/SR.1 (Feb. 20, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 7, 12–14.

President Dada's speech was just the beginning.<sup>227</sup> Delegates spent several sessions quarrelling over credentials and which governments should have been invited.<sup>228</sup> For example, the delegate from Iraq, supported by a number of other states, argued for the exclusion of the Israeli delegation.<sup>229</sup> Indeed, the representative of Syria claimed that Israel "owed its existence to a violation of international law."<sup>230</sup> In addition, the representative from the Democratic Republic of Vietnam (North Vietnam)—together with those of Soviet bloc and third world countries—claimed that the Viet Cong should have been invited<sup>231</sup> (an issue raised again in the Second Diplomatic Conference<sup>232</sup>), and

227. One observer of the Conference wrote, "[t]he victims of wars were largely forgotten in debates over the two issues of what governmental delegations were to be seated at the Conference, and which types of war were to be considered as international." Forsythe, *supra* note 15, at 77.

228. See *infra* notes 229–35.

229. Credentials Committee Report, First Session, CDDH/51/Rev.1 (Feb. 20–Mar. 29, 1974), in 2 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 661, 665; see also Twentieth Plenary Meeting, CDDH/SR.20 (Mar. 28, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 211, 213 (statement of the representative of Algeria); *id.* (statement of the representative of Mauritania); *id.* at 215 (statement of the representative of Iraq). The question of Israeli credentials arose again during the Third Diplomatic Conference in 1976. Credentials Committee Report, Third Session, CDDH/233/Rev.2 (Apr. 21–June 11, 1976), in 2 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 683, 685–86; Thirty-Third (Closing) Plenary Meeting, CDDH/SR.33 (Apr. 21, 1976), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 379, 384 (statement of the representative of Iraq); *id.* (statement of the representative of Pakistan); *id.* (statement of the representative of Syria).

230. Twentieth Plenary Meeting, CDDH/SR.20 (Mar. 28, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 211, 214.

231. Second Plenary Meeting, CDDH/SR.2 (Feb. 27, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 15, 15 (statement of representative of the North Vietnam); *id.* at 16 (statement of the representative of the Soviet Union); *id.* at 17 (statement of the representative of Cuba); *id.* at 18 (statement of the representative of Tanzania); *id.* at 18–19 (statement of the representative of Romania); *id.* at 21–22 (statement of the representative of Albania); Third Plenary Meeting, CDDH/SR.3 (Feb. 27, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 23, 24–25 (statement of the representative of Ukraine); *id.* at 26 (statement of the representative of the Democratic Republic of Germany); *id.* at 28–29 (statement of the representative of China); Fourth Plenary Meeting, CDDH/SR.4 (Feb. 28, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 33, 37–38 (statement of the representative of Algeria); *id.* at 39 (statement of the representative of Mongolia); Fifth Plenary Meeting, CDDH/SR.5 (Feb. 28, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 41, 41 (statement of the representative of Czechoslovakia); Eleventh Plenary Meeting, CDDH/SR.11 (Mar. 5, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 101, 111 (statement of the representative of Poland); see also Credentials Committee Report, First Session, CDDH/51/Rev.1 (Feb. 20–Mar. 29, 1974), in 2 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 661, 661–67 (stating that the delegations of Czechoslovakia, Senegal, and Madagascar protested against the presence of the Saigon Administration).

232. Twenty-Seventh Plenary Meeting, CDDH/SR.27 (Feb. 5, 1975), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 313, 317–23.

others refused to recognize the credentials of South Vietnam<sup>233</sup> and Cambodia.<sup>234</sup> The Conference also debated and ultimately accepted the attendance of other national liberation movements, such as the PLO.<sup>235</sup>

The remainder of the First Diplomatic Conference never got past Article 1 of Protocol I, which dealt with the single issue of whether wars of national liberation should be deemed international armed conflicts for purposes of the Protocol.<sup>236</sup> Ultimately, third world nations, with support of the Soviet bloc,<sup>237</sup> were able to garner

233. *E.g.*, Fourteenth Plenary Meeting, CDDH/SR.14 (Mar. 7, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 141, 146–47 (statement of the representative of Albania); Twentieth Plenary Meeting, CDDH/SR.20 (Mar. 28, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 211, 212 (statement of the representative of Romania); *id.* at 212–13 (statement of the representative of the Soviet Union); *id.* at 213 (statement of the representative of Mongolia); *id.* (statement of the representative of Albania).

234. *E.g.*, *id.* at 213 (statement of the representative of Albania); *id.* at 214 (statement of the representative of China); *id.* at 216 (statement of the representative of North Korea).

235. Sixth Plenary Meeting, CDDH/SR.6 (Mar. 1, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 55, 56; Seventh Plenary Meeting, CDDH/SR.7 (Mar. 1, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 65, 65.

236. Baxter, *supra* note 14, at 11–12; Forsythe, *supra* note 15, at 78; Roberts, *supra* note 15, at 124–27.

237. The Soviet delegation argued for increased “protection for guerillas and fighters in national liberation movements.” Twelfth Plenary Meeting, CDDH/SR.12 (Mar. 6, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 117, 121; *see also* Thirty-Sixth Plenary Meeting, CDDH/SR.36 (May 23, 1977), in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 33, 42 (noting that Article 1 defends “the rights of peoples fighting against colonial domination and alien occupation . . . [for] self-determination”); Summary of Records of Comm. III, Thirty-Fifth Meeting, CDDH/III/SR.35, in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 355, 356–57 (stating that the Conference should make a concerted effort to improve the status of members of national liberation movements).

Apparently, the Soviet Union never intended to comply with the Protocol provisions it supported—or at least never envisioned it would fight against a national liberation movement. In its war in Afghanistan against Mujahedeen guerrillas, the Soviets were indiscriminate in the use of force, leveling villages and cities, destroying food and water supplies, employing chemical weapons, and forcing millions of civilians to flee. THOMAS T. HAMMOND, RED FLAG OVER AFGHANISTAN 160–62 (1984); *Mass Killings of Afghans Confirmed*, BOSTON GLOBE, May 15, 1985. By some estimates, over one million people died. Svante E. Cornell, *The War Against Terrorism and the Conflict in Chechnya: A Case for Distinction*, 27 FLETCHER F. WORLD AFF. 167, 180 (2003). The Soviet Union’s successor, Russia, has fared no better. In Chechnya, the theatre of a struggle for independence by a people who have long resisted Russian hegemony, Russian troops indiscriminately bombarded the Chechen capital, Grozny, for two months at the cost of over “20,000 civilian lives, a total destruction of the city, and displacement of hundreds of thousands of people.” *Id.* at 170. Perhaps over 100,000 civilians were killed during the war. *Id.* at 181; *see also* *The War in Chechnya: Russia’s Conduct, the Humanitarian Crisis, and United States Policy: Hearing before the S. Comm. on Foreign Relations*, 106th Cong., 2d Sess. (2000) (statement of Sen. Helms) [hereinafter *Chechnya Hearings*]. Indications are that the Russians disregarded their obligations under the law of war. *Chechnya Hearings, supra*, at 12 (statement of Mr. Peter Boukaert,



sufficient votes to pass the measure.<sup>238</sup> The provision predicates the application of Protocol I on whether “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self determination.”<sup>239</sup> Article I thus collapses the concept of *jus ad bellum* into *jus in bello*,<sup>240</sup> making application of international humanitarian principles dependent upon the justness of one’s cause.<sup>241</sup>

The notion that a belligerent is entitled to law of war protections only if its cause is just (e.g., it is not an aggressor) bled over into other issues considered by all four Conferences, most notably North Vietnam’s contention that it was not required to afford captured U.S. service members POW status because they were aggressors and war criminals.<sup>242</sup> Other nations as well sought to distinguish between

Investigator, Human Rights Watch); U.S. MARINE CORPS INTELLIGENCE ACTIVITY, URBAN WARFARE STUDY: CITIES CASE STUDIES COMPILATION 8, 10 (Apr. 1999), available at <http://smallwarsjournal.com/documents/urbancasestudies.pdf> [hereinafter URBAN WARFARE STUDY]; Cornell, *supra*, at 172. Russian conduct did not improve during its 2008 invasion of Georgia, in which it has failed to discriminate between military and civilian targets. See, e.g., Anne Barnard, *Georgia and Russia Nearing All-Out War*, N.Y. TIMES, Aug. 10, 2008, available at [http://www.nytimes.com/2008/08/10/world/europe/10georgia.html?\\_r=1&fta=y&pagewanted=print&oref=slogin](http://www.nytimes.com/2008/08/10/world/europe/10georgia.html?_r=1&fta=y&pagewanted=print&oref=slogin); Alex Rodriguez, *Russia Hammers Georgia Sites*, CHI. TRIB., Aug. 10, 2008, at 14 (noting Russia’s bombing raid on the town of Gori hit several apartment buildings killing and injuring scores of civilians).

238. Forsythe, *supra* note 15, at 79.

239. Protocol I, *supra* note 13, art. 1(4).

240. See *supra* note 4.

241. Forsythe, *supra* note 15, at 80; David E. Graham, *The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the “Just War” Concept of the Eleventh Century*, 32 WASH. & LEE L. REV. 25, 41 (1975); Rabkin, *supra* note 15, at 184; Sofaer, *supra* note 19, at 464–65; Seventeenth Plenary Meeting, CDDH/SR.17 (Mar. 8, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 173, 177 (statement of the representative of Israel); Eighteenth Plenary Meeting, CDDH/SR.18 (Mar. 11, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 183, 183 (statement of the representative of Canada).

242. See, e.g., Draft Amendments to Additional Protocol I Proposed by North Vietnam, CDDH/41, Annex III (Mar. 12, 1974), in 4 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 177, 177–88 [hereinafter North Vietnam Draft Amendments] (documenting amendments to Additional Protocol I proposed by North Vietnam); Summary Record of the Sixteenth Meeting, CDDH/III/Sr.16 (Feb. 10, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 127, 131; Summary Record of the Twenty-First Meeting, CDDH/III/SR.21 (Feb. 17, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 181, 192; Summary Record of the Twenty-Sixth Meeting, CDDH/III/SR.26 (Feb. 27, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 233, 235–36; Summary Record of the Thirtieth Meeting, CHHD/III/SR.30 (Mar. 13, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 287, 289–90; Summary Record of the Thirty-Fifth Meeting, CDDH/III/SR.35 (Mar. 21, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 355, 362–63; Statement Made at the Thirty-Third Meeting, 19 March 1975, by Mr. Nguyen Van Huong (Democratic Republic of Viet Nam), CDDH/III/SR.33-36, Annex (Mar. 19, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note

aggressors and victims of aggression in determining the applicability of humanitarian principles.<sup>243</sup> The danger of this approach is obvious: any nation may refuse to provide international

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11, at 464, 468; CDDH/III/254 (proposing an amendment to draft Article 42 of Protocol I denying prisoner-of-war status to “[p]ersons taken in *flagrante delicto* when committing crimes against peace or crimes against humanity”); see Forsythe, *supra* note 15, at 83–84 (citing statements by North Vietnam rejecting any legal rights of their enemy on a “just war” theory).

243. *E.g.*, Eleventh Plenary Meeting, CDDH/SR.11 (Mar. 5, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 101, 103 (statement of the representative of Romania) (noting that “humanitarian law must distinguish between the aggressor and the victim of aggression and must guarantee greater protection for the victim in the exercise of his sacred right of self-defence”); Fourteenth Plenary Meeting, CDDH/SR.14 (Mar. 7, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 141, 148 (statement of the representative of Algeria) (arguing that the Protocol had to distinguish between “combatants” and “war criminals”); Nineteenth Plenary Meeting, CDDH/SR.19 (Mar. 11, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 195, 198 (statement of the representative of India) (indicating that the Protocol must “clearly define the difference between a just and an unjust war”); *id.* at 200 (statement of the representative of the Mozambique Liberation Front) (stating that the revision of humanitarian law “should not be allowed to become an academic debate” and that it was “essential to establish a distinction between the aggressor and the victim and between the oppressor and the oppressed”); Fortieth Plenary Meeting, CDDH/SR.40 (May 26, 1977), in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 119, 129 (statement of the representative of Uganda) (claiming the justness of liberation wars warranted the new rule to eliminate the requirement that people fighting “colonial domination, foreign occupation, [and] racist regimes” distinguish themselves from the civilian population); Forty-First Plenary Meeting, CDDH/SR.41 (May 26, 1977), in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 141, 149 (statement of the representative of Qatar) (arguing that the righteousness of the cause justified a measure eliminating the requirement that liberation movements distinguish themselves from the civilian population); *id.* at 183 (statement of the representative of Cuba) (contending that the Protocol’s provisions relating to liberation movements were justified because they “would undoubtedly be a positive achievement for the members of national liberation movements”); Forty-Second Plenary Meeting, CDDH/SR.42 (May 27, 1977), in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 205, 213 (statement of the representative of Madagascar) (suggesting that the Protocol make distinctions between aggressors and victims of aggression); see Thirteenth Plenary Meeting, CDDH/SR.13 (Mar. 6, 1974), in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 127, 134 (statement of the representative of the United Kingdom) (noting that some delegations wanted to make the application of humanitarian law conditional upon the legitimacy of a belligerent’s cause); see also Summary Record of the Eighth Meeting, CDDH/III/SR.8 (Mar. 19, 1974), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 59, 70 (statement of the representative of Albania); Summary Record of the Fifteenth Meeting, CDDH/III/SR.15 (Feb. 7, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 117, 121 (statement of the representative of the Soviet Union); *id.* at 122 (statement of the representative of Romania); Summary Record of the Thirty-Fifth Meeting, CDDH/III/Sr.35 (Mar. 21, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 355, 368 (statement of the representative of North Korea); Summary Record of the Third Meeting of the *Ad Hoc* Comm. on Conventional Weapons, CDDH/IV/SR.3 (Mar. 15, 1974), in 16 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 25, 26 (statement of the representative of China); *id.* at 28 (statement of the representative of Albania).

humanitarian law protection to an adversary simply by asserting that its enemy's cause is unjust.<sup>244</sup> To protect effectively civilians as well as combatants rendered *hors de combat*, however, international humanitarian law must apply regardless of the guilt or innocence of any party to the conflict.<sup>245</sup>

Political and ideological considerations also infected debates about Protocol I's substantive provisions.<sup>246</sup> Third world nations opted for provisions that would assist them in conflicts with technologically advanced adversaries, regardless of the humanitarian consequences of their positions.<sup>247</sup> Perhaps most notable was the proposal of the delegations of Togo and Tanzania to ban the use of military aircraft in conflicts in which one side has them and the other side does not.<sup>248</sup> Asserting the need to equalize the battlefield, third world nations argued also (1) in favor of eliminating the century-old requirement that to be entitled to POW status, combatants had to differentiate themselves from the civilian population by wearing

244. Baxter, *supra* note 14, at 16.

245. KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 163 (2003); OLÁSULO, *supra* note 41, at 2–3; Baxter, *supra* note 14, at 17; Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, *supra* note 4, at 43, 44; Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 465–66 (1991); Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 39–40 (2008); *see also* Eleventh Plenary Meeting, CDDH/SR.11, in 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 101, 101 (statement of representative of the Netherlands) (noting that humanitarian law “could only serve its purpose if no discrimination was made between the parties to armed conflicts”); *id.* at 109 (statement of representative of the United States) (stating that the philosophy of international humanitarian law “was concern not for who was right and who was wrong, but for the protection of all victims of armed conflict, irrespective of the cause they supported”). *But see* Richard J. Arneson, *Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT'L L.J. 663, 664 (2006) (arguing that what one may do in war is governed by the justness of one's cause).

246. *See* Roberts, *supra* note 15, at 122–23 (“Several delegations evidently attended the Conference with the idea of restricting the means and methods of combat to such a degree that the parties to an armed conflict would find it difficult, if not impossible, to wage war.”).

247. *See* Meyer, *supra* note 69, at 162 (noting that Third World countries were interested in restricting the use of air power); Rabkin, *supra* note 15, at 184–85; Reynolds, *supra* note 20, at 58–59.

248. Summary Records of the *Ad Hoc* Comm. on Conventional Weapons, First Meeting, CDDH/IV/SR.1 (Mar. 13, 1974), in 16 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 7, 16 (statement of the representative of Togo); Summary Records of the *Ad Hoc* Comm. on Conventional Weapons, Second Meeting, CDDH/IV/SR.2 (Mar. 14, 1974), in 16 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 17, 22 (statement of the representative of Tanzania); *cf.* North Vietnam Draft Amendments, *supra* note 242, at 183 (“Resort[ing] to so-called ‘strategic’ attacks against the economic and military potential of a people whose degree of economic and military development is clearly disproportionate to that of the attacking country” constitutes a “war crime[ ] *stricto sensu* and [a] crime[ ] against humanity.”).

distinctive insignia recognizable at a distance and by carrying their weapons openly at all times;<sup>249</sup> (2) that members of national

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249. See, e.g., Summary Records of Comm. III, Twenty-Eighth Meeting, CDDH/III/SR.28 (Mar. 4, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 259, 260 (statement of the representative of North Vietnam) (asserting that the definition of “perfidy” should not include a combatant’s disguising himself in civilian clothing); *id.* at 262 (statement of representative of Algeria) (arguing that the definition of “perfidy” should not include guerrilla forces who disguise themselves in civilian clothing); *id.* at 265 (statement of the representative of the Philippines) (contending that “[i]t would be basically unjust to brand the wearing of civilian clothing by a combatant as perfidy when such circumstances were brought about by the superior military strength of the aggressor”); Summary Records of Comm. III, Thirty-Third Meeting, CDDH/III/SR.33 (Mar. 19, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 317, 324 (statement of the representative of North Vietnam) (claiming that removal of uniform requirement necessary to eliminate inequality between resistance movements and “heavily armed imperialist Powers”); Summary Record of Comm. III, Thirty-Fourth Meeting, CDDH/III/SR.34 (Mar. 20, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 335, 342 (statement of the representative of the Ukraine) (indicating that the rule gives necessary assistance to persons fighting against colonial and racist regimes); *id.* at 344 (statement of the representative of Lesotho) (arguing that because of their “financial situation and military inferiority” members of liberation movements could not openly carry distinctive emblems or arms); Summary Record of Comm. III, Thirty-Fifth Meeting, CDDH/III/SR.35 (Mar. 21, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 355, 370 (statement of the representative of Nigeria) (suggesting that it was not always possible for members of national liberation movements fighting “well-equipped colonialist forces” to comply with the distinctive insignia requirement); Summary Record of Comm. III, Thirty-Sixth Meeting, CDDH/III/SR.36 (Mar. 24, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 373, 373 (statement of the representative of Ivory Coast) (arguing that national liberations were militarily forced to adopt “guerilla tactics” and did not possess the resources of regular armed forces); *id.* at 384 (statement of representative of Zimbabwe African National Union) (asserting that requiring members of national liberation movements to “distinguish themselves from the civilian population in military operations,” was totally unrealistic and revealed a failure to understand the positive nature of wars of national liberation”); Statement Made at the Thirty-Third Meeting, 19 March 1975, by Mr. Namon (Ghana), CDDH/III/SR.33-36, Annex, in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 454, 454 (Mar. 19, 1975) (asserting that the nature of the struggle might not permit members of national liberation movements to comply with prisoner-of-war requirements); Statement at the Thirty-Third Meeting, 19 March 1975, by Mr. Nguyen Van Huong (Democratic Republic of Viet Nam), CDDH/III/SR.33-36, in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 464, 466 (arguing that members of national liberation movements are not as powerful as the forces they fight and to distinguish themselves from civilians would result in their demise); Statement Made at the Thirty-Fifth Meeting, 21 March 1975, by Mr. Abada (Algeria), CDDR/III/SR.33-36, in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 521, 522 (holding that as a matter of equality members of liberation movements must not be required to meet distinction requirement); Fortieth Plenary Meeting, CDDH/SR.40 (May 26, 1977), in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 119, 124 (statement of representative of Poland) (suggesting that a provision was required to balance the advantage between parties to a conflict); *id.* at 125 (statement of the representative of Nigeria) (arguing that the elimination of the requirement to distinguish members of liberation movements from civilians enabled them to overcome “unequal combat”); *id.* at 129 (statement of the representative of Uganda) (claiming that the justness of

liberation movements could not always be expected to conduct their activities removed from civilian populations;<sup>250</sup> and (3) that members of such movements were entitled to slip in and out of their civilian status depending upon whether they are, at the time, engaging in direct hostilities.<sup>251</sup>

The difficulty with acceding to demands that combatants need not differentiate themselves from the civilian population, may freely enter in and out of civilian status, or may conduct their operations from civilian population centers is that the distinction between combatant and noncombatant becomes blurred and—unless the adversary surrenders—civilian casualties become inevitable. International humanitarian law does not create a system that awards a belligerent a “handicap” because it may be militarily weaker than its opponent.<sup>252</sup> War is not bowling or golf. The principal purpose of

liberation wars warranted the new rule and that to require liberation movement combatants to “distinguish themselves from the civilian population in the same way as combatants engaged in conventional warfare would be tantamount to requesting them to surrender and be slaves in their own homeland”); Forty-First Plenary Meeting, CDDH/SR.41 (May 26, 1977), in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 141, 146 (statement of the representative of the Soviet Union) (arguing provision was required to give protection to poorly armed resistance movements against their better equipped adversaries); *id.* at 149 (statement of the representative of Qatar) (claiming that the justness of the cause supported the measure and that it was needed to protect liberation movements from better-equipped adversaries); *id.* at 151 (statement of the representative of East Germany) (contending that provision would restrict possibility of resistance movements being attacked); *id.* at 189 (statement of the representative of Madagascar) (asserting that the provision corrects an “imbalance due primarily to structural and financial factors, which leads on the field of battle to an unequal balance of forces”); North Vietnam Draft Amendments, *supra* note 242, at 180 (“[R]equir[ing] guerrilla fighters to wear distinctive emblems . . . would only serve to make them the target of the imperialist aggressor’s fire . . .”).

250. *E.g.*, Summary Records of Comm. III, Eighth Meeting, CDDH/III/SR.8 (Mar. 19, 1974), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 59, 69 (statement of the representative of Indonesia); Summary Records of Comm. III, Nineteenth Meeting, CDDH/III/SR.19 (Feb. 13, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 161, 162 (statement of representative of North Vietnam) (referring to military facilities on dangerous instrumentalities, *e.g.*, dykes, dams); Forty-First Plenary Meeting, CDDH/SR.41 (May 26, 1977), in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 19, 168 (statement of the representative of Cameroon); *see also id.* at 180 (statement of representative of Colombia) (noting the political nature of measures protecting resistance movements without regard to safety of civilian population).

251. *E.g.*, Summary Records of Comm. III, Seventh Meeting, CDDH/III/SR.7 (Mar. 13, 1974), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 51, 57 (statement of the representative of China).

252. *See Parks, supra* note 6, at 169–70 (noting that there is no legal obligation to sacrifice military superiority over a weaker opponent); Michael N. Schmitt, *Targeting and Humanitarian Law: Current Issues*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, *supra* note 4, at 151, 173. *But see* Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT’L LAW. 733, 755 (2005) (“It is unfair to create a legal standard that handicaps insurgents.”).

the law of war is to protect civilians and their objects.<sup>253</sup> Unfortunately, many delegations to the Diplomatic Conferences did not hold this vision.<sup>254</sup>

## B. Law of Civilian Immunity After Protocol I

### 1. General

The central tenets of Protocol I are not controversial: belligerents may not lawfully make civilians *qua* civilians the object of attack,<sup>255</sup> nor may belligerents make civilian objects the subject of attack.<sup>256</sup> As a corollary, belligerents must limit their attacks to military objectives.<sup>257</sup> These basic rules are consistent with centuries-old beliefs that the laws of war do not recognize in belligerents an unlimited choice of methods or means of warfare,<sup>258</sup> and that innocents (i.e., civilians) are immune from direct attack.<sup>259</sup> Indeed,

253. See *supra* note 4.

254. See *supra* Part III.A.

255. Protocol I, *supra* note 13, arts. 48, 51(1), 51(2), 57(1), 57(2), 57(5); Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, ¶ 109 (July 29, 2004); see also Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 4, at 119, 193–94. The term attack in Protocol I “means acts of violence against the adversary, whether in offence or in defence.” Protocol I, *supra* note 13, art. 49(1). The term target in U.S. doctrine is “an entity or object considered for possible engagement or action. It may be an area, complex, installation, force, equipment, capability, function, individual, group, system, entity, or behavior identified for possible action to support the commander’s objectives, guidance, and intent.” JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING, at I-1 (2007), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_60.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_60.pdf) [hereinafter JP 3-60].

