# It's Time to Rethink the Law of Armed Conflict

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ABSTRACT: Recent armed conflicts present a paradox. Military officials routinely claim that conflicts, such as the recent war against ISIS in Iraq and Syria, are the most precise in history. Yet thousands of civilians continue to be killed. This Article shows the reason so many civilians continue to be killed is that the law we have was never designed for modern warfare, in which states are heavily reliant on air power, and enemy combatants are not generally separate or readily distinguishable from civilians. This truth about the limits of the legal protections codified nearly fifty years ago in the Additional Protocols to the Geneva Conventions was explicitly and repeatedly recognized at the Protocols' negotiating conference. Yet states have effectively blinded themselves to these limits and continue to apply the law as if it were adequate to the conditions in which we fight. This Article seeks to remedy the legal blindness by asking—and answering—how the law should be constructed if we want to protect civilians, and do so while serving our strategic interests in eliminating enemy threats and establishing durable security.

This Article makes three central contributions. First, it shows that the law of armed conflict is explicitly based on the classical assumption that civilians would be generally separate and distinguishable from combatants. This assumption, and the law built on it, fails particularly when air power is used to deliver exploding munitions against combatants and other military objectives in civilian populated areas. Second, the Article shows that the correct response to the inadequate law we have is not to make it less restrictive, but rather more restrictive. The weight of historical and contemporary evidence overwhelmingly shows that a more

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restrictive approach to the law of armed conflict is in our strategic security interest. Finally, the Article articulates how the fundamental rules of distinction, proportionality, and precaution in attack should be formulated and applied in a way that serves both our humanitarian values in protecting civilians, and our strategic security goals.



## I. Introduction

The war against ISIS in Iraq and Syria has been described by military commanders as the most "precise air campaign in the history of armed conflict."[1] U.S. officials assured the public that the requirements set by the laws of armed conflict had been met or

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1 Stephen Townsend, *Reports of Civilian Casualties in the War Against ISIS Are Vastly Inflated*, FOREIGN POLICY, (Sept. 15, 2017), https://foreignpolicy.com/2017/09/15/reports-of-civilian-casualties-from-coalition-strikes-on-isis-are-vastly-inflated-lt-gen-townsend-cjtf-oir/ [https://perma.cc/QQ2W-EULE].

exceeded and that the utmost care had been taken to spare civilian lives.[2] Nevertheless, credible reporting has corroborated the deaths of thousands of civilians killed by coalition airstrikes and thousands more injured.[3] We might thus ask how so many civilian casualties could occur within the bounds of the extensive civilian protections built into the modern law of war.

The standard response is that while the law does require the minimization of civilian casualties,[4] it does not contemplate their elimination altogether. Indeed, very extensive civilian casualties are perfectly consistent with the law, as long as civilians are not directly targeted, feasible precautions have been taken, and the anticipated casualties are not "excessive" in relation to the military advantage sought.[5] The law even requires military lawyers to be on hand to give real-time legal advice.[6] In highly compliant military operations, like the coalition's airstrikes in Iraq and Syria, every strike is supposed to be assessed by military lawyers to ensure its lawfulness.[7] In such operations, the law is functioning perfectly well, imposing meaningful restrictions on the use of military force,

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2 *See id*.

3 The independent monitoring group, Airwars, has corroborated evidence of 8,252 – 13,157 civilian deaths from US-led Coalition air strikes in Iraq and Syria and a further 5,764 – 8,956 civilians injured. *See* AIRWARS, *US-led Coalition in Iraq & Syria*, https://airwars.org/conflict/coalition-in-iraq-and-syria/ [https://perma.cc/J67Q-MS5A]. Since these are numbers only for confirmed or corroborated deaths and injuries, the actual numbers may be higher.

4 Protocol Additional to the Geneva Conventions of 12 Aug.1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 57(2)(a)(ii), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

5 *Id*. at arts. 48, 51, and 57.

6 *Id*. at art. 82.

7 *See* Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html [https://perma.cc/Q63A-YQKB]. More recent reporting, however, suggests that thousands of airstrikes against ISIS in Syria "sidestepped safeguards and repeatedly killed civilians." *See* Dave Philipps et al., *Civilian Deaths Mounted as Secret Unit Pounded ISIS*, N.Y. TIMES (Dec. 12, 2021), https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html [https://perma.cc/3P3R-SQWC]; *see also* Dave Philipps & Eric Schmitt, *How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria*, N.Y. TIMES (Nov. 13, 2021), https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html [https://perma.cc/C7PS-DN35]; and Eric Schmitt & Dave Philipps, *Pentagon Faults Review of Deadly Airstrike but Finds No Wrongdoing*, N.Y. TIMES (May 17, 2022), https://www.nytimes.com/2022/05/17/us/politics/us-airstrike-civilian-deaths.html [https://perma.cc/F6EC-GKNB].

and ultimately saving civilian lives. As regrettable as the deaths of thousands of civilians are, the law of armed conflict has been designed as a compromise between military necessity and humanitarian concerns.[8] Although tragic in many instances, that designed compromise is what has played out in the war against ISIS.[9]

Almost everything about the above account of the design and function of the law is correct except for one crucial element. The law of armed conflict was never designed for the kinds of wars we have been fighting against ISIS and other terrorist and insurgent groups over the last two decades. The cornerstone of the law is distinction, the rule that requires combatants to distinguish themselves from civilians, thus enabling military operations to be aimed only at combatants and other military objectives. When the cornerstone is removed and combatants are no longer distinct from civilians, the edifice designed to protect civilians from the ravages of war crumbles. This truth about the limits of the legal protections codified nearly fifty years ago in the Additional Protocols to the Geneva Conventions was explicitly and repeatedly recognized at the Protocols' negotiating conference. Yet states have effectively blinded themselves to these limits and continue to apply the law as if the cornerstone of distinction were in place. This Article seeks to remedy the legal blindness by asking—and answering—how the law should be constructed if we want to protect civilians in the conditions we actually face, where combatants and civilians are routinely intermingled and indistinguishable from one another.

The need to rethink the law flows not just from the stubborn persistence in applying inadequate rules beyond their design remit. There is also widespread recognition, explicit in some quarters and implicit in others, that the law we have accords with neither our values nor our strategic interests. Examples of the explicit recognition of the inadequacy of the law abound in military, political, and civilian arenas. A few of the most well-known examples are reflections on the strategic disadvantages of civilian casualties in the Counterinsurgency Field Manual,[10] routine Rules

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8 *See* Eric Schmitt & Dave Philipps, *Pentagon Faults Review of Deadly Airstrike but Finds No Wrongdoing*, N.Y. TIMES (May 17, 2022), https://www.nytimes.com/2022/05/17/us/politics/us-airstrike-civilian-deaths.html [https://perma.cc/F6EC-GKNB].

9 *Id.*

10 *See* DEP'T OF THE ARMY, *FM 3-24/MCWP* 3-33.5, COUNTERINSURGENCY 247-48,

of Engagement that require soldiers to exercise precautions that exceed legal requirements,[11] the Obama and Biden administrations' Presidential Policy Guidance and Memorandum for targeting outside areas of active hostilities,[12] and the multitude of intergovernmental organizations and NGOs publicizing and seeking to limit civilian casualties in armed conflict.[13] An implicit recognition of the inadequacy of the law and the unacceptability of the civilian deaths allowed under it may also be lurking in the now well-documented gross and "systematic . . . undercounting" of civilian deaths by the U.S. military.[14] Extensive research has demonstrated that coalition air strikes in Iraq and Syria were far "less precise [and more deadly toward civilians] than the coalition claim[ed]."[15] Although there is no evidence to suggest that coalition air strikes were generally unlawful, the systematic misrepresentation and denial of their deadly effects on civilians suggest that the reality of what is legally permitted would be difficult to square with our commitment to take "extraordinary efforts to protect non-combatants."[16] This Article thus seeks to establish four interlocking claims about the current law: (1) the law was not designed for the conditions in which we most frequently fight today; (2) the law does not fulfill its civilian protecting object and purpose; (3) the law does not accord with our values; and (4) the law does not serve our strategic interests.

The Article begins by examining the evolution of civilian protections over the last century that culminated in the 1977

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para. 7-32 (2006) [hereinafter COIN Manual].

11 Michael N. Schmitt & Major Michael Schauss, *Uncertainty in the Law of Targeting: Towards a Cognitive Framework*, 10 HARV. NAT'L SEC. J. 148, 160 (2019).

12 For Obama's Presidential Policy Guidance, *see* Press Release, Office of the Press Secretary, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism [https://perma.cc/89MN-VBCW]. The Biden administration's Presidential Policy Memorandum remains classified. For an off the record account *see* Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, N.Y. TIMES (Oct. 7, 2022), https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html [https://perma.cc/R2DA-VTN7].

13 *See* HUMAN RIGHTS WATCH, *World Report 2023: Events of 2022*, https://www.hrw.org/world-report/2023 [https://perma.cc/KGV7-UQSL].

14 Khan & Gopal, *supra* note 7; s*ee also* AIRWARS, *supra* note 3.

15 Khan & Gopal, *supra* note 7; *see also* Philipps & Schmitt, *supra* note 7.

16 Townsend, *supra* note 1.

Additional Protocols. The central aim of the Additional Protocols was to improve civilian protections by devising law that responded to the risks to civilians posed by aerial bombardment and guerrilla warfare. Part I shows that the system of legal protections ultimately produced by the Additional Protocols was fundamentally flawed because it rested on the assumption that the law would be applied to conditions in which civilians and combatants were generally separate and distinguishable. Those negotiating the Additional Protocols explicitly recognized that if distinction between combatants and civilians broke down, the law they devised would not protect civilians.[17] Distinction has broken down for reasons that were not anticipated, however. Many states feared that a legal recognition of guerilla fighters would erode distinction and endanger civilians. Yet it is not legitimate guerrilla fighters who have undermined civilian protections. It is rather the persistent use of air power, on the one hand, and fighters with no regard for the laws of war, on the other, that have undermined civilian protections and exposed the inadequacy of the law.

Given the poor design of the law for the conditions of so much armed conflict today, Part II confronts the challenge that the correct response is not more restrictive law, but more permissive law. Against the claim that the current law is too restrictive and prevents law-abiding militaries from winning wars, I marshal a host of historical and contemporary analyses that show first, that indiscriminate warfare has generally been counterproductive, and second, that even a law-abiding reliance on air power tends to work against military success. Given the weight of historical and contemporary evidence, I argue that a more restrictive approach to the law of armed conflict is in our strategic security interest.

The final Part of the Article articulates precisely how the fundamental rules of distinction, proportionality, and precaution in attack should be rethought to effectively protect civilians and meet our security interests. In brief, distinction should focus on the civilian or military character of the area affected by an attack, rather than simply the presence of military objectives. Proportionality should incorporate, wherever possible, data on medium- and long-term disadvantages of similar strikes when calculating the military

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17 Official Records of the Diplomatic Conference On The Reaffirmation And Development Of International Humanitarian Law Applicable In Armed Conflicts Geneva (1974-1977), vol. 6, p. 132, para. 72 [hereinafter Official Record].

advantage of an attack. Finally, precaution in attack, rather than playing a secondary suggestive role, should be the cornerstone of civilian protections, pushing militaries to design operations that eliminate, as far as possible, civilian casualties, both for civilian protection and overall military success.

## II. The Design Flaws of Civilian Protections

It is an abiding cliché that the law of war is always made for the last war. Unfortunately for the Additional Protocols of 1977 ("the Protocols"), their essential shortcoming was not that they failed to anticipate the future, but rather that they failed to adequately address the longstanding issues that were their very *raison d'etre*. Notwithstanding the tremendous advancement in the law brought about by the Protocols, they failed to adequately address a fundamental question of warfare, which is as old as guerrilla warfare itself and which has been exacerbated by technological innovations, especially air power: how to protect civilians when they are not separate or readily distinguishable from combatants. The failure was not due to a lack of concern with the devastating effects that air power and conflicts with guerrillas had on civilians. The failure was rather due to a one-sided focus on trying to bolster guerrilla compliance with the law, instead of tackling the more difficult challenges of non-compliance and the advent of aerial bombardment that blurred the classical distinction between civilians and military objectives.

The sections below chart the course to the system of civilian protections that culminated in the Additional Protocols, focusing on the challenges the Protocols tried to resolve, the assumption underpinning the legal solutions offered, and their ultimate shortcomings for conflicts both then and now. The first section focuses on the far-reaching attempts to develop meaningful legal responses to the advent of air power between the First and Second World Wars. Although no internationally binding protections for civilians were ultimately adopted and widespread indiscriminate bombing during World War II ensued, the 1923 Hague Rules of Air Warfare demonstrate how states could have responded to the new reality of air power and its devasting impact on civilians. The second section chronicles the failures to establish robust civilian protections from air power over the three decades following World War II. The central problem was not a failure to recognize the need for robust civilian protections, or even a reluctance of states to

accept meaningful restrictions on the means and methods of warfare. The stumbling block was rather nuclear states' refusal to accept restrictions on conventional warfare that would also apply to nuclear weapons. I show that as soon as the nuclear question was set aside, states were ready to negotiate restrictions on conventional warfare. The third section then analyses how and why the Additional Protocols failed to address the fundamental challenge of air power that had been recognized half a century earlier in the Hague Rules. I will show that, despite the real advances brought by the Additional Protocols, the law contained therein does not serve our core humanitarian values because it was not designed to protect civilians in the conditions in which we actually fight.

### *A. Early Failures to Resolve the Problem of Air Power*

While the customary prohibition on attacks against civilians is millennia old,[18] the explicit prohibition in international law was codified for the first time in the 1977 Additional Protocols to the Geneva Conventions.[19] The path to concrete and codified civilian protections from war traversed most of the twentieth century and built off of prior customary law. Although the International Committee of the Red Cross (ICRC) commented that "[t]he original humanitarian legislation represented by the First Geneva Convention of 1864 provided only for combatants, as at that time it was considered evident that civilians would remain outside hostilities,"[20] the contemporaneous American Civil War was already proving otherwise.[21] Nevertheless, the latter part of the nineteenth century produced no strong protections for civilians. The St. Petersburg Declaration of 1868 gave indirect voice to the prohibition on targeting civilians by stating that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."[22] The Regulations

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18 *See, e.g.,* UNITED KINGDOM, JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, UK JSP 383, ¶ 1.16 (2004) ("[I]t is said . . . that the first systematic code of war was that of the Saracens based on the Koran.").

19 *See* AP I, *supra* note 4, at art. 48.

20 International Committee of the Red Cross, The Geneva Convention of 12 Aug. 1949, Preliminary Remarks, 29.

21 Of course, the long history of sieges and raids, and the rather exceptional status of battle warfare would have demonstrated otherwise as well. *See* JAMES WHITMAN, THE VERDICT OF BATTLE, 26–36 (2012).

22 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under

concerning the Laws and Customs of War on Land, annexed to the Fourth Hague Conventions of 1899 and 1907 went somewhat further by prohibiting attacks on undefended towns, villages, dwellings, and buildings.[23] However, the Hague Regulations still did not include an explicit prohibition on attacks against civilians, perhaps again due to a lingering view that civilians were "relatively secure from the effects of battle."[24] Whatever the reason for the lack of explicit and detailed civilian protections, the protections afforded by the Hague Regulations were almost immediately proven inadequate by the experience of World War I. This section analyses the early and often far-reaching attempts to rein in air power whose foundering led to the indiscriminate bombing of World War II.

George Quester long ago observed that proposals to restrict air warfare generally followed "the older traditions of the laws of war, which tended often (but not always) to hinge on type of target rather than type of weapon, on the assumption that target distinctions would retain their meaning long after weapons innovations had blurred the distinctions there."[25] Although Quester's insight is true of the rule of distinction that we have today, early attempts to regulate air power grappled with the transformative nature of the technology head-on and formulated rules that specifically accounted for the effects that air bombardment was likely to have well beyond its intended target. By 1920, the ICRC had already submitted to the League of Nations proposed restrictions on aerial

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400 Grammes Weight. Saint Petersburg, 29 Nov. / 11 Dec. 1868, https://ihl-databases.icrc.org/en/ihl-treaties/st-petersburg-decl-1868/declaration.

23 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 Oct. 1907, art. 25, https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907 [https://perma.cc/A656-4V88] [hereinafter 1907 Hague Regulations]. The Hague Conventions and Regulations were convened, in part, to revisit the work of the Brussels Conference of 1877 that had failed to gain the general agreement of the participants. *See* International Committee of the Red Cross, International Humanitarian Law Databases, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 Oct.1907, https://ihl-databases.icrc.org/ihl/INTRO/195 [https://perma.cc/MH4A-3EHM].

24 MICHAEL BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 315 (2d ed. 2013) [hereinafter New Rules].

25 GEORGE H. QUESTER, DETERRENCE BEFORE HIROSHIMA: THE AIRPOWER BACKGROUND OF MODERN STRATEGY 79 (1966).

warfare to contain its potentially indiscriminate effects.[26] Soon thereafter, the Washington Naval Disarmament Conference of 1921 called for a commission of jurists to write new rules for aerial weapons, which resulted in the 1923 Hague Rules of Air Warfare ("The Hague Rules").

The Hague Rules would have been the first codification of robust rules of distinction. The jurists had proposed prohibitions on targeting civilians and civilian property.[27] They also specified that air bombardment should only be directed against military objectives.[28] The proposed rules went significantly beyond the rules in force today, however, by restricting air bombardment to the "immediate vicinity of the operations of the land forces,"[29] and by prohibiting bombing of military objectives located in the vicinity of a civilian population when those objectives "cannot be bombarded without the indiscriminate bombardment of the civilian population."[30] This latter rule accounted for two fundamental features of bombardment from the air: its inherent inaccuracy, and the use of exploding munitions that spread destruction far beyond the intended target. Even as precision has greatly increased and blast radii of some munitions, such as Hellfire missiles, have become far narrower, the destruction wrought by these weapons still far exceeds the target.[31] It was the recognition of the imprecision and wide destructiveness of air power that led the drafters of the 1923 Hague

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26 INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR 18 (1956) [hereinafter 1956 Draft Rules].

27 RULES CONCERNING THE CONTROL OF WIRELESS TELEGRAPHY IN TIME OF WAR AND AIR WARFARE art. 22 (Dec. 1922 – Feb. 1923) https://ihl-databases.icrc.org/en/ihl-treaties/hague-rules-1923 [https://perma.cc/2YDW-W46Z] [hereinafter 1923 Hague Rules].

28 *Id*. at art. 24(1).

29 *Id*. at art. 24(3) ("Any bombardment of cities, towns, villages, habitations and building which are not situated in the immediate vicinity of the operations of the land forces, is forbidden.").

30 *Id*. at art. 24(3).

31 I analyze the blast radius and destructive effects of Hellfire missiles and other exploding munitions in detail in Part IV(A) below. There are some very limited, non-explosive munitions in the U.S. arsenal, such as the Hellfire AGM-114R9X, which uses blades rather than explosives for its lethal effects. *See* Peter Beaumont, *US Military Increasingly Using Drone Missile with Flying Blades in Syria*, THE GUARDIAN (Sept. 25, 2020), https://www.theguardian.com/world/2020/sep/25/us-military-syria-non-explosive-drone-missile-blades [https://perma.cc/A44P-C85K].

