

*The Geneva Conventions in 21st Century Warfare: How the Conventions Should Treat Civilians' Direct Participation in Hostilities*

# Taking Distinction to the Next Level: Accountability for Fighters' Failure to Distinguish Themselves from Civilians

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## TAKING DISTINCTION TO THE NEXT LEVEL: ACCOUNTABILITY FOR FIGHTERS' FAILURE TO DISTINGUISH THEMSELVES FROM CIVILIANS

Laurie R. Blank\*

### I. INTRODUCTION

Suicide bombings, terrorist attacks, rockets launched from civilian residences, weapons stored in mosques or hospitals—these now common news stories from conflicts share one common thread: the erosion of the distinction between fighter and civilian during armed conflict. The principle of distinction is one of the fundamental principles of the law of armed conflict (“LOAC”) and obligates all parties to a conflict to distinguish between combatants and civilians—between those who are fighting and those who are not. The Geneva Conventions establish a framework based on this distinction: Combatants are entitled to participate in hostilities, and are also legitimate targets of attack at all times; civilians are immune from attack unless and for so long as they participate directly in hostilities. This distinction lies at the heart of the law governing warfare.

The nature of recent conflicts and the “civilianization” of the battlefield have thus led many to question the effectiveness of distinction going forward, in essence challenging the very foundations of LOAC. Indeed, the use of tactics that ignore this distinction have led some to call for new rules to govern warfare or for revisions to the existing law of war to address the challenges of contemporary conflict with terrorist groups and other non-state actors. But is distinction truly on the defensive, or do we simply need to rethink how we approach this most fundamental protective principle?

Indeed, without a deep and unwavering commitment to distinction and its central place in the law of war, the horrors and atrocities of armed conflict in the past century may well become merely a prelude. LOAC, otherwise known as international humanitarian law or the law of war, applies to situations of armed conflict and governs the conduct of hostilities and the protection of persons during conflict.<sup>1</sup> Distinction is

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<sup>1</sup> See *War and International Humanitarian Law*, ICRC (Sept. 23, 2011), <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>. The law of armed conflict is set forth primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),

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one of the “intransgressible principles” of LOAC and the building block upon which so many other key provisions and principles of the law are founded.<sup>2</sup> The first critical step is to recognize that the principle of distinction mandates that we distinguish between and among civilians—between those who are legitimate targets of attack and those who are innocent civilians deserving of every protection during the conduct of hostilities.

However, trumpeting the obligation to distinguish between combatants and civilians and then bemoaning the blurred and complex nature of the zone of combat, in which fighters purposely blend into the civilian population and fight from within the civilian infrastructure, simply falls short of the mark. The principle of distinction has two parts. It is not sufficient simply to distinguish between innocent civilians and legitimate targets in the targeting process. Persons who are fighting must also distinguish themselves from those who are not fighting so as to ensure and maximize the protection of innocent civilians. The nature of contemporary conflicts demands that we take distinction to the next level and hold non-state actors and others accountable for the failure to distinguish themselves from innocent civilians. The essential next step, therefore, is to reinforce this distinction—not only in the conduct of hostilities but also in the post-conflict accountability phase. International criminal tribunals have issued numerous convictions and sentences for deliberate targeting of civilians, indiscriminate attacks on civilians, and disproportionate attacks on civilians—all violations of the principle of distinction. However, accountability for violations in this second part of distinction, which this Article will refer to as distinction in conduct, lags far behind.

This Article explores how the failure to hold persons accountable for perfidy and other violations of the obligation to distinguish will continue to undermine the ability of the law to provide maximum protection to innocent civilians during armed conflict. These violations pose an equal

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*adopted by Conference* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted by Conference* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

<sup>2</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. ¶ 79 (July 8) [hereinafter Nuclear Weapons].

danger to civilians when soldiers cannot tell who is an innocent civilian and who is a fighter simply disguised in civilian clothes. When militants benefit both tactically and strategically from the use of the civilian population as a shield and as a disguise, the international community must take distinction to the next level and demand accountability for such violations as a critical step in the protection of civilians during armed conflict.

The first section of this Article sets forth the parameters of the principle of distinction and how LOAC implements this fundamental principle. In addition, the first section explores the challenges and complexities of contemporary warfare, specifically with relation to the obligations of distinction. The second section addresses current trends and efforts in the implementation and enforcement of the principle of distinction. Militaries operationalize distinction through rules of engagement that focus on the concepts of hostile act and hostile intent, rather than the formal legal distinction between civilian and combatant. The jurisprudence of the international criminal tribunals—as well as other courts and tribunals—includes extensive precedent regarding the obligations of distinction in targeting. However, this wealth of jurisprudence does not extend to violations of the obligations all parties have to distinguish themselves from innocent civilians, creating a range of risks for civilians and soldiers alike. Finally, this Article highlights LOAC's untapped potential, a gap resulting from the failure to enforce distinction on both sides of the coin.

## II. DISTINCTION: PAST AND PRESENT

One of the most fundamental issues during conflict is identifying who or what can be targeted. The principle of distinction, one of the “cardinal principles of [international humanitarian law],” requires that any party to a conflict distinguish between those who are fighting and those who are not, and direct attacks solely at the former.<sup>3</sup> Similarly, parties must distinguish between civilian objects and military objects and target only the latter.

Distinction has a long pedigree and has been a central tenet of warfare for thousands of years. Many ancient codes of conduct during wartime differentiated in some way between those who could be killed and those who must be spared.<sup>4</sup> For example, in his orders to his

<sup>3</sup> *Id.* ¶ 78 (Higgins, J., dissenting) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of international humanitarian law).

<sup>4</sup> See MICHAEL WALZER, *JUST AND UNJUST WARS* 42 (1977) (“[T]he general conception of war as a *combat between combatants* . . . turns up again and again in anthropological and historical accounts.”). For example, the Mahabharata text tracing the history of the

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commanders, the first caliph, Abu Bakr, stated, “[t]he blood of women, children and old people shall not stain your victory.”<sup>5</sup> The Greeks considered the temples, embassies, priests, and envoys of the opposite side inviolable.<sup>6</sup> Beginning with Augustine and St. Thomas Aquinas, early legal theorists began to set forth a framework for who could be killed during armed conflict—the underpinnings of today’s principle of distinction. Thus, St. Thomas Aquinas declared that “it is no way lawful to slay the innocent.”<sup>7</sup> During the Enlightenment, Jean-Jacques Rousseau advanced this thinking significantly, focusing primarily on distinguishing between those who bore arms and those who did not. In this way, Rousseau formulated the principle of noncombatant immunity in terms that remain vital and recognizable today:

Since the purpose of war is to destroy the enemy State, it is legitimate to kill the latter’s defenders *so long as they are carrying arms*; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.<sup>8</sup>

Although early wars were often uncompromising in their brutality, these early moral, religious, and legal precepts and teachings established a firm foundation for the modern law of war and the notion of discrimination between and among persons on the battlefield.

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Kurukshetra War stated, “[h]e is no son of the Vishni race who slayeth a woman, a boy or an old man.” L.C. Green, *Enforcement of the Law in International and Non-International Conflicts – The Way Ahead*, 24 DENV. J. INT’L L. & POL’Y 285, 287 (1996). Similarly, the prophet Elisha warned the king against the killing of civilians: “[W]hen thou comest nigh unto a city to fight against it, . . . thou shalt smite every male therof with the edge of the sword: But the women, and the little ones, and the cattle, and all that is in the city . . . shalt thou take unto thyself . . .” L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 21 (1993) [hereinafter *THE CONTEMPORARY LAW OF ARMED CONFLICT*]. Also, the Code of Hammurabi ordered “protection of the weak against oppression by the strong and ordered that hostages be released on payment of a ransom.” Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 12 (Dieter Fleck ed., 1995).

<sup>5</sup> Greenwood, *supra* note 4, at 14.

<sup>6</sup> *Id.* at 13; see *THE CONTEMPORARY LAW OF ARMED CONFLICT*, *supra* note 4, at 19 (discussing how Elisha warned the king against the killing of civilians).

<sup>7</sup> 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Question XL, Sixth Article (Benziger Bros. ed., *Fathers of the English Dominican Province trans.*, 1947).

<sup>8</sup> Daphne Richemond-Barak, *Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity*, in *NEW BATTLEFIELDS, OLD LAWS: FROM THE HAGUE CONVENTIONS TO ASYMMETRIC WARFARE* 10 (William C. Banks ed., 2011) (quoting JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL [THE SOCIAL CONTRACT]* 111 (1762)).

A. *Distinction in LOAC: The Basics*

In the modern law of war, distinction was first set forth in Article 22 of the Lieber Code, the first codification of the law of war, which was drafted during the U.S. Civil War:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.<sup>9</sup>

A few short years later, the international community reinforced the rule in the St. Petersburg Declaration, which stated “[t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”<sup>10</sup> Although the overall purpose of the St. Petersburg Declaration was the prohibition of weapons causing unnecessary suffering for combatants, this provision confirms the immunity of the civilian population from attack.

Neither the Hague Conventions of 1899 and 1907 nor the Geneva Conventions of 1949 contain specific statements of the principle of distinction, but its force as customary law remained in effect. By 1977, when the Additional Protocols were drafted, the nature of warfare demonstrated the need for a clear restatement of the principle of distinction and reinforcement of its central role in LOAC. Article 48 of Additional Protocol I thus sets forth the basic rule: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties 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.”<sup>11</sup>

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<sup>9</sup> FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 22, at 9 (1898), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Instructions-gov-armies.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Instructions-gov-armies.pdf) [hereinafter LIEBER CODE].

<sup>10</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight pmbl., Nov. 29, 1868, reprinted in *Official Documents*, 1 AM. J. INT’L L. SUPP. 87, 95 (1907) [hereinafter St. Petersburg Declaration].

<sup>11</sup> AP I, *supra* note 1, art. 48. Article 48 is considered customary international law. See 1 JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW Rule 1, at 3–4 (2005) [hereinafter CIHL], available at

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Distinction lies at the core of LOAC's seminal goal of protecting innocent civilians and persons who are *hors de combat*. The obligation to distinguish forms part of the customary international law of both international and non-international armed conflicts—as the International Criminal Tribunal for the former Yugoslavia (“ICTY”) held in *Tadic*.<sup>12</sup> As a result, all parties to any conflict are obligated to distinguish between combatants, or fighters, and civilians, and concomitantly, to distinguish themselves from civilians, and their own military objects from civilian objects.<sup>13</sup> The purpose of distinction, to protect civilians, is emphasized in Article 51 of Additional Protocol I, which states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”<sup>14</sup> Article 51 continues, stating:

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) [t]hose which are not directed at a specific military objective;
  - (b) [t]hose which employ a method or means of combat which cannot be directed at a specific military objective;
- or

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<http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

<sup>12</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 111, 127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (citing U.N. General Assembly Resolution 2675). The decision states that:

Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:

....

