VIRGINIA JOURNAL
OF
INTERNATIONAL LAW

Volume 50 — Issue 4 — Page 795

Commemorative Essay

Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance

Michael N. Schmitt

50TH ANNIVERSARY
COMMEMORATIVE ESSAY

Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance

MICHAEL N. SCHMITT*

* Chair of Public International Law, Durham University, United Kingdom; General Editor, *Yearbook of International Humanitarian Law*. The author, a retired U.S. Air Force judge advocate, was previously Dean, Marshall Center for Security Studies, Germany; 2007–08 Charles Stockton Visiting Professor of International Law, U.S. Naval War College; and 2006 Sir Ninian Stephen Visiting Scholar at Melbourne University Law School.

INTRODUCTION

No principle is more central to international humanitarian law (IHL), nor more misunderstood, than that of military necessity. It has been proffered both to justify horrendous abuses during armed conflicts and to impose impractical and dangerous restrictions on those who fight. Contemporary conflicts, as well as ongoing efforts to clarify IHL's application therein, have further muddied the waters.

This Essay examines the principle of military necessity and its current trajectory. In IHL, the principle appears in two guises: justification for normative deviation, and as an element of the *lex scripta*. The first notion will be quickly dispatched, for the law surrounding military necessity as a justification for violating IHL is well-settled. With regard to the latter, military necessity appears as both a specific element and a general foundational principle. Although the catalogue of direct references to military necessity in IHL is slim, the principle pervades the entire body of law by undergirding individual rules. In this central role, military necessity exists in equipoise with the principle of humanity, which seeks to limit the suffering and destruction incident to warfare. This symbiotic relationship determines in which direction, and at what speed, IHL evolves. It also determines the manner of its application on the battlefield.

The orderly development of treaty law by states over time allows for equilibrium in the legal system, since states must be responsive to both military and humanitarian interests. Yet, as this Essay will demonstrate, various external pressures have fueled a gradual shift in emphasis toward humanitarian considerations. Although the trend may represent one form of "progress," it equally risks destabilizing the delicate balance that preserves the viability of IHL in a state-centric normative architecture.

I. MILITARY NECESSITY AND HUMANITY IN IHL

A. Historical Underpinnings: Military Necessity as Justification

The premise that military necessity can justify departure from the strict rules of international law finds its roots in the German nineteenth-century doctrine of *Kriegsraison geht vor Kriegsmanier* (necessity in war overrules the manner of warfare). Prior to World War I, various German writers argued that extreme necessity could deprive the laws of

war of their binding force.[1] Specifically, this elevation of necessity over legal norms was justified when the sole means of avoiding severe danger was to violate the law or when compliance with the law might jeopardize the conflict's ultimate objectives.

The concept of *Kriegsraison* never gained traction, however—its risks to the legal order being self-evident. For instance, writing in 1908, Percy Bordwell noted that "given a liberal interpretation it would soon usurp the place of the laws of war altogether."[2] Elihu Root, then President of the American Society of International Law, similarly remarked at the organization's 1921 meeting that "[e]ither the doctrine of *kriegsraison* must be abandoned definitely and finally, or there is an end of international law, and in its place will be left a world without law."[3]

War crimes trials occurring in the aftermath of the Second World War definitively put the argument to rest. In *The Hostage Case*, German generals argued that military necessity justified actions such as reprisal killings of civilians during occupation.[4] The American Military Tribunal rejected the argument, noting that

> [m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war . . . but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. . . . We do not concur in the view that the rules of

1. For a discussion of this period, see 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE (Hersch Lauterpacht ed., 7th ed. 1952).

2. PERCY BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS: A HISTORY AND COMMENTARY 5 (1908).

3. Elihu Root, President, Am. Soc'y of Int'l Law, Opening Address at the Fifteenth Annual Meeting of the American Society of International Law (Apr. 27, 1921), *in* 15 AM. SOC'Y INT'L L. PROC. 1, 3 (1921); *see also* CHARLES FENWICK, INTERNATIONAL LAW 655 (4th ed. 1965) (claiming the doctrine would reduce "the entire body of the laws of war to a code of military convenience").

4. United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948), *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230 (1950).

> warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law.[5]

There is no basis whatsoever in contemporary international law or practice to suggest the contrary; *Kriegsraison* is plainly incompatible with the operation of IHL in the modern world.[6] Nevertheless, the historical underpinnings of military necessity as a justification for divergence from the absolute protection of civilians and civilian objects during armed conflict are carried through and reflected in the entire body of IHL. Although carte blanche deviation from established legal norms based on military necessity is impermissible, the balancing of necessity and humanity pervades contemporary international law in both a general and a specific sense.

B. Modern Notions: Balancing Military Necessity and Humanity

As the 1899 and 1907 Hague Regulations famously noted, "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[7] Rather, IHL represents a carefully thought out balance between the principles of military necessity and humanity. Every one of its rules constitutes a dialectical compromise between these two opposing forces.

This should be unsurprising, for only states have the capacity to make international law, either by treaty or through state practice maturing into customary law.[8] International law thus reflects the goals of those states

---

5. *Id.* at 1253–56.

6. On the doctrine of *Kriegsraison*, see GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 172–79 (1983) (providing an excellent general discussion of *Kriegsraison*). For concise summaries of military necessity and humanity, see YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT 16–20 (2004); A.P.V. ROGERS, LAW ON THE BATTLEFIELD 3–7 (2d ed. 2004); William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251 (1953); N.C.H. Dunbar, *Military Necessity in War Crimes Trials*, 29 BRIT. Y.B. INT'L L. 442 (1952); H. McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 215 (1991); William V. O'Brien, *The Meaning of 'Military Necessity' in International Law*, 1 WORLD POLITY 109 (1957).

7. Convention Respecting the Laws and Customs of War on Land annex art. 22, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277 [hereinafter Hague IV]; Convention with Respect to the Laws and Customs of War on Land annex art. 22, July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2) 949 [hereinafter Hague II]. The principle also appears in Additional Protocol I, albeit with the addition of "methods" of warfare. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 35(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Methods generally refer to tactics, whereas means refer to weapons.

8. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33

consenting to be bound by it. In the arena of conflict, states harbor two prevailing aims. The first is an ability to pursue and safeguard vital national interests. When crafting IHL, states therefore insist that legal norms not unduly restrict their freedom of action on the battlefield, such that national interests might be affected. The principle of military necessity constitutes the IHL mechanism for safeguarding this purpose. It is not, as sometimes asserted, a limitation on military operations.[9] Instead, the principle recognizes the appropriateness of considering military factors in setting the rules of warfare.

Legitimate states are equally obligated to ensure the well-being of their citizenry, for the provision of "public goods," such as physical safety, underpins the social contract between a state and its people. The principle of humanity, which operates to protect the population (whether combatants or noncombatants) and its property, advances this imperative.

In light of these often contradictory interests, states must make policy choices, in the form of treaties or practice, as to their most efficient accommodation.[10] Of course, all policy decisions are contextual in the sense of being based on past, existing, or anticipated circumstances. When circumstances change, the perceived sufficiency of a particular balancing of military necessity and humanity may come into question. In response, states reject, revise, or supplement current IHL or craft new norms. Interpretation and application of existing law may also echo the new circumstances.

This balance between military necessity and humanity pervades IHL in both a general and specific sense. The 1868 St. Petersburg Declaration, for example, explicitly recognized the need to strike such a balance, seeking to "fix[] the technical limits at which the necessities of war ought to yield to the requirements of humanity."[11] Elsewhere, ba-

---

U.N.T.S. 993 [hereinafter ICJ Statute].

9. I have changed my view on this issue. For my earlier approach, see Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 54 (1997). This view was also advanced in DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31: INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (1976), which was rescinded in 2006.

10. On the making of such choices, see MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 521–30 (1961); Myres S. McDougal, *Law and Minimum World Public Order: Armed Conflict in Larger Context*, 3 PAC. BASIN L.J. 21 (1984).

11. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight pmbl., Nov. 29, 1868, 18 Martens Nouveau Recueil (ser. 1) 474 [hereinafter 1868 St. Petersburg Declaration].

lancing appears as a more general, foundational principle of IHL. The 1907 Hague Convention IV, which the International Court of Justice (ICJ) has recognized as having matured into customary law,[12] provides one such example. According to its preamble, the instrument was "inspired by the desire to diminish the evils of war, as far as military requirements permit . . . ."[13] Inclusion of the celebrated "Martens Clause" in Hague Convention IV further confirms that the balancing of military aims by humanitarian considerations was intended to serve as a general notion infusing the law:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[14]

An analogous provision in the 1977 Additional Protocol I,[15] as well as citation of the clause by the ICJ,[16] affirm its continuing applicability.

The Martens Clause demonstrates that IHL is excluded from any positivist assertion to the effect that all which is not forbidden in international law is permitted.[17] As acknowledged by the ICJ in *Corfu Channel*, "elementary considerations of humanity" permeate international law.[18] Consequently, the mere absence of an express IHL rule on point does not necessarily justify an action on the basis of military necessity; actions in warfare must equally reflect respect for humanity.

---

12. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 172 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8). The rules were also found to be customary by the Nuremberg Tribunal. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 254 (1947) [hereinafter IMT NUREMBURG].

13. Hague IV, *supra* note 7, pmbl. para. 5; *see also* Hague II, *supra* note 7, pmbl. para. 6.

14. Hague IV, *supra* note 7, pmbl. para. 8.

15. *See* Additional Protocol I, *supra* note 7, art. 1(2).

16. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 257.

17. Arguing against presumed restrictions on state independence in *The Case of the S.S. "Lotus,"* the Permanent Court of International Justice famously asserted that "[t]he rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims." S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 14 (Sept. 7).

18. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

Nevertheless, by its own terms, the Martens Clause applies only when the *lex scripta* is silent. Extant treaty law therefore reflects an agreed-upon balance between military necessity and humanity, such that neither independently justifies departure from its provisions, unless otherwise specifically provided for in the law.[19] As only states make law, they alone can adjust the consensus balance.

C. Military Necessity and Humanity in the Lex Scripta

The principle of military necessity surfaces as such only sparingly in the *lex scripta*. It first appeared prominently in the 1863 Leiber Code,[20] which bound Union forces during the Civil War. The Code's three articles on military necessity provided the touchstone for subsequent development of the principle:

> *Art. 14*. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are *indispensable for securing the ends of the war*, and *which are lawful* according to the modern law and usages of war.
> *Art. 15*. Military necessity *admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable* in the armed contests of the war . . . . Men who take up arms against one another in public war *do not cease on this account to be moral beings*, responsible to one another and to God.
> *Art. 16*. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge . . . . [A]nd, in general, military necessity *does not include any act of hostility which makes the return to peace unnecessarily difficult*.[21]

---

19. The Department of Defense's forthcoming *Law of War Manual* states: "Where an express prohibition has been stated, neither military necessity nor any other rationale of necessity may override that prohibition. Military necessity was weighed by nations as each express prohibition was promulgated, and again at the time each State Party ratified or acceded to each treaty." DEP'T OF DEF., LAW OF WAR MANUAL (forthcoming 2010) (on file with author).