256. Protocol I, *supra* note 13, art. 52(1); see Oeter, *supra* note 255, at 193–94.

257. Protocol I, *supra* note 13, arts. 48, 52(2); see Oeter, *supra* note 255, at 175–76.

258. See Project of an International Declaration Concerning the Laws and Customs of War art. 12, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, 65 BRIT. FOREIGN & ST. PAPERS 1005 (1873–74), available at <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument> [hereinafter Brussels Declaration] (“The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.”); Laws of War on Land (Oxford Manual), *supra* note 80, art. 4; Hague Convention No. IV, *supra* note 110, art. 22; see also *supra* note 6 and accompanying text (noting that belligerents not entitled to do anything necessary to win). The current iteration of this rule appears at Article 35(1) of Protocol I which states that “[i]n any armed conflict, the right of Parties to the conflict to choose methods or means of warfare is not unlimited.” Protocol I, *supra* note 13, art. 35(1).

259. LIEBER CODE, *supra* note 58, arts. 22–25; Brussels Declaration, *supra* note 258, arts. 15–16; Final Protocol of Brussels Conference, *supra* note 78; Laws of War on Land (Oxford Manual), *supra* note 80, arts. 7, 32; Hague Convention No. IV, *supra* note 110, art. 25; see also Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶ 87 (Nov. 30, 2006) (“The principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection, have a long-standing history in international humanitarian law.”); Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX.

these principles have been recognized by the tenth century Christian Peace of God (*Pax Dei*),<sup>260</sup> in the writings of Vitoria, Grotius, and Vattel;<sup>261</sup> and in early codes of the law of war.<sup>262</sup> They are deeply embedded in U.S. military doctrine,<sup>263</sup> as well as the military doctrines of other democratic nations,<sup>264</sup> and their violation constitutes a war crime.<sup>265</sup>

One reason why nations should readily accept these basic tenets is that attacking civilians or their property serves no legitimate military purpose. Bluntly stated, intentionally targeting civilians or purely civilian objects does not make good military sense; it does nothing to achieve a nation's military goals<sup>266</sup>—namely, to destroy the enemy's military capabilities and its will to fight.<sup>267</sup>

Since the end of World War I, U.S. Army doctrine has recognized nine fundamental Principles of War that “represent the most important nonphysical factors that affect the conduct of operations at the strategic, operational, and tactical levels. . . . [T]hey summarize the characteristics of successful operations.”<sup>268</sup> Targeting civilians—instead of military objectives—contravenes at least two of these basic principles. First, attacks on civilians violate the Principle of

INT'L L.J. 453, 458 (2008) (discussing the beliefs underlying the ethical model of civilian immunity).

260. See *supra* note 49 and accompanying text.

261. See *supra* notes 49–54 and accompanying text.

262. See *supra* notes 64–68, 73, 78, 85–86, and accompanying text.

263. JP 3-60, *supra* note 255, at I-8, E-2-E-3; DEPT OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ¶ 40(a) (1976), available at <http://www.aschq.army.mil/gc/files/fm27-10.pdf> [hereinafter FM 27-10]; U.S. NAVY, U.S. MARINE CORPS, & U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.3 (2007), available at [http://www.nwc.navy.mil/cnws/ild/documents/1-14m\\_\(jul\\_2007\)\\_nwp.pdf](http://www.nwc.navy.mil/cnws/ild/documents/1-14m_(jul_2007)_nwp.pdf) [hereinafter COMMANDER'S HANDBOOK]; THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 13 (2007) [hereinafter OP LAW HANDBOOK]; see also Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 U.S.A.F. ACAD. J. LEGAL STUD. 35, 43, 45 (1997).

264. These tenets are part of British military doctrine, UK MANUAL, *supra* note 88, at 69–70, as well as Israeli, HCJ 769/02 Public Comm. Against Torture v. Government of Israel [2005] IsrSC ¶¶ 23, 26; Israel Ministry of Foreign Affairs, Background Paper, *Responding to Hamas Attacks from Gaza—Issues of Proportionality* (Dec. 2008), available at <http://www.mfa.gov.il/NR/rdonlyres/A1D75D9F-ED9E-4203-A024-AF8398997029/0/GazaProportionality.pdf>; Galic, Case No. IT-98-29-A, ¶ 89; 2 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 4–10, 24–29 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter INTERNATIONAL HUMANITARIAN LAW].

265. Rome Statute, *supra* note 26, art. 8(2)(b)(i)–(ii).

266. WALZER, *supra* note 1, at 154; Parks, *supra* note 6, at 150; Shotwell, *supra* note 28, at 21.

267. DEPT OF THE ARMY, FIELD MANUAL NO. 3-0: OPERATIONS ¶ A-2 (2008), available at <http://downloads.army.mil/fm3-0/FM3-0.pdf> [hereinafter FM 3-0]; JP 3-0, *supra* note 36, app. A, at 1.

268. FM 3-0, *supra* note 267, app. A.

Objective.<sup>269</sup> Combat power is necessarily limited: “commanders never have enough.”<sup>270</sup> Thus, the Principle of Objective “allow[s] commanders to focus combat power on the most important tasks” and prevents commanders from undertaking “actions that do not contribute directly to achieving the objectives.”<sup>271</sup> A related principle is Economy of Force, which dictates that commanders “allocate only the minimum combat power necessary to shaping and sustaining operations so they can mass combat power for the decisive operation.”<sup>272</sup> Both of these principles discourage commanders from using scarce combat power for purposes other than defeating the enemy’s military, and attacking civilians necessarily squanders the resources needed to accomplish this central mission.<sup>273</sup>

Making civilian populations and civilian objects the focus of an attack also violates at least two of the three principles of the joint U.S. military operations doctrine.<sup>274</sup> The first is the Principle of Restraint, the purpose of which is “to limit collateral damage and prevent the unnecessary use of force.”<sup>275</sup> The principle recognizes that “[a] single act could cause significant military . . . consequences.”<sup>276</sup> Therefore, strict adherence to rules of engagement is essential to prevent fratricide, mission failure, and national embarrassment.<sup>277</sup> Second, the Principle of Legitimacy develops and maintains “the commitment necessary to attain the national strategic end state.”<sup>278</sup> This principle entails convincing the nation and the international community of “the legality, morality, and rightness of the actions undertaken.”<sup>279</sup> Even the perception that a nation is violating the laws of war—whether valid or not—may result in an

269. *Id.* app. A, ¶ 1.

270. *Id.*

271. *Id.*

272. *Id.* app. A, ¶ 10.

273. See OLÁSULO, *supra* note 41, at 161 (applying the “principle of economy in the use of force” to argue that allocating soldiers to civilian-attacking missions is inefficient); Roberts, *supra* note 15, at 119 (arguing that because of limited resources, “[e]xcessive destruction not only violates humanitarian concerns but is not good practice from a military operations standpoint.”).

274. The term joint “[c]onnotes activities, operations, organizations, etc., in which elements of two or more Military Departments participate” (e.g., Army and Air Force). JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 283 (2008), available at [http://jtc.fhu.disa.mil/jtc\\_dri/pdfs/jp1\\_02.pdf](http://jtc.fhu.disa.mil/jtc_dri/pdfs/jp1_02.pdf). “Joint doctrine presents fundamental principles that guide the employment of US military forces in coordinated and integrated action toward a common objective.” JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1: DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, at I-1 (2007), available at [http://hqdainet.army.mil/mpsa/jp1\\_02.pdf](http://hqdainet.army.mil/mpsa/jp1_02.pdf).

275. JP 3-0, *supra* note 36, app. A, at 3.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*



erosion of domestic as well as international support for a nation's involvement in the conflict;<sup>280</sup> a loss of such support almost exclusively affects democratic governments, which are particularly sensitive to popular opinion.<sup>281</sup> These principles apply with special force to the military operations of the United States and its allies, predominately Israel, because the international community, including the media, focuses inordinately on the perceived missteps of Western states as opposed to their adversaries' violations of the law of war.<sup>282</sup>

## 2. Principle of Distinction

To avoid striking civilians and civilian objects, U.S. military doctrine requires that, before an attack, commanders and soldiers distinguish between civilians and combatants and between civilian and military objects to ensure that only combatants and military objects are targeted.<sup>283</sup> In other words, U.S. forces use only "those means and methods of attack that are discriminate in effect and can be controlled, as well as take precautions to minimize collateral injury to civilians and protected objects or locations."<sup>284</sup>

The doctrine is in harmony with Article 48 of Protocol I, which provides: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all

280. JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 137 (2004).

281. Parks, *supra* note 6, at 179.

282. See *supra* note 28 and accompanying text.

283. OP LAW HANDBOOK, *supra* note 263, at 13–14, defines "distinction" as

the customary international law obligation of parties to a conflict to engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking part in the hostilities), and combatant forces, directing the application of force solely against the latter. Similarly, military force may be directed only against military objectives, and not against civilian objects. Under the principle of distinction, the civilian population as such, as well as individual civilians, may not be made the object of attack.

See FM 27-10, *supra* note 263, ¶ 40.c (defining what is a permissible object of attack); see also DEPARTMENT OF DEFENSE, FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR app. O, at 697 (1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf> [hereinafter GULF WAR FINAL REPORT] (requiring that the military distinguish "between legitimate military targets and civilian objects"); cf. UK MANUAL, *supra* note 88, at 82 (declaring obligation of British commanders to do "everything feasible" to properly identify targets and enumerating factors for commanders to consider in the identification process).

284. JP 3-60, *supra* note 255, app. E, at E-2; see also Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1075 (1998) (stating that "discrimination . . . requires an attacker to distinguish between civilians and civilian objects on the one hand and military objectives . . . on the other"). Israeli practice is the same. Public Comm. Against Torture v. Go'vt of Israel, HCJ 769/02, ¶ 26 (2005).

times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>285</sup> Likewise, Article 51.4 prohibits “indiscriminate attacks”—that is:

- (a) [T]hose which are not directed at a specific military objective;
- ...
- (c) [T]hose which employ a method or means of combat[,] the effects of which cannot be limited as required by this Protocol;

and consequently, in each case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>286</sup>

The initial task for a commander or soldier is to determine what constitutes a “military objective.” Protocol I defines “military objectives” as “those objects which by their nature, location, and purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>287</sup> Citing Article 52, the ICRC’s Commentary to the Protocol suggests that the military advantage should be “concrete and direct”;<sup>288</sup> however, nothing in the language of Article 52 supports this position, and it is not customary international law.<sup>289</sup>

U.S. targeting doctrine, on the other hand, takes a much broader view of the term “military objective.” The term refers not only to obvious targets such as armaments, military equipment, military facilities, and troops (including also economic targets (i.e., factories, workshops, and plants) that make an effective contribution to an adversary’s military capability), but also to dual-use objects—those serving both a military and civilian purpose (e.g., modern transportation and communications systems).<sup>290</sup> Moreover, U.S. doctrine permits attacks on “targets that *indirectly*, but effectively, support and sustain the adversary’s warfighting capability.”<sup>291</sup>

The ultimate challenge for any commander or soldier is distinguishing civilians and civilian objects from military personnel

285. Protocol I, *supra* note 13, art. 48.

286. *Id.* art. 51(4).

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

288. Claude Pilloud & Jean Pictet, *Protocol I—Article 52: General Protection of Civilian Objects*, in ICRC COMMENTARY, *supra* note 207, at 629, 637.

289. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 264, at 29–32; see also Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143 149–50 (1999) (noting the divergence of the U.S. and ICRC positions).

290. JP 3-60, *supra* note 255, app. E, at E-3.

291. *Id.* (emphasis added); see also *id.* at I-10 (describing indirect effects in targeting). See generally Henry Shue & David Wippman, *Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions*, 35 CORNELL INT’L L.J. 559, 567 (2002) (discussing the targeting of infrastructure).

and military objects in the fog, friction, and turmoil of war.<sup>292</sup> Under Protocol I, a civilian is defined in the negative—it is someone who is not a combatant.<sup>293</sup> When doubt exists, a person is presumed to be a civilian.<sup>294</sup> Under these conditions, the ability of a commander or soldier to tell combatants and civilians apart on the battlefield largely depends upon the opposing belligerent's effort to differentiate itself from civilians.<sup>295</sup> Traditionally, combatants have identified themselves by wearing fixed distinctive signs recognizable at a distance (e.g., uniforms) and by carrying their arms openly at all times.<sup>296</sup> Protocol I, however, intentionally obscures the distinction between civilians and combatants by removing the distinctive-insignia requirement<sup>297</sup> and by permitting persons to move back and forth between military and civilian pursuits, allowing them to be targeted only when engaged in the former.<sup>298</sup>

Third world delegations to the Diplomatic Conference—with the help of Soviet bloc members<sup>299</sup>—were able to purge from the Protocol the requirement included in all previous law of war treaties: to

292. See CARL VON CLAUSEWITZ, ON WAR 117–21, 140 (Michael Howard & Peter Paret eds. & trans., 1984) (describing the difficulty in obtaining reliable information in war and the talent required for a commanding officer to discern good information from bad).

293. Protocol I, *supra* note 13, art. 50(1); see Claude Pilloud & Jean Pictet, *Protocol I—Article 50: Definition of Civilian and Civilian Population*, in ICRC COMMENTARY, *supra* note 207, at 609, 610 (“[T]he Protocol adopted . . . a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces.”).

294. Protocol I, *supra* note 13, art. 50(1).

295. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29 (2004) (“[The law of international armed conflict] can effectively protect civilians from being objects of attack in war only if and when they can be identified by the enemy as non-combatants.”).

296. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 13, art. 4.A(2); see also Brussels Declaration, *supra* note 258, art. 9 (requiring soldiers to “have a fixed distinctive emblem recognizable at a distance”); Laws of War on Land (Oxford Manual), *supra* note 80, art. 2; Hague Convention No. IV, *supra* note 110, art. 1 (requiring soldiers to wear an emblem of identification).

297. Protocol I, *supra* note 13, art. 44(3) (dispensing with the need for a distinctive sign recognizable at a distance (such as a uniform) and limiting the requirement that arms be carried openly to military deployments and attacks); see Jones, *supra* note 39, at 270 (discussing Article 44(3)'s blurring of the distinction between “combatant” and “civilian”).

298. Protocol I, *supra* note 13, art. 51(3). “Civilians shall enjoy the protection [from attack or threats or acts of violence], unless *and for such time*, as they take a direct part in hostilities.” *Id.* art. 51(2) (emphasis added); see Claude Pilloud & Jean Pictet, *Protocol I—Article 51: Protection of the Civilian Population*, in ICRC COMMENTARY, *supra* note 207, at 613, 619 (noting that once a civilian ceases to participate in hostilities, “the civilian regains his right to the protection [of the Protocol], and he may no longer be attacked”); see also MCKEOGH, *supra* note 48, at 139–40 (“Civilians enjoy their protected status ‘unless and for such time as they take direct part in hostilities.’”); Aldrich, *supra* note 9, at 9 (“What is not required is that an irregular distinguish himself at all times.”).

299. See *supra* note 249–51 and accompanying text.

receive POW status, combatants must distinguish themselves from the civilian population by wearing a fixed distinctive sign recognizable at a distance.<sup>300</sup>

The Protocol concedes that, to ensure the protection of civilians, combatants must differentiate themselves from the civilians; nevertheless, it eliminates the absolute requirement to do so by noting that, in some situations, "owing to the nature of hostilities an armed combatant cannot so distinguish himself."<sup>301</sup> In such situations, a person retains the status of "combatant" provided that he carries his arms openly during military operations and when visible to his adversary while deploying to an attack.<sup>302</sup> Moreover, all combatants must be under a commander responsible for his or her subordinates and must be subject to an internal disciplinary system that enforces the laws of war.<sup>303</sup> Even if a person fails to meet even these minimal conditions, however, he or she must still receive protections equivalent to those afforded prisoners of war.<sup>304</sup> Combatants who emulate civilians by feigning civilian status in this manner are not deemed perfidious under the Protocol.<sup>305</sup>

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300. See *supra* note 296; see also *supra* note 249 and accompanying text. The original ICRC draft Protocol required members of organized resistance movements to "distinguish themselves from the civilian population in combat." Draft Additional Protocol to the Geneva Convention of August 12, 1949, art. 42, in 1 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, pt. 3, at 13–14. Delegates from Western nations opposed the amended version, arguing that resistance fighters must differentiate themselves from the civilian population. Summary Records of the Thirty-Third Meeting, CDDH/III/SR.33 (Mar. 19, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 317, 328 (statement of the representative of the Netherlands); *id.* at 331 (statement of the representative of the U.S.); *id.* at 333 (statement of the representative of Norway); Summary Records of the Thirty-Fourth Meeting, CDDH/III/SR.34 (Mar. 20, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 335, 349–50 (statement of the representative of the United Kingdom); Summary Records of the Thirty-Fifth Meeting, CDDH/III/SR.35 (Mar. 21, 1975), in 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 355, 367 (statement of representative of Australia); Statement Made at the Thirty-Fifth Meeting, 21 Mar. 1975, by Mr. Ronzitti (Italy), CDDH/III/SR.33–36 annex, 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 513, 513; Statement Made at the Thirty-Fifth Meeting, 21 Mar. 1975, by Mr. Sabel (Israel), CDDH/III/SR.33–36 annex, 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 11, at 535, 535.

301. Protocol I, *supra* note 13, art. 44(3).

302. *Id.* art. 44(3)(a)–(b). The provision limits the instances in which combatants are required to carry their arms openly; now combatants must only do so immediately before an attack when they are visible to their adversaries. *Id.*

303. *Id.* art. 43(1).

304. *Id.* art. 44(4); see also Roberts, *supra* note 15, at 129 ("[M]embers of a guerilla group that routinely execute prisoners would be entitled to prisoner of war status upon capture."). See generally MCKEOGH, *supra* note 48, at 140 (noting that the distinction of unlawful combatant no longer exists); Jinks, *supra* note 42, at 423 ("Geneva law provides substantial legal protection to all war detainees, including unlawful combatants.").

305. Protocol I, *supra* note 13, art. 44(3); see also *id.* art. 37(1)(a) (defining perfidy as "[a]cts inviting the confidence of an adversary to lead him to believe that he

The ICRC's Commentary to Protocol I states that Article 44 is "mainly aimed at combatants using methods of guerrilla warfare" and is justified because

[g]uerrilla fighters will not simply disappear by putting them outside the law applicable in armed conflict, on the basis that they are incapable of complying with the traditional rules of such law. Neither would this encourage them to at least comply with those rules which they are in a position to comply with, as this would not benefit them in any way.<sup>306</sup>

The ICRC has it backwards. By their very nature, guerrillas, insurgents, and particularly terrorists blend into civilian populations—a tactic at the very center of their military operations,<sup>307</sup> especially in urban areas,<sup>308</sup> and the *raison d'être* for Article 44's inclusion in the Protocol.<sup>309</sup> Nothing prevents guerrillas, insurgents, or even members of terrorist groups from distinguishing themselves from civilians. Indeed, Michael Walzer notes that Tito's partisans did so during World War II with apparently no disadvantage in the kind of war they fought.<sup>310</sup> Groups like

is . . . obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."). An example of an act of perfidy is "the feigning of civilian, non-combatant status." *Id.* art. 37(1)(c); see Dinstein, *supra* note 245, at 45 (noting that relaxation of the requirement of a fixed distinctive emblem means that "Article 37(1)(c) does not amount to much more than lip-service"); *supra* note 38.

306. Jean de Preux, *Protocol I—Article 44: Combatants and Prisoners of War*, in ICRC COMMENTARY, *supra* note 207, at 519, 520–21.

307. DEPARTMENT OF THE ARMY, FIELD MANUAL 3-06.11: COMBINED ARMS OPERATIONS IN URBAN TERRAIN ¶¶ 1-3b(2), 1-5f (2002), available at <http://www.globalsecurity.org/military/library/policy/army/fm/3-06-11/index.html> (noting the asymmetrical threats in urban environments, including the adversary's use of the civilian population and infrastructure to shield its capabilities and the existence of "unconventional forces," which can mix with the civil population); URBAN WARFARE STUDY, *supra* note 237, at 23, 25, 28 (noting the PLO's use of civilian populations as shields during Israel's Operation Peace for Galilee in 1982); WALZER, *supra* note 1, at 184 ("[G]uerrillas don't merely fight *as* civilians; they fight *among* civilians."); Gardam, *supra* note 52, at 822 (noting that because of the nature of guerrilla warfare, insurgents are unlikely to attempt to distinguish themselves from the civilian population); Patrick D. Marques, *Guerrilla Warfare Tactics in Urban Environments* 29–30, 36–39, 43, 45–48, 53–54 (2003) (unpublished Master of Military Art and Science thesis, U.S. Army Command & General Staff College), available at <http://www.fas.org/man/eprint/marques.pdf> (noting the failure of insurgent groups—including the Irish Republican Army, the Mujahedeen in Afghanistan, the Chechen rebels in Grozny—to distinguish themselves from civilian populations); A.P.V. Rogers, *Zero-Casualty Warfare*, INT'L REV. RED CROSS 165 (Mar. 2000), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JQCU> (indicating that guerrillas "merge with the civilian population" and "prefer to launch attacks out of civilian anonymity").

308. JENNIFER MORRISON TAW & BRUCE HOFFMAN, *THE URBANIZATION OF INSURGENCY: THE POTENTIAL CHALLENGE TO U.S. ARMY OPERATIONS* 7, 11–15 (1994), available at [http://www.rand.org/pubs/monograph\\_reports/2005/MR398.pdf](http://www.rand.org/pubs/monograph_reports/2005/MR398.pdf) (describing the increasingly urban nature of insurgencies).

309. See *supra* note 249–51 and accompanying text.

310. WALZER, *supra* note 1, at 182.

Hezbollah and Hamas have uniforms—they pose in them for the media for ceremonial purposes.<sup>311</sup> But they plainly prefer not to wear the uniforms in battle in order to blend into the civilian population to shield their operations, using the inevitable civilian casualties as a propaganda tool against their adversaries.<sup>312</sup>

Offering combatants *de jure* or *de facto* POW status upon capture gives them even less incentive to separate themselves from civilians<sup>313</sup> and necessarily increases the dangers to civilians.<sup>314</sup> Article 44's chief concern is protecting insurgents rather than saving civilians.<sup>315</sup> The article complicates the obligation of commanders and their soldiers to discriminate between military objectives and the civilian population, thus resulting in greater civilian casualties.<sup>316</sup> As Professor Yoram Dinstein observed:

311. See, e.g., Hezbollah Photos, <http://www.daylife.com/topic/Hezbollah/photos/all/1> (last visited Mar. 22, 2009); Hamas Militia Photo, [http://img.timeinc.net/time/daily/2007/0704/hamas\\_war0402.jpg](http://img.timeinc.net/time/daily/2007/0704/hamas_war0402.jpg) (last visited Mar. 22, 2009).

312. See *infra* notes 428–34, 439, 452–58, 488–94, and accompanying text; see also ANTHONY H. CORDESMAN, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, THE “GAZA WAR”: A STRATEGIC ANALYSIS 2 (2009), [http://www.csis.org/media/csis/pubs/090202\\_gaza\\_war.pdf](http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf) (explaining that Hamas uses civilians as a shield, increasing civilian deaths, which increases public sentiment against Israel.).

313. See Roberts, *supra* note 15, at 133 (“Neither article provides any incentives for guerillas to distinguish themselves from civilians.”); Schmitt, *supra* note 284, at 1078 (“[T]he relaxation of the criteria for combatant status” increases the tendency that combatants will hide as civilians.).

314. Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT’L L. 209, 229 (2005) (“Part of the reason combatants are given special privileges is because they distinguish themselves from the civilian population, and by doing so, hold themselves out as targets to lawful and unlawful combatants alike.”) (footnotes omitted); see also Geoffrey Best, *Civilians in Contemporary War*, AIR UNIV. REV. Mar.–Apr. 1984, available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1984/mar-apr/best.html> (arguing that legitimizing guerilla warfare under the laws of war, while necessary to an extent, endangers civilians); Roberts, *supra* note 15, at 130, 133–34 (arguing that articles 43 and 44 “represent a dangerous regression”). But see Jinks, *supra* note 42, at 438 (arguing that criminalizing unlawful combatancy creates a powerful incentive to violate the law of war).