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

*Id.* (alteration in original); see *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 178 (1997); Nuclear Weapons, *supra* note 2, ¶ 79 (distinction is one of the “intransgressible principles of international customary law”); CIHL, *supra* note 11, Rule 1 (explaining that the principle of distinction is customary international law in all types of armed conflicts).

<sup>13</sup> U.S. DEP'T OF THE AIR FORCE, PAMPHLET NO. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 5-8 (1976) [hereinafter AIR FORCE PAMPHLET] (“The requirement to distinguish between combatants and civilians, and between military objectives and civilian objects, imposes obligations on all the parties to the conflict to establish and maintain the distinctions.”).

<sup>14</sup> API, *supra* note 1, art. 51(2).

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(c) [t]hose which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;  
and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>15</sup>

Furthermore, Article 85 of Protocol I declares that nearly all violations of distinction constitute grave breaches of the Protocol, including:

- (a) [m]aking the civilian population or individual civilians the object of attack;
- (b) [l]aunching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
- ....
- (d) [m]aking non-defended localities and demilitarized zones the object of attack; [and]
- (e) [m]aking a person the object of attack in the knowledge that he is *hors de combat* . . . .<sup>16</sup>

The Rome Statute similarly criminalizes attacks on civilians and indiscriminate attacks.<sup>17</sup>

Finally, the principle of distinction mandates not only differentiation between civilians and combatants, but between civilian objects and military objects as well—a critical component of the protection of the civilian population during armed conflict. Article 52(1) of Additional Protocol I declares that “[c]ivilian objects shall not be the object of attack or of reprisals,” and defines civilian objects as “all objects which are not military objectives.”<sup>18</sup> The definition of military objectives in Article 52 of Additional Protocol I demonstrates the framework for distinguishing between military and civilian objects: “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or

<sup>15</sup> *Id.* at art. 51(4).

<sup>16</sup> *Id.* at art. 85.

<sup>17</sup> Rome Statute of the International Criminal Court, arts. 8(2)(b)(i)–(ii), 8(2)(b)(iv)–(vi), 8(2)(e)(i)–(ii), 8(2)(e)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>18</sup> AP I, *supra* note 1, art. 52(1).



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neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>19</sup>

Thus, beyond the obligation to differentiate between innocent civilians and persons who are fighting (and therefore can be targeted), the principle of distinction requires comparable determinations regarding the targeting of objects. The obligation to target only military objectives is one means of implementing the age-old principle that the means and methods of warfare are not unlimited.<sup>20</sup>

The prohibition on attacks against civilian objects is a necessary and inherent complement to the prohibition on attacks on civilians and the civilian population. For example, schools and residential areas are immune from attack unless used for military purposes to the extent that they qualify as military objectives. The Commentary on the Additional Protocols explains that many civilian objects are or “can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if . . . used to accommodate troops or headquarters staff, [it will] become [a] military objective[.]”<sup>21</sup> For example, during Operation Iraqi Freedom, the United States attacked, among other buildings, the Baath Party Headquarters, which at first blush appeared to be a civilian object. Yet, Iraqi forces were firing at U.S. troops from

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<sup>19</sup> *Id.* at art. 52(2).

<sup>20</sup> The modern version of this principle appears in Article 35 of Additional Protocol I; earlier formulations appear in the writings of Vitoria, Grotius, and Vattel, as well as in early codifications of the laws of war. St. Petersburg Declaration, *supra* note 10; LAWS OF WAR ON LAND art. 4 (1880 Oxford Manual) art. 4, available at [www.icrc.org/ihl.nsf/FULL/140?OpenDocument](http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument); LIEBER CODE, *supra* note 9, art. 16, at 8; 3 HUGO GROTIUS, THE LAW OF WAR AND PEACE (Francis W. Kelsey trans., Oceana Publ’ns 1964) (1646); EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (Charles G. Fenwick trans., Carnegie Institute of Washington 1916) (1785); FRANCISCUS DE VICTORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES (John Pawley Bate trans., Oceana Publ’ns 1964) (1557).

<sup>21</sup> YVES SANDOZ, CHRISTOPHE SWINARSKI, BRUNO ZIMMERMANN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2022 (1987); see CIHL, *supra* note 11, at 236 (citing AUSTRALIA, DEFENCE FORCE MANUAL § 530 (1994)) (“For example, if enemy soldiers use a school building as shelter from attack by direct fire, then they are clearly gaining a military advantage from the school. This means the school becomes a military objective and can be attacked.”); *id.* at 237 (citing OFFICE OF THE JUDGE ADVOCATE GENERAL, NATIONAL DEFENCE OF CANADA, THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS 4–5 (2001)) (“[W]here a civilian object is used for military purposes, it loses its protection as a civilian object and may become a legitimate target.” (internal quotation marks omitted)); *id.* at 238 (citing NETHERLANDS, MILITARY MANUAL, at V-3 (1993)) (noting civilian buildings can become military objectives if, for example, they house combatants or are used as commando posts); see also AIR FORCE PAMPHLET, *supra* note 13, § 5-3(b)(2) (“The inherent nature of the object is not controlling since even a traditionally civilian object, such as a civilian house, can be a military objective when it is occupied and used by military forces during an armed engagement.”).

within and near the building, and a weapons cache was subsequently found inside the facility.<sup>22</sup> This episode shows how actual use is a critical component to understanding whether a building is a legitimate target and to distinguishing between military and civilian objects. Even though the Additional Protocol I emphasizes, importantly, that all doubts as to the civilian or military nature of an object should be resolved in favor of civilian status, the actual use of a building must be taken into account in distinguishing between civilian and military objects in targeting determinations.

Some objects enjoy additional special protection under LOAC, including hospitals, religious and cultural property, the environment, objects indispensable for the civilian population, and works and installations containing dangerous forces (such as dams or nuclear power generating stations). Beyond the general protection these buildings and sites have as civilian objects, they benefit from additional protections as set forth in Articles 53–56 of Additional Protocol I as a further means of protecting both the civilian population and its ability to survive during and after conflict. In particular, the LOAC prohibits the use of such objects for military purposes. In situations where they are used for military purposes (in violation of the law) and meet the test for military objectives, the attacking party is obligated to follow further precautions and only attack in restricted circumstances.

Several of these categories have recognized protective emblems that mark objects as deserving of special protection under the law. For medical and religious objects and personnel, the recognized emblems are: (1) the Red Cross; (2) the Red Crescent; and (3) the newly-added Red Crystal.<sup>23</sup> Cultural property is marked by a shield, as denoted in the 1954 Hague Cultural Property Convention, and works and installations containing dangerous forces are marked with three bright orange circles.<sup>24</sup>

Through this framework for differentiating between civilians and fighters, between civilian objects and military objectives, LOAC transforms the spirit and purpose of the principle of distinction into

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<sup>22</sup> Michael N. Schmitt, *The Conduct of Hostilities During Operation Iraqi Freedom: An International Humanitarian Law Assessment*, 6 Y.B. INT'L HUM. L. 73 (2003) (citing US CENTCOM News Release No. 03-03-105, *U.S. Marines Destroy Ba'ath Party Headquarters* (Mar. 31, 2003)).

<sup>23</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, 2404 U.N.T.S. 1 [hereinafter AP III]. Israel uses the Red Star of David, which is protected as a matter of practice.

<sup>24</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, arts. 16–17, Apr. 9, 1956, 249 U.N.T.S. 215; AP I, *supra* note 1, annex I, art. 16.

concrete obligations and protections. And yet, as the following section highlights, modern conflicts continue to impose extraordinary strain on distinction and pose grave threats to civilians and civilian protection.

*B. Contemporary Challenges for Distinction*

In traditional conflicts, one could distinguish between soldiers—who wore uniforms—and civilians—who typically did not venture near the battlefield—in most circumstances. Similarly, identifying military and civilian objects was usually feasible. Contemporary conflicts introduce a whole new set of challenges in this area, however, demanding ever-greater efforts—through intelligence-gathering and surveillance—to determine who is who in the zone of combat operations. It is precisely because of the lack of boundaries between conflict areas and civilian areas—between those who are actively participating in hostilities and those who are not—that today’s conflicts pose particular challenges for distinction. In addition, modern warfare is increasingly characterized by asymmetry in the military capabilities of the parties, which adds to these challenges. As such asymmetry grows, “the disadvantaged party has an incentive to blur the distinction between its forces and the civilian population in the hope that this will deter the other side from attack.”<sup>25</sup>

Critical to the implementation of distinction in all situations is the identification of targets—both planned targets and dynamic targets. A lawful attack must be directed at a legitimate target: either a combatant, a civilian directly participating in hostilities, or a military object. In international armed conflicts—those occurring between states—all members of a state’s regular armed forces are combatants and can be identified by the uniform they wear, among other characteristics. In state versus non-state actor conflicts, including counterterrorism operations within the context of an armed conflict, determining who is a legitimate target is significantly more complex. The legal obligation remains the same, however, requiring parties to distinguish between an innocent civilian and an individual who, although dressed in civilian attire, may pose an immediate threat, and is therefore a legitimate target. In addition, a commander must assess whether and when to target identifiably hostile persons deliberately hiding among the civilian population.

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<sup>25</sup> Michael N. Schmitt, *The Impact of High Tech and Low Tech Warfare on Distinction*, in *INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY’S CONFLICTS: CHANGES AND CHALLENGES* 169, 178 (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005).

Persons who are members of an organized armed group are legitimate targets at all times<sup>26</sup>—but dress the same as civilians either due to a lack of uniforms or specifically in order to blend into the civilian population for protection. A second category of legitimate target, as noted above, is the civilian directly participating in hostilities. The concept of what constitutes direct participation has been the subject of extensive analysis and debate and is outside the scope of this Article.<sup>27</sup> Nonetheless, regardless of the particular parameters of direct participation, the essence of the targeting determination in this situation is the notion that persons directly participating in hostilities—whether all the time or only once or intermittently—must be distinguished from innocent civilians. When neither hostile persons nor members of armed groups wear uniforms or carry their arms openly, differentiating between legitimate targets and innocent civilians is extraordinarily difficult and fraught with danger for both the soldier and the innocent civilian.

U.S. and NATO forces in Iraq and Afghanistan have been wrestling with the difficult legal and moral questions contemporary conflict raises for nearly a decade and continue to face complicated questions about who to target, how to target, and when to target. For example, as one news article explained about combat in Afghanistan:

The elusive insurgents blend easily into the population, invisible to Marines until they pick up a weapon. They use villagers to spot and warn of U.S. troop movements, take up positions in farmers' homes and fields, and attack Marines from spots with ready escape routes.