20. Francis Lieber, U.S. War Dep't, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004). Note that the Lieber Code was a national regulation, not a treaty. Nevertheless, it provided the foundation for much subsequent international humanitarian law. For more information on the Lieber Code and military necessity, see Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998).

21. *Id.* arts. 14–16 (emphasis added).

Note how the Lieber Code's considerations of humanity temper each mention of military necessity. Article 14, for instance, envisages whatever destruction is necessary to achieve the overall war aims, but only to the extent the actions comport with established law of war norms. Similarly, although Article 15 foresees the inevitability of harm to persons other than combatants, it limits such harm to that which is incidental and avoidable. Article 16 bounds the assertion that all attacks on combatants qualify as necessary with the stipulation that they not be cruel.

Conversely, IHL sometimes contemplates deviation from a rule grounded in humanitarianism on the basis of military necessity. Hague Convention IV, for example, bars the destruction or seizure of enemy property unless "imperatively demanded by the necessities of war."[22] The 1949 Fourth Geneva Convention prohibits occupying powers from destroying certain property "except where such destruction is rendered absolutely necessary by military operations."[23] Protections secured for cultural property in the 1954 Hague Cultural Property Convention may be narrowed "in cases where military necessity imperatively requires such a waiver."[24] The 1977 Additional Protocol I permits the following actions in the presence of "imperative military necessity": derogation from the ban on "scorched earth" tactics within territory under control of a Party;[25] use of enemy "*matériel* and buildings of military units permanently assigned to civil defence organizations";[26] and restrictions on the activities of civil defense and relief personnel.[27] These examples illustrate that even when mentioned explicitly in IHL instruments, military necessity always operates in the shadow of humanitarian concerns.

22. Hague IV, *supra* note 7, annex art. 23(g).

23. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. By the convention, extensive destruction or seizure of property is a grave breach when "not justified by military necessity and carried out unlawfully and wantonly." *Id.* art. 147. It further permits limits on relief for internees based on military necessity, albeit only under strict conditions. *Id.* art. 108; *see also id.* art. 143 (regarding visits by representatives of Protecting Powers); Geneva Convention Relative to the Treatment of Prisoners of War art. 126, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (regarding visits to prisoners of war).

24. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4, May 14, 1954, S. TREATY DOC. NO. 106-1 (1999), 249 U.N.T.S. 240 [hereinafter CPCP]; *see also id.* art. 11; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 6, Mar. 26, 1999, 2253 U.N.T.S. 212 [hereinafter Second Protocol to CPCP].

25. Additional Protocol I, *supra* note 7, art. 54(5).

26. *Id.* art. 67(4).

27. *Id.* arts. 62(1), 71(3).

Implicit balancing is far more pervasive. Most significantly, military necessity restricts the principle of distinction, characterized as one of two "cardinal" principles of IHL by the ICJ in *Nuclear Weapons*.[28] This customary law principle, reflected in Article 48 of Additional Protocol I, requires parties to "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives."[29] Articles 51 and 52 operationalize distinction in the context of military necessity. Thus, while Article 51 prohibits attacks on civilians, those who participate in the conflict lose said protection for so long as they "take a direct part in hostilities."[30] Analogously, Article 52 prohibits attacks on objects that are not "military objectives," but acknowledges that civilian objects can become military objectives when, "by their nature, location, purpose or use," such objects "make an effective contribution to military action" and their "total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[31] Necessity also appears as a limiting factor in the second cardinal principle, unnecessary suffering, which implicitly recognizes the lawful nature of weapons that cause militarily necessary suffering.[32]

In the aforementioned examples, the bounding, whether explicit or implicit, of a general rule on the basis of military necessity is overt. But analysis of most IHL rules, especially those governing the conduct of hostilities, reveals consistent sensitivity to the balance between military

28. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

29. Additional Protocol I, *supra* note 7, art. 48; *see also* DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 8.1 (2007), *available at* http://tinyurl.com/yerq4lo [hereinafter COMMANDER'S HANDBOOK] ("The law of targeting . . . requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that noncombatants, civilians, and civilian objects are spared as much as possible from the ravages of war."); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3–8, 25–26 (2005). The *Commander's Handbook* is especially relevant with regard to the existence of customary law because the United States is not a party to Additional Protocol I. Some of the *Handbook*'s provisions, however, are based on policy choices rather than customary law.

30. Additional Protocol I, *supra* note 7, art. 51(3). These rules reflect customary international law. *See* COMMANDER'S HANDBOOK, *supra* note 29, § 8.3; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, at 3–8.

31. Additional Protocol I, *supra* note 7, art. 52(2). This rule also reflects customary international law. *See* COMMANDER'S HANDBOOK, *supra* note 29, § 8.3; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, at 25–26.

32. *See* Additional Protocol I, *supra* note 7, art. 35(2). This rule reflects customary international law. *See* COMMANDER'S HANDBOOK, *supra* note 29, § 9.1; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, at 244–50.

necessity and humanity. For instance, an attacker may not treat multiple military objectives in an area containing a concentration of civilians as a single military objective (as with area or carpet bombing) when, because the targets are "separated and distinct," it is feasible to attack them individually.[33] As lawful targets, their destruction is militarily necessary, but the humanitarian aim of limiting harm to the civilian population mandates a tactical alternative as a matter of law.

Requiring particular tactical choices is a frequent means of preserving humanity during the conduct of hostilities. Attackers may not target a military objective if other viable targets exist that offer "a similar military advantage" with less "danger to civilian lives and to civilian objects."[34] They must also choose among tactics and weapons (methods and means) with an eye to "avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[35] The existence of choice depends on the "feasibility" of the options, thereby demonstrating that "precautions in attack" constitute a negotiated compromise between military and humanitarian factors.[36]

The most conspicuous balancing appears in the principle of proportionality. A customary principle of law codified in Article 51 of Additional Protocol I, proportionality forbids an attack as indiscriminate if it may "be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[37] The give and take of military necessity and humanity is ap-

33. Additional Protocol I, *supra* note 7, art. 51(5)(a).

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

35. *Id.* art. 57(2)(a)(ii).

36. *See id.* art. 57(2)(a). The term "feasible precautions" is generally understood as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) art. 1(5), Oct. 10, 1980, S. TREATY DOC. NO. 105-1 (1997), 1342 U.N.T.S. 171; *see also* Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Amended Protocol II) art. 3(10), May 3, 1996, S. TREATY DOC. NO. 105-1 (1997). A number of countries specifically adopted this standard as their interpretation of the term upon ratifying Additional Protocol I. *See, e.g.*, Letter from Christopher Hulse, Ambassador from the U.K. to Switz., to the Swiss Gov't (Jan. 28, 1998), *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument [hereinafter U.K. Reservations] (listing the United Kingdom's reservations and declarations to Additional Protocol I, and explaining that "[t]he United Kingdom understands the term 'feasible' as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations").

37. Additional Protocol I, *supra* note 7, art. 51(5)(b); *see also* Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute];

parent in the relative nature of the term "excessive."[38] Even minor collateral damage might bar an otherwise lawful attack if the military tage that accrues to the attacker is slight, whereas a great deal of teral damage might be justified if the corresponding military advantage is considerable.

At times the express or inherent balance between military necessity and humanity may appear illogical, such that one or the other ought to be invoked to rebalance an existing rule. But any such rebalancing would be without justification insofar as the new balance deviates from that which states have agreed upon. The paradigmatic example involves treatment of an enemy soldier captured by a Special Forces unit behind enemy lines. Although the unit cannot complete its mission with the prisoner in tow, it realizes that the soldier will raise the alarm if released. The logical answer is to kill him; after all, he is the enemy and but for capture would have been subject to deadly attack on sight. But IHL characterizes captured enemy forces as *hors de combat* and safeguards them from attack, which as defined in IHL encompasses any act of violence against an adversary.[39] Thus, the team may not harm the captured soldier; they must either abort their mission and return to base with the prisoner or secure him in a fashion that permits him to eventually escape unharmed. Irrational as it may seem, the rule reflects a de jure balance between military necessity and humanity. No adjustment is permissible.

II. EVOLUTION OF THE BALANCE

International humanitarian law necessarily evolves to reflect the nature of conflict and the values of its participants. Since the nineteenth century, it has moved steadily in the direction of humanity and away from that of military necessity. Even the moniker of the law has shifted

---

Additional Protocol I, *supra* note 7, art. 57(2); COMMANDER'S HANDBOOK, *supra* note 29, § 8.3, 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, at 46–77.

38. Note that the nonbinding ICRC commentary to the provision suggests that "[t]he Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 626 (Yves Sandoz et al. eds., 1987) [hereinafter AP COMMENTARY]. No basis exists in practice or law for this statement, which would represent a disproportionate emphasis on the humanity aspect of the balance in that it applies regardless of the military advantage gained through an attack. Its rejection is exemplified in the ICC Statute provision on proportionality, which adds the adjective "clearly" to the term "excessive," lest the bar be set too low. ICC Statute, *supra* note 37, art. 8(2)(b)(iv).

39. Additional Protocol I, *supra* note 7, art. 49.

over time. In the first half of the twentieth century, it was known as the "law of war." The 1949 Geneva Conventions prompted a change to the "law of armed conflict," reflecting those instruments' use of the term "armed conflict" to emphasize that application of their humanitarian prescriptions did not depend on either a declaration of war or recognition by the parties of a state of war. More recently, this body of law has become known as "international humanitarian law," in great part through the efforts of the International Committee of the Red Cross (ICRC). Despite its recognition by the ICJ,[40] the label has the marked disadvantage of masking the role military necessity plays in the law governing armed conflict. Nevertheless, it accurately reflects the trend toward according greater weight to the humanitarian features of the law.