Rules not simply to require targeting of military objectives only. They also directly took into account the effects of air power and attempted to tightly cabin its use to avoid the killing of civilians that would accompany the use of air power in civilian populated areas. Had these rules been adopted, they would have given far more meaning to distinction than our current rule which requires simply identifying and aiming at a military objective. An analysis of the effects of a proposed attack on civilians would have been necessary, such that where the destructive means employed were as likely to affect civilians as military objectives, the attack would not satisfy the core rule of distinction.

Although the Hague Rules proposed quite significant restrictions on air warfare, several delegations expressed regret that more far-reaching restrictions could not be agreed upon.[32] Nevertheless, the proposed rules ultimately failed to be ratified by any of the major powers due, at least in part, to doubts over whether states would restrict the use of air power were war to break out.[33]

With no major power accepting the restrictions on the means and methods of air warfare proposed by the 1923 Hague Rules, attention turned to restricting air power at its source. The ensuing period was punctuated by the League of Nations' work on disarmament in which various calls were made to ban aerial bombardment and/or bomber aircraft altogether.[34] Although many states were willing to endorse a ban on aerial bombardment, no state wanted to be at a strategic disadvantage when it came to bomber capacity.[35] The concern with strategic disadvantage and the rapid development of civilian aircraft, which could be readily converted to military use, effectively put an end to disarmament talks.[36] Once again, no agreements were reached and many feared that civilian populations would be the primary target in any future war.[37]

Although the ICRC renewed efforts to regulate air power in 1931 by convening an international panel of experts to study the "legal and technical means of protecting the civilian population"

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32 *Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare: General Report*, 32 THE AM. J. OF INT'L LAW 1, 23 (1938).

33 *See* Quester, *supra* note 25, at 78.

34 *Id*. at 77–81.

35 *Id*. at 70.

36 *Id*. at 56, 58, 66, 69, 70, 77, 79, and 81.

37 *Id*. at 81.

from the dangers posed by new developments in the means of waging war, no international agreement followed on the study.[38] Finally, in 1938 there was a last-ditch effort led by Prime Minister Neville Chamberlain of Great Britain to at least set out ground rules for aerial bombing. He proposed three rules that would be adopted by a nonbinding League of Nations resolution on September 30, 1938:

> 1. It is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations.
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> 2. Targets which are aimed at from the air must be legitimate military objectives and must be capable of identification.
>
> 3. Reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighborhood is not bombed.[39]

A year later, as war had already been declared, President Franklin Roosevelt of the U.S. urged the warring nations to refrain from bombing civilians.[40] While all parties initially agreed to those terms and generally stuck to them until the "Battle of Britain" in the summer of 1940,[41] the agreed upon rules soon gave way to unrestricted indiscriminate bombing of military and civilian targets. Although generally cast as "reprisals" for prior breaches by the enemy, the British Royal Air Force (RAF) came to explicitly adopt "morale" bombing and a "dehousing" strategy aimed at the German working-class population.[42] The United States also reversed course late in the Pacific War and adopted a policy of firebombing Japanese cities, with horrific effects on the civilian population.[43] Despite the clear threat to civilians posed by air power between the wars, and frequent efforts to temper those threats with binding international agreements, the failure of those efforts meant that no legal instrument was in place that could have prevented the indiscriminate use of airpower throughout World War II.[44]

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38 1956 Draft Rules, *supra* note 26, at art. 17–18.

39 LEAGUE OF NATIONS OFFICIAL JOURNAL, Document A.69, 1938 IX, 15–16 (Special Supplement 182 [1938]), *cited in* W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 36 (1990), p. 36.

40 Quester, *supra* note 25, at 106; *See also* Parks, *supra* note 39 at 36–37.

41 *See* Quester, *supra* note 25, at 106–13.

42 *See id*. at 136–58; and discussion below in Part III(A).

43 *See* Quester, *supra* note 25, at 170–71.

44 *See* William Hays Parks, *Air War and the Law of War, in* 1 THE CONDUCT OF

### *B. The Halting Path Toward Robust Civilian Protections*

The massive assault on civilians and civilian infrastructure during the Second World War made civilian protections a central topic of the diplomatic conference that went on to adopt the Geneva Conventions of 1949.[45] However, despite the undeniable threat to civilians posed by air power and a reinvigorated campaign to codify extensive civilian protections, efforts to protect civilians in 1949 and many times thereafter repeatedly foundered on the nuclear question. Only when the question of how to regulate nuclear weapons was set aside was there an opening to talk about how to regulate the means and methods of "conventional" warfare.

The Geneva Conventions of 1949 were an important advance in the regulation of warfare despite their omission of civilian protection from attack. The incorporation of rules dealing with prisoners of war and civilians in occupied territory were significant developments of rules originally dealt with by Hague Law.[46] Debate during the negotiations went significantly further and considered civilian protections against the tremendously increased direct dangers of hostilities due to technological advances in air power and its unrestricted use, as well as the dangers posed by nuclear, chemical, and biological weapons.[47] However, civilian protections against the effects of hostilities became immediately politicized.[48] They were championed by the still non-nuclear Soviet Union as a package that included a prohibition on nuclear weapons.[49] Such a position was seen as both cynical and unacceptable to the United States and its allies, who believed nuclear weapons had been fundamental to victory in World War II. The U.S. and U.K. thus sought to block the inclusion of restrictions on means and methods

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HOSTILITIES IN INTERNATIONAL HUMANITARIAN LAW 356-59 (Michael N. Schmitt ed., 2012). I discuss indiscriminate bombing and its ineffectiveness during World War II in Part III(A) below.

45 *See* Jean S. Pictet, *IV Geneva Convention Relative To The Protection of Civilian Persons In The Time Of War*, *in* THE GENEVA CONVENTIONS OF 12 AUG. 1949 COMMENTARY, 4, 10 (1958).

46 1956 Draft Rules, *supra* note 26, at 18–19; *See* 1907 Hague Regulations, *supra* note 23, arts. 4–20 and 42–56.

47 Giovanni Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*," *in* DO THE GENEVA CONVENTIONS MATTER? 46 (Matthew Evangelista & Nina Tannewald eds., 2017).

48 *Id*.

49 *Id*.

of warfare from the 1949 Geneva Conventions by arguing that such restrictions were traditionally a matter of Hague law and thus exceeded the mandate of the Geneva Conference.[50] The U.S. and its allies eventually won the day, garnering enough votes to block the significant development of restrictions on the means and methods of warfare to protect civilians from air power in 1949.[51]

The path toward robust civilian protections thus began anew with a meeting of international military and legal experts convened by the ICRC in 1954 to discuss "restrictive rules" for "safeguarding the civilian population" from "the new methods of warfare."[52] Among the central topics of discussion, the ICRC sought confirmation of rules on targeting military and non-military objectives, the effects of "total air war" in the Second World War, and the need for rules governing aerial warfare.[53] The group of experts affirmed the prohibition on directly attacking non-combatants, as well as the need for a code of rules regulating air power.[54] The experts also agreed that "total war from the air had not 'paid,'" with one expert adding, "the value of indiscriminate bombing had borne no relation either to the efforts it had cost or to the expenditure, including that of human lives, which it had involved."[55] Despite affirming the customary prohibition on attacking civilians and against causing unnecessary harm, the experts acknowledged "the difficulty of expressing them in the form of precise provisions, applicable to bombing from the air."[56] In addition to focusing on conventional weapons, the discussion also focused on the need to regulate weapons of mass destruction and concluded that any new code of rules for the protection of the civilian population would be more effective if states agreed to renounce the use of such weapons.[57]

In the wake of the meeting of experts, the ICRC spent the next year formulating rules, many of which would later be taken up

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50 *Id*.

51 *Id*.

52 1956 Draft Rules, *supra* note 26, at 21; *See id*. at 21, note 1 for the list of experts and their qualifications.

53 *Id*. at 22.

54 *Id*.

55 *Id*.

56 *Id*.

57 *Id*.

nearly verbatim in the Additional Protocols some twenty years later.[58] The rules were presented at the 19th International Red Cross Conference in New Delhi in January 1957.[59] Although most of the rules generated little controversy, the provision prohibiting nuclear weapons was intolerable to the nuclear powers and delayed the codification of the more acceptable civilian protections for another twenty years.[60] As François Bugnion describes it, "[t]he project was shot down by an unholy alliance of the United States and Soviet Union. That painful failure left a deep scar in the ICRC's memory, and for a long time prevented any new codification attempts."[61]

After a decade of languishing, the momentum again shifted in favor of updating the laws of armed conflict. In 1968, the International Conference on Human Rights asked the UN General Assembly "to invite the Secretary-General to study . . . [t]he need for additional humanitarian international conventions or for possible revision of existing Conventions . . . ."[62] The General Assembly that year went on to unanimously pass Resolution 2444 (XXIII), which expressly called on

> the Secretary-General, in consultation with the International Committee of the Red Cross . . . to study . . . [t]he need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.[63]

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58 INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR (1956), https://ihl-databases.icrc.org/en/ihl-treaties/icrc-draft-rules-1956 [https://perma.cc/9QTS-Q2UP].

59 *Id*.

60 The U.S., for its part, had already placed the core rules of distinction, proportionality, and some precautionary rules in its July 1956 update of the Army Field Manual. *See* DEP'T OF THE ARMY, DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE FM27-10, Change No. 1, arts. 40–41 (July 1956).

61 François Bugnion, *Adoption of the Additional Protocols of 8 June 1977: A Milestone in the Development of International Humanitarian Law*, 99 INT'L. REV. RED CROSS, Number 905, 785, 787–88 (Nov. 2017).

62 International Conference on Human Rights, *Final Act of the International Conference on Human Rights,* U.N. Doc. A/CONF.32/41 (May 13, 1968), *cited in* Bugnion, *supra* note 61.

63 G.A. Res. 2444 (XXIII) *Respect for Human Rights in Armed Conflicts* (19 Dec. 1968) [hereinafter UNGA Resolution 2444].

Resolution 2444 (XXIII) also quoted and affirmed the basic principles governing armed conflict that the ICRC had articulated at its 20th International Conference of the Red Cross in Vienna in 1965.[64] The ICRC had called on all governmental and other authorities responsible for action in armed conflicts to recognize and conform to at least the following principles:

> (a) that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
>
> (b) that it is prohibited to launch attacks against the civilian populations as such;
>
> (c) that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.[65]

The General Assembly went on to pass one or more similar resolutions in every year through 1976.[66] The Secretary General himself stated in 1970 that:

> Geneva Convention IV, the main international instrument covering [civilian protections], suffers from certain basic deficiencies. The first is that it covers the civilian populations only when they fall into the power of the enemy while the greatest dangers to which civilian populations may be exposed arise from attacks by the enemy in areas not under its control. This latter situation is still only governed by the Hague Regulations [of 1907], which may be considered in this respect as largely out of date.[67]

Given the widespread recognition of the inadequacies of existing law and the explicit call to the ICRC to develop more effective law,

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64 *Id*. at para. 1 (Dec. 19, 1968).

65 *Id*. *See* International Committee of the Red Cross, *Resolution XXVIII*, 56 INT. REV. RED CROSS 589 (1965).

66 *See* UNGA Resolutions 2597 (XXIV) 1969, 2674 (XXV) 1970, 2675 (XXV) 1970, 2676 (XXV) 1970, 2677 (XXV) 1970, 2852 (XXVI) 1971, 2853 (XXVI) 1971, 3032 (XXVII) 1972, 3076 (XXVIII) 1973, 3102 (XXVIII) 1973, 3103 (XXVIII) 1973, 3319 (XXIX) 1974, 3500 (XXX) 1975, 31/19- 1976, and 32/44-1977.

67 Respect for Human Rights in Armed Conflict, Report of the Secretary General, UN General Assembly, 25th Sess., UN Doc. A/8052 (Sept. 18, 1970), p. 69, para. 218. While it is true that the Report goes on to call attention to "indiscriminate attacks against civilians, by bombing or otherwise," and particularly in the context of opposition to "freedom movement," as I will demonstrate below, the rule of distinction codified in the Additional Protocol I does not cure the problem of dangers to the civilian population from air warfare.

the ICRC again took the lead in developing what would become the Additional Protocols. The ICRC launched a series of consultations with international and government experts "to identify both the expectations of the international community and the fields in which new developments appeared possible."[68] On the basis of those consultations, the ICRC formulated two draft Additional Protocols and then, through the Swiss Government, convened The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts from 1974-77.

### *C. The Failings of the Additional Protocols*

Although the Diplomatic Conference was not exclusively concerned with civilian protections, its principal motivation "was a shared need to formulate more effective rules to protect the civilian population and individual civilians from the effects of attacks."[69] The delegates to the Conference were keenly aware of the very limited civilian protections in the history of the law of armed conflict (LOAC). Several delegates contrasted the assumptions apparently at work in the Hague Regulations with the harsh reality of the Second World War. Mr. Nahlik of Poland, chairman if a committee at the Conference, for instance, said that "codification of the rules of war at the turn of the nineteenth and twentieth centuries appeared to have been based on the notion that war would be restricted to combat between armed forces and that rules would be required for their protection alone."[70] For Mr. Nahlik and several other delegates, the "history of the Second World War, during which civilians had often been exposed to even greater danger than combatants, had shown up that notion as unrealistic."[71] Given "the

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68 Bugnion, *supra* note 61, at 789.

69 New Rules, *supra* note 24, at 315. The authors go on to state, "[i]t cannot be doubted that the principal area of concern which motivated the initiatives that led to the convening of the 1974–1977 Diplomatic Conference was a shared need to formulate more effective rules to protect the civilian population and individual civilians from the effects of attacks in the light of the development of air power and modern methods and means of warfare."

70 Official Record, *supra* note 17, vol. 6, at 166, para. 127–28.

71 *Id*. At the end of the Conference, Poland added, "[t]he authors of some of the earlier codifications of the law of war, such as The Hague Conventions of 1899 and 1907, had considered it superfluous to provide in detail for the protection of civilians. They had been proved wrong by the two world wars of the twentieth century, particularly the Second World War. Poland knew that better than any other country, having lost six million of its people, most of them innocent civilians, between 1939 and 1945." *Id*. vol. 7, at 210. *See*

inadequacy of the protection granted to victims" the Conference embraced "the need to reaffirm and develop existing law."[72]

For many delegations, the need for additional civilian protections was fueled by "the development of air power and modern methods and means of warfare."[73] Air power and the increased prevalence of guerrilla tactics had blurred "the capital distinction between combatants and civilians"[74] and subjected civilians to "the same cruel treatment as combatants."[75] Despite the explicit recognition of the dangers posed by air power, no substantial attention was paid to how to regulate air power and its far reaching effects on civilians. Rather, the greatest energy went into trying to maximize guerrilla compliance with distinction and LOAC more generally.

Indeed, the central controversy of the negotiating conferences became how to deal with guerrilla fighters with delegates falling into two camps. The majority that ultimately won argued that distinction requirements had to be relaxed for guerrilla fighters in order to incentivize their general compliance with the law of war and thus bolster civilian protections. By contrast, a significant minority argued that any relaxation of distinction would be detrimental to civilians. For all their apparent disagreement, both sides of the debate remained faithful to the classical assumption that military objectives and civilians would be separate and distinct from each other. As a result, the delegates offered an artificial and indeed utopian solution to the problem of civilian protections.

Despite all the efforts and real gains won by the Additional Protocols, the fundamental challenge of air power, i.e. its destructiveness for civilians whenever they were not generally separate and readily distinguishable from combatants, was never adequately grappled with. The debate around guerrilla fighters is nevertheless crucial, as it lays bare the fundamental assumptions informing the Protocols as a whole and thus the civilian protections in place today.

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*also* the remarks of the Romanian delegation, *id*. vol. 6, at 196.

72 *Id*. vol. 5, at 114, para. 66.

73 New Rules, *supra* note 24, at 315.

74 Official Record, *supra* note 17, vol. 5, at 114, para. 66 (emphasis added).

75 *Id*.

*1. Distraction from the Greater Threat*

During the negotiation of the Additional Protocols over a three-year period, the actual rules of distinction, proportionality, and precaution in attack were agreed upon with relatively little controversy. However, no provision garnered more discussion and debate than what was to become AP I, Art. 44(3), which relaxed the traditional requirements of distinction for certain irregular combatants fighting against colonial or armed occupation. On the surface, the fight over Art. 44(3) was about who should and should not be eligible for combatant and prisoner of war (POW) privileges, with recently decolonized states of the developing world and industrialized states with strong militaries largely following predictable and divergent lines of argument. Beneath the surface of the debate, however, was a struggle over the very structure of the law and its ability to ground civilian protections, whose need virtually all parties agreed was the *raison d'être* of the Additional Protocols. The fight over Art. 44(3) thus simultaneously exposes and distracts from the more fundamental question: how to protect civilians when the enemy is *not* separate and distinct from civilians and our weapons are as likely to affect civilians as combatants.

The impetus for Art. 44(3) went hand-in-hand with Art. 1(4), which expanded the scope of international armed conflicts to include conflicts between states and "peoples . . . fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."[76] The idea behind Art. 1(4) was to broaden the category of international armed conflict and thereby expand the number of fighters who would be entitled to combatant and POW privileges. It was hoped that, given their new privileges, those fighters would be incentivized to comply with the laws of war which would, in turn, increase civilian protections.[77] Art. 44(3) went a step beyond recognizing the then contemporary prevalence of anti-colonial struggles and attempted to respond to the material conditions of those struggles. Art. 44(3) thus referred to "situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot . . . distinguish

76 AP I, *supra* note 4, at art. 1(4).

77 *See* INT'L COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS 522, para. 1685, 529n40 (1987) [hereinafter AP I Commentary]. *See also* New Rules, *supra* note 24 at 284.

himself"[78] by the traditional means of wearing a uniform and "a fixed distinctive sign recognizable at a distance."[79] Without defining such "situations" further, Art. 44(3) went on to preserve combatant status for such persons "provided that, in such situations, he carries his arms openly: a) during each military engagement, and b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."[80] In the words of the Rapporteur of the committee charged with drafting the final text of Art. 44, it "represented a major development in the law to make it conform more closely to reality, while at the same time giving the guerrilla fighter an incentive to distinguish himself from the civilian population where he reasonably could be expected to do so."[81]

The innovation of Art. 44(3) was driven by those states who argued for the fundamental importance of relaxing distinction requirements for guerrilla fighters in order to improve civilian protections. For Norway, resolving the problem of how to regulate guerrilla combat situations, which they saw as having stood unresolved since the failed Brussels conference of 1874, was the paramount task of the negotiations and fundamental to the protection of the civilian population.[82] Norway argued that the reason guerrilla warfare so often adversely affected civilians was that guerrilla fighters were not extended the same legal protections as members of states' armed forces, which undercut the fundamental motivation of reciprocity for adherence to the law.[83] Norway thus identified the stakes of Art. 44(3) as fundamentally about whether humanitarian law will apply at all to guerrilla combat, rather than the superficial issues of combatant or POW privileges:

> Since in guerrilla combat situations, as in other situations of armed conflict, only a reciprocal interest in the implementation of

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78 AP I, *supra* note 4, at art. 44(3).