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<sup>26</sup> See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991 (2008) (adopted by ICRC Assembly Feb. 26, 2009), <http://www.cicr.org/web/eng/siteeng0.nsf/html/review-872-991> [hereinafter *Interpretive Guidance*] (stating that organized armed groups are targetable based on status in non-international armed conflict); see also JIMMY GURULÉ & GEOFFREY S. CORN, *PRINCIPLES OF COUNTER-TERRORISM LAW* 70–76 (2011) (discussing the rules governing targeting of enemy forces in international and non-international armed conflict and noting that (1) “a member of an enemy force . . . is presumed hostile and therefore presumptively subject to attack” in international armed conflict, and (2) “[s]ubjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of states engaged in non-international armed conflicts”).

<sup>27</sup> *Interpretive Guidance*, *supra* note 26; see H CJ 769/02 Public Committee against Torture in Israel v. Government of Israel (Targeted Killings Case) 57(6) IsrSC [2006]; Forum, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 42 N.Y.U. J. INT'L L. & POL. 637 (2010).

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The Marines, under strict rules to protect civilians, must wait for insurgents to attack and then attempt to ensnare them. Limited in their use of airstrikes and artillery—because of the danger to civilians and because aircraft often frighten the Taliban away—Marine riflemen must use themselves as bait and then engage in the riskier task of pursuing insurgents on foot.<sup>28</sup>

Similarly, during Operation Iraqi Freedom, Iraqi insurgents commonly wore civilian clothing when approaching American and British forces in order to get closer without seeming to present a threat.<sup>29</sup> Perhaps most nefariously, insurgent groups that employ suicide bombing as a tactic have now turned to the use of women and children—for they have proven more likely to evade measures designed to identify suicide bombers.<sup>30</sup>

In all of these situations, the great fluidity between hostile persons and innocent civilians and the conscious blending of hostile persons into the civilian population makes the task of identifying legitimate targets nearly impossible.<sup>31</sup> Insurgents take advantage of this dilemma every day to gain an edge over the superior fighting capabilities of state forces. In Afghanistan, for example, the Taliban regularly “use a tactic of engaging coalition forces from positions that expose Afghan civilians to danger.”<sup>32</sup> This tactic is designed to force U.S. troops to either hold their

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<sup>28</sup> Ann Scott Tyson, *In Afghanistan, a Test of Tactics Under Strict Rules to Protect Civilians, Marines Face More Complex Missions*, WASH. POST, Aug. 13, 2009, at A6.

<sup>29</sup> *Id.*; see *Official: Afghan Militants Fled Dressed as Women*, CNN.COM (July 6, 2009), <http://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.standoff/index.html> (discussing how insurgents locked in a standoff with U.S. marines disguised themselves as women in order to escape).

<sup>30</sup> See, e.g., Dan Abrams, *Turning a Blind Eye to Child Suicide Bombers*, MSNBC.COM (Mar. 26, 2004, 11:37 AM), <http://www.msnbc.msn.com/id/4601244>; *Child Bombers-in-Training Arrested in Iraq*, UPI.COM (Apr. 21, 2009, 11:14 AM), [http://www.upi.com/Top\\_News/2009/04/21/Child-bombers-in-training-arrested-in-Iraq/UPI-48761240326883/](http://www.upi.com/Top_News/2009/04/21/Child-bombers-in-training-arrested-in-Iraq/UPI-48761240326883/); Cassandra Clifford, *The Battle for Suicide Bombers*, FOREIGN POL’Y BLOGS NETWORK (Jan. 8, 2010), <http://children.foreignpolicyblogs.com/category/suicide-bombers/>; *Pakistan: Taliban Buying Children for Suicide Attacks*, CNN.COM (July 7, 2009), <http://edition.cnn.com/2009/WORLD/asiapcf/07/07/pakistan.child.bombers/index.html> (explaining that “young suicide bombers may be able to reach targets unnoticed”).

<sup>31</sup> Laurie R. Blank & Amos N. Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. J. 45, 65–66 (2010).

<sup>32</sup> Jim Garamone, *Directive Re-emphasizes Protecting Afghan Civilians*, U.S. AIR FORCE (July 6, 2009), <http://www.af.mil/news/story.asp?id=123157435>; see UNITED NATIONS ASSISTANCE MISSION TO AFGHANISTAN, HUMAN RIGHTS UNIT, AFGHANISTAN: MID YEAR BULLETIN ON PROTECTION OF CIVILIANS IN ARMED CONFLICT ¶ 35 (2009), available at <http://unama.unmissions.org/portals/unama/human%20rights/09july31-unama-human-rights-civilian-casualties-mid-year-2009-bulletin.pdf> (“In several cases investigated by

fire in the face of an attack or endanger innocent civilians—a lose-lose situation. By not distinguishing themselves from civilians—thus violating the principle of distinction—these militants deliberately create such situations. Israel’s conflicts, particularly those with Hezbollah in Lebanon in 2006 and with Hamas and other Palestinian armed groups in Gaza from December 2008 through January 2009, offer an equally searing commentary about the nature of asymmetrical war. Indeed, in the Gaza Strip, “one of the most densely populated tracts of land in the world,”<sup>33</sup> where militants intermingle with the civilian population, store munitions in residential buildings, hospitals, and mosques, and launch rockets from farmers’ fields and residential rooftops, the implementation of LOAC faces one of its gravest tests. Faced with Hamas militants firing from schools, storing munitions in mosques, and using hospitals as command posts, Israeli troops encounter many of the same challenging decisions as U.S. troops in Afghanistan.

In all of these situations, the failure of some groups and/or individuals—whether state or non-state actors—to distinguish themselves from civilians creates ever-greater dangers for the civilian population caught in the conflict zone. The purposeful mixing with civilians and use of the civilian population as a shield only exacerbates these dangers. For this reason, it is essential to focus not only on the need to implement distinction in targeting as effectively as possible, but also to enforce accountability for violations of distinction in conduct.

### III. IMPLEMENTING DISTINCTION IN TARGETING AND IN CONDUCT

Legal obligations in targeting receive significant attention during dissemination, training, decision-making, and post-hoc accountability. There is little doubt that training troops—whether fighter pilots, infantrymen, or artillery units—in how to carry out the legal obligation to distinguish between legitimate targets and innocent civilians protected from attack is central to the lawful conduct of hostilities. Accountability for violations of these obligations is equally important, and has been a key focus of the international and hybrid tribunals over

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[United Nations Assistance Mission to Afghanistan], it is apparent that important traditional codes of hospitality and power imbalances inhibit the ability of villagers living in areas with a strong [anti-government element] presence to refuse shelter to an [anti-government element] commander or his men. Information indicates that [anti-government elements] take advantage of these factors to use civilian houses as cover, to deter [pro-government force] raids, or to increase the likelihood of civilian casualties if raided by [pro-government forces], potentially violating international humanitarian law.”)

<sup>33</sup> *Key Maps*, BBC NEWS, [http://news.bbc.co.uk/2/shared/spl/hi/middle\\_east/03/v3\\_israel\\_palestinians/maps/html/population\\_settlements.stm](http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlements.stm) (last visited Mar. 29, 2012).

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the past decade or longer. But these efforts only tell part of the story and tackle part of the problem. Fighters who launch attacks in civilian clothing, from protected civilian sites, and use civilians as shields are violating LOAC and must be held accountable for their conduct. Until then, distinction will only be enforced halfway.

A. *Operationalizing Distinction*

On the battlefield, the critical determination is between those who can be attacked and those who cannot. Combatant status does provide one lens for making this determination: All members of the opposing armed forces are legitimate targets of attack at all times. Other individuals, such as members of militia groups and civilians directly participating in hostilities, are legitimate targets but are significantly harder to identify. Operationalizing distinction in the zone of combat thus requires extensive training and the use of intelligence to help understand who is an innocent civilian deserving of protection and who is a hostile actor posing a legitimate threat.

In practice, military forces implement distinction through rules of engagement ("ROE") that set forth the parameters for the use of force during armed conflict. ROE are "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which [U.S.] forces will initiate and/or continue combat engagement with other forces encountered."<sup>34</sup> In most conflicts between states or readily identifiable armed groups, the ROE will declare the enemy force hostile, meaning that any member of such force is a legitimate target.<sup>35</sup> Thus, Iraqi military forces and certain paramilitary groups were declared hostile for Operation Iraqi Freedom.<sup>36</sup> ROE for Operation Iraqi Freedom designated the following "groups and organizations . . . as paramilitary forces that may be considered hostile and engaged" and destroyed: Special Republican Guard, Ba'ath Party Militia, Fedayeen Sadaam, Al

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<sup>34</sup> DEP'T OF DEFENSE, JOINT PUBL'N 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2010), as amended through 15 February 2012, available at [http://www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf); see INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, JA-422, OPERATIONAL LAW HANDBOOK 73 (2010) [hereinafter OP LAW HANDBOOK].

<sup>35</sup> See Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01A, *Standing Rules of Engagement (SROE) for U.S. Forces* (2000) Enclosure A, 6 [hereinafter SROE] ("Once a force is declared hostile by appropriate authority, US units need not observe a hostile act or a demonstration of hostile intent before engaging that force.").

<sup>36</sup> CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003), at 98 (2004) [hereinafter CLAMO], available at <http://www.fas.org/irp/doddir/army/clamo-v1.pdf>.

Quds, and others.<sup>37</sup> Identifying who fell into these groups was then the key issue for determining who was a legitimate target.

In contrast, in Afghanistan, the ROE for Operation Enduring Freedom did not declare any forces hostile by status. One reason was simply the challenge in defining the contours of the enemy groups:

First, it was difficult to determine who exactly was a hostile force in Afghanistan. The Taliban was an amorphously defined group comprised of the Taliban regime itself as well as their armed units, various members of which were not committed to any cause and willingly switched allegiances. Al Qaeda members similarly were difficult to define.<sup>38</sup>

Second, status-based targeting did not fit as well with the counterinsurgency goals of the mission. In both Afghanistan and Iraq, as in all military operations, the ROE provided for the use of deadly force in self-defense in response to a hostile act or exhibited hostile intent, as set forth in the U.S. Standing Rules of Engagement (“SROE”), which is the ROE for all military operations short of declared war or prolonged conflict.<sup>39</sup>

In conflicts where status-based targeting gives way to conduct-based targeting due to the inherent difficulties of differentiating among persons in the zone of combat, the concepts of hostile act and hostile intent demonstrate how distinction is operationalized in practice. As one Marine Staff Judge Advocate explained in an After Action Report: “What does a Taliban or Al Qa[e]da fighter look like? Can you determine the enemy’s identity by the equipment they use? These and other questions were often unanswerable, even when based on the most current intelligence available.”<sup>40</sup> As a result, the conduct analysis inherent in hostile act and hostile intent prove to be the predominant method of identifying hostile persons in Afghanistan and other combat

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<sup>37</sup> ANNEX E (CONSOLIDATED ROE) TO 3-187 FRAGO 02, OPORD 02-005, <http://www.expose-the-war-profiteers.org/archive/government/2005/20050000.pdf> [hereinafter IRAQ ROE].