A. Codification of IHL Prior to World War II

The increasing weight accorded humanity is especially evident in treaty law. As multinational codification of the law governing conflict began, its emphasis was on the state and its agents, not protection of the civilian population. The 1856 Paris Declaration on Maritime Law dealt with privateering, neutrality, and blockades—issues grounded in the rights and interests of states.[41] The 1864 Geneva Convention on the wounded and sick and the 1868 St. Petersburg Declaration on explosive projectiles were both aimed solely at enhancing protection of the armed forces.[42] The 1899 and 1907 Hague Peace Conferences produced an array of conventions and declarations, most of which addressed either matters relevant to the activities of states, such as the opening of hostilities, neutrality, and merchant shipping, or the protection of combatants, such as limitations on certain weapons.[43] While the 1899 Convention II

40. *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8). The label also appears in contemporary treaty law. *See, e.g.*, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction pmbl., Sept. 18, 1997, 36 I.L.M. 1507; Statute of the International Tribunal for Rwanda, S.C. Res. 955 annex, art. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991**,** U.N. Doc. S/25704 annex (May 3, 1993), *available at* http://www1.umn.edu/humanrts/icty/statute.html [hereinafter ICTY Statute].

41. Declaration of Paris Respecting Maritime Law, Apr. 16, 1856, *reprinted in* 1 SUPPLEMENT AM. J. INT'L L. 89 (1907).

42. 1868 St. Petersburg Declaration, *supra* note 11; Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 129 Consol. T.S. 361.

43. Final Act of the International Peace Conference, July 29, 1899, *reprinted in* 1 SUPPLEMENT AM. J. INT'L L. 103 (1907); Final Act of the Second Peace Conference, Oct. 18,

on the Laws and Customs of War on Land and the 1907 Hague Convention IV on the same subject envisaged protection of the civilian population, the catalogue of said provisions was slim, dealing primarily with belligerent occupation.[44] Attempts to craft treaties extending additional protection to civilians faltered repeatedly.[45] Throughout this period, military necessity reigned supreme, while humanity served primarily to protect the armed forces.

B. Codification of IHL Since World War II

The carnage of the Second World War stimulated a major shift toward humanitarian protection of the civilian population. In 1945, nineteen states ratified the Charter of the International Military Tribunal, which provided for jurisdiction over war crimes against civilians and crimes against humanity.[46] Of particular note, the tribunal embraced the

---

1907, *available at* http://www.icrc.org/ihl.nsf/FULL/185?OpenDocument.

44. *See* Hague II, *supra* note 7; Hague IV, *supra* note 7. The annexed regulations to Hague IV also dealt with attacking populated areas; warnings; protection of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, and medical facilities; and pillage. Hague IV, *supra* note 7, annex arts. 24–27. Other conventions adopted during the period preceding the close of World War II likewise focused humanitarian attention primarily on combatants. *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885, 22 Consol. T.S. 144; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Convention Relative to the Treatment of Prisoners of War art. 82, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 25, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303.

45. This includes the 1923 Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, *available at* http://www.icrc.org/ihl.nsf/FULL/275?OpenDocument; the 1934 Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who Are on Territory Belonging to or Occupied by a Belligerent, *available at* http://www.icrc.org/ihl.nsf/FULL/320?OpenDocument; and the 1938 Draft Convention for the Protection of Civilian Populations Against New Engines of War, *available at* http://www.icrc.org/ihl.nsf/FULL/345?OpenDocument.

46. Charter of the International Military Tribunal at Nuremburg art. 6(b)–(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 [hereinafter Nuremburg Charter]. The Charter defined the offenses thusly:

> (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in viola-

premise that the 1907 Hague Regulations, with their limited protection of civilians and their property, had become "declaratory of the laws and customs of war."[47] The Charter also codified the notion of "crimes against humanity," which arguably represented a new norm, especially in the sense that it applied irrespective of a state of war and to the victimization by a state of its own citizens.

Codification proceeded even as the trials were underway. In 1948 the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which protected "national, ethnical, racial or religious" groups and applied in "time of peace or in time of war."[48] The following year a diplomatic conference adopted the four Geneva Conventions. The first three dealt with issues primarily affecting combatants: wounded and sick on land;[49] wounded, sick, and shipwrecked at sea;[50] and prisoners of war.[51] The fourth, however, dealt exclusively with the protection of civilians, thereby marking a milestone in IHL. The longest of the four Conventions, it expressly supplemented the 1899 and 1907 Hague Regulations.[52]

The postwar period also saw the adoption of a number of treaties providing protection for specific individuals and objects. In 1954, the Hague Cultural Property Convention and its First Protocol were adopted.[53] Modification of the environment during wartime was banned in 1976;[54] a Second Protocol to the Cultural Property Convention was

---

tion of the domestic law of the country where perpetrated.

Id. The Charter principles were unanimously affirmed by the UN General Assembly in 1946. G.A. Res. 95 (I), at 188, U.N. Doc. A/236 (Dec. 11, 1946).

47. 1 IMT NUREMBERG, *supra* note 12, at 254. The finding was necessary because of the general participation clause in Article 2: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention." Hague IV, *supra* note 7, art. 2.

48. Convention on the Prevention and Punishment of the Crime of Genocide arts. 1–2, Dec. 9, 1948, S. EXEC. DOC. O, 81-1 (1949), 78 U.N.T.S. 277 [hereinafter Genocide Convention].

49. 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.

50. 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.

51. GC III, *supra* note 23.

52. GC IV, *supra* note 23, art. 154.

53. *See* CPCP, *supra* note 24; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358. Additional Protocol I also provides for the protection of cultural property. Additional Protocol I, *supra* note 7, art. 53.

54. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, art. I(1), 31 U.S.T. 333, 1108 U.N.T.S. 152.

adopted in 1999;[55] and a 2000 Optional Protocol sought to enhance the protection of children during armed conflict.[56]

The law of weaponry, which had heretofore been designed primarily to alleviate the suffering of combatants, likewise reflected the emphasis on humanitarian concerns. Protocol III of the 1980 Convention on Conventional Weapons (CCW) placed limits on the use of incendiary weapons against or in the vicinity of civilians and in forested areas.[57] As civilians were often the unintended victims of booby traps and antipersonnel mines, CCW Protocol II (1980) and Amended Protocol II (1996) imposed restrictions on their use in situations endangering the civilian population.[58] The 1997 Ottawa Convention banned the use of such mines altogether by states party thereto.[59] A fifth Protocol to the CCW, adopted in 2003, created a system to deal with explosive remnants of war.[60] Five years later, a diplomatic conference in Dublin produced the Convention on Cluster Munitions in order to deal with the problem of failed bomblets, which, like explosive remnants and land mines, pose a persistent risk to civilians.[61]

The seminal event in the treaty-based shift came with adoption of the 1977 Additional Protocols to the 1949 Geneva Conventions. In the eyes of many members of the international community, conflicts since the Second World War had evolved in a direction that merited a corresponding evolution in the law. Two factors were of particular importance: guerrilla warfare (especially during national liberation struggles) and the spread of non-international armed conflicts. Both phenomena placed civilians and their property at particular risk. In response, Additional Protocols I and II were adopted—the former governing international armed conflicts, the latter focusing on intranational hostilities.

Additional Protocol I was unique in its joinder of "Hague" and "Geneva" law.[62] Moreover, the diplomatic conference that drafted the two

55. Second Protocol to CPCP, *supra* note 24.

56. Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, S. TREATY DOC. NO. 106-37 (2000), 39 I.L.M. 1285.

57. Protocol III, *supra* note 36, art. 2.

58. Amended Protocol II, *supra* note 36.

59. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997).

60. Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), Nov. 28, 2003, 45 I.L.M. 1348 (2006).

61. Convention on Cluster Munitions, Dec. 3, 2008, 48 I.L.M. 357 (2008).

62. This is with respect to norms addressing the conduct of hostilities and protections for persons and objects respectively.

Protocols amounted to the first comprehensive endeavor to carefully assess where the balance between military necessity and humanity lay, especially in the context of the "conduct of hostilities." In particular, it elaborated the customary international law principle of distinction, including its key components of indiscriminate attack, proportionality, and precautions in attack, thereby signaling a new sensitivity to the humanity component of IHL.[63]

Equally important was the adoption of Additional Protocol II, the first treaty to exclusively address non-international armed conflict.[64] Previously, such conflicts were principally governed by Common Article 3 of the 1949 Geneva Conventions, a provision extending only the most basic of protections to "persons taking no active part in the hostilities."[65] By contrast, Additional Protocol II contained articles addressing the protection of children, detainees, internees, the wounded, sick, and shipwrecked, and set forth restrictions on prosecution and punishment. Perhaps most importantly, it established a protective regime for the civilian population, including prohibitions related to targeting, terrorizing, or starving civilians; dams, dykes, and nuclear electrical generating stations; cultural and religious objects and places of worship; the forced movement of civilians; and relief agencies and humanitarian assistance.[66]

The revolutionary scope of these protections, albeit less comprehensive than those contained in Additional Protocol I, must be understood in context. Previous IHL instruments represented negotiated "rules of the game" for warfare between states. To the extent that a rule protected the enemy's combatants or the civilian population, it provided corresponding protection to one's own. Accommodation of military necessity to humanitarian concerns theoretically affected all parties to a conflict equally.

---

63. *See* OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS (1978).

64. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

65. The text of Common Article 3, which also extended protection to the wounded and sick, is identical in all four of the 1949 Geneva Conventions. *See supra* notes 23, 49–50. The 1949 Genocide Convention applied to non-international armed conflict in certain circumstances, *see* Genocide Convention, *supra* note 48, art. 1, as did the 1954 Cultural Property Convention, *see* CPCP, *supra* note 24, art. 19.

66. Additional Protocol II, *supra* note 64, arts. 4–8, 13–18.

By contrast, in non-international armed conflict, the "enemy" is by definition acting unlawfully under domestic law irrespective of any treaty. Additional Protocol II therefore added little to the practical prescriptive regime.[67] Moreover, the reciprocity inherent in treaties governing international armed conflict is nonexistent in the context of intrastate conflict because the domestic "rebels" are not party to relevant international instruments. Consequently, Additional Protocol II was, for states party thereto, a self-imposed limit on military necessity in the name of humanity. Their adoption of Additional Protocol II absent the reciprocity motivation further illustrates the extent to which the necessity-humanity dynamic had been revolutionized in the years following the Second World War.

Despite the altered balance symbolized by Additional Protocol II, President Reagan submitted the instrument to the Senate in 1987 for advice and consent.[68] In his letter of transmittal, the President opined that the agreement was, with certain exceptions, a positive step toward the goal of "giving the greatest possible protection to the victims of [non-international] conflicts, consistent with legitimate military requirements."[69] The Legal Adviser to the State Department characterized the instrument's terms as "no more than a restatement of the rules of conduct with which United States military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency."[70] In other words, the United States was willing to accept Additional Protocol II because it reflected established practice on the battlefield.