79 Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2)(b), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

80 AP I, *supra* note 4, at art. 44(3).

81 Official Record, *supra* note 17, vol. 15, at 454, para. 21.

82 *Id*. vol. 14, at 480–82. For Norway, "the success or failure of our entire Conference" would depend on arriving at an adequate solution to challenges besetting "the legal regulation of guerilla combat situations." *Id*. at 482.

83 *Id*. at 482, 547–48.

> the rules can guarantee their application, what is at stake is in the final analysis not whether or not a given category of combatants shall have prisoner-of-war status if captured and on what conditions, but rather whether or not one wishes humanitarian rules to apply at all in guerrilla combat situations. The application of international humanitarian law applicable in armed conflicts is based on a very fragile equilibrium of interests. To disturb this equilibrium amounts to a negation of the very application of humanitarian law.
>
> We submit that any discriminatory treatment of any category of combatants would destroy this equilibrium and, hence, entail an escalation of violence and counter-violence which in the past has far too often been a characteristic feature of guerrilla combat situations, and the final victim of which has always been the civilian population. Our proposals relating to articles [35], [37], [43] and [44] should therefore not primarily be considered as proposals for a widening of the group of combatants that should be entitled to prisoner-of-war status in case of capture and for a redefinition of the concept of perfidy, but rather as proposals put forward in order to ensure the application of humanitarian law in guerrilla combat situations, and hence to protect all war victims, and first and foremost the civilian population.[84]

Norway defended one of the most permissive approaches to guerrilla distinction requirements, even to the point of dispensing with a distinction requirement altogether.[85] While few states were willing to completely dispense with a distinction requirement in order to gain guerrilla compliance with the laws of war,[86] there was a general recognition that extending combatant privileges and protections to previously unprivileged guerrilla fighters would offer an incentive to those fighters to conform to the law and thereby increase protections for civilians. As the Dutch delegation put it, they "hoped that the new beneficiaries of combatant status would

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84 *Id*. at 547-48. See Norway's proposals for different versions of Art. 44 (Arts. 42 and 42bis of the ICRC draft) in *id*. vol. 3, at 180, 185–86, 189.

85 *Id*. vol. 3, at 180. Norway's proposed "redraft" of Art. 44 would have included no condition of distinction at all, but only the requirement that guerrilla fighters were "under the orders of a commander responsible for the conduct of his subordinates" in order for them to be entitled to POW status.

86 Among the other delegations to endorse dropping distinction requirements altogether for guerrilla and resistance fighters were Lesotho and the Zimbabwe African National Union. *See id*. vol. 14, at 499–500, for Lesotho's statements. *See id*. at 555–56, for statements of the Zimbabwe African National Union delegation.

be prompted to comply with the requirements set forth in Article [44], thereby enhancing the protection of the civilian population against the effects of hostilities."[87]

Although Art. 44 was ultimately celebrated by many delegations, a significant number of delegations were concerned that, rather than bolstering civilian protections, the relaxation of distinction in Art. 44(3) would do the opposite. The Swedish delegation stated the challenge in its starkest terms:

> the most important and most difficult question is how to increase the legal protection of the guerrillas without endangering the civilian population. If a guerrilla movement were systematically to take advantage of the surprise element that lies in attacking while posing as civilians until – as one expert said "a split second before the attack" – it would inevitably undermine the presumption, which is vital to maintain, namely that apparently unarmed persons in civilian dress, do not attack. The result of undermining or eliminating this presumption is bound to have dreadful consequences for the civilian population.[88]

Given the risks involved in any relaxation of the distinction requirement, there were a large number of delegations that stressed the fundamental importance of the rule. It was repeatedly remarked that a "clear . . . distinction had to be made between combatants and the civilian population, in order to ensure the maximum protection of the latter."[89] The Japanese delegation argued for the importance of distinction in unequivocal terms, stating "that in order to ensure protection of the civilian population it is imperative to make a clear distinction between combatants and civilians. This principle of distinction between combatants and civilians constitutes one of the most fundamental bases for the protection of the civilian population."[90] The Italian delegation also stressed the importance of distinction, stating that "[i]t was essential that the distinction principle should remain the basis of international humanitarian law, because on respect for that principle depended the protection of the

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87 *Id*. Vol 6, at 142.

88 Delegation of Sweden, Press Release, ICRC Conf. Gvt. Experts, Geneva (May 15, 1972), *cited in* New Rules, *supra* note 24, at 288.

89 Official Record, *supra* note 17, vol. 5, at 179, para. 35. *See also id*. Vol 14, at 502, the Republic of Vietnam's statement ("the distinguishing of combatants from the civilian population is essential for the effective protection of the latter.").

90 *Id*. vol. 14, at 527, para. 4.

civilian population."[91] Finland argued that the requirement for combatants to distinguish themselves from civilians was "indispensable to ensure the protection of the civilian population."[92] Specifically with respect to guerrilla fighters, the West German delegation argued that the distinction between "guerrilla fighters and the civilian population . . . . is . . . essential to ensure the humanitarian protection of the life, health and property of a civilian."[93] The Australian delegation argued much the same point, stating that "the irregular forces should be distinguishable from the civilian population in military operations," adding that "[u]nless satisfactory safeguards are established the civilian population will be in peril."[94] For these and other delegations, a commitment to the classical ideal of warfare in which civilians could be cleanly separated from the fighting continued to inform their approach to the rules.

As would be expected with any deeply contested legal rule, the final text of Art. 44(3) was a compromise, ultimately requiring guerrilla fighters to distinguish themselves from civilians only by carrying their arms openly in limited circumstances. In the words of Jean de Preux,

> The text of Article 44 is a compromise, probably the best compromise that could have been achieved at the time. It is aimed at increasing the legal protection of guerrilla fighters as far as possible, and thereby encouraging them to comply with the applicable rules of armed conflict, without at the same time reducing the protection of the civilian population in an unacceptable manner.[95]

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91 *Id*. vol. 6, at 123, para. 24. Argentina also expressed concerns about the text of Art. 44, emphasizing the danger it could pose for civilians. *Id*. at 124. Sweden argued that "it was extremely important to maintain the distinction between combatants and civilians, without which the protection afforded to the civilian population would be seriously eroded." *Id*. at 134, para. 83. Japan went further, stating, "[t]he provisions of [Art. 44] paragraph 3 on the ways in which members of irregular forces were required to distinguish themselves from civilians would lead to inadequate protection of civilian population." *Id*. at 152, para. 51.

92 *Id*. vol. 14, at 519.

93 *Id*. at 515, para. 2.

94 *Id*. at 525, para. 7.

95 AP I Commentary, *supra* note 77, at 522, para. 1685. De Preux immediately adds, "[w]hatever the text, one might still consider that, when all is said and done, the protection of the civilian population is not assured unless both Parties to the conflict are genuinely concerned about this."

The compromise was reached, at least for some states, with the understanding that Art. 44(3) would have very limited application. George Aldrich of the U.S. delegation stated that it was his delegation's understanding that Art. 44(3) would only apply "in the exceptional circumstances of territory occupied by the adversary or in those armed conflicts described in Article 1, paragraph 4, of draft Protocol I," i.e. anti-colonial conflicts. Subsequent commentary saw an even narrower application of Arts. 44(3) and 1(4), extending their application perhaps only to "the peoples of Southern Africa and Palestine."[96] Belgium highlighted the extent to which even the compromise reached in Art. 44 regarding irregular combatants would be extremely difficult to apply in practice due to the difficulties of adjudicating whether guerrilla fighters actually satisfied the conditions for lawful combatancy.[97] Because in practice very few armed groups or resistance movements would uncontroversially satisfy the criteria, Belgium concluded that Art. 44 did not present a substantial advance over provisions for resistance movements found in the Third Geneva Convention of 1949.[98] Thus although Art. 44(3) was celebrated as "an important advance in the law"[99] and reflecting "a realistic view of history and the good will to develop humanitarian law,"[100] its narrow scope of practical application was already explicitly recognized during the negotiating conference itself.

### *2. Why the Solution Fails*

The limited application of Art. 44(3) was not, however, its most critical failure. The central failure was rather that the compromise reached in Art. 44(3) prevented the delegates from confronting a more prevalent and difficult challenge: how to develop the law for circumstances in which combatants and civilians are neither separate or readily distinguishable from one another—

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96 New Rules, *supra* note 24, at 50, *citing* Frits Kalshoven, *Reaffirmation and Dev. of Int'l Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conf., Geneva, 1974-1977: Part I: Combatants and Civilians*, 8 NETH. Y.B. INT'L L. 107, 122 (1977)). Kalshoven, in turn, cites comments by the Mozambique delegation in its written explanation of its vote on Art. 44 of AP I. *See* Official Record, *supra* note 17, vol. VI, at 154.

97 Official Record, *supra* note 17, vol. 14, at 492.

98 *Id.*

99 *Id.* vol. 6, at 149 (quoting George H. Aldrich from the U.S. Delegation).

100 *Id.* at 153, paras. 57–58 (Van Luu, Socialist Republic of Viet Nam).

circumstances that are common both to guerrilla warfare and more generally whenever air power and exploding munitions are used in the vicinity of civilians. The system of civilian protections codified in the Additional Protocols rested on the baseline assumption that civilians and combatants would be generally separate and, in any case, distinguishable from one another, thus enabling combatants to be targeted without exposing civilians to the same harm. The discussions around Art. 44(3) ultimately brought these assumptions to the surface by those delegations who emphasized not just the fundamental importance of distinction, but who went further by explicitly and repeatedly recognizing that if combatants and civilians were not distinguishable "the whole system of protection contained in the law of Geneva" would founder.[101]

The Israeli delegation, which voted against Art. 44,[102] explained that "[i]n the case of guerrilla warfare it was particularly necessary for combatants to distinguish themselves because that was *the only way* in which the civilian population could be effectively protected."[103] If irregular combatants looked just like other civilians, that would mean that "no civilian would be safe, since the regular combatant in uniform would no longer know who was the enemy and who was not."[104] The Israeli delegation indicated that without "a clear and unmistakable distinction between the combatants and the civilian population,"[105] the remaining provisions designed to protect the civilian population in the Additional Protocols would fail.

The fundamental importance of distinction to the "purposes of Protocol I" was expressed in perhaps the most emphatic terms by Mr. Reed of the U.S. delegation:

> Very simply, we say that an individual, who is a member of an irregular force listed in paragraph 1 or is listed in Article 4 of the

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101 *Id*. at 132.

102 Israel was the sole negative vote, with 73 countries voting for Art. 44 and 21 countries abstaining from the vote. *See id*. at 121.

103 *Id*. at 121 (emphasis added).

104 *Id*. at 122. West Germany agreed, arguing that "the basic rule set forth in Article [44], paragraph 3, first sentence, that combatants are obliged to distinguish themselves from the civilian population means that these combatants have to distinguish themselves in a *clearly recognizable manner*." *Id*. at 136 (emphasis added). For West Germany the system of civilian protections depended on a clearly recognizable difference between civilians and combatants, without which it could not serve its civilian protecting purpose.

105 *Id*. at 122, para. 19.

> third Geneva Convention of 1949, who commits a war crime or other violation of international law applicable in armed conflict, shall not forfeit his entitlement to be a prisoner of war - that is with only one exception. That single exception is the requirement that individuals distinguish themselves from civilians and the civilian population in their military operations. This requirement that they distinguish themselves from civilians is so fundamental to the purposes of Protocol I - so essential, if we are to give meaning to the protected status that we have conferred on civilians - so basic in lending credibility to [draft] article 45, paragraph 4, (which provides that in case of doubt an adversary must consider the doubt in favour of civilian status) and also [draft] article 46 (which not only provides that civilians shall never be attacked but also that they shall enjoy a general protection against the dangers of military operations), for all of these reasons, it is vital that Protocol I deny a privileged status to combatants who violate the requirement that they must in some manner distinguish themselves from civilians in their military operations . . . . In our view, a combatant who deliberately fails to distinguish himself from other civilians while engaging in combat operations has committed such an extraordinary violation of the laws of war and so prejudices the protection for civilians that he loses his entitlement to be a prisoner of war, and, along with it, any immunity from punishment he may have had for acts of violence against the adversary.[106]

Although the U.S. delegation ultimately endorsed Art. 44(3) on the basis of its very limited application, they made it unmistakably clear that the core civilian protections in the rest of the Additional Protocols depended fundamentally on the distinguishability of combatants from civilians.[107]

The New Zealand delegation stated the underlying issue most clearly and forcefully. For New Zealand, it was clear that the purpose of Art. 44 was not to enable combatants "to shelter among the civilian population."[108] However, if the distinction between civilians and combatants were to be "blurred," then as Mr. Quentin-Baxter speaking for New Zealand concluded, "it was not only the value of Article [44] that would be at risk, but also *the whole system of protection* contained in the law of Geneva, which depended on

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106 *Id*. vol. 14, at 477.

107 *Id*.

108 *Id*. vol. 6, at 132, para. 72.

enabling belligerents to identify clearly who was and who was not a combatant."[109] The New Zealand delegation made perfectly explicit what was implicit in many other delegations' remarks. The whole system of protection developed in the Additional Protocols depends on belligerents being able to clearly identify who was and was not a combatant. If they cannot do so, then the law as it is designed cannot adequately protect civilians.

### *3. The Reciprocal Relationship between Air Power and Guerrilla Warfare*

The central worry around Art. 44(3)—that a breakdown in distinction would undermine civilian protections—has become the reality of a great deal of armed conflict today. Large numbers of civilians are killed as unintended but lawful side effects of modern warfare. What was already seen by the negotiators in the 1970s has now been abundantly demonstrated: the existing law is inadequate to protect civilians when they are not separate and distinguishable from combatants and other military objectives. However, the intermingling of military objectives and civilians and the difficulty of distinguishing one from the other has come about not due to a change in the law of war, but rather due to the facts of modern warfare.[110] Modern warfare is generally even more reliant on air power than it was during World War II. Yet rules specifically designed for the effects of aerial weapons—effects that almost always go beyond their intended target—have never been fully developed or adopted.

Compounding the long-recognized risks of air power is the fact that combat today is often radically asymmetric in nature, pitting armed forces with futuristic weapons and heavily reliant on air power against rudimentary fighting forces with little more than rifles and rocket propelled grenades. Technological advances and irregular methods of combat were frequently described in the same breath during the Additional Protocols negotiating conference as causes of increased risks for civilians.[111] Yet the inference to the

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109 *Id*. at 132 (emphasis added).

110 As was made clear in negotiating committee statements and affirmed after the adoption of Art. 44 of AP I, the change in law brought about by Art. 44(3) of AP I "was not, in any event, intended to protect terrorists who acted clandestinely to attack the civilian population." *Id*. at 128, para. 51.

111 *See*, *e.g*., the Colombian delegation's statement that "[t]he disruption of the classical pattern [in which civilians were not part of war] is also caused both by the latest

deeper causal relationship between the two was never drawn. The Colombian delegation, for instance, explicitly linked the increased risks to civilians to "the latest technological inventions and . . . the use of the most primitive methods of combat."[112] However, no delegation drew the deeper inference that whenever there is a significant technological asymmetry between fighting forces, the use of superior technology by one side *causes* an increase in irregular warfare by the other, with detrimental consequences for the principle of distinction and, in turn, severe consequences for civilians. The failure to understand the reciprocal relationship between superior air power and guerrilla tactics—and indeed non-compliance with distinction—contributed to a one-sided focus on how to get guerrilla fighters to conform to the law, rather than focusing on how to protect civilians from air power generally, and particularly under conditions of guerrilla non-compliance.

Even those delegations that did emphasize the inseparability of their own guerrilla fighters from their civilian population focused on combatant status for their guerrillas rather than appropriate targeting rules for such situations. Thus the delegation from the Zimbabwe African National Union argued that guerrilla fighters "cannot be distinguishable from the masses of the people."[113] The North Vietnamese delegation pressed a similar line, arguing that in the anti-imperial and anti-colonial conflicts that the North Vietnamese were concerned with, the lives and activities of irregular fighters are "inseparable from the civilian population."[114] The Ugandan delegation expressed the problem in its starkest terms: "[t]he nature of the war those peoples were waging was such that to require them to distinguish themselves from the civilian population

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technological inventions and by the use of the most primitive methods of combat." *Id*. at 180.

112 *Id*. The Austrian delegation made a more general observation, arguing that "guerrilla warfare" was a "very general method of combat" that was not limited to anti-colonial conflicts, adding that "guerrilla warfare may become . . . the most suitable method of combat for small armies in their struggle against adversaries of far greater strength." *Id*. vol. 14, at 539.

113 *Id*. vol. 14, at 555, para. 11. Mr. Masangomai of the delegation went on to state that the "guerrilla combat situation is very different from the conventional combat situation. A characteristic of conventional warfare is the clear and distinct separation between the activities of armed forces and the life of the civilian population. But that clear distinction and separation is hard to come by in guerrilla warfare." *Id*. at para. 12.

114 *Id*. at 466, para. 13.

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."[115]

Although each of these delegations concluded that what was needed was a weakening of distinction requirements for their irregular combatants, they might have drawn a different conclusion. They might have argued that the targeting rules of distinction, proportionality, and precaution in attack needed to be reformulated to adequately protect civilians when the classical distinction between civilians and combatants is blurred by guerrilla tactics, a reliance on air power, or both.[116] To be clear, the purpose of what would likely be more restrictive rules would not be to make the fight fair or equal, as North Vietnam explicitly called for.[117] There is nothing unlawful or unjust in an advanced military seeking to stop armed attacks or seeking the greatest possible protections for its own troops in doing so. However, applying existing law to situations in which the context or our choice of weapons make civilians and combatants indistinguishable is manifestly unjust to those civilians and contrary to the object and purpose of the law we have.

#### *4. The Solution that is Still Needed*

It is perhaps understandable that the delegates to the diplomatic conference did not want to confront the realities of asymmetrical conflict, guerrilla warfare, and unlawful combatants. After all, their overwhelming intention was to improve civilian protections, in part, by increasing compliance with the laws of armed conflict. As we have seen, it was the intention and hope of many delegations that by

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115 *Id*. vol. 6, at 129, para. 58.

116 The U.S. and other militaries sometimes achieve similar aims through Rules of Engagement (ROEs) and policy guidance. *See* Luke Hartig & Stephen Tankel, *The Muddy Middle: The Disappearing Lines in America's Counterterrorism Wars and How to Restore Order*, JUST SEC. (Aug. 14, 2019), www.justsecurity.org/65813/the-muddy-middle-the-disappearing-lines-in-americas-counterterrorism-wars-and-how-to-restore-order/ [https://perma.cc/5RTF-N7L7]; Luke Hartig & Stephen Tankel, *Part II: The Muddy Middle: Challenges of Applying Use of Force Policy Guidance in Practice*, JUST SEC. (Aug. 15, 2019), www.justsecurity.org/65819/part-ii-the-muddy-middle-challenges-of-applying-use-of-force-policy-guidance-in-practice/ [https://perma.cc/BPQ8-5X65]; and Luke Hartig & Stephen Tankel, *Part III: The Muddy Middle: A New Framework for Use of Force*, JUST SEC. (Aug. 16, 2019), www.justsecurity.org/65832/part-iii-the-muddy-middle-a-new-framework-for-use-of-force/ [https://perma.cc/8RH6-SAMB].