<sup>38</sup> CLAMO, *supra* note 36, at 101.

<sup>39</sup> SROE, *supra* note 35, Enclosure A, 1(c)(1). *See generally* CLAMO, *supra* note 36 (noting that the ROE include authorization for the use of force in self-defense); IRAQ ROE, *supra* note 37, at 3.A.(2)–(3) (stating that commanders have inherent authority and an obligation to respond in self-defense to hostile acts or demonstrations of hostile intent).

<sup>40</sup> CLAMO, *supra* note 36, at 98 (citing Major Ian D. Brasure, Staff Judge Advocate, 26th Marine Expeditionary Unit (Special Operations Capable), After Action Report: Operation Enduring Freedom/Operation Swift Freedom ¶ (3)(b) (Mar. 22, 2002)).



areas where fighters look like civilians and the two are mingled together in civilian areas.

The SROE define “[h]ostile [a]ct” as:

An attack or other use of force against the United States, US forces, and, in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property. It is also force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel and vital US Government property . . . .<sup>41</sup>

The ROE for Operation Iraqi Freedom offer several examples of hostile acts, including: “releasing, launching, or firing missiles, guns, rockets, directed-energy weapons or any other weapons against US Forces; laying mines; attacking or taking control of information systems critical to military employment or national infrastructure.”<sup>42</sup> Hostile intent is defined as the threat of imminent use of force against the same interests listed in the definition of hostile act above. External factors such as “the state of international or regional political tension, military preparations, intelligence, and indication and warning information” will all play a role in determining the existence of hostile intent.<sup>43</sup>

Evidence of hostile intent is considered to exist when a foreign force or terrorist(s): is detected to maneuver into a weapon launch position; is preparing to fire, launch or release weapons against the US, US Forces, and in certain circumstances, US nationals and their property, or US commercial assets; is preparing to lay mines; or attempts to gain control of information systems critical to military employment or national infrastructure.<sup>44</sup>

Finally, the ROE for Operation Enduring Freedom (“OEF ROE”) in Afghanistan added a new component to the determination of legitimate targets—and thus to the process of discrimination between such targets and innocent civilians protected from attack. OEF ROE added the criterion of “likely and identifiable threat” (“LIT”): “[C]ertain enemy forces who posed a likely and identifiable threat to friendly forces could

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<sup>41</sup> SROE, *supra* note 35, at 5(g).

<sup>42</sup> IRAQ ROE, *supra* note 37, at 3.H.(6).

<sup>43</sup> *Id.* at 3.H.(7).

<sup>44</sup> *Id.*

be considered hostile and engaged and destroyed.”<sup>45</sup> The idea was to allow the U.S. military and allied forces to target potential threats that could arise during the conduct of military operations—in addition to actual or imminent threats—thus creating a middle ground between a declaration of hostile force and a self-defense based authorization of the use of force.

During the course of operations, therefore, militaries have a range of tools for implementing distinction to comport with their obligations under LOAC. The nature of contemporary conflicts and the tactics of militants make this task exponentially harder. As a result, effective military operations will continually demand additional efforts and new tools for operationalizing distinction and other LOAC principles, so as to maximize protection of innocent civilians while still enabling mission fulfillment.<sup>46</sup>

#### *B. Enforcing Distinction: Accountability for Attacks on Civilians*

The prohibition on attacks against civilians is the most fundamental component of distinction. As the Commentary to Additional Protocol I explains, the prohibition in Article 51 “explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities.”<sup>47</sup> Unlawful attacks on civilians include both deliberate and indiscriminate attacks. For example, the Rome Statute of the International Criminal Court criminalizes both types of attacks: intentional attacks directed against civilians and attacks made in the knowledge that civilian casualties would be clearly excessive in relation to the military advantage gained—that is, attacks that violate the principle of proportionality.<sup>48</sup>

<sup>45</sup> CLAMO, *supra* note 36, at 100.

<sup>46</sup> See Blank & Guiora, *supra* note 31 (setting out a framework for operationalizing LOAC in response to the challenges of contemporary conflicts).

<sup>47</sup> SANDOZ ET AL., *supra* note 21, at 615.

<sup>48</sup> Rome Statute, *supra* note 17, art. 8. Defining “war crimes” as:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

...

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to

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The ICTY has extensive jurisprudence on the prosecution of deliberate and indiscriminate attacks on civilians and has consistently reinforced “that there is an absolute prohibition on the targeting of civilians in customary international law.”<sup>49</sup> In particular, the ICTY has repeatedly reaffirmed “that a violation of the principle prohibiting attacks on civilians entails individual criminal responsibility.”<sup>50</sup> The elements of the crime of unlawful attacks on civilians and civilian property track the obligations of distinction. As the ICTY held in *Prosecutor v. Galic*, the crime of attacks on civilians consists of the following elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully [sic] made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.<sup>51</sup>

In *Galic*, the Bosnian Serb army laid siege to Sarajevo and engaged in a protracted campaign of sniping and shelling the civilian population over the course of three years. Certainly, deliberate attacks on civilians violate the principle of distinction. Indiscriminate attacks and disproportionate attacks on civilians do so as well because, in such cases, the perpetrator wilfully or recklessly disregards the presence of civilians when launching an attack. The ICTY thus emphasized, in *Prosecutor v. Kupreskic*, “the sacrosanct character of the duty to protect civilians” – even when interspersed in a city or town with combatants or other armed elements.<sup>52</sup>

National courts, national criminal codes, and military manuals also criminalize attacks on civilians. Perhaps the most emphatic statement of the prohibition on attacks against civilians and the universality of that norm appears in the court-martial of Lieutenant William Calley after the My Lai massacre during the Vietnam War. Finding Lieutenant Calley

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the concrete and direct overall military advantage anticipated.

*Id.*

<sup>49</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeals Judgment, ¶ 109 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

<sup>50</sup> *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, ¶ 29 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); *Prosecutor v. Strugar*, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2002).

<sup>51</sup> *Galic*, Case No. IT-98-29-T, Judgment, ¶ 56.

<sup>52</sup> *Prosecutor v. Kuprei*, Case No. IT-95-16-T, Judgment, ¶ 513 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2002).

guilty of the murder of innocent men, women, and children, the U.S. Court of Military Appeals stated that “kill[ing] infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force . . . is . . . palpably illegal.”<sup>53</sup> Countries around the world have incorporated the war crime of attacks on civilians into their penal codes and codes of military justice.<sup>54</sup> In military manuals and military training, protection of civilians from attack is often the first rule. Thus, “The Soldier’s Rules” start with the phrase “[s]oldiers fight only enemy combatants,” a direct incorporation of the prohibition on attacks against civilians into military training and teaching.<sup>55</sup> The United Kingdom *Manual on the Law of Armed Conflict* details extensively the categories of war crimes, including attacks on civilians and other violations of distinction in targeting, and the nature of individual criminal responsibility for war crimes.<sup>56</sup>

<sup>53</sup> United States v. Calley, 22 C.M.A. 534, 544 (Dec. 21, 1973).

<sup>54</sup> See *Galic*, Case No. IT-98-29-T, Judgment, ¶ 31, n.47, citing the following statutes:

Law of 16 June 1993 relative to the repression of serious violations of international humanitarian law, Belgium, Chapter 1§ 3, No.11; Swedish Penal Code, Chap. 22, § 6, No. 3 and 4 (1990); Hungarian Criminal Code, Chapter XI, Section 160 (1978); Philippine Criminal Code, Article 334 (1964); Criminal Code of Mozambique, Article 83 (1987); Italian Criminal Military Code of War, Article 185 (1941); Spanish Penal Code, Article 611 (1) (1995); Croatian Penal Code, Article 120 (1) (1991).

*Id.*

<sup>55</sup> DEP’T OF THE ARMY, AR 350-1, ARMY TRAINING AND LEADER DEVELOPMENT ¶ G-12(b) (2009).

<sup>56</sup> UK LAW OF WAR MANUAL, CH. 16, § G. Many other national military manuals do as well, as the ICTY Trial Chamber noted in the *Galic* judgment. *Galic*, Case No. IT-98-29-T, Judgment, ¶ 31, n.50, citing the following:

United States Field Manual No. 27-10: The Law of Land Warfare, para. 25 (1976); United Kingdom Manual of Military Law, chap. 4, para. 88 (1958); German Military Manual (Humanitäres Völkerrecht in bewaffneten Konflikten-Handbuch), paras 404 and 451 (1992) (English translation available at ICTY library); Canadian Law of Armed Conflict at the Operational and Tactical Level, Section 4, paras 15 and 22 (1992); Dutch “Soldiers Handbook” (Handboek voor de Soldaat), VS 2-1350, Chapter VII, Art. 34 (1974); Australian Law of Armed Conflict Commander’s Guide (ADFP 37 Supplement 1), para. 1302 (1994); New Zealand Interim Law of Armed Conflict Manual, para. 517 (1992); Canadian Law of Armed Conflict at the Operational and Tactical Level, Section 4, paras 15, 22 (1992); Soviet Minister of Defence Order No. 75 of 16 February 1990 on the Publication of the Geneva Conventions of 12 August 1949 relative to the Protection of Victims of War and their Additional Protocols (1990), art. 8, para. (f) (French translation available at the ICRC’s web site: <<http://www.icrc.org>>).

*Id.*

All of these tools for criminalizing attacks on civilians and ensuring individual criminal responsibility for such attacks play a critical role in the implementation and enforcement of the obligations of the principle of distinction. Individuals who disregard this fundamental obligation and target civilians—whether deliberately or indiscriminately—can face criminal prosecution and individual accountability for their actions. Unfortunately, direct targeting of civilians remains far too prevalent in today's conflicts, but these efforts at individual accountability continue to make inroads into the protection of civilians and the punishment of those who fail to adhere to these standards. Without more, however, as detailed below, these efforts at operationalizing and accountability are only half the battle.

*C. Enforcing Distinction in the Conduct of Fighters*

The tragically all-too-common practices of fighters disguising themselves as civilians, launching attacks from and locating military objectives in civilian areas, and using civilians as human shields raise grave concerns for the implementation of LOAC. These tactics violate LOAC and also increase the danger that civilians face during armed conflict. Still worse, in many contemporary conflicts, militants or weaker states fighting against more powerful states use these tactics to achieve broader strategic purposes by increasing civilian casualties—such as diminished civilian support for the war effort, claims of war crimes by the stronger military, or strategic and policy limitations on the use of force that impact the outcome of the conflict. Enforcing the obligations of distinction at the tactical level of the conduct of militants and fighters thus goes well beyond the protection of civilians in the immediate vicinity of and affected by a particular incident—it can have substantial consequences for the protection of civilians writ large during conflict. And yet, as the discussion below demonstrates, little to no effort is made to hold fighters accountable—or even to condemn their failure to distinguish themselves from innocent civilians and for their use of the civilian population for their own gain in direct contravention of LOAC's fundamental principles.