C. State Apprehension

In the face of postwar codification, various states displayed apprehension as to the military necessity-humanity balance that had been

67. It is reasonable to assume that states would be unlikely to defer to international prosecution of rebels who could be tried instead in domestic courts. That being said, international law prohibitions would nonetheless serve further to ostracize those who engage in such acts.

68. Ronald Reagan, Letter of Transmittal to the U.S. Senate (Jan. 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910 (1987). Additional Protocol II is still awaiting ratification, although no administration since that of President Reagan has publically expressed fundamental concerns about its provisions.

69. *Id.* at 910. President Reagan identified prohibitions on mass murders falling short of genocide and the deliberate killing of noncombatants as particularly significant concerns. *Id.* at 910–11.

70. Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, January 22, 1987*, 2 AM. U. J. INT'L L. & POL'Y 460, 461–62 (1987).

struck in a number of treaties, most notably Additional Protocol I. First among these was the United States, which believed that "the Protocol suffers from fundamental shortcomings that cannot be remedied through reservations or understandings," even though "certain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments."[71] President Reagan made exactly this point in his letter of transmittal. Characterizing the agreement as "fundamentally and irreconcilably flawed," he announced that "we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war."[72]

Military and policy considerations loomed large in the rejection. The United States was concerned that Article 1(4), which extended coverage to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," would place rebel groups on an equal footing with the armed forces by affording them the more comprehensive protections of the law of international armed conflict, even though their actions demonstrated a disdain for law generally.[73]

Similarly, the United States concluded that Article 44(3) denuded the requirement for combatants to distinguish themselves from civilians by providing that in "'situations . . . where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself . . . he shall retain his status as a combatant' [including prisoner of war status]" so long as he openly carried weapons during the "military deployment" preceding an engagement and during the engagement itself.[74] Aside from the fact that an inability to distinguish fighters from civilians heightens the risk to the latter, the United States worried that by wearing

71. *Id.* at 463, 471. Examples of positive new developments included certain protections for medical aircraft and the missing and dead. On the many provisions supported by the United States, see Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 422–29 (1987). At the time he wrote the piece, Professor Matheson was serving as the State Department's Deputy Legal Adviser.

72. Letter of Transmittal, *supra* note 68, at 911. Among the reasons proffered by the president for U.S. opposition were (1) the instrument's characterization of "wars of national liberation" as international armed conflict rather than non-international armed conflict (thereby appearing to imbue them with a greater sense of legitimacy); (2) the grant of combatant status to irregulars even if they did not comply with the traditional requirements for such status; and (3) the fact that the "Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable." *Id.*

73. Sofaer, *supra* note 70, at 464.

74. *Id.* at 466 (quoting Additional Protocol I, *supra* note 7, art. 44(3)).

civilian clothes and concealing their weapons, "terrorist[s] could . . . hide among civilians until just before an attack."[75] This would seriously impair a state's ability to identify and target potential enemy combatants.

An assessment conducted by the U.S. military judged the treaty "to be too ambiguous and complicated to use as a practical guide for military operations."[76] Article 56, for example, proscribed attacks against dams, dykes, and nuclear electrical generating stations even if they were proportionate and even if sufficient precautions were taken prior to launch. For the United States, the rule not only appeared to give excessive weight to humanity, but also seemed unnecessary in light of the reasoned balancing implicit in existing norms of proportionality and precaution.[77]

The United States was not alone in its uneasiness. The United Kingdom waited two decades before becoming a party to Additional Protocol I, making sixteen substantive "statements" at the time of ratification.[78] The statements evidenced concern that the instrument required interpre-

75. *Id.* at 467.

76. *Id.* at 468. For example, it failed to account for modern integrated power grids since an attacker would have difficulty determining the destination—civilian or military—of electricity from a particular power plant. The balancing seemed to be taking place without a complete grasp of the consequences for contemporary warfare.

77. *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 436 (1987).

78. *See* U.K. Reservations, *supra* note 36. *Inter alia*, the statements provided that the Protocol did not apply to nuclear weapons; clarified the term "feasible"; emphasized that "military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach their decisions on the basis of their assessment of the information from all sources which is [sic] reasonably available to them at the relevant time"; noted that the assessment of damage to the environment "is to be assessed objectively on the basis of the information available at the time"; accepted the Article 44(3) provisions only as to occupied territory or Article 1(4) situations; stated that the presumption of civilian status in the case of doubt did not "override[] a commander's duty to protect the safety of troops under his command or to preserve his military situation"; explained that the term "military advantage" in the proportionality principle "is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack"; cautioned that in certain circumstances areas of land could qualify as military objectives; pointed out that cultural objects and places of worship lose their protection if used for military purposes; noted that destruction of items necessary for civilian sustenance is only prohibited when such denial was the intended purpose; allowed for reprisals in certain circumstance involving enemy violation of the law; refused to grant absolute protection to dams, dykes, and electrical generating stations, although recognized that such attacks required "authorisation at a high level of command"; and indicated that the obligation to cancel an attack if it became apparent that the target was not a military objective or if the attack would violate proportionality was applicable only to "those who have the authority and practical possibility to cancel or suspend the attack." *Id.*

tation with an eye toward military realities. Virtually all of the statements preserved aspects of military practicality, whether at the tactical, operational, or strategic level. Thus, while the United Kingdom took a different tact than the United States, its motivation was identical: ensuring that the treaty not skew the sensible balance between military necessity and humanity.[79]

The position of the United States regarding certain other IHL instruments also displays sensitivity to ensuring that military necessity not be unduly sacrificed on the altar of humanitarianism.[80] Its stance regarding antipersonnel mines exemplifies such concern. The United States is a party to the 1980 Protocol II and the 1996 Amended Protocol II of the CCW. Designed to protect the civilian population from unintended exposure to dangerous explosives, these instruments limit particular uses of antipersonnel mines, impose technical requirements such as self-deactivation, and mandate cautious deployment of such devices.

In 1997, the Ottawa Convention took matters further by prohibiting the use of antipersonnel mines altogether. The United States, however, saw continued military value in their use, such as establishing defensive perimeters and channelizing enemy forces into "kill zones." Furthermore, it was believed that the risk to civilians could be sufficiently mitigated through use restrictions and technology such as command-detonation and deactivation capacity.[81] President Bill Clinton accordingly declared, "[T]here is a line that I simply cannot cross, and that line is the safety and security of our men and women in uniform."[82] The United States expressed concern about its ability to effectively defend South Korea, where vast fields of land mines along the border with North Korea served as an effective barrier against invasion. Until such concerns could be addressed, the United States was unwilling to categorically halt its use of persistent antipersonnel mines.

In 2004, President George W. Bush issued a revised U.S. landmine policy suggesting that certain limitations beyond those contained in the

79. The United States is still not a party to Additional Protocol I.

80. It is on this general basis, as well as for other narrower reasons, that the United States elected not to become party to the Ottawa Convention, the Dublin Cluster Munitions Convention, and the Statute of the International Criminal Court. In each of these cases, the United States took the position that the instrument in question paid insufficient heed to the realities of armed conflict. Note that the Obama administration is reviewing the U.S. position regarding a number of international humanitarian law treaties.

81. COMMANDER'S HANDBOOK, *supra* note 29, § 9.3.

82. William Clinton, *U.S. Leads in Land Mine Issues While Others Talk*, 12 DEF. ISSUES 47 (1997), *available at* http://www.defense.gov/speeches/speech.aspx?speechid=785.

CCW Protocols were acceptable as a matter of policy.[83] These included the removal of nondetectable mines from its inventory, destruction of persistent landmines not required for the defense of South Korea, and a prohibition on the use of all persistent landmines after 2010. The Bush policy exemplified the need to gauge the military necessity-humanity balance contextually and temporally.

A contextual approach to the necessity-humanity balance was likewise apparent in the U.S. position regarding the 1954 Hague Cultural Property Convention, ratified in 2009.[84] Experience in conflicts such as Operation Desert Storm had demonstrated that earlier concerns about the Convention's weighing of military needs against the protection of cultural property had been ill-founded. As explained by the Defense Department's Deputy General Counsel in a 2008 statement to the Senate,

> The Convention does not prevent military commanders from doing what is necessary to accomplish their missions. Legitimate military actions may be taken even if collateral damage is caused to cultural property. Protection from direct attack may be lost if a cultural object is put to military use. The Department of Defense has carefully studied the convention and its impact on military practice and operations. The Department believes the convention to be fully consistent with good military doctrine and practice as conducted by U.S. forces.[85]

Similarly, the United States ratified the CCW Protocol III on incendiary weapons in 2009, after nearly three decades of nonparty status.[86] In ratifying the Protocol, the United States explicitly reserved the right to use such weapons

> against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, in-

83. Department of State, U.S. Landmine Policy, http://www.state.gov/t/pm/wra/c11735.htm (last visited Apr. 28, 2010); *see also* COMMANDER'S HANDBOOK, *supra* note 29, § 9.3.

84. *See* CPCP, *supra* note 24.

85. S. EXEC. REP. NO. 110-22, at 29 (2008), *available at* http://www.fas.org/irp/congress/2008_rpt/protocols.pdf.

86. *See* Protocol III, *supra* note 36.

jury to civilians and damage to civilian objects.[87]

This reservation reflects the symbiotic nature of military necessity and humanity. Consider a military objective in a concentration of civilians that would release chemicals harmful to the civilian population if attacked with regular explosive bombs. For the sake of analysis, assume that despite the expected incidental harm to civilians, the anticipated military advantage is great enough to comply with the proportionality principle. However, if incendiary weapons are employed, the resulting fire will consume the chemicals, thereby lessening the civilian impact and keeping the area accessible to ground forces. In this scenario, the use of incendiary weapons would serve both humanitarian and military ends: hence, the U.S. reservation.

III. EXTERNAL INFLUENCES: UPSETTING THE BALANCE?

As illustrated, the past century and a half has witnessed an orderly and acceptable evolution of the military necessity-humanity balance through codification. Although not all states agree on the suitability of the balancing set forth in the various IHL instruments, they remain free to opt out of legal regimes that they believe have inappropriately tilted the law in one direction or the other. Since only states make international law, the risk of becoming bound by laws (or legal interpretations) to which they do not consent, either de jure or de facto, has generally remained slight. In the past two decades, however, this state-centric process has been subjected to a variety of external influences.[88] Such influences risk depriving states of their monopoly over determining the appropriate balance for themselves. This development is significant because these outside influences do not share the states' incentive to find compromise between the principles.