315. See Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?*, 15 FLA. J. INT’L L. 389, 421 (2003) (“[Article 44] exports the definition of combatants to embrace freedom fighters who are entitled to the rights that the Convention grants to Combatants.”); see also Gardam, *supra* note 52, at 826 (noting the undesirability of sacrificing the safety of civilians for the cause of the combatant); W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT’L L. 852, 858 (2006) (pointing out reasons that different groups wanted to relax lawful combatant requirements). At the same time that it endows POW rights on insurgents, including members of the terrorist groups, the Protocol removes all protections from mercenaries. Protocol I, *supra* note 13, art. 47. The ICRC notes the irony of a provision denying POW status to a group of combatants when the purpose of the Protocol is to expand such protection. Jean de Preux, *Protocol I—Article 47: Mercenaries*, in ICRC COMMENTARY, *supra* note 207, at 571, 574. However, it justifies the provision “because of the shameful character of mercenary activity.” *Id.*

316. See Gross, *supra* note 315, at 417 (“If combatants were able to disappear within the civilian population, every civilian within that population would be suspected of being a hidden combatant and would suffer the inevitable consequences.”); Howard

The preservation of traditional modes of combat by uniformed (or otherwise properly identified) soldiers is a matter of great import. The only way to ensure respect for the basic principle of distinction between civilians and combatants, protecting the latter from attack and injury, is to enable each belligerent party to know whom it is facing.<sup>317</sup>

Even more disconcerting is the perverse inducement Protocol I gives to members of insurgent, guerilla, and terrorists groups to disregard *any* efforts to distinguish themselves from the civilian population, particularly when they are operating in areas not subject to the law enforcement authority of the states whom they attack.<sup>318</sup>

Under the Protocol, civilians are immune from attack “unless *and for such time* as they take a direct part in hostilities.”<sup>319</sup> Ambassador George H. Aldrich, a U.S. delegate to the Diplomatic Conference, explained that the provision simply “recognizes the reality that some irregulars in occupied territory will, of necessity, be part-time soldiers—bakers by day and soldiers by night.”<sup>320</sup> Of course, by its terms, the provision is neither limited to cases of

M. Hensel, *Introduction*, in *THE LAW OF ARMED CONFLICT*, at ix, x–xi (Howard M. Hensel, ed., 2005) (“[T]ragically, modern warfare very often fails to distinguish between combatants and non-combatants.”); Jensen, *supra* note 314, at 228–29 (“This approach does not support the overall idea of ‘promoting the protection of the civilian population from the effects of hostilities.’”); Joel Rosenthal, *New Rules for War?*, 57 *NAVAL WAR C. REV.* 91, 98 (2004) (discussing the “combatant/noncombatant” distinction); *see also* Reisman, *supra* note 315, at 858 (noting the “disturbing correlation” between the “appalling increase in the death and injury to noncombatants relative to those of combatants” since the relaxation of the distinction requirement). *See generally* Fellmeth, *supra* note 259, at 455 (noting an increased ratio of civilian to combatant casualties, particularly in the 1990s).

317. Dinstein, *supra* note 245, at 45–46; *see also* Mark David “Max” Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of Customariness*, *ARMY LAW.*, Mar. 2007, at 1 (discussing the fight for Fallujah in Iraq and the debate over civilian casualties).

318. *See infra* note 319 and accompanying text.

319. Protocol I, *supra* note 13, art. 51(3); Pilloud & Pictet, *supra* note 298, at 618 (“[A] civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities.”).

It is important to understand that while [civilians] forfeit their immunity from direct attack while participating in hostilities, they, nonetheless, retain their status as civilians. Unlike ordinary combatants, once they cease their hostile acts, they can no longer be attacked, although they may be tried and punished for all their belligerent acts.

Inter-American Commission on Human Rights, Third Report on the Human Rights Commission in Columbia, ¶ 55, OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (Feb. 25, 1999), available at <http://www.cidh.org/countryrep/Colom99en/chapter.4a.htm>.

The ICRC Study gives Article 51.3 customary international law status, 1 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 264, at 19–20, although the U.S. does not consider it to be so, Schmitt, *supra* note 252, at 173, and Israel accepts it only in part as customary international law, Public Comm. Against Torture v. Government of Israel, HCJ 769/02, ¶ 40 (Dec. 11, 2005).

320. Aldrich, *supra* note 9, at 9.

military occupation nor to instances in which civilians fight by night and work by day. It potentially gives absolute sanctuary from attack to any person affiliated with insurgent or terrorist groups *except* when they are actually engaged in hostilities.<sup>321</sup> The Protocol potentially affords a “safe harbor” during all other periods of military operations (unless located within an otherwise lawful military objective), including training and equipping for combat, planning and preparing for attacks, deploying to and re-deploying from combat, and resting between engagements<sup>322</sup>—respite from violence not enjoyed by any other soldiers on the battlefield.<sup>323</sup>

How do members of an insurgent or terrorist group avail themselves of the immunity afforded civilians from attack? They do so by disobeying Protocol I’s minimalist distinction requirement. Protocol I divides humans into two—and only two—sub-species: combatants and civilians.<sup>324</sup> If a person is not a combatant, he or she is necessarily a civilian.<sup>325</sup> To qualify as a combatant, one

321. See Jones, *supra* note 39, at 278 (“[T]he rule could reasonably be construed as authorizing civilians to engage in acts that negate their immunity, and then permit them to regain that immunity.”).

322. Antonio Cassese, Expert Opinion on Whether Israel’s Targeted Killing of Palestinian Terrorists Is Consonant with International Humanitarian Law 8–9, 19, submitted in Public Comm. Against Torture v. Government of Israel, HCJ 769/02 (Dec. 11, 2005), available at <http://www.stoptorture.org.il/files/cassese.pdf>.

323. Ben-Naftali & Michaeli, *supra* note 41, at 279; David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence*, 16 EUR. J. INT’L L. 171, 190–191 (2005). Professor Cassese argues that international humanitarian law

prohibits belligerents from targeting and killing enemy combatants, such as uniformed soldiers, who are no longer on the battlefield, but are resting at home or taking their family to the cinema, the principle being that the enemy may only be attacked when he is engaging in combat, not when he has laid down his arms.

Cassese, *supra* note 322, at 8. This argument is inconsistent, however, with the ICRC’s Commentary on the nature of members of armed forces:

All members of the armed forces are combatants, and only members of the armed forces are combatants. . . . A civilian who is incorporated in an armed organization . . . becomes a member of the military and a combatant *throughout the duration of the hostilities* (or in any case, until he is permanently demobilized by the responsible command . . .) *whether or not he is in combat, or for the time being armed*.

Jean de Preux, *Protocol I—Article 43: Armed Forces*, in ICRC COMMENTARY, *supra* note 207, at 505, 515 (emphasis added); see also Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, ¶ 114 (July 29, 2004) (holding that simply because they may not be armed at the time, members of the armed forces are not accorded civilian status).

324. Protocol I, *supra* note 13, art. 50(1).

325. *Id.*; see also Public Comm. Against Torture v. Government of Israel, HCJ 769/02, ¶¶ 26–28 (Dec. 11, 2005); Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 4, at 237, 262–63; Yael Stein, *By Any Name Illegal and Immoral*, 17 ETHICS & INT’L AFF.



must abide by the rules distinguishing combatants from civilians, such as wearing distinctive insignia recognizable at a distance or, at the very least, carrying weapons openly preceding a military operation.<sup>326</sup> If insurgents or terrorists fail to take such measures, they ultimately count as civilians and are entitled to immunity from attack before an engagement and once the engagement ceases.<sup>327</sup>

Take, for example, Ambassador Aldrich's baker. In this case, he is a citizen of Lebanon and a member of Hezbollah. The baker takes a fifteen-minute "coffee break" to fire a rocket or a mortar at Israel from Lebanon and then returns to his bakery. Under Protocol I,

127, 128 (2003) ("The law establishes only two categories of persons involved in a conflict, combatants and civilians, and makes no room for any middle definitions.").

326. Protocol I, *supra* note 13, art. 44(3).

327. Cassese, *supra* note 322, at 8; *see also* Kretzmer, *supra* note 323, at 191–92 (stating the proposition); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 65 (2003) (discussing the legality of the CIA unmanned drone attack in Yemen in 2002 when terrorists were not engaged in combat at the moment); Stein, *supra* note 325, at 130 ("The prohibition of killing, then, is valid as long as civilians are not literally participating in the hostilities."); *see also* Daniel Byman, *Do Targeted Killings Work?*, FOR. AFF., Mar.–Apr. 2006, at 95, 101 ("[S]ome experts believe . . . that they should be treated under international law as civilians."). Not all commentators agree with this position. Instead, they argue that terrorists are combatants, albeit unlawful ones. Dinstein argues:

[A] person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a law combatant. He is an unlawful combatant.

DINSTEIN, *supra* note 295, at 29; *see also* Ben-Naftali & Michaeli, *supra* note 41, at 270–71 ("[I]n non-international conflicts . . . unlawful conduct itself has no bearing on the determination of status"); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 328 (2004) (discussing the suicide bomber as an unlawful combatant); Kretzmer, *supra* note 323, at 194 ("When the armed conflict is essentially between a state and the terrorist group, the theory that the terrorists are civilians simply does not make sense."); Richmond, *supra* note 4, at 1028 ("Applied to transnational terrorists, the concepts of innocence, harmlessness, and the bearing of arms would militate in favor of treating them as combatants."). While refusing to characterize terrorists as unlawful combatants, the Israeli High Court of Justice has distinguished civilians taking a direct part in hostilities only once or sporadically from those who constantly engage in direct acts of hostility and use their civilian status for immunity while they rest and prepare for the next act. Public Comm. Against Torture v. Government of Israel, HCJ 769/02, ¶¶ 39–40 (Dec. 11, 2005). The former are immune from attack once they have ceased hostilities; the latter are not. *Id.*; *see also* William J. Fenrick, *The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities*, 5 J. INT'L CRIM. JUST. 332, 337 (2007) ("The civilian who takes a direct part in hostilities a single time or sporadically . . . is entitled to protection from attack once he detaches himself from the hostile activity."). *See generally* INT'L COMM. OF THE RED CROSS, SUMMARY REPORT, THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 60, 64 (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf) [hereinafter THIRD EXPERT MEETING] (attempting to clarify what "direct participation in hostilities" means).

provided the baker hides his armament while deploying to the engagement and does not wear a uniform, he may only be targeted as a military objective while *actually* firing the rocket or mortar.<sup>328</sup> Once the baker has completed his mission and starts back to his bakery, Israel may no longer attack him—he is a civilian.<sup>329</sup> Moreover, the baker may continue to engage Israel with rockets or mortars until Israeli forces are able to kill him *in the act*.<sup>330</sup> In essence, the Protocol creates a revolving door between combatant and civilian status for insurgents or terrorists who violate the law of war's principle of distinction.<sup>331</sup>

Those supporting immunity for combatants who fail to distinguish themselves from civilians stress the fact that such persons are subject to arrest, trial, and punishment for their actions. Indeed, many reproach any armed attacks on these "civilians" because armed attacks would deprive them of their right to due process under international human rights law.<sup>332</sup> While the allure of

328. See Protocol I, *supra* note 13, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.").

329. See Jones, *supra* note 39, at 278 ("Article 51 does nothing more than to turn a civilian into a sniper by day and a legally immune citizen by night."); Maxwell & Meyer, *supra* note 317, at 6 n.63 (pointing out criticism of the U.S. CIA use of a predator unmanned aerial vehicle to kill terrorists who were not fighting at that moment).

330. Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Target Killings*, 15 DUKE J. COMP. & INT'L L. 281, 312 (2005).

331. INT'L COMM. OF THE RED CROSS, SUMMARY REPORT, SECOND EXPERT MEETING, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 22 (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2004\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf); Commander Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 82, 87; Kretzmer, *supra* note 323, at 193; Parks, *supra* note 6, at 118; Watkin, *supra* note 330, at 312. The ICRC Commentary seemingly takes a more realistic approach, refusing to recognize the status of a "part-time combatant"—at least insofar as such combatants are members of guerilla units seeking lawful combatant status under Article 44. Thus, Protocol I does not allow a combatant "to have the status of a combatant while he is in action, and the status of a civilian at other times. It does not recognize combatant status 'on demand.'" de Preux, *supra* note 323, at 515–16. The ICRC feared that allowing such changes in status would erode the protections afforded guerrilla units and reestablish the "presumption of illegality" of such forces. *Id.*

332. See, e.g., THIRD EXPERT MEETING, *supra* note 327, at 60 (summarizing different "experts" views); Cassese, *supra* note 322, at 11–14 (arguing for a "regular trial"); Vincent-Joël Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 889–90 (2005) (claiming that this is essentially the death penalty without due process); Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1878 (2007) (such a standard "may cause the military to engage in more targeted killings that do not satisfy the international legal standard for necessity"). Some commentators would give POW status to persons who transition from civilian to

arrest, trial, and punishment is understandable if the “civilians” are located within an area subject to the law enforcement authority of the state attacked or in a friendly state that will cooperate in the seizure and extradition of the individual,<sup>333</sup> the approach is breathtakingly naïve for “civilians” operating as combatants in a hostile state or within territory outside the jurisdiction and effective control of the state attacked.<sup>334</sup> With regard to the Hezbollah baker, to whom is Israel to turn for an arrest? Hezbollah?<sup>335</sup> The Government of Lebanon?<sup>336</sup> The UN?<sup>337</sup>

combatant and back again, thus precluding a criminal prosecution for their hostile actions. *See, e.g.,* MCKEOGH, *supra* note 48, at 140.

333. Even if members of a terrorist organization are located within territory amenable to the criminal process of the attacked state, law enforcement measures may not be possible given the military capabilities of such organizations. *See* Public Comm. Against Torture v. Government of Israel, HCJ 769/02, ¶¶ 21, 40 (Dec. 11, 2005); *see also* Byman, *supra* note 327, at 97 (noting that many Palestinian militants enjoy the protection of Arab governments making extradition for trial impossible); Watkin, *supra* note 330, at 311–12 (noting the military aspects of terrorist organizations); *cf.* Janin, *supra* note 331, at 88 (“Counterinsurgencies are often fought in non-permissive environments where an arrest attempt would place lawful armed forces combatants *in extremis*.”).

334. *See* Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES. L. 179, 184–85 (2004) (“The proposition that . . . [terrorists] could be prevented from carrying out further terror attacks by issuing an arrest order to the governments harboring them, is, at best, naïve.”). For example, in those areas of the Israeli Occupied Territories under Palestinian Authority (PA) control, the PA does not arrest Palestinian terrorists. Guiora, *supra* note 327, at 322. Even if the insurgents or terrorists are captured, the capturing force will often have difficulty finding local citizens willing to testify against them. Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT’L L. 645, 660 (2006).

335. Hezbollah’s charter “vigorously condemn[s] all plans for negotiation with Israel, and regard[s] all negotiators as enemies, for the reason that such negotiation is nothing but the recognition of the legitimacy of the Zionist occupation of Palestine.” Open Letter, Hizballah, The Hizballah Program, at 5, available at [http://www.standwithus.com/pdfs/flyers/hezbollah\\_program.pdf](http://www.standwithus.com/pdfs/flyers/hezbollah_program.pdf). The charter also calls for the destruction on Israel. *Id.* Hamas’ Charter similarly calls for the destruction of Israel. Gross, *supra* note 20, at 492.

336. *See* Catherine Bloom, *The Classification of Hezbollah in Both International and Non-International Armed Conflicts*, 14 ANN. SURV. INT’L & COMP. L. 61, 79–81 (2008) (noting that the Lebanese government has consistently failed to respond to Hezbollah and that Hezbollah acts on behalf of the Lebanese government); Zachary Myers, Comment, *Fighting Terrorism: Assessing Israel’s Use of Force in Response to Hezbollah*, 45 SAN DIEGO L. REV. 305, 311–312 (2008) (noting Lebanese government’s inability or unwillingness to control Hezbollah); Keith A. Petty, *Veiled Impunity: Iran’s Use of Non-State Armed Groups*, 36 DENV. J. INT’L L. & POL’Y 191, 195 (2008) (noting Lebanon’s unwillingness to disarm Hezbollah); Jason S. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?*, 60 A.F. L. Rev. 29, 43–46 (2007) (noting Lebanon’s unwillingness or inability to prevent Hezbollah from carrying out its operations).

337. *See* William W. Burke-White & Abraham Bell, *Debate: Is the United Nations Still Relevant?*, 155 U. PA. L. REV. (PENNUMBRA) 74, 84 (2007) (rebuttal of Abraham Bell) (noting the UN’s failure to enforce a Security Council resolution directing the disarmament of Hezbollah); Wrachford, *supra* note 336, at 46 (noting the UN’s lack of success in meeting the Hezbollah threat); Harry De Quetteville & Michael

Moreover, the argument is also made that once members of insurgent, guerilla, or terrorist group have ceased for the moment their hostile actions (for the moment), they are likely to seek shelter in the civilian community.<sup>338</sup> Thus, any attacks against them are likely to endanger the civilians who surround them.<sup>339</sup> The underlying basis of this proposition is undoubtedly accurate—once the baker returns to his “day job,” attacking him may cause casualties among surrounding innocent civilians. At the same time, however, the argument ignores the fact that it is the baker who has placed civilians in danger—not Israel.<sup>340</sup> While civilians may not be targeted as civilians, they are not immune from the effects of attacks on military objectives.<sup>341</sup>

The dilemma for the commander or soldier attempting to abide by the law of war is determining whether the baker is in fact a civilian or a combatant. Indeed, given the loose requirements of Article 44 and the restrictions imposed by Article 51 of Protocol I, commanders and soldiers will necessarily have difficulty distinguishing a part-time from a full-time insurgent or terrorist, or between an insurgent or terrorist and a civilian. Thus, Protocol I increases the danger to civilians by making combatants indistinguishable from civilians.<sup>342</sup> It establishes a tremendous incentive—immunity from attack—for insurgents and terrorists to forego efforts to set themselves apart from civilians and to conduct their operations outside of civilian population areas.<sup>343</sup> Ironically, combatants who abide by the law of war do not enjoy this privilege; only those who violate international law do.

Similar concerns exist for civilian property. Commanders are able to recognize readily those things that are properly marked, either as cultural objects,<sup>344</sup> medical facilities, or means of transport.<sup>345</sup> Likewise, such objects as homes, shops, schools, churches, mosques, and recreational facilities are not normally

Hirst, *UN Will Not Stop Syria Sending Weapons to Lebanon*, TELEGRAPH, Aug. 27, 2006, available at <http://www.telegraph.co.uk/news/1527391/UN-will-not-stop-Syria-sending-weapons-to-Lebanon.html> (describing the UN's refusal to prevent Syria from arming Hezbollah in violation of Security Council Resolution 1701).

338. See Jones, *supra* note 39, at 278 (“Article 51 does nothing more than to turn a civilian into a sniper by day and a legally immune citizen by night.”)

339. Eichensehr, *supra* note 332, at 1878; see also Byman, *supra* note 327, at 101 (“Critics . . . charge: that the attacks inevitably lead to the death of innocents.”).

340. Statman, *supra* note 334, at 186.

341. See *infra* notes 353–54 and accompanying text.

342. Jones, *supra* note 39, at 263; Parks, *supra* note 6, at 118.

343. See Reynolds, *supra* note 20, at 74 (discussing the benefit for terrorists to hide among civilians).

344. Hague Cultural Property Convention, *supra* note 192, arts. 10, 16.

345. See Protocol I, *supra* note 13, art. 18 (setting out medical care identification marks).

military objectives.<sup>346</sup> Unfortunately, modern belligerents, including members of insurgent and terrorist groups, often use civilian objects to shield military objectives and operations<sup>347</sup> by, for example, (1) transporting armaments in ambulances,<sup>348</sup> (2) using churches, mosques, hospitals, and schools as weapons-storage facilities and combat positions;<sup>349</sup> and (3) placing civilians in command and control

346. See *id.* art. 52 (“Civilian objects shall not be the object of attack or of reprisals.”).

347. CORDESMAN, *supra* note 312, at 43–47, 49, 51–52, 54–55 (describing Hamas’s use of mosques, houses, and cemeteries for military operations and storage of armaments); GULF WAR FINAL REPORT, *supra* note 283, app. O, at 699; Howard M. Hensel, *The Protection of Cultural Objects During Armed Conflicts*, in *THE LAW OF ARMED CONFLICT* 39, 75–76 (Howard M. Hensel ed., 2005).

348. See REUVEN ERLICH, INTELLIGENCE AND TERRORISM INFORMATION CENTER AT THE CENTER FOR SPECIAL STUDIES (C.S.S), HEZBOLLAH’S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS: THE EXTENSIVE MILITARY INFRASTRUCTURE POSITIONED AND HIDDEN IN POPULATED AREAS, pt. 1, ¶ 28 (2006), available at <http://www.ajcongress.org/site/DocServer/part1.pdf?docID=701> (describing Hezbollah’s use of medical transports for military purposes); Benjamin A. Gorelick, *The Israeli Response to the Palestinian Breach of the Oslo Agreements*, 9 *NEW ENG. J. INT’L & COMP. L.* 651, 670 (2003) (noting the Palestinian use of ambulances to transport weapons); Serge Schemann, *Mideast Turmoil: Diplomacy; Powell, in Israel, Keeps up Pressure for a Withdrawal*, *N.Y. TIMES*, Apr. 12, 2002, at A1 (“Israel has reported finding explosives in ambulance.”). Improper use of distinctive emblems of the Geneva Conventions, such as the Red Cross or the Red Crescent, constitutes a grave breach of Protocol I, *supra* note 13, arts. 37, 38, 85(3)(f), and a war crime, Rome Statute, *supra* note 26, art. 8(2)(b)(vii).

349. See GULF WAR FINAL REPORT, *supra* note 283, app. O, at 699 (indicating that during the Persian Gulf War, Iraqi forces dispersed military helicopters in civilian residential areas, and stored military supplies in mosques, hospitals, and schools); Dinstein, *supra* note 245, at 49 (describing the Iraqi use of “hospitals, mosques, and schools as weapon arsenals, staging areas for military operations, and launch pads for attacks against Coalition forces”); Rabkin, *supra* note 24, at 201 (describing the use of mosques, churches, and protected sites by PLO combatants); Dexter Filkins, *The Conflict in Iraq: With the Eight Marines; In Taking Falluja Mosque, Victory by the Inch*, *N.Y. TIMES*, Nov. 10, 2004, at A1 (describing the use by insurgents of a mosque as a command center); Carlotta Gall, *Americans Face Rising Threat from Taliban*, *INT’L HERALD TRIB.* July 15, 2008, at 4 (describing the Taliban’s use of houses, shops, and a mosque in an attack on a U.S.-Afghan outpost); Robert F. Worth, *The Conflict in Iraq: Insurgents; Marines Find Vast Arms Cache in Falluja Leader’s Mosque*, *N.Y. TIMES*, Nov. 25, 2004, at A22 (describing mortars and TNT discovered in insurgent leader’s mosque).

The Second Protocol to the Hague Cultural Property Convention attempts to shift responsibility for protecting historical and cultural property from the defending to the attacking force, in spite of the fact the defender generally determines where to conduct its defense. See *supra* note 201. Not surprisingly, belligerents often seek to neutralize superior firepower by entrenching themselves among cultural or historical objects. See, e.g., GULF WAR FINAL REPORT, *supra* note 283, app. O, at 701–02 (indicating that during the Persian Gulf War, Iraqi forces placed military equipment adjacent to archeological and cultural sites); Baker, *supra* note 28, at 280 (describing the 2002 use of the Church of Nativity in Bethlehem by armed Palestinian terrorists for cover and firing positions).

facilities.<sup>350</sup> When insurgents, terrorists, or other belligerents thus use civilian objects to store military supplies and equipment or as centers for actual military operations, these objects become legitimate military targets.<sup>351</sup>

### 3. Principle of Proportionality

The proscription against attacking civilians *qua* civilians does not mean that civilian populations and objects are always immune from the effects of an attack.<sup>352</sup> A commander may engage military targets even though civilians are present in the area.<sup>353</sup> Protocol I accepts this concept, providing that the presence of civilians or civilian objectives near a military objective does not make the military objective immune from attack:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour[,] or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.<sup>354</sup>

In addition, the Protocol requires that parties to a conflict shall, “to the maximum extent feasible . . . avoid locating military objectives within or near densely populated areas [and] take the other necessary precautions to protect the civilian population, individual civilians[,] and civilian objects under their control against the dangers resulting from military operations.”<sup>355</sup>

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350. GULF WAR FINAL REPORT, *supra* note 283, app. O, at 702 (describing the attack on the al-Firdus bunker during the Persian Gulf War); *see also* Jones, *supra* note 39, at 271–72 (describing the Iraqi placement of citizens in the Al-firdus bunker).