1. *Perfidious Attacks*

News stories from Afghanistan, Gaza, Lebanon, Colombia, and a number of other conflict areas repeatedly tell of persons fighting in civilian clothes. Indeed, this characteristic of contemporary conflict presents perhaps the greatest challenge to LOAC-compliant militaries: If a soldier cannot tell who is an innocent civilian and who is a hostile

person, distinguishing and identifying legitimate targets is an extraordinarily complex and difficult task. But it remains essential to the lawful conduct of military operations.

Simply fighting in civilian clothing or without a formal uniform is not in and of itself a violation of LOAC. Civilians who take part in hostilities do not run afoul of the law just by picking up a gun or firing a rocket. Rather, the immediate consequence of civilian participation in hostilities is that such persons lose their immunity from attack and become lawful targets of attack.<sup>57</sup> When individuals deliberately use the appearance of protected status in order to launch an attack, however, they violate the law.

In many cases across a range of conflicts, fighters specifically exploit the protections LOAC grants to civilians in order to gain an advantage in attacking the state party or the more powerful party in the conflict. The traditional definition of perfidy is “[t]o kill or wound treacherously individuals belonging to the hostile nation or army,” as set forth in Article 23(b) of the 1907 Hague Convention.<sup>58</sup> Suicide bombers disguising themselves as civilians to gain closer access to military checkpoints or other locations is a prime example of killing “treacherously.” Article 37(1) of Additional Protocol I offers a more comprehensive formulation, forbidding killing, capturing, or injuring the enemy “by resort to perfidy.”<sup>59</sup> In particular, the Protocol states that “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or *is obliged to accord*, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”<sup>60</sup> Based on notions of honor, this prohibition unquestionably forms part of customary international law.<sup>61</sup>

<sup>57</sup> See AP I, *supra* note 1, art. 51(3).

<sup>58</sup> Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23(b), Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague IV]. The prohibition of killing treacherously goes back to the Lieber Code, which states that military necessity “admits of deception, but disclaims acts of perfidy.” LIEBER CODE, *supra* note 9, art. 16, at 8.

<sup>59</sup> AP I, *supra* note 1, art. 37(1). Examples of perfidy in Article 37(1)(a)–(d) include feigning truce or surrender, feigning civilian status, or feigning protected status by using emblems of the U.N. or neutral states.

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 199 (2004); Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 22–23 (2008) (citing NWP 1-14M, ¶ 12.7); see INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, JA-423, LAW OF WAR HANDBOOK 192 (Keith E. Puls ed., 2005), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/law-war-handbook-2005.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA Rule 111 (June 12, 1994); see also CIHL, *supra* note 11, Rule 65 (stating that the prohibition on perfidy is a

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As the Commentary to the Additional Protocols explains, “[t]he central element of the definition of perfidy is the deliberate claim to legal protection for hostile purposes. The enemy attacks under cover of the protection accorded by humanitarian law . . . .”<sup>62</sup> Thus, when fighters intentionally disguise themselves as civilians to lead soldiers on the opposing side to believe that they need not take defensive action to guard against attack, they commit perfidy. It is important to distinguish such perfidious attacks from legitimate ruses of war, which also involve deception, but do not violate LOAC.

Ruses are legitimate tools of warfare; the Lieber Code states that “deception in war is admitted as a just and necessary means of hostility . . . consistent with honorable warfare . . . .”<sup>63</sup> The key difference between a ruse and perfidy is that the latter must involve a deliberate attempt to benefit from the protections of LOAC by inducing the other side to believe that one is protected under LOAC. Examples of ruses include: (1) camouflaging a tank so that the enemy does not see it; (2) using disinformation to lead the enemy to believe that the attack will take place at a different time or a different place; or (3) faking communications to suggest the presence of multiple units or a larger force. Thus, it is not the act of hiding from the enemy or making oneself less noticeable that is the essence of perfidy, but the use of what appears to be protected status. “A soldier may attempt to become invisible in the landscape [by wearing a camouflage uniform], but not in a crowd [by pretending to be a civilian].”<sup>64</sup> The indirect consequence of such actions is that civilians are placed at greater risk, since soldiers previously attacked by fighters disguised as civilians may be more likely to view those who appear to be civilians as dangerous and respond accordingly.

Past and present conflicts offer numerous examples of perfidious conduct. Suicide bombing—a classic example of perfidy, as noted above—is a regular tactic of numerous terrorist and insurgent groups in conflicts from Sri Lanka to Gaza to Pakistan. The Tamil Tigers in Sri Lanka, formally known as the Liberation Tigers of Tamil Eelam (“LTTE”), are the “fathers of modern-day suicide bombing,” and they

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long-standing rule of customary international law in both international and non-international armed conflicts).

<sup>62</sup> SANDOZ, *supra* note 21, at 435 (footnote omitted) (“The definition is based on three elements: inviting the confidence of an adversary, the intent to betray that confidence (subjective element) and to betray it on a specific point, the existence of the protection afforded by international law applicable in armed conflict (objective element).”).

<sup>63</sup> LIEBER CODE, *supra* note 9, art. 101, at 31.

<sup>64</sup> GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 423 (2010).

accounted for one-third of all suicide bombings in the world in 2002.<sup>65</sup> In most such attacks, the suicide bomber dresses as a civilian to gain better access to the target, such as a checkpoint or government building. For example, in February 2009, a female insurgent dressed as a civilian blew herself up at a government checkpoint for civilians fleeing the conflict zone, killing twenty-eight people and wounding dozens of others.<sup>66</sup>

After the conflict ended in May 2009, the United Nations (“U.N.”) Secretary General appointed a Panel of Experts to examine “the accountability obligations arising from the last stages of the war” and to assess “the ‘nature and scope of alleged violations.’”<sup>67</sup> Among the hundred-plus pages of violations that the Panel details, it addresses a wide variety of violations of LOAC and human rights law, including the killing of civilians through suicide attacks. After referring to “[c]redible allegations” of “a number of suicide attacks, both in and outside of the conflict zone, against civilians[,] . . . [t]he Panel notes that these attacks constitute a clear violation of the ban on intentional or indiscriminate attacks on civilians.”<sup>68</sup> However, notwithstanding the fact that these suicide attacks also constitute perfidy—a violation of LOAC codified as far back as the Lieber Code—the Panel’s report does not even mention perfidy or the fact that the perpetrators of these suicide attacks are violating their obligations under the principle of distinction, with severe consequences for civilian protections.<sup>69</sup>

One of the more widely reported and catastrophic examples of perfidy took place in Srebrenica in the summer of 1995. As the Bosnian Serbs overran the U.N.’s safe haven of Srebrenica, thousands of Bosnian Muslims fled the city, seeking safety elsewhere. As a long column of Bosnian Muslim men—who had been forcibly separated from their families—tried to reach Bosnian government territory and safety, they faced repeated attacks by Bosnian Serb forces. Eventually, “Bosnian Serb soldiers wearing stolen UN uniforms and driving stolen U.N. vehicles announced over megaphones [that they were U.N. peacekeepers and that they were] prepared to oversee the Bosnian Muslims’ surrender and

<sup>65</sup> Alex Perry, *How Sri Lanka’s Rebels Build a Suicide Bomber*, TIME (May 12, 2006), <http://www.time.com/time/world/article/0,8599,1193862,00.html>.

<sup>66</sup> *More Civilians Killed in Sri Lanka Fighting*, AMNESTY INT’L (Feb. 10, 2009), <http://www.amnesty.org/en/news-and-updates/news/more-civilians-killed-sri-lanka-fighting-20090210>.

<sup>67</sup> U.N. SECRETARY-GENERAL, REPORT OF THE SECRETARY-GENERAL’S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA i (Mar. 31, 2004) [hereinafter SRI LANKA REPORT].

<sup>68</sup> *Id.* at 66.

<sup>69</sup> LIEBER CODE, *supra* note 9, at art. 16 (stating that military necessity “admits of deception, but disclaims acts of perfidy”).



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guarantee they would not be harmed.”<sup>70</sup> The Bosnian Muslim men surrendered; shortly thereafter, the Bosnian Serb forces killed all of them and buried them in mass graves.<sup>71</sup>

The Bosnian Serbs’ conduct is a textbook example of perfidy: They used the stolen U.N. uniforms and vehicles to gain the Bosnian Muslims’ confidence, induce their surrender, and then kill them. None of the judgments of the ICTY involving crimes at Srebrenica discuss the violation of perfidy or directly condemn the Bosnian Serbs’ use of U.N. uniforms and vehicles to gain the confidence of the Bosnian Muslim men before killing them. The crimes of genocide and crimes against humanity for which the perpetrators were held accountable are certainly far more heinous and far graver than perfidy, and the Tribunal’s focus was to prosecute the most serious crimes stemming from the war in the former Yugoslavia, making the omission of perfidy significantly less important than it otherwise might have been. Nonetheless, a condemnation or even a recognition of the violation would contribute to the enforcement of accountability for this and other similar violations of distinction.

During Operation Cast Lead, the Israeli military operation in the Gaza Strip from December 2008 to January 2009, Palestinian armed groups generally operated in civilian clothing and from civilian areas, enabling them to take advantage of the protections that LOAC affords civilians. However, the Report of the U.N. Fact-Finding Mission on the Gaza Conflict (“Goldstone Report”), which investigated allegations of violations during the conflict, does not even mention perfidy in discussing the activities of Hamas and other armed groups, instead completely ignoring the true nature of their practices. The Goldstone

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<sup>70</sup> David Rohde, *Perfidy and Treachery*, CRIMES OF WAR, <http://www.crimesofwar.org/a-zguide/perfidy-and-treachery/> (last visited Mar. 29, 2012); see THE COMMISSION FOR INVESTIGATION OF THE EVENTS IN AND AROUND SREBRENICA 10TH AND 19TH JULY 1995, THE EVENTS IN AND AROUND SREBRENICA BETWEEN 10TH AND 19TH JULY 1995, at 15 (2004), available at [http://trial-ch.org/fileadmin/user\\_upload/documents/trialwatch/Srebrenica\\_Report2004.pdf](http://trial-ch.org/fileadmin/user_upload/documents/trialwatch/Srebrenica_Report2004.pdf) [hereinafter MASSACRE AT SREBRENICA]; see also Prosecutor v. Karadzic & Mladic, Initial Indictment, IT-95-18-I, ¶ 19 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 14, 1995) [hereinafter Karadzic & Mladic Indictment] (“In many instances, assurances of safety were provided to the Muslims by Bosnian Serb military personnel who were with other Bosnian Serb soldiers wearing stolen UN uniforms . . .”); SOLIS, *supra* note 64, at 431 (describing how the Bosnian Serb soldiers wore U.N. uniforms to convince the Bosnian Muslims that they would be safe if they surrendered).