A. The Influence of International Tribunals

In international law, judicial decisions are not, strictly speaking, a source of law. Rather, they are "subsidiary means for the determination of rules of law."[89] Like academic writings, judicial decisions serve as

87. U.S. Consent to be Bound by Protocol III (with reservation and understanding) (Jan. 21, 2009), Transmittal by U.N. Secretary-General, at 1, U.N. Doc. C.N.75.2009.TREATIES-1 (Feb. 5, 2009), *available at* http://treaties.un.org/doc/Publication/CN/2009/CN.75.2009-Eng.pdf.

88. On the influence of the human rights movement on this development, see Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

89. ICJ Statute, *supra* note 8, art. 38(1)(d).

persuasive evidence of the state of the law, but are not dispositive in this regard; they bind only the parties before the tribunal.[90] Indeed, international courts such as the ICJ do not follow a formal doctrine of precedent. Of course, as a practical matter, and in order to develop a coherent body of jurisprudence, they generally do so.[91]

Following the war crimes prosecutions after the close of World War II, four decades passed before an international tribunal was established and charged with applying IHL. In 1993 the United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY).[92] In the years since, ad hoc tribunals have been established by various means to address both inter- and intranational IHL violations occurring during conflicts in Cambodia, East Timor, Iraq, Rwanda, and Sierra Leone. In 2002, following ratification of the Rome Statute by sixty states, a permanent International Criminal Court was established in The Hague, Netherlands.

Despite the technically unauthoritative nature of their judgments, the dearth of previous judicial decisions interpreting and applying IHL has rendered the holdings of these courts extremely significant. The ICTY has been the most influential of the tribunals. In many cases, the court merely confirmed longstanding IHL tenets. For instance, in *Blaskic*, the court acknowledged that command responsibility for the acts of subordinates includes situations in which a commander should have known a war crime was being committed,[93] while in *Erdemovic*, it rejected the defense of superior orders.[94]

---

90. For instance, the Statute of the International Court of Justice provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." *Id.* art. 59.

91. See, for example, the judgment of the Appeals Chamber of the ICTY in *Aleksovski*, which found that "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice." Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber Judgment, ¶ 107 (Mar. 24, 2000).

92. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

93. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 332 (Mar. 3, 2000). In *The High Command Case*, the American military tribunal at Nuremberg held that for responsibility to attach in the absence of knowledge, there must be a "personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence." United States v. von Leeb (The High Command Case), *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 543–44 (1950); *see also* ICC Statute, *supra* note 37, art. 28; ICTY Statute, *supra* note 40, art. 7(3); Prosecutor v. Strugar, Case. No. IT-01-42-A, Appeals Chamber Judgment, ¶ 299 (July 17, 2008).

94. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Appeals Chamber Judgment, Separate Opinion of Judge McDonald and Judge Vohrah (adopted by the Chamber on this issue), ¶ 34 (Oct. 7, 1997); *see also* ICC Statute, *supra* note 37, art. 33; ICTY Statute, *supra* note 40, art. 7(4);

In others, the ICTY has added granularity to the IHL governing the conduct of hostilities. For example, in *Galic*, it emphasized that the prohibition on terrorizing a civilian population applies only when the operation was designed to cause terror.[95] This is an important affirmation of the military necessity-humanity balance resident in the norm, since many military operations incidentally terrorize the population without terror being their purpose. *Galic* also confirmed that the prohibition against directly targeting civilians is absolute and therefore not subject to considerations of military necessity, and that to be prohibited as an attack on civilians, an act must be willful.[96] In the other key ICTY conduct of hostilities case, *Strugar*, the tribunal considered "devastation not justified by military necessity."[97] Importantly, it did not treat military necessity as a constraint that was additional to the extant law. Rather, it defined the term by reference to the customary definition of "military objective" codified in Article 52(2) of Additional Protocol I, such that any attack against a nonmilitary objective is unnecessary.[98] In these and related cases, the tribunal has shown impressive sensitivity to maintaining the military necessity-humanity balance.[99]

Somewhat more daringly, the ICTY has occasionally confirmed positions which had previously been questionable as a matter of strict legal interpretation. In *Nicaragua*, the ICJ had held that the rules set forth in Common Article 3 to the 1949 Geneva Conventions "constitute a minimum yardstick" in international armed conflict, for they represent "elementary considerations of humanity."[100] Although a sensible holding, it was not at all certain that the assertion represented *lex lata*, for on its

---

Nuremberg Charter, *supra* note 46, art. 8.

95. Prosecutor v. Galic, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶¶ 90, 103–04 (Nov. 30, 2006).

96. *Id.* ¶¶ 130, 140; *see also* Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶109 (July 29, 2004).

97. Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶¶ 293–94 (Jan. 31, 2005).

98. *Id.* ¶ 295.

99. At times, the ICTY has gone further by usefully extrapolating norms from existing IHL. As an example, in the *Celebici Camp* case, it held that the principle of command responsibility for war crimes extended to civilians and that the key to the concept is not the formal title of the individual, but rather the fact of "effective exercise of power or control" over a subordinate committing a war crime. Prosecutor v. Delalic (Celebici Camp), Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 197 (Feb. 20, 2001). The ICTY has also addressed the troublesome dilemma of characterizing a conflict as international or non-international. This is critical because the nature of the conflict determines what body of law applies. Thus, in *Tadic*, the tribunal accepted the premise of vertically mixed conflicts by holding that an intrastate armed conflict can morph into international armed conflict through the participation of other states. Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 84 (July 15, 1999).

100. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 114 (June 27).

face, Common Article 3 applies only to the "case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[101] Nevertheless, in *Tadic*, and later *Celebici*, the ICTY embraced the notion, specifically rejecting an argument that there was neither *opinio juris* nor sufficient state practice to establish its customary nature in international armed conflict.[102]

Unfortunately, the distinction between "law-finding" and "law-making" has occasionally been blurred. The ICTY has been especially active in identifying purported customary rules applicable in non-international armed conflict.[103] Faced with a scarcity of applicable treaty law, the *Tadic* Court stated that "it cannot be denied that customary rules have developed to govern internal strife."[104] The tribunal went on to adopt an impressive catalogue of international armed conflict rules into the law of non-international armed conflict.

There is no question that many such rules have matured into customary law applicable in internal conflicts. But the broad sweep of the judgment makes it difficult to discern those that have from those that have not.[105] Furthermore, the tribunal's incorporation of such rules neglects the fact that, for reasons outlined above, states, the sole "law-makers in international law," have intentionally crafted a far narrower legal regime for non-international armed conflicts. In justification of its approach, the ICTY implicitly cited the shifting balance between military necessity and humanity. According to the tribunal, "[a] State-sovereignty-oriented approach has been gradually supplanted by a hu-

101. *See* conventions cited *supra* note 65.

102. Prosecutor v. Tadic, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 98–99 (Oct. 2, 1995); *see also* Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶¶ 157, 174 (Feb. 20, 2001).

103. For an unofficial compilation of such rules, see generally, MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006), *reprinted in* 36 ISRAEL YEARBOOK ON HUMAN RIGHTS (special supplement) (Yoram Dinstein & Fania Domb eds., 2006).

104. *Tadic*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 127. The tribunal cited, as examples, the protection of civilians from indiscriminate attack, the protection of cultural property, the notion of taking a direct (active) part in hostilities, and prohibitions applicable in international armed conflict on specific methods and means of warfare. *Id.*

105. The ICTY's cautionary note in this regard provides little guidance in making the distinction. Specifically, it noted that only a small number of rules and principles applicable to international armed conflict have been extended to non-international armed conflict, and that "the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts." *Id.* ¶ 126.

man-being-oriented approach."[106] This being so, "the distinction between interstate wars and civil wars is losing its value" and "international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings."[107] Noble as the desire to protect human beings may be, and despite the undeniable growth of the customary law bearing on non-international armed conflict, such pronouncements are more suited to proposals of *lex ferenda* than claims of *lex lata*.

On rare occasions, the ICTY has gone too far in its willingness to articulate new law. In *Krupreskic*, it opined that the prohibition on belligerent reprisals against civilians that appears in Additional Protocol I had become customary.[108] Although admitting an absence of state practice, it argued that, in light of the Martens Clause, "principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent."[109] For the tribunal, "a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred," such that "belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts."[110] In its view, the establishment of international tribunals further augured against the need for reprisals as a means of enforcing IHL.[111]

This is a curious finding for four reasons. First, it is counterfactual; certain key states have expressed their view on the subject. In its *Commander's Handbook on the Law of Naval Operations*, the United States notes that "[r]eprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property."[112] Similarly, the British *Manual of the Law of Armed Conflict* states that reprisals "may sometimes provide the only practical means of inducing the adverse party to desist from its unlawful conduct."[113] The United

106. *Id.* ¶ 97.

107. *Id.* The same approach was taken in *Celebici*: "[T]o maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person." Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 172 (Feb. 20, 2001).

108. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶¶ 527–33 (Jan. 14, 2000).

109. *Id.* ¶ 527.

110. *Id.* ¶ 529.

111. *Id.* ¶ 530.

112. COMMANDER'S HANDBOOK, *supra* note 29, § 6.2.4.

113. U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT 421 (2004)

Kingdom specifically qualified the issue of reprisals when ratifying Additional Protocol I.[114] It even went so far as to specifically address the *Kupreskic* judgment in a footnote to its manual, stating that "the court's reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists."[115] Even the ICRC's study, *Customary International Humanitarian Law*, concludes that "[b]ecause of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians."[116] As these examples illustrate, some states still consider reprisals as militarily necessary to force an enemy to desist in its own violations of IHL.

Second, the ICTY erred in basing its reasoning on human rights law. As acknowledged by the ICJ in *Nuclear Weapons*, human rights law is conditioned by the *lex specialis* of IHL.[117] Reprisals have long been an element of the latter, so much so that set conditions for their execution are widely accepted.[118] In light of this *lex specialis*, human rights law cannot deprive reprisals of their customary character.[119]

Third, international tribunals do not suffice to enforce IHL, if only because they are of limited jurisdiction. For instance, the ICTY may only hear cases "committed in the territory of the former Yugoslavia since 1 January 1991,"[120] while the ICC's jurisdiction is limited by subject matter (reprisal against civilians is not included), party status of the state of nationality or state where the war crime is alleged to have been committed, action by the Security Council, and so forth.[121]

Fourth, and most problematic, the discussion of the customary status of reprisals was arguably unnecessary since, as the ICTY itself noted,

---

[hereinafter U.K. MANUAL].

114. *See* U.K. Reservations, *supra* note 36. The United Kingdom noted that, in the event of a "serious and deliberate attack[]" by the enemy in violation of Articles 51–55 of Additional Protocol I, it would "regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations." *Id.*

115. U.K. MANUAL, *supra* note 113, at 423 n.62.

116. 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, at 523.

117. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

118. *See, e.g.*, COMMANDER'S HANDBOOK, *supra* note 29, § 6.2.4.1; U.K. MANUAL, *supra* note 113, 421; CAN. OFFICE OF THE JUDGE ADVOCATE GEN., LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, JOINT DOCTRINE MANUAL B-GJ-005-104/FP-021, at 15-2 to -3 (Aug. 13, 2001); *see also* DINSTEIN, *supra* note 6, at 220–27.

119. For a classic treatment of the subject, see FRITS KALSHOVEN, BELLIGERENT REPRISALS (1971).

120. ICTY Statute, *supra* note 40, art. 9.

121. *See* ICC Statute, *supra* note 37, arts. 5–7, 11–15.

the parties to the conflict were bound by the "relevant treaty provisions prohibiting reprisals."[122] This rendered the entire discussion of reprisals troubling, for it meant that the tribunal took on a highly controversial issue, while recognizing there was no need to do so, and proceeded to purportedly find the law.

The lesson to be drawn from the foregoing discussion is that while international tribunals represent a positive step forward in filling IHL's enforcement void, their influence on the interpretation and application of the law, despite the fact that their judgments theoretically apply only to the case at hand, is significant. This rings especially true with regard to the balance between military necessity and humanity. A clear propensity exists to inflate the effect of the latter; indeed, the ICTY has admitted as much. When they engage in such activism, international tribunals supplant states in their role as the arbiter of the balance.

B. Other Influences on the Balance

Courts are not alone in acting as informal influences on the balance between military necessity and humanity. Nongovernmental organizations (NGOs) have increasingly moved from oversight and advocacy of human rights into the field of international humanitarian law. In particular, a number of prominent organizations have begun to issue reports on IHL compliance during armed conflicts. This is, in general, a positive trend, for NGOs can often mobilize effective pressure on states to comply with the law, or help ostracize those which do not. Moreover, they enjoy access to nonstate actors in conflicts which official organs do not, thereby enhancing the likelihood of compliance. That said, NGOs typically exist for purely humanitarian purposes. Thus, their perspective on IHL is far from neutral, often departing from that of states. The fact that NGOs sometimes lack the military expertise to conduct an informed balancing complicates matters.

Numerous examples can be cited to illustrate this dynamic. In 1999, NATO commenced Operation Allied Force, the air campaign against the Federal Republic of Yugoslavia to stop the slaughter of Kosovar Albanians and force Slobodan Milosovic back to the bargaining table.

122. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Trial Chamber Judgment, ¶ 536 (Jan. 14, 2000). In 1993, both Croatia and Bosnia and Herzegovina were parties to Additional Protocols I and II, in addition to the four Geneva Conventions of 1949. *See* International Committee of the Red Cross, State Parties to the Following International Humanitarian Law and Other Related Treaties as of 13-Apr-2010, http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf.

Amnesty International (AI) conducted a comprehensive review of the campaign.[123] The report's title, *"Collateral Damage" or Unlawful Killings?*, revealed its inherent bias. Further, of the 14,000-plus strike sorties conducted by NATO, AI identified only nine incidents—hardly a statistically meaningful set.[124]

The report contained numerous questionable applications of IHL. For instance, consider AI's criticism of high-altitude bombing on the basis that the tactic heightened risk to civilians. The NGO alleged that the practice violated the requirement to take precautions in attack, such as verifying the target, selecting methods of attack that minimize civilian casualties, and determining whether an attack already underway needs to be aborted because it might violate the principle of proportionality.[125]

In part, NATO's release altitude (not less than 15,000 feet; later adjusted downward) was motivated by a desire to stay outside the threat envelope of Yugoslavian air defenses.[126] AI perceived this as an imbalance in favor of military necessity at the expense of humanity, ignoring the fact that precision guided weapons operate optimally at certain altitudes which allow them sufficient time to fix onto a target and "zero-in" on their aim points.[127] Under certain circumstances, flying at lower altitudes may actually decrease accuracy. Further, a pilot flying within a threat envelope is often distracted by enemy defenses, thereby rendering weapons delivery less controlled.

AI also criticized NATO's failure to issue warnings of attack, an arguably customary norm codified in Additional Protocol I, Article 57(2)(c). Although acknowledging that warnings are not required when "circumstances do not permit," AI wondered whether, "[g]iven all the other measures taken in order to avoid NATO casualties (including high-altitude bombing), one might question whether sparing civilians was given sufficient weight in the decision not to give warnings."[128] It also noted that aircraft survival could not explain the absence of warn-

123. *See generally* Amnesty Int'l, *NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, AI Index EUR 70/018/2000, June 5, 2000, *available at* http://www.amnesty.org/en/library/info/EUR70/018/2000.

124. For the case studies, see *id.* at 27–63. On the air strikes, see DEP'T OF DEF., REPORT TO CONGRESS: KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT 69 (2000).

125. Amnesty Int'l, *supra* note 123, at 15–17. The rule is codified in Additional Protocol I, *supra* note 7, art. 57(2); *see also* COMMANDER'S HANDBOOK, *supra* note 29, §§ 8.1, 8.3.1; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, ch. 5.

126. *See* DEP'T OF DEF., *supra* note 124, at xxiv, 65–66.

127. *Id.* at 16.

128. Amnesty Int'l, *supra* note 123, at 17.

ing when NATO employed cruise missiles.[129] Aside from the technological error in the assessment, such criticism can only apply to strikes against fixed targets. Warnings in the case of movable targets or combatants would surely result in a failed mission since the targets would simply leave the area as soon as they received word of an impending attack. The report completely ignored this military reality.[130]

In 2003, Human Rights Watch (HRW) issued a similar report on U.S. operations in Iraq.[131] Provocatively titled *Off Target*, it evidenced a much better grasp of IHL than did AI's *Collateral Damage*.[132] However, it too reflected a particular bias towards interpretations of IHL that emphasize humanity at the expense of military necessity. For example, the United States conducted fifty leadership strikes, all of which proved unsuccessful, but which caused dozens of civilian casualties. HRW singled out targeting based on satellite phone-derived geo-coordinates during these attacks for particular criticism, arguing that the tactic "turned a precision weapon into a potentially indiscriminate one."[133]

This misstates the law. An indiscriminate weapon, or method of attack, is one "which cannot be directed at a specific military objective."[134] In other words, weapons must be capable of being aimed at a target, such that the strike is more than simply a "shot in the dark." In the leadership attacks, the use of precision weapons combined with phone intercepts ensured the weapon would strike in the general vicinity of the intended target. Additionally, the strikes were often corroborated by human intelligence. HRW missed the fact that IHL mandates no specific degree of accuracy in either weapons or tactics; it simply bars those that cannot be aimed.[135]

---

129. *Id.*

130. Moreover, the criticism is contradictory in light of the earlier condemnation of high-altitude bombing, which Amnesty International characterized as posing a greater risk to civilians.

131. *See generally* HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ, Dec. 11, 2003, *available at* http://www.hrw.org/en/reports/2003/12/11/target.

132. *See* Michael N. Schmitt, *The Conduct of Hostilities During Operation Iraqi Freedom: An International Humanitarian Law Assessment*, 6 Y.B. INT'L HUMANITARIAN L. 73 (2003). The response by HRW is found in Dinah PoKempner, Marc Garlasco & Bonnie Docherty, *Off Target on the Iraq Campaign: A Response to Professor Schmitt*, 6 Y.B. INT'L HUMANITARIAN L. 111 (2003).

133. HUMAN RIGHTS WATCH, *supra* note 131, at 24.

134. Additional Protocol I, *supra* note 7, art. 51(4)(b).

135. IHL also bars the use of weapons which, although capable of being aimed at a military objective, have effects on the civilian population which cannot be controlled by the attacker. This aspect of the prohibition, however, does not bear on the HRW criticism. *See id*. art. 51(4)(c).

The problem was not accuracy, but rather that the targeted individuals continuously moved. The relevant legal issue is taking "feasible" precautions in attack to minimize civilian casualties.[136] Feasibility is generally understood as meaning "that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations."[137] In executing these strikes, U.S. forces employed time-sensitive targeting methodologies because of concern that the target might depart. This would appear to satisfy the general proposition that the adequacy of precautionary measures is to be judged on a case-by-case basis.[138] Moreover, the report neglected to address the very relevant issue of proportionality. In these cases, the military advantage of decapitating the enemy command and control system would have been enormous. That the strikes proved unsuccessful is irrelevant: the legal question is the relationship between expected harm and anticipated advantage in the operation as planned, not that which eventuated.

Reports evidencing a bias towards the humanity component of the balance are not limited to human rights NGOs. The recent United Nations *Goldstone Report* on Israeli Operation Cast Lead is a case in point.[139] Criticized heavily by a number of states,[140] it repeatedly mis-

136. *See* Additional Protocol I, *supra* note 7, art. 57(2); COMMANDER'S HANDBOOK, *supra* note 29, § 8.3.1; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, at 54.

137. *See* discussion *supra* note 36. This was the position taken by the United States and its NATO allies at the Diplomatic Conference leading to the adoption of Additional Protocol I. *See* MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 362 (1982). The ICRC's *Commentary on the Additional Protocols* suggests that "[w]hat is required of the person launching an offensive is to take the necessary identification measures in good time in order to spare the population *as far as possible*." AP COMMENTARY, *supra* note 38, at 682 (emphasis added). The *Commentary* acknowledges that the availability of technical assets is a relevant consideration. *Id.* As noted in the report to the prosecutor on the NATO bombing campaign during Operation Allied Force, "[t]he obligation to do everything feasible is high but not absolute." Int'l Criminal Tribunal for the Former Yugo., *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶ 29 (June 13, 2000), *available at* http://www.icty.org/x/file/Press/nato061300.pdf.

138. Prosecutor v. Galic, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 133 (Nov. 30, 2006).

139. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶¶ 29–31, U.N. Doc. A/HRC/12/48 (2009) [hereinafter *Goldstone Report*], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf.