117 Official Record, *supra* note 17, vol. 14, at 465–66.

giving irregular fighters an onramp to combatant status, they would be incentivized to obey the law and civilian protections would thereby be improved. Recognizing and responding to the reality of irregular combatants, wherein most fighters would not distinguish themselves, would have been tantamount to admitting defeat in the development of the law by both the ICRC and many of the represented nations. Rather than coming to terms with the extraordinarily limited application of Art. 44(3) and the more challenging reality that it papered over, it was celebrated as a watershed moment in international law.

In sum, the failures of the conference were twofold. First, there was a failure to draw the correct inference from the problem posed by technological developments in warfare and their relation to a breakdown of distinction. Second, there was a failure to develop rules for precisely those contexts in which distinction could be expected to break down. Even delegations that clearly seemed to recognize the challenges posed by irregular combatants, such as Norway, only addressed the question of how to treat legitimate guerrilla fighters and argued for completely relaxed distinction requirements rather than tighter targeting requirements. States like Norway thus treated only one half of the problem, i.e. guerrilla non-compliance with the law of war, and left the other half, i.e. civilian death under conditions of non-distinction, completely untreated. Throughout the negotiating conference there was no serious attempt to confront the reality that militaries would increasingly confront situations where civilians and combatants were not generally separate and distinct and develop appropriate law for that reality.

Given that the law we have was not designed for the reality of a great deal of modern conflict, what law should we have? In particular, are less or more restrictive rules likely to lead to better civilian protection and serve our strategic interests in winning conflicts and assuring peace and security? It is to these questions that I now turn by looking at the data and in-depth studies we have on less and more discriminating uses of military force, particularly in the form of air power, from the First World War to the present.

## III. Less Discriminating Force is Counterproductive

The data I examine below overwhelmingly points to the conclusion that greater restrictions on the use of force will not only better protect civilians, but also better serve our strategic interests. Nevertheless, those who would advocate for more restrictive rules

must overcome the long-standing view that sharp and unrestricted wars are both the shortest and most humane. The view was made perhaps most famously by Prussian General Clausewitz,[118] endorsed by at least the early Francis Lieber,[119] endorsed again in the age of air power by Italian General Giulio Douhet and British Air Marshal Arthur Harris,[120] and again most recently in the age of counterterrorism and counterinsurgency by authors such as Sean McFate.[121]

Although the age-old view persists, the central problem with it is that there is virtually no evidence to support it. The overwhelming body of evidence, from the two World Wars through Vietnam, shows that indiscriminate warfare, at best, did not contribute to military success or, at worst, was militarily disadvantageous. Significant resources were wasted, and the targeted population was often hardened in its commitment to carry on fighting. More recent empirical studies of the use of air power in Afghanistan and Iraq find that even a law-abiding reliance on air power tends to work against military success. These studies show that the current law we have fails to preserve civilian protections and also fails to work to the military advantage of law-abiding forces.

To demonstrate the ultimate failure of unrestricted warfare, particularly through a reliance on air power, this part examines the development of air power over the last century and its supporting doctrines. The first section focuses on the early development of air

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118 CARL VON CLAUSEWITZ, ON WAR 260 (Michael Howard et al. eds., 1976). *But see* JOHN NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM 16–19 (2002) for Nagl's discussion of the misinterpretation and popularization of Clausewitz by Antoine-Henri Jomini.

119 *See*, *e.g.*, Instructions for the Government of Armies of the United States in the Field, General Order No. 100, art. 29 (Apr. 24, 1863) ("The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.") [hereinafter Lieber Code]. *See also* JOHN WITT, LINCOLN'S CODE 184 (2012) for the broader historical discussion of Lieber's views.

120 GIULIO DOUHET, THE COMMAND OF THE AIR 122, 188 (Donna Budjenska et al. eds., Dino Ferrari trans., 2019) [hereinafter Douhet]; ARTHUR HARRIS, BOMBER OFFENSIVE 176, 238 (1947) [hereinafter Harris].

121 SEAN MCFATE, THE NEW RULES OF WAR 3-4 (2019). It also appears that the official view espoused to navy junior reserve officer training corps students is that restrictions on the use of force in Vietnam undermined U.S. victory, making "effective military prosecution of the war difficult if not impossible." *See* CDR. RICHARD R. HOBBS, USNR (RET.), NAVAL SCIENCE 2: MARITIME HISTORY, LEADERSHIP, AND NAUTICAL SCIENCES FOR THE NJROTC STUDENT 132, 2nd ed., (2006).

power from the First through the Second World War. This was the age in which the doctrine of "morale bombing," i.e. the terror bombing of civilians to break their will to support the war effort, was most fervently developed, advocated, and tested, particularly by the British Royal Air Force (RAF) during World War II. Despite its adherents at the top of the RAF, official Allied accounts cast it as a failure, while also discrediting the United States' late turn to morale bombing at the end of the war against Japan. The second section then reviews the most in-depth analyses of the effects of air power in Vietnam, Afghanistan, and Iraq. These detailed empirical studies all reach the conclusion that the destructiveness wrought by air power leads to stronger, rather than weaker, insurgent enemies. Contrary to what the advocates of more unrestricted force believe, the evidence we have overwhelmingly shows that a more permissive approach to the use of force will actually work against states' security interests.

### *A. The Development and Failure of Indiscriminate Air Power*

What is perhaps most striking about early analyses and enthusiasts of air power is the extent to which the primary strategic attribute of bomber aircraft is openly and unabashedly described as facilitating the "rapid infliction of great pain on civilian populations."[122] Bomber aircraft are straightforwardly described as a "terroristic instrument" with which nations strove to establish a "balance of terror."[123] Of course, inflicting terror was not the only perceived strategic attribute. It was also hoped that bomber aircraft would enable attacking forces to "impose greater losses on the military forces of a defended territory than on the invading forces," thereby inverting the traditional advantages of those defending territory over attackers.[124] Bomber aircraft thus were conceived and developed for the twin aims of terror bombing civilians and disabling enemy military capacity.

Although the terror bombing of civilians throughout the First and Second World Wars was carried by both the Germans and the Allies, the overwhelming consensus is that it did not contribute to military victory or break the enemy's will to fight. Even at the early stages of air power's development, there were those who doubted

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122 Quester, *supra* note 25, at 1.

123 *Id.* at 1, 3.

124 *Id.* at 1–3.

the efficacy of targeting civilians. Winston Churchill, who was Minister of Munitions during World War I, was an early critic of attacks against civilians, arguing that it was

> improbable that any terrorization of the civil population . . . by air attack would compel the Government of a great nation to surrender . . . . In our own case we have seen the combative spirit of the people roused, and not quelled, by the German air raids. Nothing that we have learned of the capacity of the German population to endure suffering justifies us in assuming that they could be cowed into submission by such methods, or, indeed, that they would not be rendered more desperately resolved by them.[125]

Speaking only of the British population, British Prime Minister Lloyd George concurred at the end of World War One, affirming that the terror bombing of civilians in London and elsewhere in England "did not swell by a single murmur the demand for peace. It had quite the contrary effect. It angered the population of the stricken towns and led to a fierce demand for reprisals."[126] While political and military leaders in key positions of power doubted the efficacy of terror bombing of civilians, British strategic policy nevertheless evolved steadily toward a focus on civilian populations both during and after the First World War.

Air Marshal Trenchard, known as the "father of the Royal Air Force," was Chief of the British Air Staff during much of World War One and an ardent supporter of air power. A memorandum of the Chief of the Imperial General Staff toward the end of the War reflected Trenchard's views and described the official British position:

> The policy intended to be followed is to attack the important German towns systematically, . . . It is intended to concentrate on one town for successive days and then to pass to several other towns, returning to the first town until the target is thoroughly destroyed, or at any rate until the morale of workmen is so shaken that output is seriously interfered with . . . . Long-distance bombing will produce its maximum moral effect only if the visits are constantly repeated at short intervals, so as to produce in each area bombed a sustained anxiety. It is this recurrent bombing, as opposed to isolated and spasmodic attacks, which interrupts

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125 Quoted in Quester, *supra* note 25, at 47.

126 DAVID LLOYD GEORGE, WAR MEMOIRS 116-17 (1934), quoted in Quester, *supra* note 25, at 46.

industrial production and undermines public confidence.[127]

During the interwar period such views became further entrenched as part of official British policy through Trenchard's continued influence and official position. Trenchard saw bombing civilian workers as the key aim and key advantage of air warfare and the best way to bring the enemy nation to surrender.[128] Although Trenchard viewed "the indiscriminate bombing of a city for the sole purpose of terrorising the civilian population" as illegitimate, as being contrary to the dictates of humanity," he viewed it as "an entirely different matter to terrorise munition workers (men and women) into absenting themselves from work or stevedores into abandoning the loading of a ship with munitions through fear of air attack upon the factory or dock concerned."[129] In reality, however, Trenchard's distinction came to very little. Terrorizing munitions workers meant terrorizing the working-class areas of cities generally, that is, the built up areas where housing was concentrated and which were easier to identify, strike, and destroy than more affluent areas where dwellings were more dispersed and screened by tree cover. Although there remained a reluctance among British officials to cast attacks on civilian populations as terror attacks, other air power enthusiasts were more candid. Italian General Douhet, whose work was widely publicized, promoted "crushing the material and moral resistance of the enemy," because the "direct attack against the moral and material resistance of the enemy will hasten the decision of the conflict, and so will shorten the war."[130] Although Douhet also emphasized the need to target and eliminate the enemy's air capacity, he saw breaking the will of the civilian population generally—not just those supporting the war effort through weapons manufacture or the like—as a critical target and that which would bring about the swiftest end of the conflict.[131]

Although there remained considerable debate about the effectiveness of bombing civilians even in those countries with

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127 Quoted in Quester, *supra* note 25, at 48.

128 *See* Quester, *supra* note 25, at 53.

129 Quoted in Quester, *supra* note 25, at 53.

130 Douhet, *supra* note 120, at 122, 188.

131 Douhet thus includes not just workers in factories and harbors as legitimate targets, but also shop workers generally ("A body of troops will stand fast under intensive bombings, even after losing half or two-thirds of its men; but the workers in shop, factory, or harbor will melt away after the first losses."). *Id*. at 222.

ardent and high placed supporters, design choices in the development of bomber aircraft in Britain effectively decided the argument in favor of indiscriminate attacks. At the beginning of the Second World War, British bombers were designed neither for precision bombing nor to withstand enemy anti-aircraft fire.[132] Commenting on the inaccuracy of the British fleet's attacks, Air Marshal Arthur Harris noted that "[n]ight photographs taken during June and July of 1941 show that of those aircraft reported to have attacked their targets in Germany only one in four got *within five miles of it*, and, when the target was the Ruhr, only one in ten."[133] The bomber's vulnerability and inaccuracy, in turn, drove British policy:

> By the spring of 1942, the British War Cabinet had planned an all-out bombing offensive against German cities with the object of dehousing a large fraction of the German working-class population, in the hope that this, and the consequent effect on civilian morale, would so reduce production as to cause a collapse of the enemy war effort . . . . A bombing campaign seemed the only offensive action open to the Western Allies. It was inaugurated, not with careful calculation of its probable effectiveness, but as a result of a failure to find a satisfactory answer to the question "What else can we do?" The choice of cities, rather than industrial and military targets, was dictated, as in 1940, by the inability of night bombers to hit anything smaller.[134]

According to Patrick Blackett, scientific adviser to the British government during the Second World War, only "in the last eighteen months of the war was the technique of night bombing so improved, largely by radio aids and target marking devices, as to make possible the precision bombing of 'point' targets" such as factories or military installations."[135] Up through 1943, British bombers "were too vulnerable to fighters and anti-aircraft fire to attempt day raids, and their navigation, target identification and bomb aiming were too inefficient at night to hit specific military or industrial targets."[136]

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132 PATRICK BLACKETT, FEAR, WAR, AND THE BOMB 20 (1949) [hereinafter Blackett].

133 Harris, *supra* note 120, at 81 (emphasis added).

134 Blackett, *supra* note 132, at 20.

135 *Id*.

136 *Id*. at 16.

The technical inadequacies of British bombers were, in turn, reinforced by the strategic and legal views of key figures in British Bomber Command, most notably Air Marshal Harris, who was appointed head of Bomber Command in February 1942. Several key figures in the British military and political establishment, including Harris himself, believed in the "morale effects" of "area bombing" as a strategy that could induce the enemy to capitulate and sue for peace. As the United States Strategic Bombing Survey found, Harris "regarded area bombing not as a temporary expedient, but as the most promising method of aerial attack. Harris and his staff . . . had a strong faith in the morale effects of bombing and thought that Germany's will to fight could be destroyed by the destruction of German cities."[137] Harris' faith in "area bombing" ran hand-in-hand with a rather dismissive view of international law and its regulation of armed conflict, leading him to the extreme view that "in this matter of the use of aircraft in war there is, it so happens, no international law at all."[138]

The British technical capacity, strategic analysis, and view of the law stood, at least throughout most of the war, in sharp contrast to the U.S. approach. The U.S. had, for its part, designed and fortified its bombers for more precise[139] daylight raids on military and industrial targets.[140] The U.S. targeted strikes on German industry supporting the German war effort were credited by both German and Allied analyses as the far more effective in degrading German military capacity and, in turn, forcing German surrender.[141] Moreover, clarity on the unlawfulness of targeting civilians was, at least until the final months of the war against Japan, not simply a matter of official lip service, but baked into the U.S. bombing culture. The following from a 1926 bombardment manual of the Air

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137 UNITED STATES STRATEGIC BOMBING SURVEY, THE EFFECT OF STRATEGIC BOMBING ON THE GERMAN WAR ECONOMY 2 (1945).

138 Harris, *supra* note 120, at 177.

139 It is worth noting that the "precision" of American bombers was relative. While only one in five British bombers hit within five miles of their targets, American bombers had a 1,000-yard margin of error or "Circular Error Probable." As John Warden notes, the margin of error of American bombers meant that, to have a 90% chance of at least one bomb hitting a target roughly thirty meters by thirty meters, the American military would have to drop 9,000 bombs. See John A. Warden III, *Success in Modern War: A Response to Robert Pape's* Bombing to Win, 7 SEC. STUD. 172, 177 (winter 1997/98).

140 Quester, *supra* note 25, at 145–46.

141 *See id*, at 154-155. *See also* Blackett, *supra* note 132, at 28.

Service Tactical School makes the U.S. position clear:

> *Against industrial centers*. Industrial centers, especially those devoted to the manufacture of war materiel, are important strategical targets . . . [P]articular subtargets should be selected and each plane or formation should be assigned a certain building or group of buildings to destroy. It is wrong to send out planes simply to drop their bombs when over a large target . . . .
>
> *Against political centers*. The bombing of political centers is prohibited by the laws of warfare. However, since they are the nerve centers of the nation, they are apt to be important targets for bombardment in reprisal for attacks made by the enemy on such centers in our own country, especially since they are apt to contain important factories or stores of war matériel. Nevertheless, such employment is purely strategical. In the World War the Germans bombed London and Paris, while the dream of all the Allies was to bomb Berlin. Whether such bombing actually accomplishes its avowed purpose—to weaken the morale of the hostile nation and thus hasten the end of hostilities—is doubtful in some cases. The reactions may be in exactly the opposite direction.[142]

The U.S. manual is clear that area bombing is unlawful, as is the bombing of civilian targets. While the reservation of bombing "political centers" for reprisals may appear to be a hedge in the U.S. position, it should be read in the opposite light. However retrograde reprisals against civilians may appear to the modern reader, military reprisals are, at least in principle, only undertaken in response to the enemy's unlawful behavior. The reservation in the 1926 manual on reprisals against "political centers" thus underscores the unlawfulness of bombing civilians, which only would be undertaken in an attempt to bring the enemy back into compliance with the law. Although the reprisal justification was frequently abused during World War II, the United States' clear view of the law coincided with its substantial doubts about the effectiveness of the "morale" bombing employed by the British.

The U.S. was not alone in doubting the effectiveness of morale bombing. There was, in fact, significant internal debate on both the British and German sides about the effectiveness of "morale" bombing, with both Churchill and Hitler openly doubting the

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142 UNITED STATES ARMY, AIR SERVICE TACTICAL SCHOOL, BOMBARDMENT, (Washington: U. S. G. P. 0., 1926), pp. 63–64, quoted in Quester, *supra* note 25, at 72.

effectiveness of such a strategy in breaking the will of the enemy.[143] Thus, although Churchill promised to bolster British bombing capacity "on the largest possible scale," he added, "I deprecate, however, placing unbounded confidence in this means of attack, and still more expressing that confidence in terms of arithmetic."[144] Churchill went on to state that the bomber offensive was "the most potent method of impairing the enemy's morale we can use at the present time," but he further added that the only path to decisive victory was through ground forces retaking German occupied territory on the Continent.[145] While Churchill was committed to the bomber "morale" offensive, his commitment was, very much as Blackett described, derived largely from lack of a better alternative until British forces might be sufficiently bolstered by the U.S. to mount a more strategically meaningful ground counterattack.

When the German military was finally broken in the spring of 1945 and Allied victory was all but certain, Churchill rethought the wisdom of the "morale" bombing:

> It seems to me that the moment has come when the question of bombing of German cities simply for the sake of increasing the terror, though under other pretexts, should be reviewed. . . . The destruction of Dresden remains a serious query against the conduct of Allied bombing. . . .
>
> The Foreign Secretary has spoken to me on this subject, and I feel the need for more precise concentration upon military objectives, such as oil and communications behind the immediate battle-zone, rather than on mere acts of terror and wanton destruction, however impressive.[146]

Churchill was not alone in doubting the effectiveness of bombing civilians. Blackett, who was already critical of the British "dehousing" strategy during the war, and the U.S. Strategic Bombing Survey reached substantially similar conclusions shortly

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143 Quester, *supra* note 25, at 114, 137–39. *See also* Blackett, *supra* note 132, at 17–18 ("Hitler's mass extermination of some seven million Jews and Eastern Europeans in the death camps . . . and the deliberate destruction of hundreds of towns and villages in Russia showed that his reluctance to embark on area bombing of cities in 1940 in no way derived from any reluctance to kill civilians or to destroy cities, but rather from carefully weighed considerations of political and military expediency based on the actual circumstances of the time.").

144 Quester, *supra* note 25, at 138–39.

145 *Id*.