351. JP 3-60, *supra* note 255, app. E, at E-3 (“An object’s normal use does not automatically determine its status. Even a traditionally civilian object such as a house can be a military target if it is occupied and used by military forces.”). Nevertheless, nations (such as the United States and Israel) will often refrain from striking such civilian objects. *See* GULF WAR FINAL REPORT, *supra* note 283, app. O, at 699 (“When objects are used concurrently for civilian and military purposes, they are liable to attack if there is a military advantage to be gained in their attack.”); Baker, *supra* note 28, at 281 (stating that in the case of the Church of Nativity, the military could have legally attacked the church); Reynolds, *supra* note 20, at 34–35 (describing the U.S. refraining from striking several possible targets).

352. OP LAW HANDBOOK, *supra* note 263, at 14.

353. DINSTEN, *supra* note 295, at 121; Oeter, *supra* note 255, at 186–188. By contrast, military necessity never justifies attacks directed against civilians or civilian objects. FM 27-10, *supra* note 263, ¶¶ 2a, 40a; Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶ 130, at 61 (Nov. 30, 2006).

354. Protocol I, *supra* note 13, art. 51(7).

355. *Id.* art. 58(b)–(c).

In cases where military objectives are located adjacent to civilians or civilian objects, U.S. doctrine—like that of many nations—requires commanders to assess whether the anticipated loss of civilian life, injury to civilians, and damage to civilian property incidental to attacks is disproportionate to the concrete and direct military advantage anticipated from the attack.<sup>356</sup> If the danger to civilians or to civilian objects is not excessive in relation to the military advantage to be gained, the attack is lawful regardless of any incidental loss of civilian life or property.<sup>357</sup> The determination as to whether civilian casualties are excessive is not to be based on hindsight but on the information available to the commander at the time of the attack.<sup>358</sup>

Protocol I recognizes this general principle by regarding as indiscriminate “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>359</sup> Protocol I demands that attacks be cancelled or suspended “if it becomes apparent that . . . the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>360</sup> Moreover, when an attacking force has “a choice . . . between several military objectives for obtaining a similar military advantage, the objective to be selected shall be [the one] . . . expected to cause the least danger to civilian lives and to civilian objects.”<sup>361</sup>

Known as the principle of proportionality, this analysis is related to St. Thomas Aquinas’ “Doctrine of Double Effect”:<sup>362</sup> it is morally

356. JP 3-60, *supra* note 255, at E-1; OP LAW HANDBOOK, *supra* note 263, at 14 (discussing the proportionality requirement); FM 27-10, *supra* note 263, ¶ 41; *see also* UK MANUAL, *supra* note 88, at 86–87 (describing British standards for preventing indiscriminate attacks); Protocol I, *supra* note 13, arts. 57(2)(a)(iii), 57(2)(b) (outlining precautionary measures commanders must take regarding civilian loss); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT’L L. 539, 565 (1997) (arguing for such assessments); Oeter, *supra* note 255, at 135–36 (describing specifically prohibited tactics such as scorching the earth in enemy territory).

357. DINSTEIN, *supra* note 295, at 121; DORMANN, *supra* note 245, at 136.

358. DINSTEIN, *supra* note 295, at 121–22; ROGERS, *supra* note 123, at 97–98, 110–11; Laurie-an D’Alderly, *Proportionality and the Laus of War*, ROYAL AIR FORCE AIR POWER REV., Summer 2005, at 90, 100; Fenrick, *supra* note 356, at 564; *see* 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 264, at 331–34.

359. Protocol I, *supra* note 13, art. 51(5)(b).

360. *Id.* art. 57.2(b).

361. *Id.* art. 57(3).

362. Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 334 n.3 (1989); *see also* Sophie Botros, *An Error About the Doctrine of Double Effect*, 74 PHIL. 71, 72–73 (1999); Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1147 (2008); W. Jason Fisher,

permissible to perform an act having two effects, one good and one evil, provided that the good, which is intended, outweighs the evil, which is merely foreseen.<sup>363</sup> “Double effect is a way of reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity.”<sup>364</sup> Strict adherence to the principles of both distinction and proportionality ensures that the good (military advantage) was intended and the evil (civilian casualties) was both foreseen and not disproportionate to the good achieved.

Little agreement exists about what should be included in the measurement of proportionality or how military actors should weigh competing concerns.<sup>365</sup> “It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants.”<sup>366</sup> Unfortunately, there is no simple equation for weighing civilian casualties against military advantage.<sup>367</sup> What values should be assigned to the military advantage expected and the collateral damages incurred?<sup>368</sup> Should a commander be able to take

*Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 745–46 (2007).

363. Mirko Bagaric & John Morss, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, 29 SUFFOLK TRANSNAT'L L. REV. 157, 174–75 (2006) (discussing the doctrine of double effect); Botros, *supra* note 362, at 72–73; Michael A. Carlino, *The Moral Limits of Strategic Attack*, 22 PARAMETERS 15 (2002); Gregory P. Fletcher, *The Law of War and Its Pathologies*, 38 COLUM. HUM. RTS. L. REV. 517, 534 (2007); Richard Hull, *Deconstructing the Doctrine of Double Effect*, 3 ETHICAL THEORY & MORAL PRAC. 195, 195–96 (2000); Quinn, *supra* note 362, at 335. *See generally* F.M. Kamm, *Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 PHIL. & PUB. AFF. 354, 376–80 (1992) (discussing the doctrine of double-effect).

364. WALZER, *supra* note 1, at 153.

365. FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 49 (2000), available at <http://www.un.org/icty/pressreal/nato061300.htm> [hereinafter BOMBING CAMPAIGN REVIEW].

366. *Id.* ¶ 50.

367. GARDAM, *supra* note 280, at 98 (noting the “inherently subjective and imprecise nature” of the concept of proportionality); *see also* Fellmeth, *supra* note 259, at 489–90 (discussing calculations involving human lives); Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 102 (1982) (discussing proportionality under the Protocol); Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425, 435–36 (1992–1993) (discussing asymmetrical valuation of human life); Schmitt, *supra* note 289, at 151 (discussing valuation paradigms).

368. BOMBING CAMPAIGN REVIEW, *supra* note 365, ¶ 49(a); *see also* Schmitt, *supra* note 289, at 151 (discussing methods of valuation); Jeffrey K. Walker, *Strategic Targeting and International Law: The Ambiguity of Law Meets the Reality of a Single-Superpower World*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, *supra* note 4, at 121, 126 (discussing strategic targeting and the law of war).



into consideration the preservation of the lives of his or her forces?<sup>369</sup> Is the military advantage to be measured by the tactical benefits from a single attack or by an attack's impact on the nation's strategy as a whole?<sup>370</sup> What constitutes excessive loss of civilian life, injury to civilians, and damage to civilian property in relation to the military advantage expected?<sup>371</sup>

Of course, if belligerents conducted their military operations far from civilian population centers, the challenges confronting commanders would be far less vexing. The need to balance military advantage against civilian loss would be diminished, if not eliminated. Ideally, the belligerent choosing the location for its military operations—whether attacking or defending—should be responsible for ensuring that civilians and civilian objects are not in the vicinity of the location selected.

Consider, for purposes of illustration, a Taliban commander who attacks a U.S. military outpost in Afghanistan. He may choose to attack the outpost from unpopulated terrain, or he may opt to use an inhabited village, using houses, shops, and mosques for cover.<sup>372</sup> If he chooses the latter, what are the U.S. commander's options? May the U.S. commander return fire, knowing that civilian casualties will

369. Compare CHRISTOPHER, *supra* note 46, at 155 ("Once we accept that it is part of the ethos of the soldier to behave courageously and to protect innocents, even at the risk of one's own life, then it becomes clear that it is the civilians' lives that must be safeguarded, not the lives of soldiers."), GARDAM, *supra* note 280, at 117 ("[T]he willingness to accept casualties is consistent with good faith in the application of proportionality."), MCKEOGH, *supra* note 48, at 169 ("Civilians ought not to be killed as a side effect of an action to save one's own combatants."), WALZER, *supra* note 1, at 156 ("[I]f saving civilian lives means risking soldier's lives, the risk must be accepted."), Carlino, *supra* note 363, at 20 ("Ultimately, force protection at the expense of noncombatant safety is immoral and contradictory to the achievement of any legitimate end."), Fenrick, *supra* note 356, at 549 (noting that military casualties incurred by the attacker are not considered), and Gross, *supra* note 20, at 472 ("[I]t is not inconceivable that soldiers be required to risk their lives for a moral imperative which directs them to avoid harm to the innocent."), with ROGERS, *supra* note 123, at 20 ("It is suggested . . . that the risk to the attacking forces is a factor to be taken into consideration when applying the proportionality rule."); Fred L. Borch, Targeting After Operation Allied Force: Has the Law Changed for CINCs and Their Planners? 6 (May 14, 2001) (unpublished manuscript, on file with the Naval War College), available at <http://handle.dtic.mil/100.2/ADA392766> ("[I]n targeting a legitimate military objective, an attacker may use methods that safeguard his own forces, provided he otherwise complies with the Law of Armed Conflict.").

370. See JP 3-60, *supra* note 255, at E-1. U.S. doctrine states that the military advantage anticipated from an attack "refer[s] to the advantage anticipated from those actions considered as a whole, and not only from isolated or particular parts thereof. . . . '[M]ilitary advantage' is not restricted to tactical gains, but is linked to the full context of a strategy." *Id.*

371. See *infra* notes 388–95 and accompanying text.

372. This hypothetical is based on a Taliban attack on an American and Afghani Army outpost in Kunar Province on Sunday, July 13, 2008, where the Taliban conducted the attack from a civilian village. See Carlotta Gall, *Nine Americans Die in Afghan Attack*, N.Y. TIMES, July 14, 2008, at A1.

result? After all, the Taliban commander chose the location of the battle, and he elected to place it in a civilian population center. One would think that the Taliban commander, and he alone, is culpable of any resulting adverse collateral effects on civilians and their property.<sup>373</sup>

Under Protocol I, however, regardless of the Taliban's manifest disregard for international humanitarian law's prohibition against using civilians to shield its military operations, the U.S. commander—not the Taliban leadership—is ultimately responsible for avoiding excessive civilian casualties.<sup>374</sup> The presence of Taliban fighters does not deprive the civilian population of its civilian character.<sup>375</sup> Under the dual doctrines of distinction and proportionality, the U.S. commander may return fire, but he is still obligated to limit his attack to military targets and to avoid civilian casualties that are excessive in relation to the gained military advantage.<sup>376</sup> Indeed, the U.S. commander would commit a grave breach of the Protocol if the response to the Taliban is later deemed to have caused excessive civilian casualties or damage to civil objects,<sup>377</sup> while the Taliban's deliberate attempt to place civilians at risk does not constitute such a breach.<sup>378</sup>

How then does the U.S. commander respond? If he asks for artillery or air support, the likelihood is that civilians will be killed and their property damaged or destroyed. If he responds with ground forces (assuming the capability), he may be able to diminish the number of civilian casualties but only at the cost of the lives of his

373. Jones, *supra* note 39, at 272; Parks, *supra* note 6, at 163.

374. See Protocol I, *supra* note 13, art. 51(8) (discussing the continuing legal obligations of the parties with respect to the civilian population and civilians even if the Protocol is violated); Gasser, *supra* note 325, at 246.

375. See Protocol I, *supra* note 13, art. 50(3) ("The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."); see also Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶¶ 136, 144 (Nov. 30, 2006) (holding that populations may keep their civilian character despite presence of combatants).

376. See Protocol I, *supra* note 13, art. 51(8) (discussing the continuing legal obligations of the parties towards the civilian population and civilians in the event of a violation of the Protocol); D'Alderly, *supra* note 358, at 99; Gross, *supra* note 20, at 455 (describing the situation where one party intentionally places a civilian population close to a military installation).

377. See Protocol I, *supra* note 13, art. 85(3)(b) (discussing attacks that are considered grave breaches of the Protocol).

378. See ROGERS, *supra* note 123, at 128 (stating that the failures both "to take precautions against the effects of attacks" and by a party to "distinguish at all times between civilian objects and military objects" are not grave breaches, and that "a state could almost with impunity carry out a policy of using the civilian population as a shield" while this would be "no defence to an attacker charged with causing excessive loss of human life"). On the other hand, although it is primarily concerned with the conduct of the attacker, the Rome Statute of the International Criminal Court deems a war crime the use of civilians "to render certain areas, points, or military forces immune from military operation." Rome Statute, *supra* note 26, art. 8(2)(b)(xxiii).

soldiers. Thus, the enemy's intentional breach of international humanitarian law places the U.S. commander on the horns of a dilemma: risk either the lives of civilians placed in danger by his adversary or the lives of his own soldiers.<sup>379</sup> If he chooses the former option, he risks international condemnation and a war crimes prosecution;<sup>380</sup> if he selects the latter, he degrades the capability of his unit, which will likely weaken domestic support for the operation.<sup>381</sup>

Most commentators seemingly accept the principle that soldiers must sometimes risk their lives to save the lives of civilians.<sup>382</sup> In a conflict between belligerents who reciprocate in their adherence to international humanitarian law, the principle is unremarkable. However, must the U.S. commander expose the lives of his soldiers when his adversary has deliberately placed civilians at risk in a purposeful effort to increase U.S. casualties? If so, how many soldiers must he be willing to lose? Carried to its logical conclusion, the question is whether a nation is willing to risk military defeat because of an adversary's readiness to place a civilian population at risk.<sup>383</sup>

Whatever course of action the commander chooses, the insurgent or terrorist group wins. The group places itself among the civilian population not only for self-preservation but also in order to increase the likelihood that civilians will be killed by the attacking force, thereby reaping a propaganda advantage in the conflict.<sup>384</sup> All the

379. Of course, the U.S. commander has a third option: retreat or surrender. See generally WESLEY K. CLARK, *WAGING MODERN WAR* 436–38 (2001) (discussing the various considerations that a military leader must encounter in a modern context).

380. See Rome Statute, *supra* note 26, art. 8(2)(b)(iv) (discussing serious violations of the laws and customs of armed conflict); see also *supra* notes 26–28 and accompanying text.

381. See CLARK, *supra* note 379, at 436–37 (discussing the Vietnam experience and its impact on the American public's response to military casualties); Robert Cryer, *The Fine Art of Friendship: Jus In Bello in Afghanistan*, 7 J. CONFLICT & SECURITY L. 37, 47 (2002) (noting that zero-casualty warfare helps build domestic support); Herman Reinhold, *Target Lists: A 1923 Idea with Applications for the Future*, TULSA J. COMP. & INT'L L. 1, 28–29 (2002) (noting the public unwillingness to accept military or civilian deaths); Rogers, *supra* note 307, at 127–28 (discussing the public sentiment that casualties be reduced to the maximum extent possible); Ronald C. Santopadre, Note, *Deterioration of Limits on the Use of Force and Its Perils: A Rejection of the Kosovo Precedent*, 18 ST. JOHN'S J. LEGAL COMMENT. 369, 403–04 (2003) (discussing the popular domestic support for the Kosovo war). *But cf.* ERIC V. LARSON, *CASUALTIES AND CONSENSUS: THE HISTORICAL ROLE OF CASUALTIES IN DOMESTIC SUPPORT FOR U.S. MILITARY OPERATIONS* 7–8, 49–50 (1996) (arguing that although casualties are an important consideration in domestic support, “when important interests and principles have been at stake, the public has been willing to tolerate rather high casualties”).

382. See *supra* note 369.

383. See Gross, *supra* note 20, at 473 (“Endangering our own forces to avoid injury to civilians, but consequently failing to harm the sinners, allows the sinners to reap the benefit of their sins.”).

384. For example, during its 2006 war with Israel, Hezbollah constructed a “broad military infrastructure” within populated areas in Lebanon to minimize

better if the group is able to ensure the degradation or destruction of the attacking force. Often, such groups are able to accomplish both objectives, as Israel learned in the Battle of Jenin in 2002, when it attacked PLO militants entrenched in civilian areas using ground forces (instead of artillery and air strikes).<sup>385</sup> Israel lost twenty-three soldiers in the process and still suffered the censure of the international community, which accused Israel (falsely as it was later discovered) of committing a massacre.<sup>386</sup>

If a commander decides to attack a military objective, he or she must, of course, ensure that the expected civilian casualties are not excessive as compared to the potential military advantage. Protocol I does not define what constitutes excessive casualties, and considerable disagreement exists as to what the term encompasses.<sup>387</sup> Clearly, however, “excessive” does not mean “any.”<sup>388</sup> Adopting such an interpretation would give insurgent and terrorist groups situated in civilian areas an absolute immunity from attack since such an attack would unquestionably endanger civilian lives.

To a country like Israel, defining “excessive” as “any” is particularly unpalatable. When groups like Hamas or Hezbollah strike Israeli civilians from Palestinian or Lebanese population centers,<sup>389</sup> Israel would be defenseless since any attack against the militants would necessarily risk the lives of Palestinian or Lebanese civilians. Thus, such a construction of the term excessive essentially sanctions the murder of one group of innocent civilians to save another.<sup>390</sup>

Hezbollah’s vulnerability from attack and to gain “a propaganda advantage if it could represent Israel as attacking innocent civilians.” ERLICH, *supra* note 348, at 6; *see also* CORDESMAN, *supra* note 312, at 2 (discussing the use of civilians as human shields); ROGERS, *supra* note 123, at 126–27; Gross, *supra* note 20, at 467 (discussing moral dilemmas and the responsibility to protect citizens).

385. *See* Baker, *supra* note 28, at 277–79 (describing the Jenin battle).

386. *See* Baker, *supra* note 28, at 277–80 (describing the accusations against the Israeli army); Gross, *supra* note 20, at 499–506 (discussing the Israeli situation); *supra* notes 389–405 and accompanying text; *infra* notes 413–35 and accompanying text; *see also* Barakeh v. Minister of Defence, HC 3114/02 (Apr. 14, 2002), ¶ 11, *available at* [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/4/Evacuation%20of%20bodies%20in%20Jenin-%20Decision%20of%20the%20Sup](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/4/Evacuation%20of%20bodies%20in%20Jenin-%20Decision%20of%20the%20Sup) (“A massacre is one thing. A difficult battle is something else.”).

387. *See generally* Protocol I, *supra* note 13 (failing to define excessive casualties).

388. *See, e.g.*, Fenrick, *supra* note 356, at 545–46 (discussing how to apply the principle of proportionality). Some commentators argue that any foreseeable civilian casualties are unjust. MCKEOGH, *supra* note 48, at 170, 172.

389. *See, e.g.*, ERLICH, *supra* note 348, at 42–44 (discussing the Hezbollah practice of firing rockets from populated areas); Rory McCarthy, *Hamas Rockets Bring Israeli City in Range*, GUARDIAN, Mar. 5, 2008, *available at* <http://www.guardian.co.uk/world/2008/mar/05/israelandthepalestinians> (discussing rockets fired from Gaza).

390. Gross, *supra* note 20, at 468 (noting the moral reprehensibility of a state choosing to remain indifferent to the risks posed to its own civilians); *see also* Fischer, *supra* note 38, at 490 (discussing anticipated self-defense targeted killings).

Instead, by its terms, Protocol I necessarily envisions that some civilian casualties may result from an attack on a legitimate military objective.<sup>391</sup> Based on the language of the Protocol, the excessiveness of civilian casualties is tied directly to the importance of the military objective—the more important the military target, the more civilian casualties that may be justified. Thus, the term excessive cannot be numerically defined without reference to the importance of the military advantage to be achieved.<sup>392</sup>

The ICRC takes the position that “excessive” means “extensive”;<sup>393</sup> however, this interpretation is wholly inconsistent with the express language of the Protocol, which unquestionably seeks to balance potential civilian losses against the military advantage anticipated from an attack.<sup>394</sup> As Major General A.P.V. Rogers has noted, the ICRC’s interpretation “makes nonsense of the rule of proportionality, the whole idea of which is to achieve a balance between the military advantage and the incidental loss.”<sup>395</sup>

Moreover, aside from the sheer difficulty in defining what is meant by “extensive,” such a construction would serve as an incentive to insurgent and terrorist organizations to increase the number of civilians likely to be killed, thereby deterring an attack or subjecting their adversaries to war crimes prosecutions.

391. DINSTEIN, *supra* note 295, at 121; DORMANN, *supra* note 245, at 136; GARDAM, *supra* note 280, at 98; Gasser, *supra* note 325, at 248–49 (explaining the need for the “pragmatic acceptance of reality,” that the law “takes into account such losses and damage as incidental consequences of (lawful) military operations”).

392. See generally DINSTEIN, *supra* note 295, at 121 (noting considerations to use in determining whether an attack is proportionate); D’Alderly, *supra* note 358, at 97 (same); Fenrick, *supra* note 356, at 565 (discussing factors relevant to a finding of proportionality).

393. Pilloud & Pictet, *supra* note 298, at 626.

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 . . . and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive[.]

*Id.*

394. Protocol I, *supra* note 13, art. 51(5) (“[T]he following types of attacks are to be considered as indiscriminate: . . . an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” (emphasis added)).

395. ROGERS, *supra* note 123, at 21; see also DINSTEIN, *supra* note 295, at 120–21 (discussing the principle of proportionality).

## IV. USING COMPLIANCE WITH THE LAW OF WAR AS A MILITARY TACTIC

Professors Jack Goldsmith and Eric Posner posit that “[s]tates do not comply with CIL [customary international law] because of a sense of moral or legal obligation; rather CIL emerges from the states’ pursuit of self-interested policies on the international stage.”<sup>396</sup> In other words, “[n]ations do not act in accordance with a norm that they feel obligated to follow; they act because it is in their interest to do so. The norm does not cause the nations’ behavior; it reflects their behavior.”<sup>397</sup> A state’s interest will either be internally motivated or result from coercion by another state.<sup>398</sup>

There is no reason to suspect that insurgent or terrorist groups behave any differently than nations; they conform to those standards that best meet their interests and accomplish their goals.<sup>399</sup> Insurgents and terrorists use civilian populations as essential components of their military operations because the tactic works. These groups cannot meet Western militaries head on and survive;<sup>400</sup> rather, they depend upon their adversaries’ adherence with international humanitarian norms, believing that the presence of civilians will either force their enemies to restrict the employment of technologically advanced weapons systems (such as air power) or to avoid targeting the groups altogether.<sup>401</sup> Moreover, the presence of civilians not only affords a degree of protection to insurgent and terrorist groups but also serves other military and political objectives.<sup>402</sup> If the groups are attacked, any resulting civilian casualties becomes a *cause célèbre*, dutifully reported and condemned

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396. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115 (1999).

397. *Id.* at 1132.

398. *Id.* at 1133.

399. Mathew V. Ezzo & Amos N. Guiora, *A Critical Decision Point on the Battlefield—Friend, Foe, or Innocent Bystander* 22 (Univ. of Utah Legal Studies Research Paper Series, Research Paper No. 057-08-03, 2008), available at <http://ssrn.com/abstract=1090331> (quoting Moshe Yaalon of the Washington Post, on August 3, 2006, who stated: “Terrorists are fanatics, but they are not idiots. If the terrorist tactic of using human shields helps them achieve their goals, they will utilize it. If it undermines their goals, they will abandon it.”).

400. See Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 U.S. AIR FORCE ACAD. J. LEGAL STUD. 71, 73 (1998) (discussing American military opponents and their employment of methods antithetical to recognized behavior in war); *supra* note 247.

401. Gross, *supra* note 20, at 447; Schmitt, *supra* note 245, at 14–15, 18; Dakota S. Rudesill, Note, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT’L L. 517, 537 (2007).