<sup>71</sup> Karadzic & Mladic Indictment, *supra* note 70, ¶¶ 19–20; MASSACRE AT SREBRENICA, *supra* note 70; John Grimond, *Nowhere to Hide: How Bosnian Serbs Executed 7,000 Muslims Under the Eyes of the U.N. and the World*, N.Y. TIMES, May 11, 1997, <http://www.nytimes.com/books/97/05/11/reviews/970511.11grimont.html> (reviewing DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA, EUROPE’S WORST MASSACRE SINCE WORLD WAR II* (1997)).

Report recognizes that Palestinian armed groups fired rockets and mortars from urban areas, citing, for example, a January 2009 interview with three Palestinian militants in which they “stated that rockets and mortars were launched in close proximity to homes and alleyways in the hope that nearby civilians would deter Israel from responding.”<sup>72</sup> Similarly, the Goldstone Report also notes that members of Palestinian armed groups did not wear uniforms. Instead, after “the start of the military operations, members of al-Qassam Brigades abandoned military dress and patrolled streets in civilian clothes.”<sup>73</sup> Notwithstanding these preliminary statements, however, the Goldstone Report does not even address the question of intent to deceive through the use of civilian clothes. “Palestinian militants were not just shielding the mortars from attack, but were attacking—firing mortars and rockets—while in civilian dress and while feigning civilian status—the fundamental element of perfidy.”<sup>74</sup> The failure to address the practice of militants attacking while disguised as civilians essentially encourages militants to embed themselves within the civilian population. After all, the Goldstone Report describes these exact tactics without identifying or condemning the LOAC violation at issue, effectively encouraging such tactics.

When international prosecutions or investigations into LOAC violations disregard perfidious tactics—whether inadvertently, deliberately, or, more justifiably, in favor of more serious crimes—the effect is to ratify such tactics. The absence of condemnation and accountability speaks volumes: Perfidy becomes an accepted practice. For example:

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

<sup>72</sup> U.N. Human Rights Council, *Human Rights In Palestine And Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶¶ 450–51, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter Goldstone Report] (internal quotation marks omitted).

<sup>73</sup> *Id.* ¶ 478 (internal quotation marks omitted).

<sup>74</sup> Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT’L L. 280, 291 (2010) (citing Int’l Humanitarian Law Research Initiative, *Legal Aspects of Suicide Attacks in IHL*, in MONITORING INTERNATIONAL HUMANITARIAN LAW IN IRAQ). “However, the fact that the attackers in recent suicide operations have posed as civilians and therefore concealed their combatant status constitutes an act of perfidy prohibited under IHL.” Int’l Humanitarian Law Research Initiative, *supra*.

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dress, do not attack. The result of undermining or eliminating this presumption is bound to have dreadful consequences for the civilian population.<sup>75</sup>

The true victims of this failure of enforcement and accountability are the innocent civilians: (1) they are trapped—literally and figuratively—in the conflict zone by fighters using them as cover for their perfidious tactics; and (2) they become the unintentional and tragic targets of soldiers who mistake them for legitimate targets when unable to distinguish between fighters and civilians.

## 2. Hiding Military Objectives in the Civilian Population

The obligation to distinguish is not limited to individuals, but governs the use of objects as well. Recent conflicts in particular have involved extensive co-mingling of civilian and military objects, which poses a grave danger to civilians. Insurgents and other fighters in Afghanistan, Lebanon, Iraq, and Gaza, for example, make extensive use of civilian infrastructure to hide, store, and launch rockets, missiles, and other weapons. In Afghanistan, Taliban militants have stored heavy weaponry in mosques and reportedly positioned two large anti-aircraft guns in front of the office of a major international humanitarian aid organization.<sup>76</sup> Such conduct makes targeting decisions extraordinarily difficult given the obligations to minimize civilian casualties and operate within the framework of proportionality. It also creates situations where a LOAC-compliant military often appears forced to choose between engaging a legitimate target and endangering civilians. “By shifting soldiers and military equipment into civilian neighborhoods and taking refuge in mosques, archeological sites and other nonmilitary facilities, Taliban forces [confront] U.S. authorities with the choice of risking civilian casualties and destruction of treasured Afghan assets or forgoing attacks.”<sup>77</sup>

These practices highlight the obligation of precautions—an essential component of how parties implement LOAC’s central purpose of

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<sup>75</sup> MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 254 (1982); see Derek Jinks, *Protective Parity and the Laws of War*, 79 NOTRE DAME L. REV. 1493, 1497 (2004) (“[T]he goal of protecting innocent civilians . . . requires a sharp line between combatants and non-combatants.”).

<sup>76</sup> See, e.g., Mark Mazzetti & Kevin Whitelaw, *Into the Thick of Things*, U.S. NEWS & WORLD REP., Nov. 5, 2001 (“Heavy weaponry is being sheltered in several mosques to deter attacks. The Taliban has even placed a tank and two large antiaircraft guns under trees in front of the office of CARE International . . .”).

<sup>77</sup> Bradley Graham & Vernon Loeb, *Taliban Dispersal Slows U.S.*, WASH. POST, Nov. 6, 2001, at 1.

protection of civilians during armed conflict. In many ways, the identification of military objectives and the proportionality considerations are, of course, precautions. But the obligations of the parties to a conflict to take precautionary measures go beyond that. Beginning at the broadest level, Article 57(1) of Additional Protocol I states: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."<sup>78</sup> This provision is a direct outgrowth of, and supplement to, the Basic Rule in Article 48, which mandates that all parties distinguish between combatants and civilians and between military objects and civilian objects. Although the obligation to take constant care is a general principle, it has important ramifications for the conduct of hostilities and the protection of civilians: "It is quite clear that by respecting this obligation the Parties to the conflict will spare the civilian population, civilians and civilian objects."<sup>79</sup> Moreover, the obligations to take precautions are "not simply [comprised of] hortatory norms encouraging good practice. They constitute obligatory standards of conduct whose violation would entail international responsibility."<sup>80</sup>

Most jurisprudence, news analyses, and legal commentary have focused on the attacking party's obligation to take precautions in identifying targets and launching attacks. Article 57 of Additional Protocol I sets forth precautions that attacking parties must take. First, parties must refrain from launching attacks that violate the principle of proportionality, as detailed above. Parties also must do everything feasible to ensure that targets are military objectives, and must choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage. When choosing between two possible attacks offering similar military advantages, parties must choose the objective that offers the least likely amount of harm to civilians and civilian objects. Finally, the attacking party must, where feasible, give effective advance warning of attacks. Failure to take the necessary precautions can render an attack unlawful, even if launched against a legitimate target. For example, the European Court of Human Rights strongly criticized a Russian operation in a Chechen village for the failure to take any precautions for the protection of civilians in the planning or execution of the operation. Although the attack may have been against a legitimate target—insurgents entrenched in the village—it was unlawful because the court found no evidence "that it was planned

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<sup>78</sup> AP I, *supra* note 1, art. 57(1).

<sup>79</sup> SANDOZ, *supra* note 21, at 680.

<sup>80</sup> Jean-Francois Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT'L REV. RED CROSS 793, 794 (2006).

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and executed with the requisite care for the lives of the civilian population.”<sup>81</sup>

However, importantly, Article 57’s emphasis on the attacking party’s obligations does not in any way diminish the defending party’s obligations.<sup>82</sup> Instead, the obligation to take precautions extends to the defending party as well. Article 58, entitled “Precautions against the effects of attacks,” requires parties to:

- (a) . . . endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) [a]void locating military objectives within or near densely populated areas; [and]
- (c) [t]ake the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.<sup>83</sup>

As the Commentary to Additional Protocol I explains, “[b]elligerents may expect their adversaries to conduct themselves [lawfully] . . . and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest.”<sup>84</sup> Parties therefore have an obligation to protect their own civilians from the consequences of their own offensive actions as well as those of the enemy. Article 58, which expands on pre-existing norms, is considered customary international law.<sup>85</sup>

Although all three obligations in Article 58 play a critical role in protecting the civilian population from the dangers of armed hostilities,

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<sup>81</sup> Isayeva v. Russia, App. No. 57950/00, 41 Eur. Ct. H.R. 847, ¶ 200 (2005); see Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 524 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000); Ethiopia v. Eritrea, 26 R.I.A.A. 1, ¶ 33 (Eth.-Eri. Claims Comm’n 2005), available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XXVI/1-22.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XXVI/1-22.pdf); Int’l Crim. Trib. for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶ 88 (2000), reprinted in 39 I.L.M. 1257 (2000), available at [http://www.icty.org/x/file/About/OTP/otp\\_report\\_nato\\_bombing\\_en.pdf](http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf).

<sup>82</sup> Although the obligation to take “constant care” appears in Article 57, which addresses the attacking party, the Commentary suggests that both parties have such an obligation: “The term ‘military operations’ should be understood to mean any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat.” SANDOZ, *supra* note 21, at 680.

<sup>83</sup> AP I, *supra* note 1, art. 58.

<sup>84</sup> SANDOZ, *supra* note 21, at 692.

<sup>85</sup> See, e.g., Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 524.

the obligation to refrain from locating military objectives in densely populated areas is particularly relevant in today's conflicts. A Human Rights Watch report on Schools and Armed Conflict highlights these dangers. Although many of the incidents detailed therein involve the occupation of schools for headquarters or barracks for soldiers or militants, in addition to the positioning of military objectives in schools, the dangers for the civilian population are the same. As one mother in Thailand explained after removing her children from a school occupied by paramilitary forces for two years: "[W]hen they moved into the school, I feared there would be an attack on the school, so that is the reason I withdrew my children[;] . . . if there was an attack on the grounds, the children would be hit as well."<sup>86</sup> In the same vein, the United States listed several examples in denouncing Iraqi mingling of military and civilian objects during the first Gulf War:

- (a) The Iraqi Government moved significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets;
- (b) Iraqi fighter and bomber aircraft were dispersed into villages near military airfields where they were parked between civilian houses and even placed immediately adjacent to important archaeological sites and historic treasures;
- (c) Coalition aircraft were fired upon by anti-aircraft weapons in residential neighbourhoods in various cities. In Baghdad, anti-aircraft sites were located on hotel roofs;
- (d) In one case, military engineering equipment used to traverse rivers, including mobile bridge sections, was located in several villages near an important crossing point. The Iraqis parked each vehicle adjacent to a civilian house.<sup>87</sup>

Locating military objectives—and weapons, equipment, and headquarters for military personnel certainly qualify as military

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<sup>86</sup> HUMAN RIGHTS WATCH, SCHOOLS AND ARMED CONFLICT 5 (2011), available at <http://www.hrw.org/sites/default/files/reports/crd0711webwcover.pdf>.