146 Cited in Quester, *supra* note 25, at 156.

after the war. Blackett wrote that despite dropping an equivalent of 1000 atomic bombs in conventional munitions, "[t]he mass attack on German cities (which was the main British contribution, both in planning and execution), though technically a success in the final stages, must be considered a strategic failure in that it affected German production remarkably little."[147] Both Blackett and the Survey further note that the same attacks also failed to break German morale.[148]

Given the doubts expressed by Churchill himself, and the consistently critical view taken by the U.S. Army Air Force of British "morale" bombing, it is quite remarkable that just as Britain was rethinking bombing civilians, the U.S. adopted the very tactic in its war against Japan.[149] At the time, the majority of U.S. war planners agreed with General MacArthur that trying to bomb Japan into submission

> assumes success of air power alone to conquer a people in spite of its demonstrated failure in Europe, where Germany was subjected to more intensive bombardment than can be brought to bear against Japan, and where all the available resources in ground troops of the United States, the United Kingdom and Russia had to be committed in order to force a decision.[150]

Yet American General LeMay in the Pacific "almost independently reversed bombing policy over Japan, precisely while United States air planners in Europe were still criticizing the British area bombing offensive, and upholding the American reliance on precision attacks as more militarily efficacious and more civilized."[151] LeMay devised and ordered the firebombing of Tokyo in March 1945, killing more than 83,000 people, mostly civilians.[152] LeMay's hope was to shorten the war and avoid the need for a land invasion of Japan.[153]

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147 Blackett, *supra* note 132, at 27. Blackett cites the "remarkable and unexpected result" of the Strategic Bombing Survey "that German total war production continued to increase till the summer of 1944 in spite of the very heavy bombing . . . aircraft production continued to rise until mid-1944." *Id*. at 22. Blackett adds that "[t]he five-fold increase of German tank production between 1941 and 1944 is even more startling." *Id*. at 26.

148 *Id*. at 3–4.

149 *See id*. at 36–37.

150 Quoted in Quester, *supra* note 25, at 170.

151 Quester, *supra* note 25, at 167.

152 *Id*.

153 *Id*. at 168.

Although the war may have ended a few months earlier than it would have otherwise, the U.S. Strategic Bombing Survey found that the firebombing of Japanese cities did not meaningfully contribute to victory.[154] The Survey concluded that "certainly prior to 31 December 1945, and in all probability prior to 1 November 1945, Japan would have surrendered even if the atomic bombs had not been dropped, even if Russia had not entered the war, and even if no invasion had been planned or contemplated."[155] Indeed, by February 1945 the consensus among Japanese senior statesmen was that "Japan faced certain defeat."[156] Although the "area attacks" of Japanese cities was a factor that accelerated Japan's unconditional surrender,[157] the Strategic Bombing Survey ultimately gives greater weight to the successful attacks against Japanese air and naval forces and the blockage against Japan which undermined any Japanese hope of rebuilding its military forces.[158] Thus even in the case of Japan during World War II, the official U.S. conclusion was that the terror bombing of civilians did not contribute to military victory and was superfluous to ultimately deciding the Pacific war in favor of the Allies.

The Allied bombing campaigns against Germany and Japan toward the end of World War II remain the most extensive avowedly indiscriminate attacks against civilian morale. According to the official assessments by the Allies themselves, neither was effective in defeating the enemy. Although air power had fundamentally changed warfare and undermined the classical distinction between civilian and military objectives, the rejection of distinction and embrace of terror bombing were proven wrong, both as a matter of law and of strategy. Since that time, a significant reliance on air power has continued to characterize most military campaigns, which, despite dramatic improvements in the accuracy and precision of aerial attacks, have been carried out with varying adherence to the principle of distinction and avoidance of civilian casualties. The systematic studies we have of the use of air power from the Vietnam War to the present largely concur with the

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154 UNITED STATES STRATEGIC BOMBING SURVEY, JAPAN'S STRUGGLE TO END THE WAR 13 (1946) [hereinafter US SBS Japan].

155 *Id.*

156 *Id.* at 5.

157 *Id.* at 12.

158 *Id.* at 11–13.

conclusions reached after the Second World War, even when the use of air power has conformed to the current *jus in bello*.

### *B. Even a Discriminating Reliance on Air Power is Ineffective*

Political scientist Stathis Kalyvas has conducted the most comprehensive study of indiscriminate violence in counterinsurgencies, which is precisely the kind of warfare that has characterized so many of the conflicts since World War II.[159] By surveying over fifty historical examples, Kalyvas presents overwhelming evidence for the general ineffectiveness of indiscriminate violence.[160] Kalyvas' study effectively shows that relaxing *jus in bello* restrictions on the use of force and thereby making attacks less targeted and more collective in their effects would be counterproductive.[161] He shows that less discriminating attacks are more likely to drive the targeted population toward insurgents.[162] This is particularly the case when the attacking force is a foreign one lacking the local infrastructure necessary to offer protection to the targeted population.[163] Without a viable alternative for their own protection and survival, local populations tend to align themselves with insurgencies, as the only force offering them any protection.[164]

Kalyvas' findings are generally reinforced by the most detailed and systematic analyses of both indiscriminate and discriminating uses of aerial attacks. For instance, Kosher, Pepinsky, and Kalyvas demonstrate "a systematic record of civilian victimization" by the U.S. in Vietnam that was "self-defeating."[165] Their analysis shows that indiscriminate bombing of the civilian population "was counterproductive as a counterinsurgency practice" because more bombing of the civilian population corresponded "unambiguously

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159 STATHIS KALYVAS, THE LOGIC OF VIOLENCE IN CIVIL WAR (2006).

160 *Id*. at 151–53. For Kalyvas' definition of indiscriminate violence, see *id*. at 142. The only counter examples Kalyvas finds are the relatively few examples of indiscriminate violence used against weak insurgencies lacking the infrastructure to protect civilians and carry out relatively selective attacks. *See id*. at 167–68.

161 *Id*. at 151.

162 For references to more than fifty historical examples, *see id*. at 152-53n11.

163 *Id*. at 155, 157–58.

164 By the same token, insurgents who are unable to offer adequate protection to civilians will likely see defectors to state power. *See id*. at 167–68.

165 Matthew Kocher, Thomas Pepinsky, & Stathis Kalyvas, *Aerial Bombing and Counterinsurgency in the Vietnam War*, 55.2 AM. J. POL. SCI. 201, 216 (Apr. 2011).

to higher levels of downstream control by the Viet Cong."[166] They come to the conclusion that "the success of counterinsurgency depends on the methods with which it is fought; tactics that run a high risk of victimizing civilians are likely to rebound against their users."[167]

Jason Lyall's extensive research on the relation between air strikes and insurgent violence in Afghanistan and Iraq reaches similar conclusions, despite the fact that the air strikes Lyall analyses are all presumed to be discriminating strikes against military objectives.[168] Lyall's most recent research involves an in-depth analysis of the relation between air strikes and insurgent attacks in Iraq during "the surge."[169] Analyzing all U.S. air strikes carried out from February 2007 to July 2008, Lyall concludes, "far from suppressing insurgent attacks, airstrikes actually may *increase* them over time. In this setting, airstrikes can be counterproductive, failing to reduce insurgent violence while also victimizing civilians."[170] Lyall and his co-authors also conclude that "increasing the number of airstrikes may initially reduce attacks but ultimately increase them over the long run."[171] Perhaps most interestingly, Lyall's study finds that "the effects of airstrikes may not be localized, but instead can ripple over long distances as insurgents respond in different parts of the country."[172] Specifically with respect to airstrikes in Iraq, the study found

> that Sunni insurgents were sufficiently organized to shift their attacks to new fronts in response to American airstrikes. That is, while heavy bombardment in Baghdad might suppress insurgent attacks locally, we find a net increase in overall violence as insurgent commanders displace their violence to new locations

166 *Id*. at 202–03.

167 *Id*. at 203.

168 *See, e.g.,* Jason Lyall, *Bombing to Lose? Airpower, Civilian Casualties, and the Dynamics of Violence in Counterinsurgency Wars*, SSRN 1-2 (Sept. 3, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422170 [https://perma.cc/W8RJ-RBZP]; Georgia Papadogeorgou, Kosuke Imai, Jason Lyall, and Fan Li, *Causal Inference with Spatio-Temporal Data: Estimating the Effects of Airstrikes on Insurgent Violence in Iraq*, 84 J. OF THE ROYAL STATISTICAL SOCIETY SERIES B: STATISTICAL METHODOLOGY 1969, 1969 (2022).

169 *See* Papadogeorgou, Imai, Lyall, & Li, *supra* note 168.

170 *Id*. at 1993.

171 *Id*. at 1971.

172 *Id*. at 1993.

such as Mosul that are experiencing less airstrikes.[173]

Lyall's study of airstrikes in Afghanistan found that the use of air power may not even lead to a localized reduction in insurgent violence.[174] To the contrary, his detailed empirical analysis concluded that the "[e]vidence consistently indicates that airstrikes markedly increase insurgent attacks relative to non-bombed locations for at least 90 days after a strike."[175] Even the resort to heavy and repeated bombings of locations "dozens of times" did not lead to a "'tipping point' after which attrition leads to the degradation of insurgent capabilities."[176] Although his findings may appear implausible, particularly to those who continue to argue for more unrestricted warfare,[177] the empirical reality is bolstered by a straightforward explanation. Insurgents typically lack the "key assets," such as "capital, infrastructure, and fielded forces," to give the use of airpower even a chance of success.[178] Moreover, the negative effects of air power are not limited only to increased insurgent violence. The Taliban consistently used airstrikes as a recruitment device.[179] Although Lyall did not find that civilian casualties *per se* were a trigger for increased insurgent violence, he does confirm that "[n]o matter how precise, airstrikes will kill civilians, shifting support away from the counterinsurgent while creating new grievances that fuel insurgent recruitment."[180] Lyall's studies show that reliance on air power, even when it is discriminating, actually fortifies the enemy we seek to defeat and works against our own military advantage.

Although Lyall's conclusions regarding the disadvantages of relying on air power do not turn on civilian casualties inflicted, a recent Open Society Foundations report concludes "with high confidence that civilian harm by U.S., international, and Afghan forces contributed significantly to the growth of the Taliban,

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173 *Id*. at 1996.

174 *Id*. at 1193.

175 Lyall, *supra* note 168, at 19-20. His study further supports the conclusion that even "repeated bombing of insurgents . . . only backfire[s], multiplying grievances among civilian populations and leading to increased violence." *Id*. at 17–18.

176 *Id*. at "Supplemental Appendix (On-Line)" 18.

177 *See*, *e.g*., McFate, *supra* note 121, at 3–4.

178 Lyall, *supra* note 168, at 3–4.

179 *Id*. at 25.

180 *Id*. at 4.

weakened the legitimacy of the U.S. mission and the Afghan government, and undermined the war effort by straining U.S.-Afghan relations."[181] Among the effects of civilian harm documented by the report are increased revenge-driven violence, loss of support for International Security Assistance Force (ISAF) troops, increased local support for the Taliban, and increased Taliban recruitment.[182] Specifically with respect to recruitment, the report found that "[c]ivilian harm was easily exploited by the Taliban. Taliban publications, public communications, and propaganda routinely made use of incidents of civilian harm to paint U.S. forces as an indiscriminate, anti-Muslim occupation force."[183] Most strikingly, the Report concluded that all of these negative repercussions of civilian harm accrued despite the fact that "the vast majority of ISAF-caused civilian harm occurred *while operating in accordance with the Law of Armed Conflict*."[184] Indeed, the report found that harm caused to civilians by LOAC-compliant attacks was "far more frequent" than harm to civilians caused by LOAC violations.[185] These findings suggest not only that less restrictive law governing the use of force would be a counterproductive response to the military failures of the last decades in Afghanistan and Iraq, but also that the amount of civilian harm that can be justified under current law is contrary to our strategic interests. The studies reviewed here support rethinking the current law and increasing civilian protections beyond what the LOAC now requires.

Part I above showed that the law we have was not designed for the conflicts we most frequently fight, in which civilians are neither generally separate nor readily distinguishable from combatants. This Part has shown that the correct response to the inadequate law we have is not to make it less restrictive, but rather to develop law that will protect civilians in the conditions in which we actually fight. Although states have relied on aerial bombardment, often marshalled indiscriminately, to subdue and defeat enemies, both official and scholarly assessments of reliance on air power

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181 C. KOLENDA, RACHEL REID, CHRIS ROGERS, & MARTE RETZIUS, OPEN SOC'Y FOUND., THE STRATEGIC COSTS OF CIVILIAN HARM 23 (2016).

182 *Id.* at 24–25.

183 *Id.* at 25.

184 *Id.* at 5.

185 *Id.*

overwhelmingly point toward its ineffectiveness. Moreover, much of the evidence suggests that reliance on air power is ultimately ineffective in defeating enemies even when strikes are carried out in accordance with the current Law of Armed Conflict. The data we have points to the conclusion that fighting wars successfully depends not on using more force with fewer restrictions, but rather with more regard for both civilian casualties and destructiveness generally.[186] Importantly, the impetus for more restrictive rules that better respect the fundamental principle of distinction is not only our humanitarian values, but also our strategic interests in actually winning wars and achieving durable security.

## IV. Rethinking the Laws of Armed Conflict

It is common to note that the law of war is a compromise between humanitarian concerns and what "military necessity" demands.[187] While it is certainly true that legal rules governing armed conflict must not be perceived as preventing military success, the two underlying principles of the law of war are not necessarily at odds with one another. As retired U.S. Colonel and professor Waldemar Solf wrote in *New Rules*,

> [t]he underlying stimulus for [the law of armed conflict's] development has been the realization that violence and destruction which is unnecessary to actual military requirements is not only immoral and wasteful of scarce resources but also counterproductive to the attainment of the political objectives for which military force is used.[188]

Following this line of reasoning, I want to suggest that law that permits more destruction than is conducive to military victory is bad law, and that the law we have is bad for precisely that reason. The first two Parts of this Article have shown that the law we have does not adequately serve either our humanitarian or military values. As Myres McDougal and Florentino Feliciano observed long before the threats we now face, "[b]y stimulating hatred in the enemy and

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186 Although there are some possible outliers, such as Russia's indiscriminate war in Chechnya, these exceptions prove the rule. For a discussion of the second Chechnya war, see Jason Lyall, *Does Indiscriminate Violence Incite Insurgent Attacks? Evidence from Chechnya*, 53.3 J. CONFLICT RESOLUTION 331, 357 (June 2009).

187 *See*, *e.g.*, Michael Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIR. J. INT'L L. 795, 796 (2010).

188 New Rules, *supra* note 24, at 211.

strengthening his will to resist[, unnecessary destruction] will in addition frequently compel the expenditure of much larger amounts of force than would otherwise have been necessary to secure the same objective."[189] It is thus to rethinking the core targeting rules of distinction, proportionality, and precaution in attack that I now turn in order to better protect civilians and serve our strategic objectives.

*A. Distinction*

The targeting rule of distinction, which was codified for the first time in the Additional Protocols, holds that "[p]arties to the conflict shall at all 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."[190] Military objectives are defined broadly to include "objects which by their nature, location, 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."[191] Falling under the definition of military objectives are enemy combatants, civilians directly participating in hostilities, and a host of military matériel such command centers, weapons, tanks, ships, etc.

While distinction requires operations to be directed "only against military objectives,"[192] the requirement is significantly less restrictive than it may at first appear. As the United States and several close allies made clear while negotiating the Additional Protocols, the rule "prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives."[193] Thus the basic rule of distinction is satisfied as long

189 MYRES MCDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 53 (1961).

190 AP I, *supra* note 4, at art. 48.

191 *Id*. at art. 52(2).

192 *Id*. at art. 48.

193 Official Record, *supra* note 17, vol. 6, at 204. For similar statements by Australia, Canada, Germany, Italy, the Netherlands, New Zealand, and the U.K. *see* International Committee of the Red Cross, *Practice relating to Rule 1. The Principle of Distinction between Civilians and Combatants*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule1_ sectionb [https://perma.cc/U2PJ-QVN8]. *See also* ISRAEL, MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA 27 DECEMBER 2008—18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS ¶ 97 (July 29, 2009) ("[The Principle of

as attacking forces intend to strike a military objective, regardless of where civilians are positioned in relation to the military objective or of whether the predominant effects of the strike will be on civilians or civilian objects.

The possible civilian protections that distinction might have had are weakened further by placing virtually no temporal, geographical, or spatial limits on the targeting of military objectives. With respect to enemy combatants, various states have held that they are targetable "wherever and whoever they are,"[194] "whether on the battlefield or outside of it,"[195] and "at all times."[196] The potential impact on civilians is increased yet again through an expansive reading of the size and scope of military objectives. The U.S. Law of War Manual, for instance, specifies that "objects that contain military objectives are military objectives."[197] This means that a single enemy fighter in a civilian apartment building, or a store of weapons in the basement of a school would convert the entire apartment building or school into a valid military objective. Indeed, the U.S. Manual favorably cites the Canadian Law of Armed Conflict Manual for the proposition that "[c]ivilian vessels, aircraft, vehicles and buildings are military objectives if they contain combatants, military equipment or supplies."[198] Neither the

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Distinction] addresses only deliberate targeting of civilians, not incidental harm to civilians in the course of striking at legitimate military objectives.").

194 UNITED KINGDOM, HOUSE OF LORDS, STATEMENT BY THE PARLIAMENTARY UNDER-SECRETARY OF STATE FOR DEFENCE, *Hansard*, vol. 653, Debates, col. 600 (Oct. 13, 2003).

195 ISRAEL, LAWS OF WAR IN THE BATTLEFIELD, MANUAL, MILITARY ADVOCATE GENERAL HEADQUARTERS, MILITARY SCHOOL 42 (1998).

196 Germany, Lower House of Federal Parliament (*Bundestag*), Reply by the Federal Government to the Minor Interpellation by Members Jerzy Montag, Hans-Christian Ströbele, Omit Nouripour, further Members and the Parliamentary Group BÜNDIS 90/DIE GRÜNEN, *BT-Drs*. 17/3916, Nov. 23, 2010, at 6 ("[M]embers of the opposing armed forces (combatants) in international armed conflict and, in non-international armed conflict, members of organized armed groups exercising a continuous combat function may be lawfully targeted at all times as enemy fighters under international humanitarian law, including with the use of lethal force.").

197 DEP'T OF DEFENSE, LAW OF WAR MANUAL, at 5.7.4.2.

198 *Id*. at 5.7.4.2, n.149, *citing* Canada, Department of National Defence, Joint Doctrine Manual B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels (Aug. 13, 2001). There is, however, disagreement even within the U.S Military. *See*, *e.g*., Michael Schmitt, *Israel – Hamas 2023 Symposium – Attacking Hamas – Part II, The Rules*, ARTICLES OF WAR (Dec. 7, 2023) ("But consider an apartment building with many apartments, one of which Hamas uses for military purposes. The prevailing view, shared by the United States and Israel, is that the entire building is a

U.S. nor Canada appear to be outliers in these views. State practice, particularly in the counterterrorism and counterinsurgency campaigns of the last two decades, increasingly confirms that single enemy combatants can be targeted even when they are surrounded by civilians or in a predominantly civilian location, such as a home,[199] marketplace,[200] or café.[201] The central failure of the rule of distinction as it has come to be understood and applied is that it offers no protection to civilians whenever combatants and other military objectives are in their midst.