140. The U.S. House of Representatives passed a resolution condemning the report. *See* H.R. Res. 867, 111th Cong. (2009). But the UN General Assembly subsequently passed a resolution adopting the report. G.A. Res. 64/10, U.N. Doc. A/RES/64/10 (Nov. 5, 2009). Eighteen nations

balances military necessity and humanity. For instance, the report criticizes attacks on police stations on the basis that policemen are civilians. With regard to Gaza, this is a questionable proposition as a matter of law.[141] While acknowledging that some members of the police force may also have been members of the al-Qassam Brigades or other armed groups, and thus combatants,[142] the report nonetheless concluded that

> the deliberate killing of 99 members of the police at the police headquarters and three police stations during the first minutes of the military operations, while they were engaged in civilian tasks inside civilian police facilities, constitutes an attack which failed to strike an acceptable balance between the direct military advantage anticipated (i.e. the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (i.e. the other policemen killed and members of the public who would inevitably have been present or in the vicinity). The attacks . . . constituted disproportionate attacks in violation of customary international humanitarian law.[143]

Proportionality evaluations require consideration of both the expected incidental civilian casualties and the anticipated military advantage.[144] Only when the former is excessive relative to the latter does an attack violate the proportionality principle. In the absence of any indication as to the number of police at the target area who qualified as "combatants" for targeting purposes, or their role in the conflict, it is impossible to make any such assessment; yet, the report does just that.[145] Seemingly, the element of military advantage (which accounts for military necessi-

---

including the United States voted against the resolution; forty-four abstained. Israel issued its own report on the operation. *See* THE STATE OF ISRAEL, THE OPERATION IN GAZA, 27 DECEMBER 2008–18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS (2009), *available at* http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf [hereinafter OPERATION IN GAZA].

141. OPERATION IN GAZA, *supra* note 140, ¶¶ 238–48. On the status of organized armed groups, see generally NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION UNDER INTERNATIONAL HUMANITARIAN LAW (2009). For a discussion of the topic, see *infra* text accompanying notes 172–75.

142. *Goldstone Report*, *supra* note 139, ¶ 434.

143. *Id.* ¶ 435 (internal citation omitted).

144. Additional Protocol I, *supra* note 7, art. 51(5)(b).

145. "Combatants" is used here in the broadest sense of the term, because combatants are either members of the armed forces, *see* GC III, *supra* note 23, art. 4(a), or civilians directly participating in hostilities, *see* Additional Protocol I, *supra* note 7, art. 51(3); *see also infra* text accompanying note 169.

ty) in the proportionality principle appears to have been discarded altogether.

The report also badly mischaracterizes the obligation to provide "effective advance warning . . . of attacks which may affect the civilian population, unless circumstances do not permit,"[146] by imposing requirements for effectiveness that are found nowhere in IHL. According to the report, an effective warning

> must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm of hoax may undermine future warnings, putting civilians at risk.[147]

The *Goldstone Report* goes on to confuse the warning requirement with the principle of proportionality. Although correctly acknowledging that the requirement for warnings may be limited in cases where the element of surprise might be forfeited, it asserts that "[t]he question is whether the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation."[148] No basis exists in IHL for applying this proportionality standard to the warnings requirement; they are separate and distinct norms. Conflating the two upsets the agreed-upon balance resident in them. What the authors of the report have neglected is that an attacker is already required to assess the proportionality of a mission as planned; the issuance of warnings would be a factor in that analysis, as would other factors such as timing of the attack, weapons used, tactics, life patterns of the civilian population, reliability of intelligence, and weather. A subsequent proportionality anal-

146. Additional Protocol I, *supra* note 7, art. 57.2(c). Nonparty states recognize the requirement as customary. For instance, *The Commander's Handbook on the Law of Naval Operations* provides that "[w]here the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy." COMMANDER'S HANDBOOK, *supra* note 29, § 8.9.2.

147. *Goldstone Report*, *supra* note 139, ¶ 528.

148. *Id.* ¶ 527.

ysis would consequently be superfluous. Additionally, the warning requirement applies whenever the attack "may affect the civilian tion."[149] Warnings must be issued even if the collateral damage expected in the absence of a warning would not be excessive relative to the anticipated military advantage and even if they are unlikely to minimize harm to civilians and civilian objects (as in the case of regularly unheeded warnings). Thus, the position proffered in the report paradoxically sets a lower humanity threshold than required by IHL.

Equally confusing are the practical measures required by the *Goldstone Report*. The ICRC's commentary to Article 57 cites three examples of warnings: leaflets, radio warnings, and low-altitude flights over populated target areas.[150] It goes on to note that "warnings may . . . have a general character."[151] Operation Cast Lead warnings included approximately 165,000 telephone calls, the dropping of 2,500,000 leaflets, radio broadcasts, and "roof-knocking"—warning shots fired at rooftops after the individuals inside had ignored earlier warnings.[152] Astonishingly, the report found these measures insufficient, despite the fact that they constituted probably the most extensive, and most specific, warnings of offensive operations over such a short period in the history of warfare.[153]

The military necessity-humanity balance was also distorted by the claim that "effective" warnings must instruct the civilian population as to the steps necessary to avoid harm. It is the party subject to attack, not the attacker, which bears the responsibility for taking precautions against the effects of attack.[154] The report further asserted that the population should be able to know when a warning will actually be followed by an attack. For operational (or perhaps even humanitarian) reasons, some attacks are always canceled. No ground exists in IHL for charging the attacker with responsibility for countering the population's reaction to the fact that warned attacks did not take place.[155]

---

149. Additional Protocol I, *supra* note 7, art. 57(2)(c).

150. AP COMMENTARY, *supra* note 38, at 686.

151. *Id.* at 687.

152. *Goldstone Report*, *supra* note 139, ¶¶ 498–99 (citing OPERATION IN GAZA, *supra* note 140, ¶ 264; Israel Ministry of Foreign Affairs, IDF Issues Warnings to the Civilians of Gaza (Jan. 7, 2009), http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population_7-Jan-2009.htm).

153. *Goldstone Report*, *supra* note 139, ¶ 37.

154. Additional Protocol I, *supra* note 7, art. 58; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, ch. 6.

155. The report also criticized prerecorded messages with generic information on the basis that they were not effective, *Goldstone Report*, *supra* note 139, ¶ 529, even though the ICRC

Finally, the report argued that roof-knocking "constitutes a form of attack against the civilians inhabiting the building"[156] and that "an attack, however limited in itself, can[not] be understood as an effective warning in the meaning of article 57 (2) (c)."[157] But any building that contains or will be used by combatants, or the location of which is militarily significant, qualifies as a military objective against which attack is permitted.[158] The presence of noncombatants therein is a matter of proportionality, not one of directly attacking civilians. Moreover, in many of these cases the civilians had already been warned by phone. Their failure to heed the warning cannot possibly be understood to create a continuing duty to warn. Once warned effectively, the requirement has been met.

In sum, on the issue of warning, the *Goldstone Report* badly distorts IHL's balance between military necessity and humanity. It imposes requirements that both have no basis in the law and which run counter to state practice and military common sense.

That NGOs and the UN Human Rights Commission tend to tilt the balance in the direction of humanity should come as no surprise. But recent ICRC activities suggest that the organization, home to some of the best minds in IHL, may be moving in this direction as well. According to the ICRC's statutes, its missions include "[working] for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and [preparing] any development thereof."[159] This mission applies only to IHL as it currently exists, not advocacy of its evolution in any particular direction. With regard to lawmaking, the ICRC is only to "prepare" for development, which as a matter of law occurs through the actions of states.

Two fairly recent efforts arguably exceed this mandate. In 1995, the Twenty-Sixth International Conference of the Red Cross and Red Crescent tasked the organization to "prepare . . . a report on customary rules of international humanitarian law . . . and to circulate the report to States and competent international bodies."[160] Ten years later, the ICRC re-

---

commentary on Article 57 specially cites the possibility of issuing general warnings. AP COMMENTARY, *supra* note 38, at 687.

156. *Goldstone Report*, *supra* note 139, ¶ 37.

157. *Id.* ¶ 533; *see also supra* text accompanying note 31 (defining "military objective").

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

159. Statutes of the International Committee of the Red Cross art. 4(1)(g), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/icrc-statutes-080503.

160. Int'l Comm. of the Red Cross, 26th International Conference of the Red Cross and Red Crescent, *Annex II: Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995: Recommendations*, 310 INT'L REV. RED CROSS 55 (1996)

leased the monumental three-volume *Customary International Humanitarian Law* study.[161]

Since customary law is by nature unwritten, the final report amounted to an unofficial codification of IHL, one which, unlike treaties, was not subject to state sanction. Although it cannot be denied that many of the rules comprise customary law, the study's reception by states (and many scholars) was markedly guarded.[162] U.S. concerns, captured in a joint letter from the State Department Legal Adviser and Defense Department General Counsel, focused on methodology.[163]

Customary law emerges through general and consistent state practice combined with *opinio juris*. With regard to the former, the United States criticized the study on five grounds: (1) citation of insufficient state practice to support the customary status of certain rules; (2) the type of practice relied on, in particular written materials such as military manuals and UN General Assembly resolutions; (3) the weight afforded NGO and ICRC statements, which do not reflect state practice; (4) insufficient attention to negative practice; and (5) frequent failure to give due regard to the practice of specially affected states (and the equating of practice by states with significant experience in armed conflict with that of those with little).[164]

As to *opinio juris*, U.S. criticism focused on the repeated inference of its existence from state practice alone; conclusions based on the position of states which are parties to a relevant treaty regime, such as Additional Protocol I; and heavy reliance on the provisions of military manuals, which may be based on a sense of legal obligation, but which are also influenced by policy and operational concerns.[165] The United States also

---

(recommending that the ICRC prepare a report on the customary rules of international law); Int'l Comm. of the Red Cross, *International Humanitarian Law: From Law to Action*, Jan. 1, 1996, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMRU (endorsing this and other recommendations made in 1995 by the Intergovernmental Group of Experts).

161. *See* 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29. The final report contained 161 rules with commentary and two volumes setting forth the state practice from which the rules derived.

162. *See generally* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susan Breau eds., 2007).

163. Letter from John B. Bellinger, III, Legal Adviser, U.S. Dep't of State, and William J. Haynes, Gen. Counsel, U.S. Dep't of Def., to Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006), *available at* http://www.defense.gov/home/pdf/Customary_International_Humanitiarian_Law.pdf. The letter wisely avoided extensive citation of specific rules that it believed had not matured into custom, so as not to implicitly acknowledge the customary status of the others.

164. *Id.* at 2–3.

165. *Id.* at 3–4.

questioned the formulation of the rules, noting that many "are stated in a way that renders them overbroad or unconditional, even though state practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions."[166]

In the U.S. view, these flaws led to two general errors permeating the study: First, its assertion that "a significant number of rules contained in the Additional Protocols . . . have achieved the status of customary international law"; and second, the lack of evidence to support the customary status of many of the purported rules for non-international armed conflict.[167] In terms of the military necessity-humanity balance, these points reveal a broader concern that U.S. military options might be limited by what is essentially *lex ferenda*.