402. CORDESMAN, *supra* note 312, at 2–3; Gross, *supra* note 20, at 456.

by the media, NGOs, and often the UN.<sup>403</sup> In short, insurgents and terrorists have no reason *not* to place civilians at risk.<sup>404</sup>

Several examples illustrate this hypothesis.

#### A. *al-Amariyah (al-Firdos Bunker) 1991*

During the 1991 Persian Gulf War, U.S. aircraft struck a converted air-raid shelter in Baghdad known to contain an Iraqi command and control center; however, unknown to the United States, the bunker also doubled at night as a civilian bomb shelter.<sup>405</sup> The attack killed between 200 and 300 civilians.<sup>406</sup> Iraqi officials immediately exploited the propaganda value of the attack<sup>407</sup> and were rewarded with worldwide condemnation of the United States' action.<sup>408</sup> Lost in the furor of the attack was Iraq's willingness to callously disregard its own obligations under the law of war by placing civilians in a legitimate military objective.<sup>409</sup>

403. See *supra* note 28 and accompanying text; see *infra* notes 407–08, 426–32, 439, 450–57, 488–96, and accompanying text.

404. See ROGERS, *supra* note 123, at 128 (explaining how military planners will be less concerned about “civilians who aid the war effort . . . or who have volunteered to act as human shields” and how the “failure to take precautions against the effects of attacks is not a grave breach”); cf. Kahn, *supra* note 367, at 437 (noting the perverse incentive to use civilian hostages to shield military and industrial installations). Such groups will wage what Major General Charles Dunlap has termed a “neo-absolutist” war, a conflict “without rules or scruples.” Dunlap, *supra* note 400, at 73. The focus of such a conflict is not the enemy's military forces, but its will to fight, “using methods that defy recognized standards of acceptable behavior in war.” *Id.*; see also Rabkin, *supra* note 15, at 195 (discussing the advantages of placing civilians near presumptive military targets).

405. GULF WAR FINAL REPORT, *supra* note 283, at 702; Michael A. O'Halloran, A Kill Is a Kill: Asymmetrically Attacking U.S. Airpower 24 (June 1999) (unpublished thesis, presented to the faculty of the School of Advanced Airpower Studies), available at <http://www.au.af.mil/au/awc/awcgate/saas/ohalloran.pdf>3. See generally Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT'L L.J. 1, 41 (2002) (describing the bunker incident).

406. Shotwell, *supra* note 28, at 33.

407. See Austin & Kolenc, *supra* note 27, at 326 (describing claims made by Iraqi sources).

408. Saby Ghoshray, *When Does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679, 697 (2008); O'Halloran, *supra* note 405, at 25.

409. Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 482 (2004); see, e.g., Ghoshray, *supra* note 408, at 697 (focusing solely on the U.S. responsibility to avoid indiscriminate and disproportionate civilian deaths while not mentioning Iraq's obligation to avoid placing civilians in a military facility). Some human rights groups have recognized Iraq's responsibilities but still suggest that the U.S. should have known of the facility's use as a civilian air-raid shelter. See HUMAN RIGHTS WATCH, *NEEDLESS DEATHS IN THE GULF WAR*, ch. 3, § D (1991), available at <http://www.hrw.org/reports/1991/gulfwar/CHAP3.htm> (discussing the bombing).

“Although the attack may have resulted in unfortunate civilian deaths, there was no law of war violation because the attackers acted in good faith based upon the information reasonably available at the time the decision to attack was made.”<sup>410</sup> Regardless, Iraq achieved a military advantage by violating international humanitarian law: the international outcry prompted a change in U.S. targeting strategy, which thereafter avoided bombing Baghdad.<sup>411</sup> As Major General Charles Dunlap observed, “The United States response to the unexpected results of the Al Firdos bombing quite obviously suggests to some opponents a cheap and reliable method of defending against U.S. strikes: cover the target with noncombatants.”<sup>412</sup>

### B. Jenin 2002

Beginning in September 2000, after the breakdown of Israeli–Palestinian peace talks, Israel civilians became the target of a series of deadly terrorist attacks.<sup>413</sup> The trigger for this *Al-Aqsa Intifada* was a visit by then-Member of the Knesset Ariel Sharon to the Temple Mount in Jerusalem.<sup>414</sup> Following a March 27, 2002, suicide bombing of a Passover Seder in Netanya, Israel, in which thirty people were killed and 120 wounded,<sup>415</sup> Israel commenced Operation Defensive Shield against Palestinian militants on the West Bank.<sup>416</sup>

The UN Refugee and Works Agency (UNRWA) camp in Jenin was a center of Palestinian militant activity and had been the staging area for several suicide attacks on Israel.<sup>417</sup> An internal Fatah report

410. Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 352 (2007); see also Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AM. J. INT'L L. 481, 504 (2003) (asserting that the military was correct in its determination that it had a legitimate target).

411. Austin & Kolenc, *supra* note 27, at 326, 330; Reynolds, *supra* note 20, at 33–34; O'Halloran, *supra* note 405, at 25. Major O'Halloran notes that, while the media condemned the attack on the bunker, Iraq continued to fire Scud missiles indiscriminately throughout the region. O'Halloran, *supra* note 405, at 25.

412. Dunlap, *supra* note 400, at 78 (footnote omitted).

413. The Secretary General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/10*, ¶ 14, U.N. Doc. A/ES-10/186 (July 30, 2002), available at <http://www.un.org/peace/jenin/index.html> [hereinafter Report of the Secretary-General].

414. SHARM EL-SHEIKH FACT-FINDING COMMITTEE, THE MITCHELL PLAN (2001), [http://avalon.law.yale.edu/21st\\_century/mitchell\\_plan.asp](http://avalon.law.yale.edu/21st_century/mitchell_plan.asp).

415. Press Release, Israel Ministry of Foreign Affairs, Passover Suicide Bombing at Park Hotel In Netanya, (Mar. 27, 2002), available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/3/Passover%20suicide%20bombing%20at%20Park%20Hotel%20in%20Netanya](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/3/Passover%20suicide%20bombing%20at%20Park%20Hotel%20in%20Netanya).

416. Report of the Secretary-General, *supra* note 413, ¶ 23.

417. Press Release, Israel Ministry of Foreign Affairs, Jenin's Terrorist Infrastructure (Apr. 4, 2002), available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/4/Jenin-s%20Terrorist%20Infrastructure%20-%204-Apr-2002](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/4/Jenin-s%20Terrorist%20Infrastructure%20-%204-Apr-2002); see also Matt Rees, *The Battle of Jenin*, TIME, May 13, 2002, available at



in September 2001 referred to Jenin as “the capital of the suicides.”<sup>418</sup> On April 3, 2002, the Israeli Defense Force (IDF) entered Jenin and faced booby-trapped buildings and entrenched Palestinian militants.<sup>419</sup> Although the majority of civilians had fled and the IDF warned others to do so, civilians remained in the camp.<sup>420</sup>

A battle ensued.<sup>421</sup> “It was real urban warfare, as a modern, well-equipped army met an armed and prepared group of guerrilla fighters intimately familiar with the local terrain.”<sup>422</sup> Rather than using airpower or artillery, the Israelis fought house-to-house with ground troops.<sup>423</sup> By their own admission, Palestinian militants employed civilians in the battle in such tasks as preparing and concealing explosives and luring Israeli soldiers into traps.<sup>424</sup> In the resulting melee, twenty-three Israeli soldiers and over fifty Palestinians were killed; more than half the Palestinian dead were combatants.<sup>425</sup>

<http://www.time.com/time/2002/jenin/story.html> (discussing the battle for Jenin). UNRWA apparently permitted—or at least did not attempt to stop—such activity even though the UN prohibits the use of refugee camps under its jurisdiction for military purposes. Baker, *supra* note 28, at 277; *see also* S.C. Res. 1296, ¶ 14, U.N. Doc. S/Res/1296 (Apr. 19, 2000) (inviting the Secretary-General to bring his attention to the refugee situation); Arlene Kushner, *Fatal Approach*, NAT’L REV. ONLINE, Mar. 30, 2004, <http://www.nationalreview.com/comment/kushner200403300906.asp> (discussing the U.N. relationship with Hamas); *cf.* S.C. Res. 1208, ¶¶ 3, 6, U.N. Doc. S/Res/1208 (Nov. 19, 1998) (stressing the need to demilitarize refugee camps in Africa).

418. Gross, *supra* note 20, at 500 (quoting Ronen Bergman, *The Rais Will Sign and Authorize*, YEDIOTH AHRONOT, July 12, 2002).

419. Baker, *supra* note 28, at 279; Gross, *supra* note 20, at 500–01.

420. Report of the Secretary-General, *supra* note 413, ¶¶ 50–51; Gross, *supra* note 20, at 500.

421. *Barakeh v. Minister of Defence*, HC 3114/02 (Apr. 14, 2002); Paul Belden, *A Street Fight Called Jeningrad*, ASIA TIMES ONLINE, Apr. 9, 2003, [http://www.atimes.com/atimes/Middle\\_East/ED09Ak04.html](http://www.atimes.com/atimes/Middle_East/ED09Ak04.html).

422. Rees, *supra* note 417. The Arab media touted the battle, claiming large Israeli losses. THE MIDDLE EAST MEDIA RESEARCH INSTITUTE, THE PALESTINIAN ACCOUNT OF THE BATTLE OF JENIN (2002), available at [http://www.memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA9002#\\_edn2](http://www.memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA9002#_edn2) [hereinafter MEMRI PALESTINIAN ACCOUNT].

423. Baker, *supra* note 28, at 279; Gross, *supra* note 20, at 501; Rees, *supra* note 417.

424. MEMRI PALESTINIAN ACCOUNT, *supra* note 422 (quoting AL-SHARQ AL-AWSAT (London), April 7, 2002 and AL-AHRAM WEEKLY (Egypt), Apr. 2002); Gross, *supra* note 20, at 501. Throughout the Intifada, Palestinians frequently employed civilians (including children) in hostile engagements with Israelis. *See ANTI-DEFAMATION LEAGUE, ANATOMY OF ANTI-ISRAELI INCITEMENT: JENIN, WORLD OPINION AND THE MASSACRE THAT WASN’T 17* (2002), available at <http://www.adl.org/Israel/jenin/jenin.pdf> [hereinafter ANATOMY OF ANTI-ISRAELI INCITEMENT] (discussing the use of young boys as suicide bombers); Gross, *supra* note 20, at 500 (discussing the use of civilians); Justus R. Weiner, *Coexistence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 BROOK. J. INT’L L. 591, 678 (2000).

425. Report of the Secretary-General, *supra* note 413, ¶ 57; Baker, *supra* note 28, at 279; Rees, *supra* note 417.

The Palestinians immediately accused Israel of a massacre in Jenin—a myth initially echoed by the UN, NGOs, and international media.<sup>426</sup> Although the UN later admitted that there had been no massacre,<sup>427</sup> it nevertheless placed blame almost exclusively on the IDF, virtually ignoring the Palestinians' obligations under the law of war to distinguish combatants from civilians and to avoid conducting military operations from civilian population areas.<sup>428</sup> The UN General Assembly passed a resolution condemning Israel alone for the battle while failing to mention Palestinian violations of international humanitarian law.<sup>429</sup> The UN Commission on Human Rights focused exclusively on alleged Israeli violations of international law, ignoring completely the Palestinian terrorist attacks leading to the Battle of Jenin and the actions of Palestinian

426. Report of the Secretary-General, *supra* note 413, Annex III (asserting in a note *verbale* dated 2 July 2002 from the Permanent Mission of Jordan to the United Nations and addressed to the Secretary-General that a massacre had occurred in Jenin); ANATOMY OF ANTI-ISRAELI INCITEMENT, *supra* note 428, at 1, 30; Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 343–45 (2004) (noting that NGOs—including Amnesty International—falsely implied that a massacre had occurred at Jenin); *see also* David Horowitz, *Jenin 'Horror Beyond Belief,' Says UN Envoy*, IRISH TIMES, Apr. 19, 2002, at 1 (demonstrating the press response); Press Release, Commission on Human Rights, Mary Robinson Submits Status Report on Planned Mission to Middle East, (Apr. 15, 2002), *available at* <http://domino.un.org/UNISPAL.NSF/fd807e46661e3689852570d00069e918/fee76d2b65d5da9c85256b9d00577947!OpenDocument> (restating Palestinian claims of a massacre in Jenin). The myth of a massacre was also reflected in a 2002 award-winning documentary, *Jenin Jenin*.

427. *See* Report of the Secretary-General, *supra* note 413, ¶ 56; *see also* Marcus Gee, *What Really Happened? The Myth of Jenin Grows*, GLOBE & MAIL, Apr. 27, 2002, at A17 (questioning the validity of the massacre theory); Paul Wood, “No Jenin Massacre” Says Rights Group, BBC NEWS, May 3, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/1965471.stm](http://news.bbc.co.uk/2/hi/middle_east/1965471.stm) (discussing media reports refuting the massacre); *Expert Weighs Up Jenin “Massacre,”* BBC NEWS, Apr. 29, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/1957862.stm](http://news.bbc.co.uk/2/hi/middle_east/1957862.stm) (describing an interview with a British military official who also refutes the existence of a massacre).

428. *See* Report of the Secretary-General, *supra* note 413, ¶ 53; Press Release, Report of Secretary-General on Recent Events in Jenin, Other Palestinian Cities, U.N. Doc. SG/2077 (Jan. 8, 2002) (dealing entirely with asserted Israeli misconduct during the battle and only briefly referring to reports that armed Palestinian groups resisted the Israeli assault and allegedly widely booby-trapped civilian homes, which placed civilians in danger).

429. G.A. Res. 10/10, U.N. Doc. A/Res/ES-10/10 (May 14, 2002); *see also* Rob Watson, *UN Condemns Israel over Jenin*, BBC NEWS, May 8, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/1974389.stm](http://news.bbc.co.uk/2/hi/middle_east/1974389.stm) (discussing the General Assembly resolution). The resolution also denounced Israel for its siege of the Church of the Nativity, failing to mention that Palestinian militants had sought shelter from attack in the Church. G.A. Res. 10/10, U.N. Doc. A/Res/ES-10/10 (May 14, 2002); *see also* Baker, *supra* note 28, at 279–80 (discussing the United Nations reaction to the incident).

militants inside the camp that contributed to—if not caused—the civilian casualties.<sup>430</sup>

Similarly, reports from NGOs such as Amnesty International and Human Rights Watch concentrated on alleged Israeli violations of international humanitarian law while effectively ignoring the fact that, by their action, Palestinian militants placed the civilian population of the camp in danger.<sup>431</sup> The media also served as instruments for Palestinian propaganda, condemning the IDF for its actions in Jenin.<sup>432</sup>

Unquestionably, those areas of the camp used by Palestinian militants—either as launching grounds for attacks on Israel or in defense—were legitimate military objectives. In “stark contrast” to the damage at Jenin, no civilian casualties or destruction of civilian property occurred in Palestinian areas where there was no armed

430. U.N. Comm'n on Human Rights, Res. 2002/1, *Situation of Human Rights in the Occupied Palestinian Territories*, UN Doc. E/CN.4/RES/2002/1 (Apr. 5, 2002). The same day, the UN High Commissioner for Human Rights, Mary Robinson, issued a statement focused solely on the plight of the Palestinians. Press Release, United Nations, High Commissioner for Human Rights, Daily Press Briefing by the Office of the Spokesman for the Secretary-General (Feb. 4, 2002), available at <http://domino.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/8c45c8ddfe8067a185256b8f00751169?OpenDocument>. A subsequent Human Rights Commission resolution likewise dealt solely with claims of Israeli violations of international law. U.N. Comm'n on Human Rights, Res. 2002/8, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, U.N. Doc. E/2002/23-E/CN.4/2002/200 (Apr. 15, 2002).

431. AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES SHIELDED FROM SCRUTINY: IDF VIOLATIONS IN JENIN AND NABLUS (2002), available at <http://www.amnesty.org/en/library/asset/MDE15/143/2002/en/dom-MDE151432002en.html>; PETER BOUCKAERT, HUMAN RIGHTS WATCH, ISRAEL, THE OCCUPIED WEST BANK AND GAZA STRIP, AND THE PALESTINIAN AUTHORITY TERRITORIES (2002), available at <http://hrw.org/reports/2002/israel3/israel0502.pdf>; see also ANATOMY OF ANTI-ISRAELI INCITEMENT, *supra* note 424, at 8–10 (discussing the use of civilians).

432. ANATOMY OF ANTI-ISRAELI INCITEMENT, *supra* note 424, at 13–16; Richard Starr, *The Big Jenin Lie*, WKLY. STANDARD, May 8, 2002, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/001/218vnicq.asp>; see, e.g., Ian Black, *Israel Faces Rage Over "Massacre"*, GUARDIAN, Apr. 17, 2002, available at: <http://www.guardian.co.uk/world/2002/apr/17/israel2>; Dalya Dajani, *UNICEF Acts to Help Jenin's Children Cope with Invasion Aftermath*, MIDDLE E. NEWS ONLINE, Apr. 23, 2002; Suzanne Goldenberg, *The Lunar Landscape that was the Jenin Refugee Camp*, GUARDIAN, Apr. 16, 2002, available at <http://www.guardian.co.uk/world/2002/apr/16/israel.readersyear>; Laura King, *Death Toll is Mystery in Rubble of Palestinian Refugee Camp It Could Be Dozens. It Could be Thousands. About 3,000 are Believed Missing*, AKRON BEACON J., Apr. 17, 2002, at A9; Steve McKenzie & Susan Severeid, *Massacre Probe UN Search the Refugee Camp Where 500 Are Feared Dead*, SUNDAY MAIL (Scotland), Apr. 21, 2002, at 8; Alan Philps, *Ravage of Jenin Is Horrific, says UN Envoy*, DAILY TELEGRAPH, Apr. 18, 2002, available at <http://www.telegraph.co.uk/news/1391287/Ravage-of-Jenin-is-horrific,-says-UN-envoy.html>; Phil Reeves, *Amid the Ruins of Jenin, the Grisley Evidence of a War Crime*, INDEPENDENT (London), Apr. 16, 2002, available at [http://findarticles.com/p/articles/mi\\_qn4158/is\\_jai\\_n12621346](http://findarticles.com/p/articles/mi_qn4158/is_jai_n12621346); Philip Smucker, *Arabs Seize "Jenin" as Rallying Cry*, CHRISTIAN SCI. MONITOR, Apr. 17, 2002, at 1.

resistance.<sup>433</sup> Thus, the Palestinians who turned Jenin into “a deathtrap” certainly did not do so to protect the civilian population, who would not have been the subject of attack if the militants had not been there.<sup>434</sup> The response to the Battle of Jenin reflects the one-sided application of international humanitarian law in conflicts between Western militaries and insurgent or terrorist groups,<sup>435</sup> as well as the indifference of the international community to the risks to which such groups expose civilians.

### C. Fallujah 2004

Following the killing and mutilation of four U.S. civilian contractors,<sup>436</sup> U.S. Marines and Iraqi forces assaulted the predominantly Sunni Iraqi city of Fallujah, engaging in battles with insurgents intermingled among the civilian population that led to the deaths of civilians.<sup>437</sup> Despite the fact that the Marines did not intentionally target civilians,<sup>438</sup> criticism of the U.S. assault was widespread.<sup>439</sup> Much of the criticism—then as well as today—has consisted of a one-sided condemnation of the United States for causing the deaths of civilians that fails to ascribe any responsibility to the insurgents who chose to conduct their campaign from a civilian population center.<sup>440</sup> For a time, U.S. forces withdrew from the

433. ANATOMY OF ANTI-ISRAELI INCITEMENT, *supra* note 424, at 19.

434. Gross, *supra* note 20, at 502.

435. *See id.* at 503 (discussing the response to the battle).

436. Maxwell & Meyer, *supra* note 317, at 1.

437. Colin H. Kahl, *How We Fight*, FOREIGN AFF., Nov.–Dec. 2006, at 83, 93.

By November 2004, Fallujah had become the most heavily fortified and dangerous place on earth. There were more than 5,000 terrorists, 500 weapons caches, [twenty-seven] factories building improvised explosive devices[,] and two factories constructing vehicle-borne improvised explosive devices. Terrorist leaders such as Abu Musab Zarqawi moved in and out of Fallujah.

John A. Weil, *The Battle for Fallujah: One Soldier's Memoir*, ARIZ. ATT'Y., July–Aug. 2005, at 13, 14.

438. Kahl, *supra* note 437, at 92–93; Jeffrey Gettleman, *The Struggle for Iraq: Insurgents; Marines Use Low-Tech Skill To Kill 100 in Urban Battle*, N.Y. TIMES, Apr. 15, 2004, at A8.

439. Kahl, *supra* note 437, at 93; John Kifner & Ian Fisher, *The Struggle for Iraq: Siege; U.S. Weighs Falluja Pullback, Leaving Patrols to Iraq Troops*, N.Y. TIMES, Apr. 30, 2004, at A1.

440. *See, e.g.*, Ghoshray, *supra* note 408, at 704–06 (discussing the ethical dimension of Fallujah); Jonathan Steele & Dahr Jamail, *This Is Our Guernica*, GUARDIAN, Apr. 27, 2005, available at <http://www.guardian.co.uk/world/2005/apr/27/iraq.iraq5> (criticizing the Fallujah attack); Richard Hoffman, *Fallujah and the Laws of War*, WORLD SOCIALIST WEB SITE, Nov. 24, 2004, <http://www.wsws.org/articles/2004/nov2004/fall-n24.shtml> (last visited Mar. 22, 2008) (describing the killing of civilians at Fallujah as gross and deliberate); Press Release, Iraq Body Count, No Longer Unknowable: Falluja's April Civilian Toll is 600 (Apr. 26, 2004), available at

city,<sup>441</sup> which became a base for Sunni insurgents and al-Qaeda terrorists.<sup>442</sup> The terrorists achieved a military victory—although fleeting—by hiding behind the civilian population and counting on international opinion to curtail U.S. military operations against them.

#### D. Israel-Hezbollah Conflict 2006

On July 12, 2006, Hezbollah fighters ambushed an IDF convoy in Israel, killing eight soldiers and kidnapping two others.<sup>443</sup> The attack triggered a month-long war between Israel and Hezbollah. Despite a prior UN Security Council resolution demanding Hezbollah's disarmament,<sup>444</sup> Hezbollah benefited from an extensive defensive infrastructure—including fortified sites and underground storage facilities—that it had constructed in southern Lebanon following Israel's withdrawal from the country in 2000.<sup>445</sup> Hezbollah also received a great number and variety of rockets and missiles from Iran and Syria that were able to strike Israeli population centers.<sup>446</sup> During the conflict, it fired between 4,000 and 5,000 of its rockets and missiles into Israel.<sup>447</sup>

Hezbollah's intentional targeting of Israeli civilians plainly violated international humanitarian law.<sup>448</sup> Hezbollah also contravened the law by (1) embedding its military infrastructure into Lebanese Shiite communities, (2) failing to differentiate its combatants from the surrounding civilians, and (3) locating its armaments in and conducting its military operations from civilian areas.<sup>449</sup> Virtually all of the international community's wrath, however, was directed at Israel, which—in targeting military objectives—caused incidental losses of civilian life, a result that is not surprising given Hezbollah's use of civilian population centers for

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<http://www.iraqbodycount.org/analysis/reference/press-releases/9/> (presenting death statistics).

441. Kahl, *supra* note 437, at 93–94.

442. *Id.* at 94.

443. Bloom, *supra* note 336, at 62.

444. S.C. Res. 1559, ¶ 3, U.N. Doc. S/Res/1559 (Sept. 2, 2004); *see also* Burke-White & Bell, *supra* note 337, at 84 (noting that the 2006 Security Council Resolution calling for disarmament of Hezbollah was not enforced).

445. ERLICH, *supra* note 348, at 23; JEREMY M. SHARP ET AL., CONGRESSIONAL RESEARCH SERVICE, *LEBANON: THE ISRAEL-HAMAS-HEZBOLLAH CONFLICT 10* (2006), available at <http://www.fas.org/spp/crs/mideast/RL33566.pdf>.

446. SHARP ET AL., *supra* note 445, at 10–11. Evidence suggests that Iran instigated Hezbollah's attack on Israel. Petty, *supra* note 336, at 197.