The core problem with distinction, that it is focused narrowly on the identity of a military objective rather than the broader context in which it is found, is compounded when we consider the effects of air power delivering exploding munitions against military objectives in civilian populated areas. By requiring commanders only to intend to target a single military objective regardless of the location or context of the objective, the modern rule of distinction fails to respond to the blurring of the classical distinction between civilians and combatants caused by modern weapons. As we have seen above, the Hague rules governing warfare contained scant mention of civilians on the assumption that civilians and civilian

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military objective, such that harm to the apartments not being used does not factor into the proportionality and precautions assessments (see below). A minority view, which I support, indicates that if the apartment can be targeted individually (which depends on an array of factors such as weapons system capability and availability and risk to the attacking forces), damage to the remainder of the building is collateral damage in the proportionality and precautions assessment. In an intense fight, this is hard to do.").

199 *See* Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 152–53 (2010) ("On the night of July 22, 2002, an Israeli F-16 aircraft dropped a single one-ton bomb on Shehadeh's house in a residential neighborhood of Gaza City, one of the most densely populated areas on the globe. As a result, Shehadeh and his aide, as well as Shehadeh's wife, three of his children, and eleven other civilians, most of whom were children, were killed. One hundred and fifty people were injured.").

200 *See, e.g.*, HUMAN RIGHTS WATCH, *Yemen: US Bombs Used in Deadliest Market Strike* (Apr. 7, 2016), https://www.hrw.org/news/2016/04/07/yemen-us-bombs-used-deadliest-market-strike [https://perma.cc/LR8N-SLEX].

201 For examples of U.S. drone strikes that hit and killed unintended targets, *see* Zaid Ali & Laura King, *U.S. Drone Strike on Yemen Wedding Party Kills 17*, L.A. TIMES (Dec. 13, 2013), http://articles.latimes.com/2013/dec/13/world/la-fg-wn-yemen-drone-strike-wedding-20131213 [https://perma.cc/55HJ-L69A]. *See also* Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came To Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html.

objects would be generally separate from the fighting. In such a context, simply directing operations at military objectives would provide fairly robust protections for civilians. By the time of the Additional Protocols, however, it was abundantly clear that the advent of "air power and modern methods and means of warfare"[202] had "exposed [civilians] to even greater danger than combatants."[203] Yet, as I argued in Part I above, the basic rule of distinction codified in 1977 could only offer robust civilian protections if civilians were generally separate and distinct from combatants and other military objectives.

Rather than grounding the basic rule of distinction on an unrealistic view of modern warfare, two of the ICRC's early draft rules for civilian protections point us in a better direction. The first rule prohibits the "use of weapons, which, when directed against the enemy armed forces, would, by their nature or effect, cause considerable losses among the civilian population."[204] The second rule instructs belligerents not only to direct their operations at the enemy's "military resources," but also to "leave the civilian population outside the sphere of armed attacks."[205] Both of these rules instruct us to look not simply to the identity of an intended military objective, but more broadly to the area affected by an attack and its military or civilian character. I propose rethinking distinction in terms of these rules so as to require commanders not simply to identify a valid military objective, but also to look beyond the objective to the "lethal area" of an attack, that is, the geographic area in which there is a greater than 50% probability of incapacitation given the weapon system used in the attack. Where the lethal area is populated by civilians in or around predominantly civilian objects, such as a dwelling or a market place, this new rule of distinction would prohibit the attack, even if a legitimate military objective, such as an enemy combatant or weapons cache, were also located there.

To better understand why a lethal area analysis is necessary for the protection of civilians, it is essential to have a basic picture of how exploding munitions create lethal effects beyond their

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202 New Rules, *supra* note 24, at 315.

203 Official Record, *supra* note 17, vol. 6, at 166, paras. 127–28.

204 ICRC, *Draft Rules for the Protection of the Civilian Population from the Dangers of Indiscriminate Warfare* (1955 Draft), Part I, art. IV.

205 1956 Draft Rules, *supra* note 26, art. 1.

aimpoint. The lethality of exploding munitions is produced chiefly by two components, the blast itself and fragmentation.[206] Blast waves and blast winds are usually what cause the most severe damage from explosive munitions.[207] Together they cause severe and lethal damage to people in proximity to blasts, including complete body disintegration, amputations, and evisceration.[208] Blast waves are also what typically cause the most damage to structures, with greater damage expected in enclosed or partially enclosed spaces such as streets or market places where blast waves can be reflected and intensified.[209] Beyond the blast waves and winds, primary and secondary fragmentation cause death and serious injury at significantly greater distances.[210] Primary fragmentation is caused when the munition explodes, causing the bomb's or missile's casing to break apart and fly at great speeds in all directions.[211] Secondary fragmentation is caused when the initial explosion turns objects in its immediate vicinity into projectiles.[212] Secondary fragments are typically larger than primary fragments and include objects ranging from bricks and vehicle parts to teeth and bones.[213] Although these secondary fragments typically travel more slowly than primary fragments, they are often still a significant cause of death and injury.[214] Finally, heat, often in the form of fire, from exploding munitions is also a serious cause of

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206 INTERNATIONAL COMMITTEE OF THE RED CROSS, EXPLOSIVE WEAPONS WITH WIDE AREA EFFECTS: A DEADLY CHOICE IN POPULATED AREAS 29 (Jan. 2022) [hereinafter Explosive Weapons].

207 *See id*. (describing how blast waves cause internal injuries as they pass through individuals near the blast and how blast winds can "make buildings collapse and throw people against objects or objects against people, causing blunt, crush, or penetrating wounds").

208 *Id*. at 65.

209 *Id*. at 65–66.

210 *Id*. at 66.

211 The lethal effects of primary fragmentation can be significantly enhanced by "pre-fragmentation," a process of scoring or otherwise dividing the shell of the munition into regular units. For more on the vastly increased lethal effects of pre-fragmentation, *see*, The Geneva International Centre for Humanitarian Demining (GICHD), *Characterisation Of Explosive Weapons, Annex E: Mk 82 Aircraft Bomb*, Feb. 2017, 6-7. [hereinafter Mk 82], available at http://characterisationexplosiveweapons.org/wp-content/uploads/2016/10/Annex-E.pdf [https://perma.cc/RQ6K-V5PE].

212 Explosive Weapons, *supra* note 206, at 66.

213 *Id*.

214 *Id*.

injury and death.[215]

The munitions used in recent conflicts in civilian populated areas produce a wide range of blast- and fragmentation radii.[216] The most common are the range of munitions from 2000-, 1000-, 500-, and 250-pound bombs,[217] down to the Hellfire missile that typically carries only a 20-pound warhead. Recent reporting suggests that the 2000-pound MK 84 bomb has been used extensively in Gaza, marking its first widespread use in civilian populated areas since Vietnam.[218] U.S. and NATO allies typically have not used the MK 84 in civilian areas in recent conflicts due to its extraordinary

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215 *See*, *e.g.*, Hiba Yazbek & Karen Zraick, *A Doctor in Gaza Describes 'Horrific Scenes' After Israeli Airstrikes*, N. Y. TIMES (Nov. 2, 2023), https://www.nytimes.com/2023/11/02/world/middleeast/voices-airstrikes-jabaliya-hospital.html.

216 Significantly larger munitions are sometimes used in areas away from civilian population concentrations, such as the 20,000 pound GBU-43/B Massive Ordnance Air Blast Bomb, used for the first time by the United States in Afghanistan in Apr. 2017. On the use and projected blast radius of the GBU-43/B, see Helene Cooper & Mujib Mashal, *U.S. Drops 'Mother of All Bombs' on ISIS Caves in Afghanistan*, N. Y. TIMES (Apr. 13, 2017), https://www.nytimes.com/2017/04/13/world/asia/moab-mother-of-all-bombs-afghanistan.html. *See also*, *U.S. military drops "Mother of All Bombs" on ISIS tunnel complex*, HISTORY (Aug. 23, 2021), https://www.history.com/this-day-in-history/mother-of-all-bombs-afghanistan# [https://perma.cc/PK5Q-S8QU].

217 Each of these bombs can be, and often is, modified with a precision guidance kit to turn a free-fall "dumb" bomb into a "smart" precision guided munition (PGM). There are several different precision guidance systems in use and each PGM kit is an "after-market" modification that can cost $50,000 or more per unit. For a comprehensive discussion of the different precision guidance systems in use with the MK 82 bomb, *see* Mk 82, *supra* note 211, at 11–15. For a discussion of the use of the Paveway IV version of the MK 82 by the UK Royal Air Force during the battles against ISIS in Mosul and Raqqa, see AIRWARS, *Written Evidence Submitted to the UK Parliament by Airwars on UK Civilian Harm Assessments for the Battles of Mosul and Raqqa* (July 18, 2018), https://committees.parliament.uk/writtenevidence/92961/pdf/. For a critical discussion arguing that number of munitions dropped, rather than their character as "dumb" or precision guided, is the critical factor for expected civilian casualties, *see* LTC Amos C. Fox, *Precision Fires Hindered by Urban Jungle*, ASSOCIATION OF THE UNITED STATES ARMY (AUSA) (Apr. 16, 2018), https://www.ausa.org/articles/precision-fires-hindered-urban-jungle [https://perma.cc/Y9J7-KAQY].

218 *See*, *e.g.*, Robin Stein, Haley Willis, Ishaan Jhaveri, Danielle Miller, Aaron Byrd & Natalie Reneau, *Visual Evidence Shows Israel Dropped 2,000-Pound Bombs Where It Ordered Gaza's Civilians to Move for Safety*, N.Y. TIMES (Dec. 21, 2023) [hereinafter Visual Evidence], https://www.nytimes.com/video/world/100000009208814/israel-gaza-bomb-civilians.html [https://perma.cc/LZ97-ACXT]; and Tamara Qiblawi, Allegra Goodwin, Gianluca Mezzofiore & Nima Elbagir, *'Not seen since Vietnam': Israel dropped hundreds of 2,000-pound bombs on Gaza, analysis shows*, CNN (Dec. 22, 2023), https://edition.cnn.com/gaza-israel-big-bombs/index.html [https://perma.cc/P6DD-U4VH].

destructiveness and lethality. The U.S. Air Force says the MK 84 is capable of "penetrating up to 11 feet of concrete" and is expected to kill people within 400 meters of impact.[219] Reporting suggests that the MK 84, which can leave craters up to 60 feet in diameter, can be expected to cause severe damage, injury, and death up to 1000 meters from point of impact.[220] Political and military leaders have generally favored the use of the smaller 500-pound MK 82 bomb in civilian populated areas, which was the most common munition fired during the war against ISIS in Iraq.[221] A standard MK 82 produces a lethal area of roughly 80 meters by 30 meters, with a 10% chance of incapacitation up to 250 meters from the blast site and a 0.1% risk-estimate distance of at least 425 meters for friendly forces under combat conditions.[222] The MK 81 is a smaller still, 250-pound version of the bomb.[223] Despite its smaller size, the MK 81 is still capable of producing severe injury and death up to 300 meters from impact.[224] Both the MK 82 and MK 81 have low collateral damage variants for use when minimizing civilian fallout is a priority, including models with reduced explosive fill and a carbon fiber shell to minimize fragmentation.[225] Finally, on the lowest end of the lethal area spectrum, is the Hellfire missile, originally developed primarily for helicopter use, and later becoming the

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219 Tech. Sgt. Jim Bentley, *MK-84 Conical Bomb Assembly*, Air Combat Command (Dec. 29, 2022), https://www.acc.af.mil/News/Article/3256056/mk-84-conical-bomb-assembly/ [https://perma.cc/A8UM-CWL8].

220 Visual Evidence, *supra* note 218. *See also* AOV, *Explosive weapons with large destructive radius: air-dropped bombs (the Mark 80 series and Paveway attachments*) (Mar. 1, 2016), https://aoav.org.uk/2016/large-destructive-radius-air-dropped-bombs-the-mark-80-series-and-paveway-attachments/ [https://perma.cc/67CJ-EUXY].

221 *See* Mk 82, *supra* note 211, at 11-15; and Airwars, *supra* note 217.

222 Mk 82, *supra* note 211, at 6–7. The 0.1% risk-estimate distance indicates that there is a predicted 1 in 1000 chance of incapacitation of friendly forces in helmet and combat gear at the prescribed distance. It is not the "safety distance" for the munition. As the authors discuss, a "pre-fragmented" version of the MK 82 produces a lethal area eight times larger.

223 *Joint Ammunition and Weapons Systems: General Purpose Bombs*, JOINT PROGRAM EXECUTIVE OFFICE ARMAMENTS & AMMUNITION, https://jpeoaa.army.mil/Project-Offices/PL-JAWS/Products/Bombs/ [https://perma.cc/RA9T-ZRSK].

224 Visual Evidence, *supra* note 218.

225 For more on the low collateral variants of the MK 82 and MK 81, see MK 82, *supra* note 211; Visual Evidence, *supra* note 218; and United States Air Force, *GBU-39B Small Diameter Bomb Weapon System*, https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104573/gbu-39b-small-diameter-bomb-weapon-system/.

weapon of choice for targeted killing from unmanned aircraft, or drones, during the Bush and Obama administrations.[226] The standard Hellfire carries a 20-pound warhead that produces a lethal radius of 15 meters.[227] Despite its relatively small size and blast radius, the Hellfire still produces an explosion that can incinerate people and objects within its blast radius, while also releasing "powerful blast waves capable of crushing internal organs."[228] It is also capable of causing serious injury at considerably greater distances, including injury from "shrapnel, . . . as well as vision and hearing loss."[229] According to one U.S. government study, sound levels from an exploding Hellfire can be expected to cause permanent or temporary hearing loss in humans at a distance up to 385 meters from the blast site.[230] Because even very low payload exploding munitions like the Hellfire produce serious destruction, injury, and death well beyond their intended target,[231] an effective rule of distinction should focus on the expected lethal area of an attack, rather than requiring only a narrow focus on an intended target.

Given this brief background on the lethal effects of some commonly used exploding munitions, I can now illustrate how the reformed rule of distinction I am proposing would be applied in practice. Once a valid military objective is identified and a weapons

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226 *See* Warren P. Strobel & Gordon Lubold, *From Tanks to Terrorists, a Missile's Mission Shifted*, THE WALL STREET JOURNAL, (May 13, 2019), https://www.wsj.com/articles/from-tanks-to-terrorists-a-missiles-mission-shifted-11557403178.

227 Thomas Gillespie, Katrina Laygo, Noel Rayo & Erin Garcia, *Drone Bombings in the Federally Administered Tribal Areas: Public Remote Sensing Applications for Security Monitoring*, 4 J. GEOGRAPHIC INFORMATION SYSTEM 136, 139 (2012), http://www.scirp.org/journal/PaperInformation.aspx?paperID=18766 [https://perma.cc/4UTT-GA9H]. *See also* INT'L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC (STANFORD LAW SCHOOL) AND GLOBAL JUSTICE CLINIC (N.Y. UNIV. SCHOOL OF LAW), LIVING UNDER DRONES: DEATH, INJURY AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN (Sept. 2012) https://law.stanford.edu/sites/default/files/publication/313671/doc/slspublic/Stanford_NYU_LIVING_UNDER_DRONES.pdf [https://perma.cc/Y5PC-NQLR] [hereinafter Living Under Drones].

228 Living Under Drones, *supra* note 227, at 56 (internal citations omitted).

229 *Id*.

230 R. A. Efroymsona, W. Hargrovea, D. S. Jones, L. L. Pater, & G. W. Suter, *The Apache Longbow-Hellfire Missile test at Yuma Proving Ground: Ecological Risk Assessment for Missile Firing*, 14.5 HUMAN AND ECOLOGICAL RISK ASSESSMENT 898, 911 (2008).

231 For reference to a non-explosive variant of the Hellfire *see* Beaumont, *supra* note 31.

platform chosen for the attack, the first step for commanders is to determine whether civilians will be present in the lethal area produced by and at the time of the attack. In determining whether civilians are present in the lethal area, doubt about persons' status should be decided, following AP I, Art. 50(1), in favor of civilian status.[232] If no civilians are expected in the lethal area[233] at the time of attack on a valid military objective, then distinction would be satisfied and no further analysis would be required. However, if a civilian presence is anticipated, then the commander would need to proceed to the second step.

The next step in the analysis takes its cue from another draft rule whose full force did not make it into the final version of the Additional Protocols. Draft Art. 47(2) stated that "objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort."[234] There are two core ideas here. The first is that objects have a design function that distinguishes certain objects as civilian. The second idea is to set a high bar for overriding an object's civilian status, such that the mere presence of enemy combatants or matériel, or even the limited use of an object by the enemy, would not render the object a military objective.[235] According to this rule, in order for the civilian status of an object to be overcome, its civilian use would have to become subordinate to military use, such as when a civilian home is taken over and used by the enemy as a command center. Had this rule been adopted, it

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232 AP I, *supra* note 4, at art. 50(1) states, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." *See also id*. art. 52(3) regarding the doubt principle applied to civilian objects.

233 For the purposes of this discussion, I am using "civilian" as shorthand for all protected persons and also assuming that there are no other objects in the lethal area that receive special protections as a matter of law, such as hospitals or cultural property, or to which special protections may be given, such as schools. For more on the project to protect schools, see the *Safe Schools Declaration* and the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*, both available here: https://ssd.protectingeducation.org/safe-schools-declaration-and-guidelines-on-military-use/ [https://perma.cc/9EC8-PZRV].

234 Official Record, *supra* note 17, vol. 1, Part Three, at 16. Draft Article 47 was the basis for what was later adopted as AP I, art. 52.

235 However, as I discuss in greater detail below, proportionality and precaution in attack would still be applied and could prevent certain responses, such as calling in air strikes to level an entire building when rockets are being fired from its rooftop.

would have prevented the now widespread inference that objects that contain military objectives are automatically military objectives themselves. It would have required instead an analysis of the actual use of an object and its predominant degree before the object as a whole could be deemed a lawful military objective. Applying this to the reformed analysis of distinction, once the commander has determined that civilians are expected in the lethal area created by the attack, the next step would be to determine whether the lethal area contains one or more civilian objects that are being put predominantly to civilian use. Where, for instance, the lethal area contains a house, apartment building, hospital, school, market, eatery, or train station that is used predominantly by civilians, then the military objective located in the same lethal area would not be targetable under those circumstances with the munitions in question. Quite simply, the planned attack would be deemed indiscriminate, because it would "strike military objectives and civilians or civilian objects without distinction."[236]

By contrast, if the lethal area contains only objects designed for military use, such as barracks, command centers, fortifications, or weapons depots, then assuming that none of these had been put predominantly to civilian use,[237] the reformed rule of distinction I am defending would not find the attack unlawful, despite the presence of civilians. The same conclusion would follow if the lethal area contains objects designed for civilian use, such as an apartment building or factory, that are now predominantly put to military use. Any continued partial civilian use, and the civilians themselves, would have to be counted in proportionality assessments. However, targeting the civilian object whose use at the time of attack was predominantly military would be sufficient to convert the object as a whole into a lawful military objective. Of course, accurate and up to date intelligence would be crucial to these determinations.[238] Whenever the intelligence supporting the

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236 AP I, *supra* note 4, at art. 51(4).