<sup>87</sup> Letter from Perm. Rep. of the U.S., to the President of the U.N. Security Council, 2-3, U.N. Doc. S/22341 (Mar. 8, 1991).

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objectives—within civilian buildings or densely populated civilian areas violates Article 58(b) and undermines efforts to protect civilians.

Not only are wars being fought within and among the civilian population—whether in southern Lebanon, Sri Lanka, northwest Pakistan, Afghanistan, the Gaza Strip, or other conflicts—but the defending party in the overwhelming majority of these situations is deliberately taking advantage of the civilian population, strategically and tactically, to gain an advantage over a more powerful military. Thus, in both 1991 and in 2003, the Iraqi regime purposely parked fighter jets in between residential buildings in Baghdad and other cities.<sup>88</sup> The Iraqi military stored ammunition in school classrooms, “including rocket-propelled grenades, 82mm and 100mm mortar shells, and 12.7mm machine gun bullets [and] . . . dug fighting positions with anti-aircraft guns in . . . schoolyard[s].”<sup>89</sup> Hezbollah fighters place rocket launchers on the roofs of civilian buildings and fire rockets in close proximity to protected locales, and Hamas militants position mobile rocket launchers in schoolyards, mosques, next to residential buildings, and in other civilian locales.<sup>90</sup> The tactical purpose is to protect the fighter jets, rocket launchers, or other military objectives by deterring attacks. The strategic purpose, which is significantly more insidious, is to use resulting civilian deaths as a broader strategic tool to accuse the attacking party of war crimes, diminish support for the war effort in that country, or otherwise change the course of the conflict.<sup>91</sup> Thus, in pursuing their goal of “gain[ing] political leverage by portraying U.S. forces as insensitive to LOAC and human rights[,] . . . opponents unconstrained by humanitarian ethics now take the strategy to the next level, that of

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<sup>88</sup> *Id.*; HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 74 (2003), available at [www.hrw.org/reports/2003/usa1203](http://www.hrw.org/reports/2003/usa1203).

<sup>89</sup> SCHOOLS AND ARMED CONFLICT, *supra* note 86, at 61, n.131.

<sup>90</sup> See HUMAN RIGHTS WATCH, MILITARY OPERATIONS BY LEBANESE GUERRILLA FORCES (1997), available at <http://www.hrw.org/reports/1997/isrleb/Isrleb-02.htm> (“Because they positioned and launched rockets and mortar shells from sites close to the Qana base on April 18, Lebanese guerrilla forces also bear responsibility for the civilian casualties caused by the massive Israeli retaliatory fire. . . . [T]he guerrillas exhibited a willful disregard for the safety of the civilian population.”); see also ANTHONY H. CORDESMAN, THE “GAZA WAR”: A STRATEGIC ANALYSIS 43-47, 49, 51-52, 54-55 (2009), available at [http://www.csis.org/media/csis/pubs/090202\\_gaza\\_war.pdf](http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf) (describing how Hamas fired mortars from the Jabaliya school and uses mosques, houses, and cemeteries for military operations and to store weapons); *Lebanese Website Blames Hizbullah for Qana Deaths*, YNET NEWS (Aug. 1, 2006), <http://www.ynetnews.com/articles/0,7340,L-3284514,00.html>.

<sup>91</sup> See Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT’L L. 707 (2011).

orchestrating situations that deliberately endanger noncombatants.”<sup>92</sup> Civilians thus become a pawn at the strategic level as well, because they are used not only for tactical advantage (e.g., shelter) in specific situations, but also for broader strategic and political advantage as well. Both the tactical and strategic goals are only realized at the direct expense of the civilian population; both goals therefore run directly afoul of the “intransgressible principle[]”<sup>93</sup> of distinction.

At the same time, it is important to emphasize that a defending party’s violation of these obligations under Article 58 and customary international law in no way absolves the attacking party of its duty to take precautions and abide by the principles of distinction and proportionality.<sup>94</sup> In highlighting the lack of enforcement for violations of defending party’s precautions, therefore, this Article does not seek to shift responsibility from one party to the other. Rather, the goal is to achieve more complete and comprehensive implementation and enforcement of the principle of distinction and the obligations both parties have to protect civilians accordingly.

Although extraordinarily common during conflict, few violations of Article 58(b) draw attention or condemnation. Unlike human shielding, addressed below, violations of Article 58 are not war crimes. To that end, international tribunals, focused on the more heinous crimes of genocide, war crimes, and crimes against humanity, have simply made mere mentions of the obligations to avoid locating military objectives in heavily populated areas and to take other similar precautions, but have never pursued criminal accountability for such actions.<sup>95</sup> Nonetheless, given both the prevalence of these violations and the consequences for both civilians and the overall enforcement of the law, more resounding condemnation of these violations could have a significant effect.

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<sup>92</sup> Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 12–13 (Carr Ctr. for Human Rights Policy, Harvard Kennedy Sch. Program on Nat’l Security & Human Rights, Workshop Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

<sup>93</sup> Nuclear Weapons, *supra* note 2, ¶ 79.

<sup>94</sup> Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 61 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (“As suggested by the Defence, the parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. However, the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.” (footnote omitted)).

<sup>95</sup> See *id.*; see also Prosecutor v. Milosevic, Case No. IT-98-29/1-T, Judgment, ¶ 949 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007).



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International investigations and fact-finding missions have been more mixed. In one notable example, the U.N. Panel of Experts Report on Accountability in Sri Lanka specifically refers to the ban on locating military objectives in heavily populated areas, noting that “[c]redible allegations point to a violation of this provision insofar as they indicate patterns of conduct whereby . . . the LTTE deliberately located or used mortar pieces, other light artillery, military vehicles, mortar pits, bunkers, and trenches in proximity to civilian areas.”<sup>96</sup> The report explains further, in a clear statement of the grave dangers of using military equipment in the midst of civilian areas:

The LTTE fired artillery from the [No Fire Zones], in proximity to [internally displaced person] populations, and fired from or stored military equipment near [internally displaced persons] or civilian installations such as hospitals. They did this even though they knew that it would provoke a response from the [Sri Lanka Artillery] and that any retaliating artillery would cause harm to civilians. Sometimes they fired from among civilians before quickly moving away, leaving the civilians on the receiving end of the return fire.<sup>97</sup>

This description fits equally well with the conduct of Hamas and other Palestinian armed groups during the conflict in Gaza. However, the Goldstone Report fails to mention Article 58 at all, even though the ban on locating military objectives in densely populated Gaza was highly relevant. The Goldstone Report concludes “that there are indications that Palestinian armed groups launched rockets from urban areas.”<sup>98</sup> It neglects to recognize, however, that in this particular conflict, the rocket launchers themselves were military objectives for Israel—one of the main goals of Operation Cast Lead was to eliminate the ability of Palestinian armed groups to fire rockets at civilian areas in southern Israel. Therefore, when Palestinian armed groups launched rockets from civilian areas in Gaza, they were locating military objectives in densely populated areas, in direct violation of Article 58(b) of Additional Protocol I.<sup>99</sup> The failure to condemn this violation—indeed to even

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<sup>96</sup> SRI LANKA REPORT, *supra* note 67, ¶ 239.

<sup>97</sup> *Id.* ¶ 177(c).

<sup>98</sup> Goldstone Report, *supra* note 72, ¶ 450.

<sup>99</sup> In addition, the “LOAC requires that the defence should be conducted from the position which would cause the least danger to civilians and civilian objects.” AUSTRALIA, DEFENCE FORCE MANUAL § 553, *cited in* CIHL, *supra* note 11, at 430. One could also argue that such attacks violated Article 57(2)(a)(ii) as well, which obligates parties to “take all

mention it in many situations, whether Gaza or elsewhere—amounts to a failure to fully recognize the obligations of the defending party, especially in the complicated scenarios of contemporary conflicts. Just as the densely populated nature of Gaza does not relieve Israel of its obligations to distinguish between civilian and military objectives and to take precautions, it correspondingly does not relieve Palestinian armed groups of their obligations under Article 58.

The absence of—or at best minimal—condemnation of the practice of placing military equipment and objectives in civilian areas thus encourages those who wish to take advantage of the civilian population's presence. Without robust enforcement of this key obligation for the protection of civilians, parties will continue to locate rocket launchers, military equipment, and other military objectives in civilian areas with impunity. The effect, unfortunately, is to endanger civilians rather than protect them. For civilians caught in the zone of combat, and for military planners and commanders making targeting determinations, the continued force of this obligation is critical. Unfortunately, the absence of any mention of this obligation simply gives parties free rein to exploit the civilian population and to undermine, at the most fundamental level, one of the central principles of LOAC.

### 3. Human Shields

Human shielding refers to the practice of civilians protecting military objectives from attack by gathering at the site of the objective and using their civilian immunity to deter attacks. In effect, human shielding directly undermines LOAC's delicate balance between military necessity and humanity by using the protections of the latter principle for military purposes. Multiple provisions of the Geneva Conventions and Additional Protocol I prohibit the use of the civilian population as a shield, with the primary prohibition appearing in Article 51(7) of Additional Protocol I:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military

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feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." AP I, *supra* note 1, art. 57(2)(a)(ii).

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operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.<sup>100</sup>

The prohibition on human shielding is part of customary international law and is included in numerous military manuals of countries around the world. In addition, it is a war crime under the Rome Statute of the International Court.<sup>101</sup> The use of human shields flies directly in the face of a party's basic obligations under the principle of distinction by deliberately mingling civilians with military objects. As a U.N. report investigating an attack on U.N. forces in Somalia in 1993 stated:

No principle is more central to the humanitarian law of war than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.<sup>102</sup>

Unfortunately, human shielding is all too common in a wide variety of armed conflicts around the world and has a long history. British troops placed Boer civilians on trains to prevent Boer commandos from attacking them during the Boer War, and General Sherman marched Confederate prisoners at the head of his forces on his march through Georgia during the U.S. Civil War.<sup>103</sup> More recently, during the 1991

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<sup>100</sup> AP I, *supra* note 1, art. 57(1); *see* GC III, *supra* note 1, art. 23 ("No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations."); GC IV, *supra* note 1, art. 28 ("The presence of a protected person may not be used to render certain points or areas immune from military operations."); AP I, *supra* note 1, art. 12(4) ("Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.").

<sup>101</sup> Rome Statute, *supra* note 17, art. 8(b)(xxiii) ("Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.").

<sup>102</sup> Report PURSUANT to PARAGRAPH 5 of Security Council Resolution 837 (1993) on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on behalf of the Secretary-General, Annex. § 9, U.N. Doc. S/26351 (Aug. 24, 1993).

<sup>103</sup> Robert E. Rodes, Jr., *On Clandestine Warfare*, 39 WASH. & LEE L. REV. 333, 341 (1982).