447. SHARP ET AL., *supra* note 445, at 10–11.

448. Protocol I, *supra* note 13, art. 48. Statements from Hezbollah's leader, Hassan Nasrallah, indicate that Israeli population areas were the intended targets of Hezbollah rockets and missiles. ERLICH, *supra* note 348, app. 2(iii), at 2–3.

449. ERLICH, *supra* note 348, pt. I, at 43–44, 51–53; app. 1(ii), at 2–8; apps. 3–4.

military purposes and failure to distinguish its fighters from civilians.<sup>450</sup> Hezbollah used the civilian casualties as part of its strategic design,<sup>451</sup> a plan abetted—albeit unintentionally—by the UN, NGOs, and the media.

Both the UN General Assembly and the Human Rights Council purposely ignored Hezbollah's unlawful activities, condemning Israel alone for the deaths of Hezbollah civilians.<sup>452</sup> Neither could bring itself to censure Hezbollah's deliberate targeting of Israeli civilians.<sup>453</sup> While some NGOs did criticize Hezbollah's actions,<sup>454</sup> the majority of NGOs focused on Israel's response, claiming it was disproportionate or accepting Hezbollah's claims that it did not launch attacks from civilian communities.<sup>455</sup> The media was equally

450. See Myers, *supra* note 336, at 349.

451. ERLICH, *supra* note 348, at 56.

452. G.A. Res. 61/154, ¶¶ 1–8, U.N. Doc. A/RES/61/154 (Feb. 14, 2007); U.N. H.R.C. Res. S-2/1, ¶¶ 1–6, U.N. Doc. No. A/HRC/S-2/1 (Aug. 11, 2006), available at [http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/docs/A.HRC.S-2.1\\_en.doc](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/docs/A.HRC.S-2.1_en.doc). The United Nations Human Rights Council established a Commission of Inquiry which purposely limited its charter to addressing Israeli violations of the law of war. U.N. Hum. Rts. Council (HRC), *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, ¶¶ 1, 5–7, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006); James G. Stewart, *The UN Commission of Inquiry on Lebanon*, 5 J. INT'L CRIM. JUST. 1039, 1041 (2007). Some claim that, although required to be impartial, the UN Force in Lebanon (UNIFIL) broadcasted Israeli troop movements to Hezbollah. See, e.g., Lori Lowenthal Marcus, *What Did You Do in the War, UNIFIL?: You Broadcast Israeli Troop Movements*, WLKY. STANDARD, Sept. 4, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/622bqwjn.asp>.

453. Cf. Stewart, *supra* note 452, at 1041 (noting that the Commission's "failure to consider Hezbollah's actions . . . undermined the Commission's consideration of Israeli conduct of hostilities").

454. See generally HUMAN RIGHTS WATCH, CIVILIANS UNDER ATTACK: HEZBOLLAH'S ROCKET ATTACKS ON ISRAEL IN THE 2006 WAR (2007), available at <http://www.hrw.org/sites/default/files/reports/iopt0807.pdf> (identifying events where Hezbollah indiscriminately fired on civilians).

455. See, e.g., HUMAN RIGHTS WATCH, FATAL STRIKES: ISRAEL'S INDISCRIMINATE ATTACKS AGAINST CIVILIANS IN LEBANON 6 (2006), available at <http://www.hrw.org/sites/default/files/reports/lebanon0806webwcover.pdf> (providing examples which "reveal a systematic failure by the IDF to distinguish between combatants and civilians"). While Human Rights Watch (HRW) asserts that Hezbollah did on occasion store weapons in or near civilian homes and that fighters placed rocket launchers within populated areas or near UN observers, no evidence suggests "that Hezbollah forces or weapons were in or near the area that the IDF targeted during or just prior to the attack." *Id.* at 6. HRW also claims that it "found no cases in which Hezbollah deliberately used civilians as shields to protect them from retaliatory IDF attack." *Id.*

HRW, however, is incorrect. There is both photographic and testimonial evidence of Hezbollah's use of civilian areas to fire rockets into Israel. See, e.g., ERLICH, *supra* note 348, pt. I, at 43–44; *id.* apps. 3–4; Hassan M. Fattah, *At Funeral, a Sunni Village Condemns Hezbollah's Presence*, N.Y. TIMES, Aug. 25, 2006, available at [http://www.nytimes.com/2006/08/25/world/middleeast/25sunnis.html?\\_r=2](http://www.nytimes.com/2006/08/25/world/middleeast/25sunnis.html?_r=2); Sabrina Tavernise, *Christians Fleeing Lebanon Denounce Hezbollah*, N.Y. TIMES, July 28, 2006, available at <http://www.nytimes.com/2006/07/28/world/middleeast/28refugees.html>. Evidence clearly exists that Hezbollah, by design, used villages in southern Lebanon as fortifications; operated from locations near mosques, public facilities, and UN posts;

complicit in demonstrating a clear anti-Israeli bias by circulating—without question—Hezbollah claims of massive civilian casualties;<sup>456</sup> news outlets even published false pictures of alleged destruction of civilian areas.<sup>457</sup>

Israel was faced with a dilemma: either fail to respond to Hezbollah's attacks and suffer the loss of its civilians or target Hezbollah militants and incur the opprobrium of the international community.<sup>458</sup> Either way, Hezbollah achieved its objectives: kill Israeli citizens, isolate Israel politically, or both.

and disguised themselves as civilians. *See, e.g.*, ERLICH, *supra* note 348, pt. I, at 51–53; *id.* app. 1(ii), at 2–8; *see also* Alan Dershowitz, Editorial, *What Are They Watching?*, N.Y. SUN, Aug. 23, 2006, available at <http://www.nysun.com/opinion/what-are-they-watching/38428/> (noting that “Human Rights Watch not only failed to interview witnesses who had contrary evidence, but also ignored credible news sources such as the New York Times and the New Yorker”); Press Release, United Nations Interim Force in Lebanon (UNIFIL) (July 28, 2006), available at <http://www.un.org/depts/dpkp/missions/unifil/pr012.pdf> (noting that UNIFIL had received reports that Hezbollah was firing from positions near the UN in five cities). Indeed, Hezbollah's leader, Hassan Nasrallah, bragged in a television interview on May 27, 2006 that Hezbollah could not be destroyed because it operated within the population. ERLICH, *supra* note 348, pt. I, at 36 (“[The organization's operatives] live in their houses, in their schools, in their mosques, in their churches, in their fields, in their farms, and in their factories.”). Finally, Hezbollah knew of the danger in which it placed civilians, preferring to risk their safety for the propaganda benefit that civilian casualties would bring. *Id.* pt I, at 56; *see also* Orde F. Kittrie, *A War Crime at Qana?*, WALL ST. J., Aug. 5, 2006, at A11, available at <http://online.wsj.com/article/SB115473619322627572.html>; Editorial, *Whose War Crimes? Evidence from Lebanon about How Terrorists Use Civilians*, WALL ST. J., Dec. 11, 2006, available at <http://www.opinionjournal.com/editorial/feature.html?id=110009371>.

456. Marvin Kalb, *The Israeli-Hezbollah War of 2006: The Media as a Weapon in Asymmetrical Conflict* 9–10 (Harv. U. J.F.K. Sch. of Gov't Faculty Research Working Paper Series, No. RWP07-012, 2007), available at [http://ksgnotes1.harvard.edu/research/wpaper.nsf/rwp/RWP07-012/\\$File/rwp\\_07\\_012\\_kalb.pdf](http://ksgnotes1.harvard.edu/research/wpaper.nsf/rwp/RWP07-012/$File/rwp_07_012_kalb.pdf); *cf.* Posting of Alvin Snyder to USC Ctr. on Pub. Dipl. Blog, “Reutersgate” Becomes An Issue In Reporting The Israel-Hezbollah War, [http://uscpublicdiplomacy.com/index.php/newsroom/pdblog\\_detail/060810\\_reutersgate\\_becomes\\_an\\_issue\\_in\\_reporting\\_the\\_israel\\_hezbollah\\_war/](http://uscpublicdiplomacy.com/index.php/newsroom/pdblog_detail/060810_reutersgate_becomes_an_issue_in_reporting_the_israel_hezbollah_war/) (Aug. 9, 2006, 18:01 PDT) (noting that Hezbollah has ambulances race around with their sirens on when no emergency is occurring in order to create the effect of emergency for the media).

457. Stephen D. Cooper, *A Concise History of the Fauxtography Blogstorm in the 2006 Lebanon War*, AM. COMM. J., Summer 2007, <http://acjournal.org/holdings/vol9/summer/articles/fauxtography.html> (identifying four types of photographic fraud committed by Reuters photographers); *see also* Posting of Michael Kraft to Counterterrorism Blog, Lebanon: Long Term vs. Short Term and Images, [http://counterterrorismblog.org/2006/07/lebanonlong\\_term\\_vs\\_short\\_term.php](http://counterterrorismblog.org/2006/07/lebanonlong_term_vs_short_term.php) (July 31, 2006, 11:32 PM EDT) (describing how photographers take photographs of isolated destroyed buildings in order to create an appearance that the city was destroyed).

458. The Hezbollah and Hamas provocations against Israel demonstrate how terrorists can exploit human rights and the media in their attacks on democracies. By hiding behind their own civilians, the Islamic radicals issue a challenge to democracies: Either violate your own morality by coming after us and inevitably killing some innocent civilians, or maintain your morality and leave us with a free hand to

E. *Israeli-Hamas Conflict 2008–2009*

Although still ongoing at the time this Article was submitted for publication,<sup>459</sup> the conflict between Israel and Hamas in the Gaza Strip is illustrative of the tactics and strategy of terrorist organizations and the response of the international community.

After thirty-eight years of occupation, Israel began withdrawing its military forces and civilian settlers from the Gaza Strip on August 15, 2005.<sup>460</sup> Among other objectives, Israel hoped that disengagement from Gaza would lead to better security and reduce friction with the Palestinian population.<sup>461</sup> Disengagement, however, did not bring peace—“[i]nstead, it was followed almost immediately by rocket fire.”<sup>462</sup>

Then, in January 2006, Hamas won Palestinian Legislative Council elections and, in June 2007, seized control of the Gaza Strip from the Palestinian Authority.<sup>463</sup> In its founding charter, Hamas advocates the complete destruction of the nation of Israel<sup>464</sup> and the

target your innocent civilians. This challenge presents democracies such as Israel with a lose-lose option and terrorists with a win-win option.

ALAN M. DERSHOWITZ, *THE ISRAEL-HEZBOLLAH WAR 3–4* (2006); Editorial, *Hamas's Human Shields*, JERUSALEM POST, Mar. 5, 2008, at 13.

459. As of January 21, 2009, the date of this article's submission, Israel and Hamas had agreed to a ceasefire. This still appears to be the case. Isabel Kershner & Michael Slackman, *Cease-Fire Holding as Israelis Pull out Gaza Largely Quiet After 22-day Battle That Killed More Than 1,300 Palestinians*, INT'L HERALD TRIB., Jan. 20, 2009, at 5.

460. Mark S. Kaliser, Note, *Modern Day Exodus: International Human Rights Law and International Humanitarian Law Implications of Israel's Withdrawal from the Gaza Strip*, 17 IND. INT'L & COMP. L. REV. 187, 219 (2007).

461. *Id.* at 219; State of Israel, Disengagement Plan of Prime Minister Ariel Sharon (Apr. 16, 2004), available at [http://www.knesset.gov.il/process/docs/DisengageSharon\\_eng.htm](http://www.knesset.gov.il/process/docs/DisengageSharon_eng.htm). The Israeli decision to withdraw from Gaza was not an easy one; some Israelis believed that terrorists would use Gaza as a base for launching attacks against Israel. *E.g.* Barry Rubin, *Israel's New Strategy*, 85 FOREIGN AFF., July–Aug. 2006, at 111, 111; Mortimer B. Zuckerman, *Life After Gaza*, U.S. NEWS & WORLD REP., Sep. 5, 2005, at 70.

462. Jeffrey Goldberg, *The Forgotten War: The Overlooked Consequences of Hamas's Actions*, NEW YORKER, Sep. 11, 2006, available at [http://www.newyorker.com/archive/2006/09/11/060911fa\\_fact2](http://www.newyorker.com/archive/2006/09/11/060911fa_fact2); see also Bren Carilli, *New World in Their Hands*, AUSTRALIAN, Sep. 13, 2008, at 24 (noting that the number of rockets fired into Israel from Gaza since the Israeli withdrawal “dramatically increased”); *Holiday Marks 35th Anniversary of Yom Kippur War*, U.S. FED. NEWS, Oct. 6, 2008 (noting that “since Israel's Gaza withdrawal, Iran-backed Hamas and other terrorist groups in Gaza have fired more than 5,800 rockets and mortars into Israel”).

463. Gal Asael, *The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada?*, ARMY LAW., July 2008, at 1, 6.

464. The Covenant of the Islamic Resistance Movement—Hamas, art. 11 (Aug. 18, 1988) (Middle Eastern Media Res. Inst. trans, 2006), available at <http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP109206> [hereinafter



extermination of the Jews;<sup>465</sup> it absolutely rejects any peaceful settlement with Israel.<sup>466</sup> Even before their seizure of Gaza, Hamas militants crossed into Israel, killed two soldiers, and kidnapped a third Israeli soldier—Corporal Gilad Shalit.<sup>467</sup> Hamas and its allies have also fired thousands of rockets into Israel.<sup>468</sup>

In June 2008, Egypt brokered a six-month ceasefire between Israel and Hamas.<sup>469</sup> Although periodically violated,<sup>470</sup> the truce generally brought a period of calm until November 2008. On November 4, 2008, Israeli ground and air forces attacked Hamas militants to destroy a 250-meter tunnel being built under the Israeli-Gaza border that would enable Hamas to abduct an Israeli or Israelis.<sup>471</sup> In response, Hamas fired dozens of rockets into Israel.<sup>472</sup>

Hamas Charter]; see CORDESMAN, *supra* note 312, at 6 (stating that the Hamas Convent “treats Zionists as illegal occupiers and the equivalent of Nazis”).

465. Hamas Charter, *supra* note 464, art. 7.

466. *Id.* art. 13; Andrea Levin, *The Truth About Hamas’s Mission*, BOSTON GLOBE, Jan. 17, 2009, available at [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/01/17/the\\_truth\\_about\\_hamass\\_mission](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/01/17/the_truth_about_hamass_mission); cf. Mortimer B. Zuckerman, *Waiting for War in Gaza*, U.S. NEWS & WORLD REP., Nov. 11, 2006, available at <http://www.usnews.com/usnews/opinion/articles/061105/13edit.htm> (noting that “two thirds of Gazans reject peace with Israel”).

467. Thomas Omestad, *The Flames of War, and Small Hope for Peace*, U.S. NEWS & WORLD REP., July 16, 2006, available at <http://www.usnews.com/usnews/news/articles/060716/24week.htm>.

468. See, e.g., Ed Blanche, *Behold, the Humble Qassem*, MIDDLE EAST (London), Apr. 2008, at 18; David Eshel, *Military Confrontation with Hamas in Gaza Unavoidable*, MIL. TECH., June 2007, at 5; *The Gaza Strip: Are the Palestinian’s Weapons Getting More Lethal?*, ECONOMIST, Oct. 13, 2007, at 50.

469. INTELLIGENCE & TERRORISM INFO. CTR. AT THE ISRAEL INTELLIGENCE HERITAGE & COMMEMORATION CTR., *THE SIX MONTHS OF THE LULL ARRANGEMENT 2* (2008), available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/pdf/hamas\\_e017.pdf](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e017.pdf) [hereinafter *SIX MONTHS LULL*]; see also Rory McCarthy, *Israel and Hamas Agree Ceasefire as Air Strikes Kill Six Palestinian Fighters*, GUARDIAN, June 18, 2008, available at <http://www.guardian.co.uk/world/2008/jun/18/israelandthepalestinians.egypt>.

470. See, e.g., *SIX MONTHS LULL*, *supra* note 469, at 6 (noting that from June 19, 2008, to November 4, 2008, a total of twenty rockets and eighteen mortar shells were fired from Gaza and that three of the rockets and five of mortar shells fell into Israel); *Rockets “Violated Gaza Ceasefire,”* BBC NEWS, June 24, 2008, available at [http://news.bbc.co.uk/2/hi/middle\\_east/7470530.stm](http://news.bbc.co.uk/2/hi/middle_east/7470530.stm) (citing that two rockets were fired into Israel from Gaza six days after initiating the ceasefire); Colin Rubenstein, Editorial, *Obstacles to Israeli-Palestinian Peace*, JAKARTA POST, Sep. 16, 2008, at 7 (noting that, in spite of the ceasefire, rockets continue to fall on Israeli towns, “albeit much more sporadically”); Hisham Abu Taha, *Israel Seals Border with Gaza After Rocket Firing*, ARAB NEWS, Aug. 27, 2008 (noting that two homemade rockets from Gaza were fired into Israel on August 25th); *VOA News: Israel Shuts Gaza After Rocket Strike*, U.S. FED. NEWS, Oct. 21, 2008 (reporting that Gaza militants fired a rocket into Israel four months into the ceasefire agreement). Some observers indicate that Hamas used the ceasefire to build its arsenal. See *SIX MONTHS LULL*, *supra* note 469, at 20–27; Karin Laub, *Gaza Tunnels: Covert to Overt*, CHI. TRIB., Oct. 10, 2008, at 15 (noting that Hamas was using the tunnels to enlarge their arsenal).

471. *SIX MONTHS LULL*, *supra* note 469, at 9; James Hider, *Back in the Line of Fire: Rocket War Resumes After Raid on “Kidnap Plot Tunnel,”* TIMES (U.K.), Nov. 6,

Thereafter, the ceasefire was never fully restored, as Hamas continued to fire rockets and mortars into Israel<sup>473</sup>—deliberately targeting its southern cities<sup>474</sup>—while Israel attempted to stop the rockets and mortars by striking at militants<sup>475</sup> and periodically closing its border with Gaza.<sup>476</sup> Although Hamas repeatedly violated the truce, Israeli officials expressed the desire to extend the six-month ceasefire; however, Hamas refused.<sup>477</sup> The ceasefire expired on December 19, 2008,<sup>478</sup> and Hamas responded by firing more rockets into Israel, including into Israeli cities.<sup>479</sup>

2008, at 44; cf. CORDESMAN, *supra* note 312, at 9 (noting that the November 4th Israeli raid inside the Gaza strip triggered the war).

472. Nidal al-Mughrabi, *Israel-Hamas Violence Disrupts Gaza Truce*, REUTERS, Nov. 5, 2008, <http://reuters.com/articlePrint?articleId=USTRE4A37B520081105>; Ethan Bronner & Taghreed El-Khodary, *Hamas Rockets Hit Israel, Sending 18 to the Hospital*, N.Y. TIMES, Nov. 15, 2008, at A7; Diaa Hadid, *Israel Launches First Airstrike on Gaza Since June*, CHARLESTON GAZETTE & DAILY MAIL (W.V.), Nov. 5, 2008, at 15A.

473. SIX MONTHS LULL, *supra* note 469, at 9–10; Bronner & El-Khodary, *supra* note 472; Isabel Kershner & Taghreed El-Khodary, *Airstrike Kills Four Palestinian Militants*, PITT. POST-GAZETTE, Nov. 17, 2008, at A4.

474. See Press Release, Israel Ministry of Foreign Affairs, Violation of Calm: Rockets Strike Sderot, Ashkelon, Western Negev, Dec. 18, 2008, [http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Rockets\\_strike\\_Sderot\\_Ashkelon\\_western\\_Negev\\_16-Nov-2008.htm](http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Rockets_strike_Sderot_Ashkelon_western_Negev_16-Nov-2008.htm) (reporting that Hamas fired rockets into Southern Israel causing damage in Sderot, Ashkelon, and western Negev); see Diaa Hadid, *Israeli Airstrikes Imperil Gaza Truce with Hamas*, SEATTLE TIMES, Nov. 6, 2008, at A11 (reporting that “near-daily rocket barrages played havoc with southern border towns and Israeli airstrikes killed scores of Palestinians in Gaza”); Diaa Hadid, *Rocket Attacks Escalate Gaza Violence*, DESERET MORNING NEWS, Nov. 15, 2008 (describing the rocket attack on Ashkelon and the Israeli response).

475. SIX MONTH LULL, *supra* note 469, at 9.

476. *Israel Closes Gaza Crossings*, ALJAZEERA.NET, Nov. 18, 2008, available at <http://english.aljazeera.net/news/middleeast/2008/11/20081118114427849650.html>.

477. Cf. Yaakov Katz, *Why Israel Prefers the Cease-Fire in Gaza*, JERUSALEM POST, Dec. 15, 2008, at 2 (discussing the Israeli intention to replace the Israeli Brigade on the Gaza front following an announcement by Khaled Mashal that Hamas will not extend the cease-fire agreement). Some news sources reported indecision amongst the Hamas leadership regarding whether or not to extend the cease-fire, see Yaakov Katz et al., *Hamas Divided Over Continuing Cease-Fire*, JERUSALEM POST, Dec. 15, 2008, at 1 (noting that the Hamas leadership in Syria opposed renewing the cease-fire while the Hamas leadership in the Gaza Strip felt compelled to extend the cease-fire); Taghreed El-Khodary & Isabel Kershner, *Hamas, Showing Split, Hints It May Extend Israel Truce*, N.Y. TIMES, Dec. 15, 2008, at A10 (“Gaza Hamas leaders in Gaza Sunday left open the possibility of renewing a tenuous truce with Israel that is due to expire Friday, putting themselves at odds with a statement by the exiled political leader of the group in Damascus, Syria.”).

478. Richard Boudreaux, *Hamas Formally Ends Gaza Cease-Fire with Israel*, L.A. TIMES, Dec. 19, 2008, at 15; *Hamas Refuses to Renew Gaza Truce*, EVENING STANDARD (London), Dec. 19, 2008, at 28. The UN Special Rapporteur for the Palestinian Territories blames Israel for the collapse of the cease-fire in large part because of its November 4, 2008 incursion into Gaza that killed Hamas militants who were attempting to tunnel into Israel to kidnap Israeli soldiers. U.N. High Comm’r for Hum. Rts., Statement of Special Rapporteur for the Palestinian Territories Occupied Since 1967 for Presentation to the Special Session of the Human Rights Council on the Situation in the Gaza Strip (9 January 2009), available at <http://www.unhchr.ch/>

Israel faced increasing domestic pressure due to the incessant rocket and mortar attacks<sup>480</sup> and issued warnings of imminent military action.<sup>481</sup> Hamas ignored the warnings, and on December 27, 2008, Israel launched Operation Cast Lead against Hamas in the Gaza Strip.<sup>482</sup>

Israel specifically targeted Hamas fighters during its offensive, even giving advance warning of impending attacks to civilians.<sup>483</sup> Despite Israel's attempts to avoid civilian casualties, Hamas fighters—dressed as civilians<sup>484</sup>—took refuge among the civilian population, firing rockets and mortars from civilian areas and occupying civilian structures such as mosques, houses, hospitals,

hurricane/hurricane.nsf/view01/14B004C3AE39004BC125753900599B5D?opendocument [hereinafter HRC Rapporteur Statement]; see *supra* note 471 and accompanying text. The Special Rapporteur's position seemingly assumes that (1) Israel had no right under international law to prevent Hamas from achieving its goal of kidnapping Israeli soldiers; and (2) Hamas rocket and mortar attacks on Israeli civilians were an appropriate response under international law to the attack on its militants.

479. Matt Brown, *Hamas Unleashes Artillery Barrage on Israel*, AUSTL. BROAD. CORP., Dec. 25, 2008; *Gaza Rockets Hit Southern Israel*, ALJAZEERA.NET, Dec. 21, 2008, available at <http://english.aljazeera.net/news/middleeast/2008/12/2008122172946123995.html>; Yaakov Katz et al., *Gazans Fire Dozens of Rockets at Negev Towns as "Truce" Ends*, JERUSALEM POST, Dec. 21, 2008, at 1; Herb Keinon & Yaakov Katz, *IDF Poised for Limited Gaza Operation*, JERUSALEM POST, Dec. 26, 2008, at 1; Isabel Kershner, *Gaza Rocket Attack of Israel Intensifies Retaliation Feared*, PITT. POST-GAZETTE, Dec. 25, 2008, at A4; Ben Lynfield, *Livni and Netanyahu Vow to Oust Hamas After Gaza Rocket Strikes*, INDEP., Dec. 22, 2008, at 20; *Israel Hit by Rocket Fire from Gaza*, ALJAZEERA.NET, Dec. 24, 2008, available at <http://english.aljazeera.net/news/middleeast/2008/12/20081224125251481376.html>; *Peace in Bethlehem as Hamas Fires on Israel*, AUSTRALIAN, Dec. 26, 2008, at 7.