237 There have been incidents in which civilians have taken shelter at, or been forcibly brought to, military installations, as was apparently the case with the NATO bombing of the Korisa military camp in 1999. The identity of the camp was based on "prior intelligence" and the presence of civilians was unknown both to commanders and the pilots executing the mission. *See* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paras. 86-89 [hereinafter NATO Final Report].

238 For several examples of faulty or out of date intelligence leading to extensive

assessment is dated or otherwise open to reasonable doubt, the rules favoring findings of civilian status in cases of doubt in AP I, Arts. 50(1) and 52(3) should be applied, which would, in turn, lead to baring the attack under my rule of distinction.

I will illustrate this reformed rule of distinction along with proportionality and precaution in attack by looking at specific cases at the end of this Part. For now, I want to note that the "lethal area" analysis that I am proposing would not add a substantially new requirement for military attack planning. Sophisticated militaries, such as NATO members, already incorporate "civilian harm mitigation measures" into their operations.[239] Moreover, militaries have long calculated "risk-estimate distances" for the use of explosive munitions in order to safeguard their own and other friendly personnel.[240] Militaries thus know the expected lethal area of the munitions at their disposal and make use of that information to choose appropriate munitions for the mission in question, while also ensuring the safety of friendly forces and the protection of civilians in the target area.

### *B. Proportionality*

The rule of *jus in bello* proportionality is supposed to reinforce the civilian protections found in distinction. While distinction does not regulate foreseeable or unintentional civilian casualties resulting from an attack, proportionality places a limit on foreseeable civilian death and injury, and damage to civilian objects, by requiring them not to be "excessive in relation to the concrete and direct military advantage anticipated."[241] Despite the near universal acceptance of proportionality as a "fundamental principle" applicable in both international and non-international armed conflict,[242] the rule

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civilian casualties, see *id*. and Khan & Gopal, *supra* note 7.

239 NATO, NATO POLICY FOR THE PROTECTION OF CIVILIANS, Press Release 135 (July 9, 2016), https://www.nato.int/cps/en/natohq/official_texts_133945.htm.

240 *See*, *e.g*., U.S. AIR FORCE, COUNTERLAND OPERATIONS, Air Force Doctrine Publication 3-03, at 49 (Oct. 21, 2020), https://www.doctrine.af.mil/Portals/61/documents/AFDP_3-03/3-03-AFDP-COUNTERLAND.pdf [https://perma.cc/93BZ-UX54].

241 AP I, *supra* note 4. at art. 51(5)(b). *See also id*. at arts. 57(2)(a)(iii), 57(2)(b), and 85(3)(b) & (c).

242 For acceptance of the principle by the United States, despite not having ratified the Additional Protocols, s*ee*, *e.g*., Executive Order 13732, United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force (July 1, 2016) ("As a Nation, we are steadfastly committed to complying with our

occupies a contradictory position in the law of armed conflict. Proportionality is heralded as at once "the central pillar of robust civilian protection from the effects of attacks in wartime,"[243] and as "indeterminate," "obscure," and "unworkable," because it requires us to compare two incommensurable values.[244] Both sides of the debate are half right. Proportionality does sometimes provide robust protections for civilians, but at other times seems to offer little or no protections, even when militaries claim in good faith to be applying the rule.[245] The reasons for this are twofold. First, proportionality appears to be applied on a sliding scale by tying the military advantage of individual attacks to the strategic aims of the conflict as a whole. When this is done, the greater or more extreme the overall war aims, the greater the perceived military advantage of individual attacks and, in turn, the more civilian harm that apparently can be justified. The second problem is not that military advantage and civilian harm are incommensurable, but rather that there is no standard and commonly accepted way of comparing the two. I will discuss how to resolve each of these problems in order to arrive at an approach to proportionality that can be meaningfully and consistently applied.

The U.S. military explicitly links military advantage to the overall strategic objectives of a conflict. In discussing proportionality, the U.S. Air Force writes that "[a] 'military advantage' is not just a tactical gain, but can span the spectrum of tactical, operational, or strategic levels."[246] The "strategic level of warfare" is, in turn, defined as the "*why* and *with what* the conflict

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obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality.").

243 Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 153 (3rd ed. 2016).

244 *See*, *e.g.*, Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 189 (2011); Aaron Fellmeth, *The Proportionality Principle in Operation*, 45 ISRAEL L.R. 125, 125 (2012).

245 *See*, *e.g.*, Frank Jack Daniel, *High civilian toll in Gaza is cost of crushing Hamas, Israeli military officials say*, REUTERS (Dec. 19, 2023, 7:29pm), https://www.reuters.com/world/middle-east/high-civilian-toll-gaza-is-cost-crushing-hamas-israeli-military-officials-say-2023-12-19/.

246 U.S. AIR FORCE, TARGETING, Air Force Doctrine Publication 3-60, at 68 (Nov. 12, 2021). *See also* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT TARGETING, Joint Publication 3-60, at A-4 (Jan. 31, 2013) ("military advantage is not restricted to tactical gains, but is linked to the full context of war strategy.").

occurs."[247] While it makes some intuitive sense to think of the military advantage of any particular attack as ultimately tied to its contribution to the strategic goals of the conflict as a whole, there are a number of problems with such an approach that should give us pause.[248] First, tying the military advantage of an attack to a conflict's overall war aims introduces *jus ad bellum* considerations into *jus in bello* questions.[249] That is, the goals that motivate and justify resorting to military force in the first place, such as self-defense or restoration of peace and security (i.e. quintessential *jus ad bellum* consideration), come to dictate how the *jus in bello* rule of proportionality is applied. The reason why *jus ad bellum* and *jus in bello* considerations are kept strictly separate in the international law governing armed conflict is to ensure that *jus in bello* applies to both sides equally regardless of their status under *jus ad bellum*.[250] Thus both unlawful aggressors and lawful defenders are equally incentivized to abide by the law governing their conduct in war, i.e. the *jus in bello*. As soon as *jus ad bellum* considerations flow into *jus in bello* questions, we risk upending the reciprocity at the heart of *jus in bello*, incentivizing rejection of the law, and endangering civilians.[251]

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247 U.S. AIR FORCE, THE AIR FORCE, Air Force Doctrine Publication 1, at 1 (Mar. 10, 2021).

248 It is notable that both the Commentary on the Additional Protocols and the HPCR Manual on International Law Applicable to Air and Missile Warfare do not construe military advantage as pertaining to the strategic level. The HPRC Manual explicitly cautions against interpreting military advantage too broadly and restricts its application to the "impact on the enemy's military tactical or operational level." THE PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 99 (2013). *See also* AP I Commentary, *supra* note 77, at 685, para. 2218.

249 For a recent example of this, *see* Pnina Sharvit Baruch, The War with Hamas: Legal Basics, INSS Insight (Oct. 16, 2023) ("In view of the enormous threat that Hamas currently poses to Israel, the denial of its military capability is expected to give Israel a great security advantage . . . . In light of this significant military advantage, even if many civilians in Gaza are harmed during the attacks, this is not necessarily excessive incidental damage . . . ."). For discussion of the problems with Baruch's approach, *see* Leonard Rubenstein, *Israel's Rewriting of the Law of War*, JUST SEC. (Dec. 21, 2023), https://www.justsecurity.org/90789/israels-rewriting-of-the-law-of-war/ [https://perma.cc/5CQK-AMUK].

250 The U.S. Law of War Manual, for instance, states "[a]s a general matter, jus in bello and jus ad bellum address different legal issues and should not be conflated." DEP'T OF DEFENSE, LAW OF WAR MANUAL, at 3.5.1.

251 Hersch Lauterpacht long ago forcefully argued that if the application of *jus in bello* were "made dependent upon the legality of the war on the part of one belligerent or group

There is another and perhaps more subtle danger to tying the military advantage of specific attacks to the overall strategic aims of a conflict. When the military advantage of individual attacks in defined in terms of a party's strategic aims in the conflict, the greater, more absolute or extreme those overall war aims are, the greater the military advantage of any specific attack will be. This, in turn, means that the greater the military advantage assigned to a specific attack, the greater the justifiable death and injury to civilians and destruction of civilian object will be. I suggest we see this phenomenon playing out in Israel's ongoing war in Gaza[252] where Israel's stated war aims are the "complete"[253] and "total victory"[254] over Hamas such that "[a]ll Hamas operatives must die."[255] We perhaps also saw this phenomenon at work in the drive toward "unconditional surrender" of the Axis powers during World War II.[256] When the military advantage of individual attacks is tied to absolute or complete victory, or the removal of all enemy threats, then each incremental contribution toward that absolute victory takes on outsized importance. The extreme nature of—and

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of belligerents" it would "cease to operate" and hostilities would "degenerate into a savage contest of physical forces freed from all restraints . . .." Lauterpacht, *The Limits of the Operation of the Law of War*, 30 Brit. Y.B. Int'l L. 206, 212 (1953).

252 *See* Rubenstein, *supra* note 249 ("Israel's spokespeople . . . discuss proportionality in the context of the strategic objective of the war, to eradicate Hamas and all its infrastructure. Accomplishing that objective in view of the existential threat Hamas poses, they claim, outweighs any excessive harm to civilians."). *See also* Baruch, *supra* note 248; STATE OF ISRAEL MINISTRY OF FOREIGN AFFAIRS, HAMAS-ISRAEL CONFLICT 2023: KEY LEGAL ASPECTS (Nov. 2, 2023), https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects ("Military advantage moreover may refer to the advantage anticipated from an operation as a whole.").

253 Najib Jobain & Wafaa Shurafa, *Defiant Netanyahu declares Israel's goal is 'complete victory' in Gaza after UN court ruling*, PBS NEWS HOUR (Jan. 27, 2024), https://www.pbs.org/newshour/world/defiant-netanyahu-declares-israels-goal-is-complete-victory-in-gaza-after-un-court-ruling.

254 Brad Dress, *Israel's war aims elusive but unchanged despite steep price*, THE HILL (Jan. 25, 2024), https://thehill.com/policy/defense/4425615-israels-war-aims-elusive-but-unchanged-despite-steep-price/.

255 THE JEWISH CHRONICLE, *Netanyahu promises total annihilation of Hamas with 'crushing ground invasion'* (Oct. 25, 2023), https://www.thejc.com/news/israel/netanyahu-promises-total-annihilation-of-hamas-with-crushing-ground-invasion-rcibr9l7 [https://perma.cc/7T77-3PV7].

256 As discussed above, the Allies' own Strategic Bombing Survey concluded that neither the firebombing of Japanese cities or the dropping of the atomic bomb on Hiroshima and Nagasaki played a crucial role in defeating the Japanese. *See* US SBS Japan, *supra* note 154, at 5, 11-13 (1946).

importance assigned to—the end goal works to justify practically any cost imposed on enemy civilians. Severing the connection between overall war aims and the military advantage of individual attacks is thus essential to the object and purpose of *jus in bello* proportionality, which is striking a reasonable balance between military necessity and the protection of civilian lives and property. A failure to do so risks ceding civilian protections—and thus civilian lives—to the apparent military necessity of achieving an absolute war aim.

Making sure that the military advantage of individual attacks is not assessed in terms of broader war aims is an important first step. However, it still leaves us with the thorny question of how to apply proportionality in practice. As I have argued elsewhere, the fundamental problem with applying proportionality is not that it asks us to compare two incommensurable values.[257] Comparing the relative weight of incommensurable values is perhaps the defining feature of legal decision making. Judges and lawyers routinely assess the relative weight of values as diverse as freedom of religion and duty to provide health care,[258] and freedom of speech and national security.[259] Although comparing incommensurables may not always be easy, the purported incommensurability of civilian harm and military advantage cannot be the heart of the problem with proportionality. Rather, the problem lies primarily in not having an agreed upon method of weighting and comparing the two. As the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia found, "[t]he main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied."[260] The initial problem of not having a method of comparing military advantage and civilian harm is compounded by practitioners and scholars who resist a rigorous approach to proportionality. Michael Schmitt, for example, argues

257 For a thorough discussion of the alleged incommensurability of military advantage and civilian harm, *see* Joshua Andresen, *New Voices*: *Challenging the Perplexity over* Jus in Bello *Proportionality*, 7 EUR. J. LEGAL STUD. 19 (2014). *See also*, Joshua Andresen, *Putting Lethal Force on the Table: How Drones Change the Alternative Space of War and Counterterrorism*, 8 HARV. NAT. SEC. J. 426, 460–62, 467–70 (2017).

258 New York v. United States Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 555 (S.D.N.Y. 2019).

259 Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

260 NATO Final Report, *supra* note 237, at para. 48.

that the rule of proportionality uses an "excessiveness" standard in order to "avoid[] the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured. Ultimately, the issue is reasonableness in light of the circumstances prevailing at the time. . . . and nothing more."[261] The force of Schmitt's claims quickly recedes, however, when we consider the data-driven nature of modern warfare.

Threat assessments and civilian harm mitigation have long been an integral part of military planning and crucial to target selection.[262] These and other data-driven approaches, like those examined in Part II above, give modern militaries the tools to analyze the effects of strikes on enemy operations and consequent changes to the casualty rates of both friendly soldiers and civilians. Taken together, these tools not only give proportionality calculations a degree of quantitative precision, but they also furnish a much needed common denominator for civilian harm and military advantage in the form of lives taken and lives saved on each side. When the military advantage of an attack is measured in terms of the lives saved by removing or neutralizing enemy threats, those lives saved can be directly compared to the civilian deaths and injury caused by the attack.

Although measuring military advantage in terms of lives saved by removing an enemy threat may seem like an untethered innovation in how military advantage is normally assessed, I would rather suggest that the approach is a natural extension of assessing military advantage in terms of reducing enemy capacity to inflict harm. It is also reinforced by modern military doctrine, particularly in counterinsurgency operations,[263] and also more broadly by the justifiable purposes of war in the age of the UN Charter, which are

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261 MICHAEL SCHMITT, ESSAYS ON LAW AND WAR AT THE FAULT LINES 190 (2012).

262 *See*, *e.g.*, U.S. AIR FORCE, TARGETING, Air Force Doctrine Document 3-60, at 2 (June 8, 2006, Incorporating Change I, July 28, 2011); and LARRY LEWIS, IMPROVING LETHAL ACTION: LEARNING AND ADAPTING IN U.S. COUNTERTERRORISM OPERATIONS (Sept. 2014), https://www.cna.org/archive/CNA_Files/pdf/cop-2014-u-008746-final.pdf [https://perma.cc/5WZK-9744].

263 This approach of measuring military advantage in terms of lives saved is also reinforced by recent military doctrine. The U.S. Army/Marine Corps Counterinsurgency Field Manual states that "[t]he moral purpose of combat operations is to secure peace." COIN Manual, *supra* note 10, at 246, para. 7-26. The Manual goes on state that "the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape." *Id*. at 247–48, para. 7-32.

self-defense[264] and the restoration of peace and security.[265] There are also specific examples in conflict, such as self-defense of a military unit under attack, where the military advantage at that moment is precisely saving the lives of friendly soldiers by stopping the enemy's ability to harm them. The approach to proportionality that I am defending here effectively generalizes the situation in which military force is used for immediate force protection or when insurgent or terrorist threats are eliminated. In those cases, the equation of lives saved, e.g. of friendly soldiers, with harm to civilians caused by eliminating the enemy threat is relatively straightforward.[266] By making broader use of the analytical tools discussed above, proportionality calculations can be a concrete tool to carry out more effective military operations and do so while saving civilian lives.

The solution I have suggested to the two key problems besetting proportionality is first, requiring a focus on the concrete and direct military advantage of an attack rather than an attack's contribution to the greater war aims. The innovation in the law that I am suggesting is then to measure the concrete and direct military advantage in terms of the lives saved by an attack.[267] By comparing

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264 U.N. Charter art. 51.

265 U.N. Charter arts. 39, 42.

266 Whereas in earlier work I have argued for this understanding of military advantage in the limited contexts of targeted killing and counterinsurgency operations, I am here presenting a general defense of this approach. For my earlier, more limited accounts, *see* sources at *supra* note 257.

267 Adil Haque has recently argued for a similar approach to proportionality with at least one very significant difference. Haque ultimately ties military advantage to the value of victory or winning a war and concludes that "civilian losses cannot outweigh the military advantage of winning a war under the *jus in bello*." ADIL HAQUE, LAW AND MORALITY AT WAR 189 (2017). Haque arrives at this conclusion via an analysis of military necessity, using this statement from *United States v. List*: "Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money." United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948). A problem with Haque's analysis is that he seems to elide the important conditioning clause, "subject to the laws of war." For only by doing so could he conclude that *jus in bello* is structured such that humanitarian considerations completely give way to military necessity when victory is at stake. However, neither the statement from *List* nor the *jus in bello* is so structured. The Tribunal in *List* goes on to state, "Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law." *Id*. *Jus in bello* does not give military necessity, nor even victory, absolute value. Rather, *jus in bello* categorically restricts the means and methods of warfare and, at least when harm to civilians and civilian objects is anticipated, *jus in bello* requires military advantage to be

anticipated lives saved to anticipated civilian lives harmed by an attack, proportionality would become a rigorous tool for assessing the lawfulness of attacks.

Such an approach does not, however, resolve all of the challenges presented by proportionality as currently understood. While I want to reinforce the requirement to assess the concrete and direct military advantage of an attack, as the studies examined in Part II show, an accurate assessment of the military advantage of an attack expressed in terms of lives saved will not be accurate unless the medium- and longer-term *dis*advantages of an attack are included in the calculation. As the COIN Field Manual insightfully notes, some actions that "provide a short-term military advantage" may actually "help the enemy."[268] As we saw in Part II, short-term military gains, particularly those predicated on conventional military goals of depletion and attrition,[269] may ultimately lead to more insurgent violence and loss of support among the local population. Thus, when assessing the military advantage of an attack in terms of lives saved, account must be taken of increased enemy violence in other areas, increased recruitment or monetary support for the enemy, and also increased international support, all of which can serve to increase the lethal capacity of the enemy and endanger friendly military forces and civilians. Taking into account the negative secondary effects of attacks is necessary to arrive at an accurate assessment of the military advantage of a strike. Doing so ensures that military force can be used efficiently and proportionality can be properly applied.

In addition to taking into account the medium- and longer-term military disadvantages of attacks, proportionality calculations should also take into account the medium- and longer-term fallout for the civilian population. There is nothing in the rule of proportionality that requires a focus only on the immediate harm to civilians caused by an attack. The need to take into account the indirect or longer-term harms to the civilian population was recently

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analyzed not in terms of victory or the overall war aims, but in terms of the "concrete and direct" military advantage achieved by that particular attack.