Persian Gulf War, Saddam Hussein seized foreign citizens and used them to shield designated military targets, calling them “special guests.”<sup>104</sup> Bosnian Serbs used civilian detainees as human shields to protect the army’s advance during the war in Bosnia, and there were widespread reports of human shields on bridges and around military targets during the NATO bombing campaign against Serbia in 1999.<sup>105</sup> In Liberia, rebel “fighters forced civilians out of the government hospital, where they had taken refuge, and used them as human shields for their positions” during fighting in Tubmanburg.<sup>106</sup> The Security Council has condemned “use by the Taliban and other extremist groups of civilians as human shields” in Afghanistan.<sup>107</sup> In one of the more horrifying and vivid examples of wholesale human shielding, LTTE fighters forcibly prevented civilians from leaving LTTE-controlled areas in the designated No Fire Zones, “ensuring their continued presence as a human buffer.”<sup>108</sup> As the U.N. Report on Sri Lanka concludes, the use of civilians “as a strategic human buffer” and “as dispensable ‘cannon fodder’ . . . added significantly to the total death toll in the conflict.”<sup>109</sup> Additional examples abound in conflicts from Chechnya to Lebanon and beyond.<sup>110</sup>

A few national and international courts have prosecuted and convicted soldiers, militia, and other fighters for the use of human

<sup>104</sup> See Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT’L L. 292, 295 (2009) (noting that the U.N. Security Council condemned this conduct in Resolution 664).

<sup>105</sup> U.N. Commission on Human Rights, *Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth Periodic Report*, §§ 36, 37, 39, 84, U.N. Doc. E/CN.4/1994/47 (Nov. 17, 1993); NATO Says Human Shields Account for Bombing Deaths, CNN.COM (May 17, 1999), [http://articles.cnn.com/1999-05-17/world/9905\\_17\\_kosovo.03\\_1\\_nato-spokesman-jamie-shea-human-shields-bombing-pentagon?\\_s=PM:WORLD](http://articles.cnn.com/1999-05-17/world/9905_17_kosovo.03_1_nato-spokesman-jamie-shea-human-shields-bombing-pentagon?_s=PM:WORLD).

<sup>106</sup> U.N. Secretary General, *Fifteenth Progress Report on UNOMIL*, § 24, U.N. Doc. S/1996/47 (Jan. 23, 1996).

<sup>107</sup> S.C. Res. 1776, ¶ 82, U.N. Doc. S/RES/1776 (Sept. 19, 2007).

<sup>108</sup> SRI LANKA REPORT, *supra* note 67, ¶ 98.

<sup>109</sup> *Id.* ¶ 177(a).

<sup>110</sup> See, e.g., U.N. Secretary General, *Report Prepared Pursuant to General Assembly Resolution ES-JO/JO*, U.N. Doc. A/ES-10/186 (July 30, 2002); REUVEN ERLICH, HEZBOLLAH’S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS (2006); HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR 52–60 (2007); Stéphanie Bouchié de Belle, *Chained to Cannons or Wearing Targets on their T-Shirts: Human Shields in International Humanitarian Law*, 90 INT’L REV. RED CROSS 883, 884 (2008) (referencing human shielding in Chechnya and Afghanistan); Ron Synovitz, *U.S. Says Al-Qaeda Used Afghan Children as Human Shields*, RADIO FREE EUROPE/RADIO LIBERTY (June 18, 2007), <http://www.rferl.org/content/article/1077179.html>; see also Schmitt, *supra* note 104, at 315 (“[I]n November 2006 Hamas radio issued an appeal for women to converge on a mosque in Beit Hanoun where Israeli security forces had trapped militants. The Palestinian women entered the mosque, clothed some of the militants in female attire, and acted as shields for them as they escaped.”) (citing *Gaza Women Killed in Mosque Siege*, BBC NEWS (Nov. 3, 2006), <http://news.bbc.co.uk/2/hi/middleeast/6112386.stm>).

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shields in some cases, although the number of prosecutions is quite small relative to the number of violations. In two separate cases, the ICTY convicted both Serbs and Croats for using civilian detainees to shield military objectives or military operations.<sup>111</sup> In the ongoing prosecution of Radovan Karadzic, the ICTY has also already condemned the use of U.N. peacekeepers as human shields, finding that the accused “physically secured or otherwise held the U.N. peacekeepers against their will at potential NATO air targets, including ammunition bunkers, [a] radar site and a nearby communications centre in order to render these locations immune from further NATO air strikes.”<sup>112</sup> However, in all of these cases, the tribunal treated the human shielding as a component of other war crimes, such as inhumane treatment, rather than convicting the accused directly for the crime of using human shields.<sup>113</sup> Israeli courts have condemned the practice as well, outlawing the use of civilians as human shields and as part of an early warning system.<sup>114</sup>

Given the widespread use of human shields, significantly greater efforts are needed to prosecute perpetrators of this serious war crime. Like the other LOAC violations addressed in this Article, human shielding poses a direct and severe challenge to the principle of distinction and to the protection of civilians during armed conflict. Indeed, those who use human shields exploit the obligation of distinction and upend LOAC’s balance between military necessity and humanity by deliberately mingling civilians and military objects and, still worse, using civilians directly to protect military targets. These

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<sup>111</sup> See Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Judgment, ¶¶ 652–654 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶¶ 765, 769 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003). Two early prosecutions for human shielding occurred after World War II. British Military Court, Luneberg, Student Case (Case No. 24) (May 6–10, 1946), *reprinted in* 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS: SELECTED AND PREPARED BY THE UNITED NATIONS WAR CRIMES COMMISSION 118 (1947) [hereinafter LAW REPORTS OF TRIALS OF WAR CRIMINALS] (convicting General Karl Student for mistreating prisoners of war, including using them as a screen to protect advancing German troops); U.S. Military Tribunal, Nuremberg, Trial of Wilhelm Von Leeb and Thirteen Others (Case No. 72, High Command Trial) (Dec. 30, 1947–Oct. 28, 1948), *reprinted in* 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra* (declaring that using prisoners of war as a shield is contrary to international law).

<sup>112</sup> Karadzic & Mladic Indictment, *supra* note 70, Counts 15–16.

<sup>113</sup> *Blaskic*, Case No. IT-95-14-A, Appeals Judgment, ¶ 716; see Prosecutor v. Aleksovski, Case No. IT-95-14/I-T, Judgment, ¶ 229 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999) (characterizing human shielding as “an outrage upon personal dignity”).

<sup>114</sup> See Adalah—The Legal Center for Arab Minority Rights in Israel v. The Minister of Defense, HCJ 3799/02, June 23, 2005 (outlawing the use of civilians to give warnings before military operations); see also Ethan Bronner, *Israeli Soldiers Convicted of Using Boy as Shield*, N.Y. TIMES, Oct. 4, 2010, at A7 (reporting that two Israeli soldiers were convicted for using a Palestinian boy to check bags for explosives during Operation Cast Lead in Gaza).

perpetrators thus take the already highly problematic practice of fighting from within a civilian population to the next level—from exposing civilians to the consequences of military operations to using them as a shield, and thus potentially guaranteeing their death or injury. Until such crimes are prosecuted extensively—and as the specific crime of human shielding rather than as a component of another crime—the practice will not stop, and civilians will continue to be used as pawns by parties seeking any advantage, even at the cost of causing the death of their own civilians in many cases.

#### IV. TAKING DISTINCTION TO THE NEXT LEVEL: LOOKING FORWARD

In the years since World War II, we have seen an extensive and comprehensive development of the law pertaining to the protection of civilians in armed conflict, ranging from the Fourth Geneva Convention—the first law of war treaty specifically devoted to the protection of civilians—to numerous international, hybrid, and national judicial mechanisms for the prosecution of the most heinous crimes committed against innocent civilians. Many militaries engage in extensive training and implement highly tailored ROE during military operations to provide soldiers with a range of tools for differentiating hostile persons from innocent civilians to fulfill the obligation to take constant care to protect civilians. All of these developments implement and enforce the principle of distinction, one of the central foundations of LOAC. Without a doubt, preventing and criminalizing deliberate and indiscriminate attacks on civilians is essential to protecting civilians during armed conflict. But maximizing the role of distinction in times of war demands more. It demands that the obligation to distinguish civilians from fighters and civilian objects from military objects occur not only at the level of targeting but at the level of conduct as well.

At present, innocent civilians face grave danger because of the conduct of the forces fighting ostensibly on their behalf, because both government forces and militants use the cover of the civilian population to gain advantage during combat operations, regardless of the risk to those innocent civilians. Such forces not only have a political or moral obligation to protect their own civilians; LOAC places a legal obligation on them to do so as well. In the absence of robust efforts to enforce those obligations, however, LOAC's mandates will not be fulfilled.

To that end, militaries need to prosecute their own soldiers who violate distinction's central tenets, whether by fighting as civilians, using human shields, or locating military equipment and objectives in civilian buildings. International and regional tribunals must give these violations greater attention and condemnation, even when tasked with

prosecuting only the most serious and widespread crimes. In some situations, such as the crime of utilizing human shields, for example, tribunals cannot simply subsume it within other violations, but should convict for the war crime of using human shields to make a greater impact and highlight the specific dangers of such practices. The impact of such tribunals goes beyond each individual prosecution and conviction they render and contributes to an overarching framework of international criminal justice and accountability. Leaving these violations aside means that the framework is incomplete.

Finally, international investigations and fact-finding missions have a critically important role to play in this area, especially given the rapidly growing use of such investigations and reports in the aftermath of conflicts and significant military operations. Such commissions and fact-finding missions are not judicial mechanisms and do not play the role of court or tribunal, pronouncing guilt or innocence. In many situations, however, their reports will serve as the most comprehensive—or ostensibly most comprehensive—outside analysis of the events and conduct during the incident in question, giving the reports a more substantial story-telling role than that of a criminal case. Here is where the absence of condemnation or even attention to the violations of distinction has the greatest effect. When a report simply does not mention Article 58(b) and its ban on locating military objectives in heavily populated civilian areas, notwithstanding extensive evidence of precisely that conduct, the effect is to ratify and even encourage such behavior. When perfidious tactics garner no condemnation or even recognition, armed forces—whether insurgents or government forces—will continue to use such tactics. The failure to address perfidy creates the impression that such tactics are acceptable during conflict, a highly dangerous conclusion.

Complaining about the nature of asymmetric warfare and the tactics of the disadvantaged party may identify violations of the principle of distinction, but does not involve action to stop or minimize such violations. Perfidy, human shields, and locating military objectives in civilian buildings and areas are not simply tactics that militaries find inconvenient or do not like on the part of their enemies. They are violations of LOAC and must be condemned and prosecuted as such. Failure to do so will leave distinction's obligations and promises unfulfilled and, more importantly, will continue to leave civilians in grave danger.