480. Patrick Martin, *Israelis Question Reasons for Restraint*, GLOBE & MAIL (Toronto), Dec. 22, 2008, at A11; Editorial, *More Rockets from Gaza*, WASH. POST, Dec. 23, 2008, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/22/AR2008122201844.html>; see *Israel Issues an Appeal to Palestinians in Gaza*, N.Y. TIMES, Dec. 26, 2008, at A15 (noting that the Israeli prime minister has thus far "resisted calls from within Israel for a major military operation against Hamas").

481. Orly Halpern, *Israel Vows Attack if Rockets from Gaza Don't Stop*, GLOBE & MAIL (Toronto), Dec. 26, 2008, at A1; Ashraf Khalil, *Israel Warns of Gaza Action*, CHI. TRIB., Dec. 26, 2008, at 18.

482. Yaakov Katz, *225 Killed as Israel Rains Fire on Hamas in Bid to End Kassams*, JERUSALEM POST, Dec. 28, 2008, at 1; Todd Venezia, *Hell Fire Rains on Gaza*, N.Y. POST, Dec. 28, 2008, at 4.

483. CORDESMAN, *supra* note 312, at 17 (describing IAF's "systematic effort to limit collateral damage"); see Interview by BBC Reporter with Colonel Richard Kemp, Former Commander of British Forces in Afghanistan (Jan. 18, 2009), available at <http://www.youtube.com/watch?v=WssrKJ3Iqcw> (stating that he doesn't "think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza").

484. Steven Erlanger, *A Gaza War Full of Traps and Trickery*, N.Y. TIMES, Jan. 10, 2009, at A1, available at <http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html>.

schools, and UN compounds.<sup>485</sup> Hamas also used Israeli warnings of impending strikes on particular targets to “organize” civilians into human shields to deter the attacks.<sup>486</sup> Indeed, a Hamas leader had

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485. CORDESMAN, *supra* note 312, at 43–47, 49, 51–52, 54–55 (describing Hamas’s use of mosques, houses, and cemeteries for military operations and storage of armaments); Ethan Bronner, *Parsing Gains of Gaza War*, N.Y. TIMES, Jan. 18, 2009, at A1, available at <http://www.nytimes.com/2009/01/19/world/middleeast/19assess.html> (describing Hamas’s strategy of firing rockets from between houses); Abraham Cooper & Harold Brackman, Op-Ed., *The Threat of the Human Shield Strategy Hamas Uses Extends Beyond Israel, Gaza*, U.S. NEWS & WORLD REP., Jan. 9, 2009, available at <http://www.usnews.com/articles/opinion/2009/01/09/the-threat-of-the-human-shield-strategy-hamas-uses-extends-beyond-israel-gaza.html> (describing Hamas’s use of civilians as human shields); Amos Harel, *Sources: Hamas Leaders Hiding in Basement of Israel-Built Hospital in Gaza*, HAARETZ, Jan. 12, 2009, available at <http://www.haaretz.com/hasen/spages/1054569.html> (describing how Hamas officials used a hospital as a “bunker”); Yaakov Katz, *Gazans Tell Israeli Investigators of Hamas Abuses*, JERUSALEM POST, Feb. 1, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1233304655613&pagename=JPost%2FJPARTicle%2FShowFull> (describing Hamas’s use of homes and schools from which to fire rockets); Yaakov Katz, *IDF Unveils Hamas Map Seized in Gaza*, JERUSALEM POST, Jan. 8, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1231424893023&pagename=JPost%2FJPARTicle%2FShowFull> (describing Hamas’s map detailing Hamas combat positions in civilian areas); Yaakov Katz, *Shelled UN Building Used by Hamas*, JERUSALEM POST, Jan. 15, 2009 available at <http://www.jpost.com/servlet/Satellite?cid=1231950855726&pagename=JPost%2FJPARTicle%2FShowFull> (describing how both Hamas militants used and Israel targeted a UN compound, UN vehicles, and a press office); Jason Koutsoukis, *Hamas Tried to Hijack Ambulances During Gaza War*, SYDNEY-MORNING HERALD, Jan. 26, 2009, available at <http://www.smh.com.au/news/world/hamas-tried-to-hijack-ambulances-during-gaza-war/2009/01/25/1232818246374.html?page=fullpage> (describing Hamas’s use of ambulances for military transport); Dominic Lawson, *No, We Are Not All Hamas Now*, SUNDAY TIMES, Jan. 11, 2009, available at [http://www.timesonline.co.uk/tol/comment/columnists/dominic\\_lawson/article5489436.ece](http://www.timesonline.co.uk/tol/comment/columnists/dominic_lawson/article5489436.ece) (describing Hamas’s use of civilians as shields according to Colonel Richard Kemp); Ulrike Putz, *Who Has Won Here?*, SPIEGEL ONLINE, Jan. 23, 2009, <http://www.spiegel.de/international/world/0,1518,603203,00.html> (describing Hamas’s use of civilian homes for military purposes); Yoav Stern, *Gaza Reporter Caught on Tape Confirming Hamas Fired Rockets Near TV Station*, HAARETZ, Jan. 20, 2009, available at <http://www.haaretz.com/hasen/spages/1057129.html> (describing a Hamas rocket attack from beneath a television studio); Andy Soltis, *Hamas in “Human Shield” Atrocity—Uses School as Mortar Lair Where Children Die*, N.Y. POST, Jan. 7, 2009, at 5 (describing how Hamas fighters fired mortars from inside a United Nations school); Press Release, Israel Defense Forces, *Hamas Sniper and Explosives Layout Discovered* (Jan. 9, 2009), available at [http://dover.idf.il/IDF/English/News/the\\_Front/09/01/0902.htm](http://dover.idf.il/IDF/English/News/the_Front/09/01/0902.htm) (describing how Hamas booby-trapped houses). For a detailed description (albeit from an Israeli point of view) of how Hamas used civilians to shield its military operations, see INTELLIGENCE & TERRORISM INFO. CTR., *HAMAS EXPLOITATION OF CIVILIANS AS HUMAN SHIELDS* (2009), available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/pdf/hamas\\_e028.pdf](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e028.pdf) [hereinafter *HAMAS EXPLOITATION OF CIVILIANS*].

486. Gil Ronen, *Study: Hamas Uses Israel’s Warnings to Prepare Human Shields*, ARUTZ SHEVA, Jan. 6, 2009, available at <http://www.israelnationalnews.com/News/News.aspx/129267>; see Erlanger, *supra* note 484 (“Hamas is using civilians as human shields in the expectation that Israel will try to avoid killing them.”).

earlier acknowledged that the employment of human shields was integral to Hamas's strategy in its conflict with Israel.<sup>487</sup>

The international community's reaction was largely predictable. The news media provided unfiltered reports emphasizing the destruction wrought by the Israeli offensive, giving little information about the nature of the Hamas tactics that led to civilian deaths.<sup>488</sup> While it is too early to determine the accuracy of all of these reports, some have already proven false.<sup>489</sup>

487. [The enemies of Allah] do not know that the Palestinian people [have] developed [their] [methods] of death and death-seeking. For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the *mujahideen* and the children. This is why they have formed human shields of the women, the children, the elderly, and the *mujahideen*, in order to challenge the Zionist bombing machine. It is as if they were saying to the Zionist enemy: "We desire death like you desire life."

Speech, Hamas MP Fathi Hammad, Al-Aqsa Television, Feb 29, 2008, available at [http://www.memritv.org/clip\\_transcript/en/1710.htm](http://www.memritv.org/clip_transcript/en/1710.htm) (last visited Mar. 22, 2009).

488. See CORDESMAN, *supra* note 312, at 30–31; INTELLIGENCE & TERRORISM INFO. CTR. AT THE ISRAEL INTELLIGENCE HERITAGE & COMMEMORATION CTR. (IICC), THE BATTLE FOR HEARTS AND MINDS 6 (2009), available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/pdf/hamas\\_e048.pdf](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e048.pdf) ("Those who follow Hamas's propaganda, the statements made by its leaders, and Al-Jazeera TV, may get the impression that the IDF's activity in the Gaza Strip focused solely on harming the civilian population, while terrorist operatives are not seen and not heard."); Evelyn Gordon, *Civil Fights: "Between Covering Death and Context, Death Wins,"* JERUSALEM POST, Jan. 14, 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1231950850547&pagename=JPost%2FJPArticle%2FPrinter> (showing that even journalists admit that reader preference is shaping the coverage of the conflict in Gaza); Ian O'Doherty, Op-Ed., *Why the Israeli People Have Finally Had Enough*, IRISH INDEPENDENT, Jan. 5, 2009, available at <http://www.independent.ie/opinion/columnists/ian-odoherty/why-the-israeli-people-have-finally-had-enough-1592022.html> (arguing that "Israel is actually acting with a ridiculous degree of restraint" contrary to the media's portrayal); see e.g., Tim McGirk, *Can Israel Survive Its Assault on Gaza?*, TIME, Jan. 8, 2009, available at <http://www.time.com/time/world/article/0,8599,1870314,00.html> (reporting that "whether Israel's response has been proportional to the threat is, at the least, questionable"). One prominent news commentator referred to Israel's offensive in terms of the Jews' "genetically coded" violence. *Bills Moyers Journal* (PBS television broadcast Jan. 9, 2009), transcript available at <http://www.pbs.org/moyers/journal/01092009/transcript3.html>. In response to Bill Moyers' January 9th commentary, the Anti-Defamation League sent Moyers a letter stating that his commentary "[consisted] mostly of intellectually and morally faulty claims." Letter from Abraham H. Foxman, National Director, Anti-Defamation League, to Bill Moyers (Jan. 13, 2009), available at [http://www.adl.org/media\\_watch/tv/20090113-Bill+Moyers+Journal.htm](http://www.adl.org/media_watch/tv/20090113-Bill+Moyers+Journal.htm).

489. For example, the UN, NGOs, and the press, all claimed that Israel had used white phosphorous against civilians in the Gaza Strip, causing severe burns. See, e.g., Kim Sengupta, *Claims that Israel Is Using White Phosphorous Illegally Won't Go Away*, BELFAST TELEGRAPH, Jan. 16, 2009, available at <http://www.belfasttelegraph.co.uk/opinion/columnists/kim-sengupta-claims-that-israel-is-using-white-phosphorus-illegally-wont-go-away-14143182.html> (noting that the UN claimed Israel had used white phosphorus shells in its attack of the UN building in Gaza); *UN Headquarters in*

The reaction of NGOs was similarly unsurprising. Although a few attempted to be fair in their assessment<sup>490</sup>—some even noting possible violations of international humanitarian law by both sides of the conflict<sup>491</sup>—most NGOs either directed their attention exclusively

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*Gaza hit by Israeli "White Phosphorous" Shells*, TIMES ONLINE, Jan. 15, 2009, [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article5521925.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article5521925.ece) (implying that Israeli forces used white phosphorous in its attack on the UN headquarters); *CNN Newsroom*, Discussion on Israel's Possible Use of White Phosphorous on CNN (CNN television broadcast Jan. 13, 2009), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/090113/cnr.07.html> (describing how burns in Israel match "the properties of white phosphorous"); Human Rights Watch, Editorial, *Israel: Stop Unlawful Use of White Phosphorous in Gaza*, Jan. 10, 2009, <http://www.hrw.org/en/news/2009/01/10/israel-stop-unlawful-use-white-phosphorous-gaza> (calling for Israel to stop using white phosphorous in crowded areas of Gaza); Matthew Kalman, *Israel Denies Using Bombs That Cause Deep Burns*, SFGATE.COM, Jan. 14, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/14/MNMF159H9T.DTL&type=printable> (noting that the "Human Rights Watch accused Israel of illegally using white phosphorous shells in its conflict with Hamas"); Press Release, Amnesty International, *Israel/Occupied Palestinian Territories: Israel's Use of White Phosphorus Against Gaza Civilians "Clear and Undeniable"* (Jan. 19, 2009), available at <http://www.amnesty.org/en/for-media/press-releases/israeloccupied-palestinian-territories-israel039s-use-white-phosphorus-a> (stating that "Amnesty International delegates visiting the Gaza Strip found indisputable evidence of widespread use of white phosphorous in densely populated residential areas in Gaza City"). The ICRC has found, however, that there was no evidence that Israel used white phosphorous unlawfully, noting that it may be used legitimately under international law to illuminate targets or create smoke. Bradley S. Klapper, *ICRC: Israel's Use of White Phosphorous Not Illegal*, S.F. CHRON., Jan. 13, 2009, available at <http://www.sfchroniclemarketplace.com/cgi-bin/article.cgi?f=/n/a/2009/01/13/international/i114520S45.DTL>; Gerald M. Steinberg, Editorial, *Human Rights Watch: White (Phosphorous) Lies*, JERUSALEM POST, Jan. 18, 2009, at 14 ("THE FALSE white-phosphorous allegation is part of a pattern led by [Human Rights Watch] that reflects the modern version of the blood libel").

Another example is a claim by UN officials that Israel attacked a UN school in the Jabalya refugee camp in Gaza, killing dozens of civilians. See, e.g., Joel Greenberg, *Mideast Crisis: Gaza School Hit; Dozens Dead*, CHI. TRIB., Jan. 7, 2009, at 6; Patrick Martin, *Israeli Strike Kills Dozens at UN School*, GLOBE & MAIL (Toronto), Jan. 7, 2009, at A1; Victoria Ward, *Israeli Strike on School Kills 36*, MIRROR (U.K.), Jan. 7, 2009, at 12. Later, faced with contradictory press reports of witnesses who said the school had not been hit, UN officials admitted the Israelis did not attack the school. Abraham Rabinovich, *UN Backs Down on "School Massacre,"* AUSTRALIAN, Feb. 6, 2009, at 1; Griff Witte, *UN Reports School in Gaza Not Hit by Strike*, CHI. TRIB., Feb. 8, 2009, at 20.

490. E.g. U.N. Hum. Rts. Council, *Written Statement Submitted by the Association for World Education (AWE), a Non-Governmental Organization on the Roster*, U.N. Doc. A/HRC/S-9/NGO/3 (Jan. 8, 2009) (noting the obstacle to peace caused by the Hamas Charter provisions rejecting peace and calling for the destruction of Israel).

491. E.g., AMNESTY INTERNATIONAL USA, ISRAEL: THE CONFLICT IN GAZA: A BRIEFING ON APPLICABLE LAW, INVESTIGATIONS AND ACCOUNTABILITY § 4 (Jan. 20, 2009), available at <http://www.amnestyusa.org/document.php?id=ENGMDE150072009&lang=e>; Press Release, Human Rights Watch, *Israel/Hamas: Civilians Must Not Be Targets* (Dec. 30, 2008), available at <http://www.hrw.org/en/news/2008/12/30/israelhamas-civilians-must-not-be-targets>. The Amnesty International report, however, seemingly takes at face value every Palestinian allegation of illegal Israeli conduct while deemphasizing Hamas's strategy of exposing Palestinian civilians to attack. See

on alleged Israeli violations of international law or essentially served as propaganda outlets for Hamas, recklessly accusing Israel of heinous crimes (including genocide) while wholly ignoring Hamas's role in the conflict.<sup>492</sup>

Likewise, the approach of the UN Human Rights Council has been shamelessly one-sided. Ignoring completely Hamas's indiscriminate rocket and mortar attacks on Israel and demonstrating a thorough indifference to Hamas's practice of conducting military operations from civilian population centers, the Council focused entirely on alleged Israeli war crimes,<sup>493</sup> culminating

*generally id.* (describing several instances where Israeli forces arguably attacked civilian populations but only briefly mentioning that Hamas has fired hundreds of "indiscriminate rockets" at Israeli towns and population centers).

492. See, e.g., U.N. Hum. Rts. Council, *Joint Written Statement Submitted by the Europe—Third World Centre, a Non-Governmental Organization in General Consultative Status, and American Association of Jurists (AAJ), a Non-Governmental Organization in Special Consultative Status*, U.N. Doc. A/HRC/S-9/NGO/7 (Jan. 8, 2009) (requesting that the UN Human Rights Council "adopt a resolution condemning unequivocally Israel for violation of international humanitarian and human rights law"); U.N. Hum. Rts. Council, *Written Statement Submitted by Badil Resource Center for Palestinian Residency and Refugee Rights, Adalah—The Legal Center for Arab Minority Rights in Israel, Al-Haq and The Arab Association for Human Rights (HRA), Non-Governmental Organizations in Special Consultative Status*, U.N. Doc. A/HRC/S-9/NGO/4 (Jan. 8, 2009) (demanding "that Israel end its military operations in Gaza and abide scrupulously by the provisions of international humanitarian and human rights law, and cease the collective punishment of Palestinian civilians"); U.N. Hum. Rts. Council, *Written Statement Submitted by Nord-Sud XXI, a Non-Governmental Organization in Special Consultative Status*, U.N. Doc. A/HRC/S-9/NGO/2 (Jan. 8, 2009) (condemning Israel's use of force and claiming that Israel has been targeting civilians, denying the Palestinians the right to self-determination and committing acts that resemble genocide); U.N. Hum. Rts. Council, *Written Statement Submitted by the International NGO Forum on Indonesian Development (INFID), a Non-Governmental Organization in Special Consultative Status*, U.N. Doc. A/HRC/S-9/NGO/1 (Jan. 8, 2009) (claiming that Israel's attack on the Gaza Strip "was a brutal act of genocide that puts the world at shame"); Souhayr Belhassen, President, International Federation for Human Rights (FIDH), Open Letter to Members of the UN Security Council, *available at* <http://astrologieklassisch.wordpress.com/2009/01/15/fidh-urges-the-un-security-council-to-refer-the-situation-to-the-icc-prosecutor/#comments> (Jan. 15, 2009, 2:39) (urging the UN Security Council to refer Israel to the ICC Prosecutor for its breaches of international humanitarian law).

493. See, e.g., HRC Rapporteur Statement, *supra* note 478; Press Release, U.N. High Commissioner for Human Rights, Ninth Special Session of the Human Rights Council (Jan. 6, 2009), *available at* [http://www2.ohchr.org/english/bodies/hrcouncil/docs/9special\\_session/NV\\_9th\\_SS\\_request\\_6jan09.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/9special_session/NV_9th_SS_request_6jan09.pdf) (announcing the U.N. Human Rights Special Session, which would discuss "[t]he grave violations of human rights in the Occupied Palestinian Territory including the recent aggression of the occupied Gaza Strip"); Press Release, U.N. Office at Geneva, Human Rights Council Decides to Dispatch Fact-Finding Mission to Investigate Violations Against Palestinians in Occupied Territory (Jan. 12, 2009), *available at* [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/25522192EE594702C125753C004CE23E?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/25522192EE594702C125753C004CE23E?OpenDocument) (indicating that the Human Rights Council fact-finding team will investigate Israeli violations of human rights exclusively).

in a resolution condemning Israel alone.<sup>494</sup> Despite inflammatory language from its president<sup>495</sup> and attempts to denounce only Israel,<sup>496</sup> the UN General Assembly passed a somewhat more balanced resolution<sup>497</sup> that referenced and resembled the previous Security Council resolution.<sup>498</sup>

Hamas sought to achieve its objectives in Gaza by killing “as many Israeli civilians as possible by firing rockets indiscriminately at Israeli civilian targets, and [by] [provoking] Israel to kill as many Palestinian civilians as possible to garner world sympathy.”<sup>499</sup> An early assessment of the international community’s reaction to the Israel–Hamas conflict demonstrates the soundness of Hamas’s strategy and bodes ill for the protection of civilians in future armed conflicts.

## V. CONCLUSION: ENHANCING CIVILIANS IMMUNITY UNDER THE LAW OF WAR

Under its current structural and institutional limits, international humanitarian law cannot effectively protect civilians

494. U.N. Hum. Rts. Council Res. S-9/1, U.N. Doc. A/HRC/S-9/L.1/ (Jan. 12, 2009). The Israel Ministry of Foreign Affairs objected that “[t]he resolution proposed for this Special Session will only further erode the barely remaining objectivity and credibility of the Human Rights Council” Leshno-Yaar, Permanent Representative of Israel, Statement by Ambassador Leshno-Yaar to UN Human Rights Council (Jan. 9, 2009), available at [http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches++statements/Amb\\_Leshno-Yaar\\_UN\\_Human\\_Rights\\_Council\\_9-Jan-2009.htm](http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches++statements/Amb_Leshno-Yaar_UN_Human_Rights_Council_9-Jan-2009.htm); see also Editorial, *Selective on Rights*, GLOBE & MAIL (Toronto), Jan. 13, 2009, at A12 (“On Monday the council lived up to its reputation for bias with its overwrought condemnation of Israel’s ‘grave violations’ in Gaza while soft-peddalling the role of Hamas in precipitating the crisis with rocket attacks on Israeli civilians.”).

495. Miguel d’Escoto Brockmann, President, 63rd Session, U.N. General Assembly, Address to the 32nd Plenary Meeting of the 10th Emergency Special Session on the Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory (Jan. 15, 2009), available at <http://www.un.org/ga/president/63/statements/onpalestine150109.shtml>.

496. Shlomo Shamir, *UN General Assembly Adopts Resolution Urging Immediate Gaza Cease-Fire*, HAARETZ, Jan. 17, 2009, available at <http://www.haaretz.com/hasen/spages/1056158.html>; *U.N. Assembly Urges Gaza Truce, Drops Radical Text*, REUTERS, Jan. 17, 2009, available at <http://uk.reuters.com/article/worldNews/idUKTRE50G0KO20090117?sp=true>.

497. Draft Resolution, General Assembly Resolution Supporting the Immediate Ceasefire According to Security Council Resolution 1860 (2009), ¶¶ 1–2, UN Doc. A/ES-10/L.21 (Jan. 15, 2009) (copy of draft resolution).

498. S.C. Res. 1860, ¶ 1, U.N. Doc. S/Res/1860 (Jan. 8, 2009).

499. Alan M. Dershowitz, Op-Ed., *Hamas’ War Crimes*, L.A. TIMES, Jan. 10, 2009, at 19; see also HAMAS EXPLOITATION OF CIVILIANS, *supra* note 485, at 2, 29; Charles Krauthammer, Op-Ed, *Moral Clarity in Gaza*, WASH. POST, Jan. 2, 2009, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/01/AR2009010101780.html> (“For Hamas, the only thing more prized than dead Jews are dead Palestinians.”).



from the desolation and anguish of war. The present approach simply serves the goals of those who use the death of civilians and the destruction of civilian property to gain a military advantage. Structural and attitudinal changes must occur in order for civilians caught in war to receive adequate security from attack. International humanitarian law must be modified and the attention of the international community refocused if insurgents and terrorists are to be deterred from gaining a military advantage by putting civilians at risk.<sup>500</sup>

*First*, the law of war should not afford POW protection to combatants who do not attempt to differentiate themselves from the civilian population by carrying arms openly at all times or by displaying distinctive insignia recognizable at a distance.<sup>501</sup> Only lawful combatants may receive the privilege of combatant immunity for their involvement in hostilities, and the quid pro quo for attaining such immunity must be that combatants distinguish themselves from the civilian population—that is, “persons entitled to immunity for pre-capture war-like acts must have made themselves legitimate targets while performing those acts.”<sup>502</sup> “While this eases an opponent’s ability to identify the combatants as legitimate targets, it is the price to obtain combatant immunity.”<sup>503</sup> Article 44 of Protocol I has only served to protect combatants who fail to distinguish themselves from civilians; it does nothing to advance the security of the civilians who live around them. In fact, the Protocol obscures the

500. See DINSTEIN, *supra* note 295, at 131 (stating that “the appraisal [of] whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that—if an attempt is made to shield military objectives with civilians—civilian casualties will be higher than usual”); Kenneth Anderson et al., Editorial, *A Public Call for International Attention to Legal Obligations of Defending Forces as Well as Attacking Forces to Protect Civilians in Armed Conflict*, CRIMES OF WAR PROJECT, Mar. 19, 2003, available at <http://www.crimesofwar.org/special/Iraq/news-iraq3.html>.