268 COIN Manual, *supra* note 10, at 295, para. A-28. *See also id*. at 297, paras. A-37, 38.

269 As U.S. Armed Forces have long acknowledged, mere attrition will rarely be the goal of an attack. Rather, the effect produced by the attack is the proper objective of an attack. For discussion of this "effects-based" approach, *see*, *e.g*., U.S. Air Force, *supra* note 262, at 1-2.

affirmed in the Dublin Declaration on Strengthening the Protection of Civilians,[270] and also forms part of the International Criminal Tribunal for the former Yugoslavia's (ICTY) influential jurisprudence. In the *Prlić* case, the Trial Chamber of the ICTY concluded that "the destruction of the Old Bridge put the residents of Donja Mahala . . . in virtually total isolation, making it impossible for them to get food and medical supplies resulting in a serious deterioration of the humanitarian situation for the population living there."[271] The Trial Chamber also took into consideration "a very significant psychological impact on the Muslim population of Mostar" resulting from the destruction of the bridge.[272] These factors led the Trial Chamber to conclude that "the impact on the Muslim civilian population of Mostar was disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge."[273] The effects on the civilian population that led the Trial Chamber to conclude the attack on the bridge was disproportionate were downstream from the attack itself. For instance, no civilians were reportedly directly killed or injured by

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270 The Dublin Declaration directs armed forces to "take into account the direct and indirect effects on civilians and civilian objects which can reasonably be foreseen in the planning of military operations and the execution of attacks in populated areas . . ." Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas" (Dublin 2022), https://www.gov.ie/en/publication/585c8-protecting-civilians-in-urban-warfare/ [https://perma.cc/3TW2-7Y2W].

271 Prosecutor v. Prlić, IT-04-74-T, Judgment, vol. 3, para. 1583 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013).

272 *Id*. Note that Schmitt appears to deny the psychological harms can be the proper object of proportionality assessments and limits the relevant harm to "physical harm" only. *See* Michael N. Schmitt, *Israel – Hamas 2023 Symposium – Attacking Hamas – Part I, The Context*, ARTICLES OF WAR (Dec. 6, 2023), https://lieber.westpoint.edu/attacking-hamas-part-i-context/ [https://perma.cc/ZZ79-NEXY]. (" . . . in the law of targeting, only those consequences that result in death or injury to civilians or damage to civilian objects factor into the two critical obligations that serve to protect civilians and civilian objects, namely, the rule of proportionality and the requirement to take feasible precautions in attack to minimize civilian harm . . . . In particular, the notion of collateral damage in both rules does not include inconvenience, stress, or other intangible consequences. For instance, the fact that civilians had to flee from their homes in Gaza City is not, as a matter of law, considered to be collateral damage. Nor is the fear and distress they understandably suffer.").

273 Prosecutor v. Prlić, *supra* note 271, at para. 1584. An important additional factor considered by the Trial Chamber was the cultural significance of the bridge. *See id*. at para. 1585 and accompanying footnotes to the Chamber's factual findings contained in vol. 2 of the judgment.

the two days of shelling that ultimately led to the collapse of the bridge. Nevertheless, the court ruled that the downstream harms to the civilian population, which a reasonable commander should have anticipated, were disproportionate to the military advantage that could have been expected from the destruction of the bridge.[274] Taking into account the longer-term repercussions on the civilian population should become a standard component of proportionality evaluations.

By rethinking proportionality in the way that I have suggested, commanders would continue to focus on the concrete and direct military advantage anticipated from an attack. However, that military advantage would be expressed in terms of friendly soldier and civilian lives saved by reducing the enemy's capacity for harm. Although getting to a conclusion about number of lives saved requires commanders to think beyond the immediate elimination of enemy tanks, munitions, or soldiers, an approach that gives commanders a positive account of numbers of lives likely to be saved by an attack is essential to being able to evaluate which attacks will be the most effective and thus how best to use limited military resources most efficiently. An account of how many lives will be saved is also necessary for a meaningful evaluation of whether the harm to civilians that can be anticipated from an attack is excessive. As described above, the final account of both military advantage and civilian harm should include the secondary negative effects of military strikes on enemy capacity, as well as longer term harms to the civilian population that can be reasonably anticipated. As demonstrated by the recent statistical analyses examined in Part II above, data on the actual long-term effects of attacks is already being produced by academics and NGOs. This data should be highly desirable for military planners who seek to use military force more effectively.[275]

### *C. Precaution in Attack*

Precaution in Attack is often cited as an afterthought following distinction and proportionality. Nevertheless, in terms of the architecture of the law, it is the most powerful device for protecting

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274 Prosecutor v. Prlić, *supra* note 271, at para. 1584.

275 The U.S. military explicitly builds the selection of targets for their effectiveness and efficiency in achieving war aims into their targeting doctrine and training. *See* U.S. Air Force, *supra* note 262, at 2.

civilians from the effects of combat.[276] The primary role played by precaution in attack is demonstrated both by its higher aspiration—the avoidance of civilian casualties altogether, or at least their minimization—and by the substance of the rule. The rules require parties to a conflict to avoid locating military objectives in or near densely populated areas.[277] Civilians and civilian objects should also be removed from the vicinity of military objectives.[278] However, when a party to a conflict is unable or unwilling to properly locate military objectives or remove civilians from their vicinity, as is all too frequently the case in urban combat, then an attacking force anticipating civilian casualties in their operations must actively seek to avoid them.[279] The attacking force must take "constant care" to spare civilians and civilian objects.[280] If the attacking force is unable to avoid civilian casualties altogether, it must "take all feasible[281] precautions in the choice of means and methods of attack" in order to minimize civilian casualties.[282] Among the required precautions are doing "everything feasible" to verify that intended objects of attack are indeed military objectives;[283] giving "effective advance

276 For insightful examples of how a town or village might become a military objective if it is used as a defensive position or as a military staging area, *see* New Rules, *supra* note 24, at 348. In such cases, the commentary concludes, "In either event, the civilians remaining in the town or village would retain the benefit of the rule of proportionality in Art. 57 even though much of the effective protection contemplated by Art. 58(a) and (b) may have eroded." *Id*.

277 AP I, *supra* note 4, art. 58(b).

278 *Id*. at art. 58(a).

279 *Id*. at art. 57(2)(a)(ii).

280 *Id*. at art. 57(1).

281 The scope of feasibility is contested. Schmitt, for instance, offers a very limited view of feasibility that privileges attacking forces and would seem to remove most meaningful limitations from the rule: " . . . feasible options are operationally viable, make good operational sense, and are likely to avoid harm to civilians and civilian objects. For instance, an alternative is not feasible if it places the attacker at greater risk or involves using a weapon system that might be better employed elsewhere or later in the conflict. Moreover, if an alternative lessens the likelihood of achieving the desired effect of the attack, it need not be taken. Consider IDF attacks against the Hamas tunnel system. There has been criticism that large weapons, such as 2,000-pound bombs, have been dropped. However, unless less destructive bombs could achieve the same effect (collapse of the tunnel) with less risk of civilian injury or death, the active precautions requirement would not require their use. This being so, the issue concerning the tunnel attacks would not be precautions in attack but instead proportionality." Schmitt, *supra* note 198.

282 AP I, *supra* note 4, at art. 57(2)(a)(ii).

283 *Id*. at art. 57(2)(a)(i).

warning . . . of attacks which may affect the civilian population, unless circumstances do not permit;"[284] and cancelling or suspending attacks if it discovered that the object of attack is not a military objective.[285] When these precautionary measures have been exhausted and civilian casualties nevertheless are anticipated, then the requirement of proportionality is engaged to make sure that those anticipated casualties are not excessive in relation to the expected military advantage of the attack.

The primary shortcoming in precaution in attack lies in the "passive precautions" that are predicated on the notion that all civilians are under the control of one or another party to a conflict.[286] In conflicts between states, it is reasonable to assume one or another party will control any given territory and the population on it, and thus be able to appropriately locate military objectives and/or remove civilians from their vicinity. However, even in international armed conflicts there are obvious gaps of control around contact points and battle fronts, as well as at transition points when territory is being lost by one side and taken by another.

The assumption that undergirds precaution in attack is on even shakier ground if we consider asymmetric conflicts in which one side employs guerrilla tactics, and worse still in many of the recent non-international armed conflicts in which fighters employ terrorist tactics with no attempt to control territory or populations. When terrorists or insurgents operate in civilian areas clandestinely, by force, or otherwise without the general support of the local population, civilians fall into a legal blackhole. The party under attack assumes no responsibility for them. Indeed, the party may directly exploit the civilians for their own protection. At the same time, the attacking party often incorrectly claims that they are not responsible for harm to civilians because it is not them, but rather the defending party, that is derelict in its duties.[287] Precaution in

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284 *Id*. at art. 57(2)(c).

285 *Id*. at art. 52(2)(b).

286 *Id*. at art. 58(a). *See also*, New Rules, *supra* note 24, at 318 ("The Party in control of the civilian population is obligated "to the maximum extent feasible" to endeavor to evacuate civilians from the vicinity of military objectives, to avoid locating military objectives within or near densely populated areas, and to take other necessary precautions (i.e., providing shelters, civil defence programmes) to protect the civilian population against the danger resulting from military operations.").

287 Examples are numerous and common. From the Vietnam era, *see* PAUL RAMSEY, THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY 437 (1968); and WILLIAM V.

attack thus needs to be reformulated in order to account for the myriad situations in which civilians will lack protections from their own state and clarify that, in such situations, attackers are not released from their responsibility for civilian casualties because defenders have refused or are incapable of fulfilling their responsibilities.[288] Indeed, in cases where defenders, such as ISIS in Raqqa or Mosul, actively seek to exploit the civilian population for their own protection,[289] greater responsibility to protect civilians should go to the attacking side. After all, in such situations the attackers are the only force that can exercise precautions and attempt to save lives. The party with the power to protect civilians should embrace that power as both consistent with its values and ultimately redounding to its strategic interest.

### *D. Applying the New Rules*

To illustrate the rules I am proposing with a common case, we can consider an automotive factory. Assume that the factory was designed for civilian automobiles and is staffed by civilians, but that it has been converted to manufacturing military vehicles or parts for military vehicles during an armed conflict. We can further assume that the contemplated mode of attack on the factory will be aerial bombardment and that at least some civilians will be present at the factory 24 hours per day. We can also simplify the example by assuming that the lethal area created by bombing the factory will not extend beyond the factory. Given the factory's current use and contribution to the enemy's war effort, it is a valid military

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O'BRIEN, THE CONDUCT OF A JUST AND LIMITED WAR 100 (1981). From the recent war against ISIS, *see* Michael R. Gordon, *Pentagon Inquiry Blames ISIS for Civilian Deaths in Mosul Strike*, N.Y. TIMES (May 25, 2017), https://www.nytimes.com/2017/05/25/us/politics/mosul-us-airstrike-civilian-deaths-isis-pentagon.html. For the ongoing war in Gaza, *see* Bret Stephens, *Hamas Bears the Blame for Every Death in This War*, N.Y. TIMES (Oct. 15, 2023), https://www.nytimes.com/2023/10/15/opinion/columnists/hamas-war-israel-gaza.html.

288 The law already stipulates that violations by one side do not release the other side from its obligations. *See* AP I, *supra* note 4, at art. 51(8), which states, "Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57." Nevertheless, the frequency with which armed forces disclaim responsibility for the civilian death and destruction caused by their attacks indicates that an explicit statement regarding attacking forces' responsibility for the effects of their attacks is needed.

289 Gordon, *supra* note 289.

objective. However, given the stipulation that some civilians will be present at the factory throughout the day and night, the second step in the distinction analysis outlined above is triggered. The question now is whether the lethal area created by the attack contains one or more objects whose current use is predominantly civilian. Although the factory was civilian in nature, it has been converted to use predominantly for military purposes. Thus, despite the civilian presence in the lethal area created by the attack, the factory's predominant military use means that it satisfies the distinction analysis and it is targetable as long as it satisfies other applicable rules.

The next step would be to apply the precaution in attack rules in order to minimize the anticipated civilian casualties before calculating whether those anticipated casualties would satisfy proportionality. Amongst the key precautionary rules for is the requirement to "take all feasible precautions" to avoid, or at least minimize, civilian casualties. It is admittedly difficult to imagine how an attack designed to render a factory inoperable could altogether avoid killing civilians present at the factory at the time of attack. However, several measures could be taken to minimize these casualties. The most obvious measures would be to give some warning of the attack, and to schedule the attack at a time, such as the middle of the nights, when the smallest number of civilians would be present. The warning could take the form of leaflets dropped on and around the factory, or direct phone calls to the factory prior to attack.[290] Even such warnings are unlikely to cause all civilians to evacuate, however.[291] Thus some number of anticipated civilian casualties will remain, and proportionality will need to be calculated.

Assuming for this example that ten civilians are anticipated to remain in the factory and be killed by the attack, proportionality requires the commander to calculate the military advantage of destroying the factory. Following the reformulated rule of

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290 While warning shots of some form might also be contemplated, considerable doubt has been raised over whether such "knocking on the roof" approaches are effective or lawful. *See* Itamar Mann, *Roof Knocking and the Problem of Talking With Bombs*, JUST SEC. (May 31, 2016), www.justsecurity.org/31319/roof-knocking-problem-talking-bombs/ [https://perma.cc/R9JY-NM8A]; and Janina Dill, *Israel's Use of Law and Warnings in Gaza*, OPINIO JURIS (July 30, 2014), www.opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/ [https://perma.cc/C3HD-S2VH].

291 *See* Mann, *supra* note 290; and Dill, *supra* note 290.

proportionality described above, the commander must determine how many lives are likely to be saved by destroying the factory given the enemy's reduced capacity for lethal operations in the absence of the vehicles or parts supplied by the factory. It is, of course, impossible to answer that question in the abstract and commanders will have to make use of data analytics that calculate the enemy's threat level in relation to the vehicles in question. If, for instance, the vehicles being manufactured were tanks, there would likely be a significant lethal capacity that would be eliminated by destroying the factory. In that case, it could be that hundreds of lives could reasonably be expected to be saved by destroying the factory. In such a case, the anticipated death of ten civilians in the process of destroying the factory would not be excessive in relation to the anticipated military advantage.

The above case is, of course, relatively straightforward. More difficult cases would arise around dual-use objects that serve both a civilian and military function, such as arteries of transport and bridges in particular. Roads, train tracks, airports, and bridges, though predominantly used by civilians in peace time, are thought to be vital military objectives during conflicts, even if they were designed for civilian use and continue to be used predominantly by civilians. For instance, even if a rail line or bridge is predominantly used by civilians, it may nevertheless play a vital role in the enemy's resupply effort or troop movements. These objects may, however, be less problematic from the point of view of my rule of distinction than they at first appear. First, the rule I am advancing would not permit hypothetical military use of the objects to convert them into valid military objectives. Rather, actual military use or hard intelligence supporting the enemy's planned military use of the object would be required to convert it into a lawful military objective. Further, recall that the rule I am proposing analyses civilian presence at the projected time of attack. For an object like a bridge, if the time of attack were to take place at rush hour when the bridge would be in crowded use by civilians, then my rule of distinction would bar the attack at that time. However, if the attack were planned for the middle of the night when no civilian presence was anticipated then, given actual or planned military use, the attack on the bridge would satisfy distinction. Of course, proportionality would have to assessed, including the longer-term effects on the civilian population by destroying the bridge, even if no civilians were directly harmed in the process. If the destruction of the bridge

imperils the survival of the civilian population because they would be cut off from food or medical supplies, then the anticipated civilian harm may well be excessive in relation to the anticipated military advantage. However, here again, precaution in attack should be considered first. If the attack can be modified, for instance, such that the bridge becomes impassible for military vehicles, but still passable for civilian pedestrians, the military objective could be achieved without critically isolating and endangering the civilian population. With these modifications to the mode of attack, distinction, proportionality, and precaution in attack could be satisfied.

The most challenging cases come either when a clear military objective is adjacent to civilian objects or when a clear civilian object is partially used for military purposes. We can imagine an enemy command center in a home in a dense urban area, or the command center occupying a floor of an apartment building that is otherwise used by civilians. Further, we can imagine that, in either case, the targeting of the command center with exploding munitions sufficient to destroy it would produce a lethal area that encompasses either neighboring civilian homes or, in the case of the apartment building, the rest of the building. Although a clear and important military objective has been identified, the lethal area would contain civilians in civilian objects being put predominantly to civilian use. My rule of distinction would thus bar the attack as contemplated. This may seem to be reason enough to reject my rule. However, while the rule would bar the attack as contemplated, it would not bar other possible attacks on the command center. The rule I am proposing would simply force the commander to deploy other lawful means and methods of attack that would not produce a lethal area in which military objectives and civilians or civilian objects were struct without distinction. As in the previous cases we have examined, the requirement to adjust the means and methods of attack to eliminate, or at least minimize, civilian casualties flows directly from the precaution in attack rule. For these admittedly challenging, but perhaps not altogether uncommon, situations, precautions extraordinary by current standards, but not infeasible, would have to be employed. A good guide for the required precautions in such situations would be the special requirements placed on military engagement of important cultural property. In short, the approach to important cultural property requires using the least destructive means to terminate the enemy's use of the property,

while protecting, as much as possible, the surrounding property.[292] This approach would, admittedly, require both far greater care and far greater restraint than militaries have become accustomed to operating with. It is worth recalling that the historical data we have reviewed shows that a more unrestrained approach is not conducive to either military victory or lasting peace and security. Indeed, the evidence suggests that the levels of force and destructiveness militaries have become accustomed to using accord with neither their humanitarian values or their strategic interests.

## V. Conclusion

I have argued that the extensive impact of war on civilians is often not an indication of unlawful attacks, but rather a reflection of the inadequate civilian protections built into the law we have. Despite over a century of attempts to deal with the radical changes brought to warfare by air power, the law we have is still based on the classical assumption that civilians and combatants can be cleanly distinguished. We still lack law designed for the reality of air power delivering exploding munitions in civilian populated areas.

In order to protect civilians from air power, more restrictive rules are needed. Neither political nor military leaders should fear more restrictive rules, however. As the evidence I have reviewed above attests, more restrictive rules will work to our strategic advantage. Rather than assuming there is a conflict between our humanitarian and strategic interests, I have argued that they are, in fact, complementary. The reformulated rules of distinction, proportionality, and precaution in attack I have defended will, if implemented, help us fight more effectively and with far fewer civilian casualties.

The restrictiveness of the rules I have proposed should not be overstated, however. The added restrictions of my proposals only come into play when civilian casualties are anticipated by an attack. Thus more "conventional" armed conflicts in which fighting forces face off along front lines vying for control of territory would be unchanged by the rules I have offered, at least as long as civilians are out of harm's way.

The history of warfare over the last century has taught us,

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292 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 13 (Mar. 26, 1999).

however, that we cannot presume that civilians will be left out of conflict. Even in more conventional conflicts between "near peer" adversaries, civilians are all too frequently in the midst of the fighting.[293] The threat to civilians is greater still in the asymmetric conflicts so prevalent since Vietnam. If we actually want to succeed in future conflicts like those in Vietnam, Iraq, and Afghanistan, simply claiming that our operations are the most precise in history will neither save lives nor lead us to victory. The more restrictive and data-driven approach to the use of military force I have suggested is the only approach that will serve both our humanitarian values and our security goals.

293 For an indication of the toll on civilians in Russia's war against Ukraine see, e.g., The New York Times, *Ukraine Under Attack: Documenting the Russian Invasion*, N.Y. TIMES (Oct. 11, 2022), https://www.nytimes.com/article/russia-ukraine-war-photos.html [https://perma.cc/4QRN-HHHY].