501. Of course, enemy combatants who do not distinguish themselves from civilians may not be mistreated upon capture; however, they should be subject to prosecution for engaging in unlawful acts of hostility. See Rosen, *supra* note 44, at 134 (noting that captured enemy combatants are entitled to protections under common Article 3 of the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 175, S. EXEC. DOC. E, 95-2 (1978), and the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984), *ratified*, Foreign Relations Auth. Act for Fiscal Years 1994 and 1995 § 506, Pub. L. No. 103-236, 108 Stat. 382 (2000)).

502. Geoffrey S. Corn & Michael L. Smidt, “*To Be or Not to Be, That is the Question*”: *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1, 14.

503. William H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 105 (2003).

difference between combatant and civilian, putting the latter in greater jeopardy.<sup>504</sup>

*Second*, civilians who take a direct role in hostilities must be deemed lawful targets until the time at which they demonstrate that they have no intent to engage in hostilities again (e.g., turn in their arms).<sup>505</sup> Article 51 of Protocol I, as currently written and interpreted (at least by some), affords civilian status to insurgents and terrorists provided that they dispense with any of the distinction requirements imposed by the law of war.<sup>506</sup> It creates a revolving door through which insurgents and terrorists can engage in military operations and regain their immunity from retaliation once the engagement is over.<sup>507</sup> Under Protocol I, unless insurgents or terrorists are disabled or killed while actually engaged in hostilities or are amenable to criminal process and trial, the nations that they attack are legally powerless to harm them, essentially allowing the insurgents or terrorists to plan, equip, and train for future battles with impunity.

*Third*, in cases where insurgent or terrorist groups conduct activities in civilian communities or fail to differentiate themselves from neighboring civilians, the law of war should afford the attacking force a limited presumption of lawful discrimination.<sup>508</sup> While the principle of proportionality must always be observed, the use of civilians and civilian objects as shields should be a factor in the proportionality determination, including an allowance for belligerents to consider their own casualties in balancing whether harm to a civilian population is excessive.<sup>509</sup> Insurgents and terrorists should

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504. Jones, *supra* note 39, at 270; see Emanuel Gross, *Thought Is Self-Defense Against Terrorism—What Does It Mean?: The Israeli Perspective*, 14 TEMP. POL. & CIV. RTS. L. REV. 579, 581 (2005) (arguing that the ambiguity in Protocol I's definition of "civilian" has led to uncertainty as to how to apply these provisions to the conflict between Hamas and Israelis); cf. DINSTEIN, *supra* note 295, at 29 ("Blurring the lines of division between combatants and civilians is bound to end in civilians suffering the consequences of being suspected as covert combatants."); Reisman, *supra* note 315, at 856–58 (discussing how Protocol I has relaxed the traditional punishment for unprivileged participation in hostilities).

505. DINSTEIN, *supra* note 295, at 29; Jones, *supra* note 39, at 264–65.

506. See Protocol I, *supra* note 13, art. 51; Shotwell, *supra* note 28, at 45–46 (mentioning the restrictive view some interest groups have of Protocol I and how this "erode[s] respect for international law").

507. See *supra* note 331 and accompanying text.

508. See ROGERS, *supra* note 123, at 129 (opining that a war crimes tribunal would take into consideration a defender's intentional flouting of the law of war to separate military objectives from civilians); Jones, *supra* note 39, at 272 (discussing the doctrine of military necessity).

509. DINSTEIN, *supra* note 295, at 119–23; see also Anderson et al., *supra* note 500 ("Defenders' violations of their obligations under international laws of war, while not relieving attackers of their obligations, will[,] in fact[,] tend to make collateral damage from even legally permitted attacks more likely and more extensive.").

not be able to use adherence to international humanitarian law as a means of increasing enemy casualties.<sup>510</sup>

*Fourth*, the law of war must classify the use of civilian communities to shield military installations, activities, or operations as a grave breach of the Geneva Convention, and either the International Criminal Court or ad hoc war crimes tribunals must be willing to prosecute those who engage in such misconduct.<sup>511</sup>

*Fifth*, just as important, the UN, NGOs, and the media must adjust their approach to conflicts between Western militaries (particularly the United States and Israel) and insurgent and terrorist groups by focusing on combatants who intentionally place civilian populations and objects at risk. Today, this is not the case. As Professor Alan Dershowitz observed:

Whenever a democracy . . . chooses to defend its citizens by going after the terrorists who are hiding among civilians, these predictable condemners [the international community and human rights organizations] can be counted on by the terrorists to accuse the democracy of “overreaction,” or “disproportionality,” and “violations of human rights.” In so doing, they play into the hands of the terrorists and cause more terrorism and more civilian casualties on both sides.<sup>512</sup>

While the UN might have held the greatest promise for suppressing violations of the law of war,<sup>513</sup> it is no longer a credible forum for discussing or deterring such violations. Especially with regard to Israel and its neighbors, the UN and its Human Rights Council have lost all moral authority; they have become apologists for one side of the dispute.<sup>514</sup> While some NGOs have attempted to take

510. This recommendation likely reflects customary international law. DINSTEN, *supra* note 295, at 115–16; Parks, *supra* note 6, at 162–63.

511. Shotwell, *supra* note 28, at 45.

512. DERSHOWITZ, *supra* note 458, at 6; *see also* Editorial, JERUSALEM POST, Mar. 5, 2008, at 13 (arguing that “ Hamas’s brazen use of human shields is directly facilitated by the international community’s reluctance to address the issue and denounce the premeditated endangerment of ordinary people”); Workshop, Project on the Means of Intervention, Carr Ctr. for Hum. Rts. Pol’y, Harv. U. J.F.K. Sch. of Gov’t, Understanding Collateral Damage 13 (2002), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/WebJuneReport.pdf> (discussing how “far more lives could be saved if NGOs devoted their efforts to inspiring less capable forces or irregular armed groups to uphold principles of international humanitarian law”) [hereinafter Collateral Damage Workshop].

513. *Cf.* Burke-White & Bell, *supra* note 337, at 74 (opening statement of William W. Burke-White) (discussing issues facing the world community, such as combating international terrorism, and stating: “The UN, with its broad reach, its all-encompassing membership, and its agenda setting potential may well be the best (and perhaps the only) hope for developing universal legal regimes that can effectively respond to these new challenges.”).

514. *See supra* notes 428–30, 452–53, 493–94, and accompanying text; *see also* Anne F. Bayefsky, *Israel and the United Nations’ Human Rights Agenda: The Inequality of Nations Large and Small*, 29 ISR. L. REV. 424, 425 (1995) (discussing the “malignant nature of the UN human rights system”); Burke-White & Bell, *supra* note 337, at 82 (rebuttal of Abraham Bell) (noting the UN’s fixation on a one-sided approach

a more balanced approach, many others suffer from a lack of partiality and have adopted political agendas that make them unsuited to monitor international humanitarian law compliance,<sup>515</sup> especially with regard to the United States and Israel.<sup>516</sup> Furthermore, the media tends to concentrate on the “sensational,” often reporting the terrorists’ side of a conflict without filter or analysis.<sup>517</sup>

If state practice matters, Protocol I does not—in many respects—represent customary international law.<sup>518</sup> And it will never become a

to Israel); Robert A. Caplen, *Mending the “Fence”: How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717, 739 (2005) (“Israel has been described as having received ‘second-class status’ within the U.N.”); Françoise J. Hampson, *An Overview of the Reform of the UN Human Rights Machinery*, 7 HUM. RTS. L. REV. 7, 15 (2007) (noting the one-sided nature of resolutions dealing with Israel); Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make a Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 358–60 (2007) (discussing the Human Rights Council’s focus on a one-sided approach to Israel); Patizia Scannella & Peter Splinter, *The United Nations Human Rights Council: A Promise to Be Fulfilled*, 7 HUM. RTS. L. REV. 41, 61–62 (2007) (discussing the Human Rights Council’s focus on Israel alone).

515. See Blitt, *supra* note 426, at 262–63 (discussing the lack of NGO accountability and objectivity); cf. Jeffrey Andrew Hartwick, *Non-Governmental Organizations at the United Nations-Sponsored World Conferences: A Framework for Participation Reform*, 26 LOY. L.A. INT’L & COMP. L. REV. 217, 228 (2003) (describing the role of politics in determining whether a NGO obtains UN consultative status).

516. See *supra* notes 426, 431, 440, 455, 492, and accompanying text. A particularly disturbing example is the NGO Forum of the 2001 UN World Conference Against Racism (Durban Conference), in which NGOs such as Amnesty International and Human Rights Watch participated in and refused to vote against (although they did not vote for) a pernicious anti-Israel resolution. Anne Bayefsky, *The UN World Conference Against Racism: A Racist Anti-Racism Conference*, 96 AM. SOC’Y INT’L L. PROC. 65, 68–69 (2002); Blitt, *supra* note 426, at 362–65; Hartwick, *supra* note 515, at 238; Tom Lantos, *The Durban Debacle: An Insider’s View of the UN World Conference Against Racism*, 26 FLETCHER F. WORLD AFF. 31, 46–47 (2002).

517. See DERSHOWITZ, *supra* note 458, at 4–5 (explaining how media reports on terrorism tend to focus on “body counts” and “claims of collective punishment”); *supra* notes 432, 440, 456–57, 488–89, and accompanying text; cf. Joan Deppa, *Media Coverage: Help or Hindrance?*, 22 SYRACUSE J. INT’L L. & COM. 25, 29 (1996) (stating that by covering terrorists, the media encourages them); Gross, *supra* note 315, at 465 (arguing that media coverage gives terrorists legitimacy).

518. See W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 AM. SOC’Y INT’L L. PROC. 208, 210 (2005) (“Government-authorized actions in war speak louder than peacetime government statements.”); *supra* notes 21, 23–24.

Whether the ICRC likes it or not, the international legal system fundamentally rests upon the building block of sovereign states and their willingness to govern their own actions. Perhaps the ICRC is a proxy for individual victims of war, but those individuals are not states and do not have a voice under the traditional international legal system.

Nicholls, *supra* note 224, at 244.

measure of state practice unless it encompasses a balanced approach to the law of war that does not reward intentional violations of its provisions.<sup>519</sup> Today, however, the Protocol reflects nothing more than the well-meaning aspirations of those who sincerely wish to end civilian casualties in war and the tool of those who see civilians as shields and civilian deaths as useful public relations.

Ironically, the nations that receive most international scorn for perceived violations of international humanitarian law—the United States and Israel—make compliance with the law of war a centerpiece of their military operations.<sup>520</sup> If customary international humanitarian law were based upon the combat practice of nations other than the Western democracies, the custom would unquestionably be that civilians are “fair game” in combat and the legitimate objects of attack.<sup>521</sup> From Soviet and Russian wars in Afghanistan, Chechnya, and Georgia;<sup>522</sup> to the Iran–Iraq War;<sup>523</sup> to

519. See Burrus M. Carnahan, *Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81 AM. SOC'Y INT'L L. PROC. 26, 36–37 (1987) (explaining how Protocol I favors some nations over others); see also Rabkin, *supra* note 15, at 194 (explaining why weak states and non-state movements have an incentive to avoid honoring the law of war, whereas stronger states will likely comply for its own reasons).

520. See *supra* notes 263–64, 483, and accompanying text; see also Kieval, *supra* note 28, at 888–89 (arguing that Israel has “balance[d] its need for security against the suffering of Palestinians”); Steven R. Ratner, *Geneva Conventions*, FOREIGN POL'Y, Mar. 1, 2008, at 26 (stating that, although the U.S. has, at times, engaged in “mangling the conventions,” “U.S. compliance with the conventions has been admirable, far surpassing many countries”).

521. Cf. Kieval, *supra* note 28, at 897 (comparing Israel's alleged human rights violations to the disproportionate force that occurred in Chechnya).

522. See *supra* note 237; see also Duncan B. Hollis, Note, *Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 803–05 (1995) (noting Russian attacks on Chechen civilian targets); *Artillery Attacks Kill Hundred of Afghans*, SAN JOSE MERCURY NEWS, Jan. 26, 1989, at 8A (describing an intentional Soviet attack on Afghan villages); Anne Barnard, *Georgia & Russia Nearing All-Out War*, N.Y. TIMES, Aug. 9, 2008, at A1, available at <http://www.nytimes.com/2008/08/10/world/europe/10georgia.html?scp=1&sq=Georgia%20&%20Russia%20Nearing%20All-Out%20War&st=Search> (reporting on Russian attacks on civilian sites in Georgia); Charles King, *Crisis in the Caucasus*, FOREIGN AFF., Mar. 1, 2003, at 134 (In Chechnya, “Tens of thousands of people have been killed—many, perhaps most, of them civilians. . . . Cities have been leveled by Russian bombs, and hundreds of thousands of citizens have been made refugees in neighboring republics and countries.”); William Mullen, *The Unprotected Refugee Camps Swell as Warfare Turns Even Babies into Targets*, CHI. TRIB., Oct. 13, 1988, at 1 (describing the wide-scale Soviet attacks on Afghan civilians, including the targeting of Afghan children with small bombs disguised as toys); Johanna Nichols, *The Chechen Refugees*, 18 BERKELEY J. INT'L L. 241, 246 (2000) (stating that the 1999 Chechen war with the Russians “is notable for its brutality towards civilians and its level of destruction. . . . civilians have been the chief (and intended) targets of the Russian forces.”); Alex Rodriguez, *Russia Hammers Georgia Sites*, CHI. TRIB., Aug. 10, 2008, at 14 (reporting on Russian attacks on civilian sites in Georgia).

the Iraqi, Hamas, and Hezbollah rocket attacks on Israeli civilians;<sup>524</sup> to the Balkan conflicts;<sup>525</sup> to the Ethiopian–Eritrean War;<sup>526</sup> to the Jordanian–Palestinian conflict of 1970;<sup>527</sup> and to nearly all of the many internal wars plaguing non-democratic nations in the past

523. See, e.g., SHAHRAM CHUBIN & CHARLES TRIPP, *IRAN AND IRAQ AT WAR* 61–62 (1988) (describing Iraqi and Iranian attacks on civilian population centers); Thomas L. McNaugher, *Ballistic Missiles and Chemical Weapons: The Legacy of the Iran-Iraq War*, INT'L SEC., Autumn 1990, at 5, 9 (describing the “war of the cities,” in which Iraqi and Iranian forces both targeted civilian population centers); S. Taheri Shemirani, *The War of the Cities*, in *THE IRAN-IRAQ WAR: THE POLITICS OF AGGRESSION* 32, 32–33 (Farhang Rajaee ed., 1993) (describing Iraq’s use of chemical weapons against Iranian civilians).

524. See *supra* notes 447–48, 468, 479, and accompanying text (discussing Hamas’s and Hezbollah’s intentional targeting of Israeli civilians); see also Robert A. Bailey, *Why Do States Violate the Law of War?: A Comparison of Iraqi Violations in Two Gulf Wars*, 27 SYRACUSE J. INT’L L. & COM. 103, 115–16 (2000) (contending that Iraq fired about ninety Scud missiles at civilian objects in Israel and Saudi Arabia during the 1991 Gulf War); Louis Rene Beres, *Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law*, 14 DICK. J. INT’L L. 187, 204 (1996) (observing that Iraq’s firing of thirty-nine Scud missiles at Israeli missiles during the 1991 Gulf War was “designed expressly to harm innocent civilians”); Isabel Kershner & Taghreed El-Khodary, *Gaza Rocket, Fired at Israel, Pierces a Fragile Calm*, N.Y. TIMES, Mar. 12, 2008, at A-6 (reporting on Hamas rocket attacks on Israeli cities); Isabel Kershner, *Israel Sees Escalation in Gazans’ Longer-Range Strikes*, N.Y. TIMES, Feb. 29, 2008, at A3 (stating similar material); Mortimer B. Zuckerman, Editorial, *A Moral Outrage*, U.S. NEWS & WORLD REP., Mar. 24, 2008, at 72 (stating that Fatah and Hamas have fired 4,000 rockets on Israel).

525. See Prosecutor v. Milosevic, Case No. IT-01-51-I, Indictment, ¶ 36 (Nov. 22, 2001), available at <http://www.un.org/icty/indictment/english/mil-ii011122e.htm> (accusing former Serbian leader Slobodan Milosevic of the execution, extermination, murder, and willful killings of non-Serbs, principally Bosnian Muslims and Bosnian Croats); Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 628 (2007) (noting the war crimes conviction of Radko Mladic for the capture, execution and secret mass burial of “between 7,000-8,000 young Bosnian Muslim men attempting to escape from Srebrenica—a UN safe enclave—after its capture by the Serbs in the summer of 1995”); Nevena Simidjijaska, Note, *From Milosevic’s Reign to the European Union: Serbia and Montenegro’s Stabilization and Association Agreement*, 21 TEMP. INT’L & COMP. L.J. 147, 173 (2007) (noting that the Serbian shelling of the Croat town of Vukovar in 1991 resulted in the deaths of 2,300 civilians and the expulsion of the Croatian population from the town); Sebastian Junger, Letter to the Editor, *Kosovo’s Valley of Death*, VANITY FAIR, July 1998, available at <http://www.vanityfair.com/magazine/archive/1998/07/junger199807> (reporting on Serbia’s targeting and killing of civilians in Kosovo).

526. Andrew England, *Ethiopia Launches New Offensive*, S. FLA. SUN-SENTINEL, June 15, 2000, at 23A (recording the tens of thousands of soldiers and civilians killed in war); Karl Vick, *Victims of Eritrea War Expect Long Camp Stays*, DALLAS MORNING NEWS, June 4, 2000, at 35A (stating that eight of every ten casualties in the Ethiopia-Eritrea War are civilians).

527. Editorial, *Another View of Hussein*, BALTIMORE SUN, Feb. 10, 1999, at 23A (noting that many innocent civilians were killed during the Jordanian conflict with the PLO); Dan Goodgame, *Jordan’s King Survives with Style*, MIAMI HERALD, Mar. 27, 1983, at 26A (noting the thousands of civilian deaths during Jordan’s war to expel the PLO in 1970).

thirty years,<sup>528</sup> the concept of civilian immunity from attack simply does not exist as a matter of state practice.<sup>529</sup>

528. Like Protocol I, Additional Protocol II, Article 13(2) to the Geneva Conventions of 1949, which governs conflicts not of an international character, see *supra* note 13, prohibits attacks against the civilian population and proscribes “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population . . . .” Most combatants simply ignore or intentionally violate civilian immunity in internal conflicts. Examples include: Cambodia, e.g., Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L.J. 1, 22 (1996) (stating that the Khmer Rouge killed over one million civilians in Cambodia in the 1970s); Congo, e.g., *U.N. Pleads for Aid to Save Lives in Congo*, N.Y. TIMES, Feb. 13, 2006, at A3 (estimating four million deaths in the Congo due to civil war that began in 1998); *Death Toll in Congo Raid*, N.Y. TIMES, July 17, 2002, at A4 (citing civilian deaths in a raid by “Rwandan-backed rebels” in the Congo); Haiti, e.g., Scharf, *supra*, at 4 (recording the deliberate killing of civilians by the Haitian military regime following the overthrow of the Aristide government); Julie Ann Waterman, *The United States’ Involvement in Haiti’s Tragedy and the Resolve to Restore Democracy*, 15 N.Y.L. SCH. J. INT’L & COMP. L. 187, 193 (1994) (using similar language); Iraq, e.g., Kenneth M. Pollack, *Faith & Terrorism in the Muslim World*, N.Y. TIMES, Apr. 6, 2003, at 11, § 7 (noting that the Iraqi government killed between 50,000 and 70,000 civilians following the 1991 intifada); Liberia, e.g., Cherner Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trials in Liberia*, 1 AFR. J. LEGAL STUD. 53, 54 (2005) (noting the deliberate targeting of civilians during the Liberian civil war); Rwanda, e.g., Joseph A. Keeler, *Genocide: Prevention Through NonMilitary Measures*, 171 MIL. L. REV. 135, 161–63 (2002) (describing the systematic murder of over 600,000 civilians in the Rwandan civil war); Letter from Boutros Boutros-Ghali, U.N. Secretary-General, to the President of the U.N. Security Council, at 1, U.N. Doc. S/1994/1405 (Dec. 9, 1994) (describing the intentional murder of Tutsis by Hutus in Rwanda); Sierra Leone, e.g., Blaine Harden & Christopher S. Wren, *U.S. Plans to Help Airlift U.N. Forces into Sierra Leone*, N.Y. TIMES, May 9, 2000, at A1 (stating similar language); Norimitsu Onishi, *Horrors Behind Rebel Lines in Sierra Leone*, N.Y. TIMES, Nov. 30, 2000, at A1 (noting the deliberate targeting of civilians by rebels in the Sierra Leone civil war); Sri Lanka, e.g., Natalie Huls et al., *International Legal Updates*, 1 HUM. RTS. BRIEF 31, 36 (2006) (noting the targeting of civilians by government and rebel forces in Sri Lanka); Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT’L L. & POL. 741, 783 (2003) (examining the escalation of civilian deaths due to the Sri Lankan government’s campaign to eliminate rebels); Sudan, e.g., INT’L COMM’N OF INQUIRY ON DARFUR, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL ¶¶ 238–257, 269–288, 301–317, 339–340 (2005), available at [http://un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://un.org/news/dh/sudan/com_inq_darfur.pdf) (detailing indiscriminate attacks on civilians by Sudanese armed forces and rebels in Darfur); and Syria, e.g., Andrew Borowiec, *Impotence, Rage Fuel Opinions in Arab Press: Anti-Americanism Drowns Out Occasional Self-Criticism*, WASH. TIMES, Apr. 9, 2003, at A17 (noting the massacre of tens of thousands in Hama by the Syrian Ba’ath regime in the 1980s); Elaine Sciolino, *Trading Villains’ Horns for Halos*, N.Y. TIMES, Oct. 8, 1995, at 1 (noting that President Hafez al-Assad of Syria ordered the massacre of 20,000 Syrian civilians in the city of Hama in 1982).

529. See Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348, 369 (1987) (arguing that because of their strong moral claims and the different kinds of evidence of state practice involved, scholars and courts have been reluctant to reject international humanitarian and human rights law as candidates for customary status). However, if states fail to observe the provisions of the Geneva Conventions in conflicts in which they are involved or resort to numerous reservations, “the claims of the Conventions to customary law status will naturally be weakened.”

The underlying basis of international humanitarian law is beyond cavil: civilians must be insulated from the effects of conflict. Except for the few who view civilians simply as instruments of military policy—shields when they are alive and propaganda when they are killed—most fully embrace as the cornerstone of the law of war the proposition that military operations may not target civilians. Unfortunately, contemporary international humanitarian law, at least to the extent it is embodied in Protocol I and interpreted by a large portion of the international community, serves largely to protect those who have little regard for the lives or property of civilians. Protocol I and its defenders have created an environment in which insurgent and terrorist groups benefit from placing civilians at risk. Unless the international community is willing to make these groups “believe that their violations of humanitarian law will come at a cost[.]”<sup>530</sup> the protection of civilians under international humanitarian law will be little more than a fantasy.<sup>531</sup>

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*Id.* at 370; see also Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 VA. J. INT'L L. 91, 98 (2003) (“Massive violation of a treaty by numerous states over a prolonged period can be seen as casting that treaty into desuetude, as transforming its provisions to paper rules that are no longer binding.”); Nicholls, *supra* note 224, at 240 (“[I]f countries engaged in conflict do not agree with the IHL or find IHL rules overly restrictive of military operations, then the law is not practiced in any relevant state and cannot reasonably be considered ‘customary.’”); Roberts, *supra* note 25, at 762 (“Laws must bear some relation to practice if they are to regulate conduct effectively, because laws that set unrealistic standards are likely to be disobeyed and ultimately forgotten.”).

530. Schmitt, *supra* note 289, at 178.

531. See Hayashi, *supra* note 5, at 119 (arguing that the principle of civilian protection should be grounded in reality rather than towards an aspirational view of society); Reisman, *supra* note 315, at 860 (discussing how “[p]rinciples of international law, like any prescription, are abrogated when their consumers and custodians decide, for better or worse, to change them, whether by explicit abrogation purportedly based on rational self-interest, or by persistent tolerated and unremedied violations”).



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