In 2009, the ICRC again attempted to clarify IHL with issuance of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (*Guidance*).[168] The product of a five-year project bringing together some of the most distinguished contemporary IHL practitioners and scholars, the *Guidance* is intended to provide direction on the customary norm codified in Additional Protocol I, Article 51(3): "Civilians shall enjoy the protection afforded by [the section of the Protocol on general protection against the effects of hostilities], unless and for such time as they take a direct part in hostilities." This short provision raises three interpretive quandaries: (1) who is a civilian? (those who are not civilians do not benefit from protection from attack, nor factor into proportionality calculations or precautions in attack requirements); (2) what acts amount to direct participation?; and (3) when does the forfeiture of protection occur? Article 13(2) of Additional Protocol II articulates an identical standard for non-international armed conflict.[169]

When consensus among the experts proved impossible to reach, the ICRC released the document as one reflecting solely its own views. A firestorm of controversy erupted.[170] Most objections can be traced to a

166. *Id.* at 4.

167. *Id.*

168. *See* MELZER, *supra* note 141. The author was a member of the group of international experts involved in the project. Many of the comments that follow reflect his experience during sessions of the experts meeting held between 2003 and 2008.

169. Additional Protocol II, *supra* note 64, art. 13(2); *see also* ICC Statute, *supra* note 37, arts. 8(2)(b)(i), 8(2)(e)(i); COMMANDER'S HANDBOOK, *supra* note 29, § 8.2.2; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, at 19–24; SCHMITT ET AL., *supra* note 103, § 2.1.1.2; U.K. MANUAL, *supra* note 113, 53–54.

170. *See, e.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. (forthcoming 2010). A forthcoming issue of the *N.Y.U. Journal of International Law and Politics* will feature critical

sense that the *Guidance* had badly distorted the military necessity-humanity balance.

Regarding the concept of civilians, the *Guidance* provides a negative definition stating that they comprise all those who are neither members of the armed forces of a party, nor participants in a *levée en masse*.[171] This approach displays sensitivity to the military necessity prong by including members of organized armed groups in the concept of armed forces, regardless of whether they comply with the requirements for combatant status, and treatment as prisoners of war, under the Third Geneva Convention.[172] As the *Guidance* perceptively states:

> [I]t would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war.[173]

However, the *Guidance* adds two further requirements: (1) that the group "belong to a Party to the conflict" (*i.e.*, the group must have a de facto relationship with a state in an international armed conflict);[174] and (2) that only those with a "continuous combat function" (such as conducting attacks) qualify as members of the group for targeting purposes.[175] Members of autonomous groups unaffiliated with the government, such as the Shi'a militia in Iraq during the early days of Operation Iraqi Freedom, are therefore civilians. So too are nonfighting members of groups affiliated with a party in an international armed conflict and of rebel groups other than dissident armed forces in a non-international armed conflict. The practical effect is to render such individuals subject to attack only while they are actually directly participating in the hostilities. By contrast, members of a state's armed forces may be attacked at any time,[176] thereby creating a double standard that benefits those who enjoy no "right" to participate in the conflict in the first place. Critics claim the requirements thereby ignore the logic of military necessity, as set forth by the ICRC itself in the excerpt above.

---

essays regarding this document.

171. MELZER, *supra* note 141, at 20.
172. GC III, *supra* note 23, art. 4(A)(2).
173. MELZER, *supra* note 141, at 22.
174. *Id.* at 23–24.
175. *Id.* at 26, 34–35.
176. *See, e.g.*, COMMANDER'S HANDBOOK, *supra* note 29, § 8.2.1.

Similar problems surfaced with respect to the notion of direct participation. The *Guidance* posits three cumulative constitutive elements: (1) the act in question must be likely to adversely affect the military capacity or capabilities of a party to the conflict or harm persons or objects that IHL protects from attacks, such as civilians; (2) a causal link must exist between the act and harm caused; and (3) there must be a nexus between the act and the conflict.[177] Although the elements generally represent a useful contribution, they suffer from a number of flaws. In particular, the approach fails to take account of acts which benefit a party to the conflict, such as conducting specialized training for combat, building defensive positions at forward locations, or repairing military vehicles or aircraft so they can quickly return to battle. The *Guidance* disregards the fact that individuals engaging in beneficial actions may sometimes pose a greater problem than fighters. To extend protection from attack to those directly enhancing the enemy's military operations and capacity makes little sense militarily.

More problematic is the causation requirement. Objections are somewhat technical and need not be explored here, but an example cited in the *Guidance* usefully illustrates how it accords disproportionate weight to the humanity prong of the balance.[178] It offers the case of assembly or storage of an improvised explosive device (IED) in a workshop as illustrative of activities which fail the test. According to the *Guidance*, the acts "may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting or detonation of that device, do not cause the harm directly."[179] In that most casualties in Iraq and Afghanistan result from IED attacks, it is unimaginable that states would agree that related activities are not "direct enough" to justify attack on those engaging in them.[180] This is particularly so since insurgents seek to emplace the devices secretly; acting on intelligence that indicates they are built at a particular location may be the only effective way to foil attack.

As to the "for such time" temporal issue, the *Guidance* adopts the position that only "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the

177. MELZER, *supra* note 141, at 46.

178. *See* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. (forthcoming 2010).

179. MELZER, *supra* note 141, at 54.

180. The experts were divided on this issue. Nearly all those with military experience or who served governments involved in combat supported the characterization of IED assembly as direct participation.

return from the location of its execution, constitute an integral part of the act."[181] Critics argue that this standard creates a "revolving door." A civilian direct participant who conducts recurring operations against the enemy would only be attackable during the period from the time of departure until return. Between operations, the direct participant could not be attacked. Again, this places members of a state's armed forces at a serious disadvantage, since they may be attacked at any time.

Although this interpretation would seem to fly in the face of a reasonable balance between military necessity and humanity, the *Guidance* claims the phenomenon serves as an "integral part, not a malfunction of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat."[182] But the reason civilians lose protection when they directly participate in hostilities is because they have chosen to be part of the conflict, not because they represent a threat. Additionally, the approach is militarily insensate. Consider again the emplacement of an IED. As noted, those who place them intentionally keep their operations secret, for if they or their device are discovered the operation can easily be foiled. Attacking them between operations based on actionable intelligence may represent the only opportunity to deter further attack. A more sensible approach would treat civilians who directly participate as valid military objectives until they unambiguously opt out of hostilities through extended nonparticipation or an affirmative act of withdrawal.[183]

The most contentious aspect of the *Guidance* is its treatment of the relationship between the principles of military necessity and humanity. According to the *Guidance*,

> [I]n addition to the restraints imposed by international humanitarian law on specific means and methods of warfare . . . the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.[184]

181. MELZER, *supra* note 141, at 65. This formula derives in part from the commentary to the direct participation articles in Additional Protocols I and II. *See* AP COMMENTARY, *supra* note 38, at 618–19, 1453.

182. MELZER, *supra* note 141, at 70.

183. *See* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 535–36 (2005).

184. MELZER, *supra* note 141, at 77.

As an example, "it would defy basic notions of humanity to kill an adversary . . . where there manifestly is no necessity for the use of lethal force."[185]

The contention represents a misapplication of the law. Most significantly, IHL already accounts for the situation through the prohibition of declaring "no quarter," and the related rule barring attacks on those who have surrendered.[186] As noted, military necessity infuses IHL; it is not a prohibition which applies over and above the extant rules. The *Guidance*'s approach also shifts the burden of decision from a direct participant fully capable of surrender to his or her adversary. Such attempts to impose a continuum of force on the battlefield, the most notable being Jean Pictet's famous dictum that "[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him,"[187] have been rejected by states and scholars alike.[188]

That the *Guidance* was promulgated by the preeminent international humanitarian law organization, yet rejected by project participants from states with the greatest involvement in contemporary armed conflict,[189] dramatizes the disquiet over the trajectory being urged on the military necessity-humanity balance by NGOs, the UN, and the ICRC.[190] Israel's decision to refuse cooperation with the Goldstone mission and the United States' disavowal of the *Customary International Humanitarian Law* study exemplify state-based push back.

---

185. *Id.* at 82.

186. Those who are *hors de combat* either because they have surrendered or are wounded and no longer fighting may not be attacked. Additional Protocol I, *supra* note 7, arts. 40–41; COMMANDER'S HANDBOOK, *supra* note 29, §§ 8.2.3, 8.2.3.3; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 29, 161–70; U.K. MANUAL, *supra* note 113, 57.

187. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75–76 (1985) (cited with approval in MELZER, *supra* note 141, at 82 n.221).

188. *See, e.g.*, Frits Kalshoven, *The Soldier and His Golf Clubs*, *in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 369 (Christophe Swinarski ed., 1984).

189. For instance, the contributors of the critical essays cited *supra* in note 170 include W. Hays Parks of the U.S. Office of the Secretary of Defense (General Counsel's Office); Brigadier General Kenneth Watkin, Judge Advocate General of the Canadian Forces; Air Commodore William Boothby of the Royal Air Force; and the author. It must be emphasized that all were writing in their personal capacities.

190. Such disquiet is exacerbated by a globalized media that can easily broadcast the tragic humanitarian consequences of warfare, but has little means to capture the military necessity of the operations that underlie them. At the same time, the academic community is increasingly populated by IHL scholars with little or no military experience. To the extent they have experienced conflict, it is often as members of humanitarian NGOs. It is unsurprising that they bring a particular perspective to the analysis of humanitarian law.

But resistance by states to what they perceive as misapplication of the balance is one thing. Arguments that conflict has so changed in the twenty-first century that existing IHL norms no longer fairly balance military necessity and humanity, and therefore, should be disregarded, are quite another. For instance, in the aftermath of the terrorist attacks of September 11, 2001, the Justice Department's Office of Legal Counsel issued a memorandum finding the 1949 Geneva Convention III provisions governing detention of those captured on the battlefield inapplicable to the ongoing conflict with al Qaeda or the Taliban, such that a decision to apply its precepts would be based solely on policy rather than law.[191] Secretary of State Colin Powell correctly objected to the President's acceptance of the position and requested its reconsideration. For Powell, the protections could only be withdrawn following decision of a status tribunal convened under Article V of the Convention.[192]

In a memorandum urging the President to adhere to his decision, White House Counsel Alberto Gonzales chillingly argued:

> [T]he war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop to the [1949 Geneva Convention on Prisoners of War]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid fur-

191. Memorandum from John Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) (on file with author); *see also* Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002) (on file with author). In response, Secretary of Defense Donald Rumsfeld instructed the Chairman of the Joint Chiefs of Staff that, while the detainees were not entitled to treatment as prisoners of war, the Combatant Commanders should nevertheless "treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949." Memorandum from Donald H. Rumsfeld, Sec'y of Def., to the Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaeda (Jan. 19, 2002) (on file with author).

192. Memorandum from Alberto R. Gonzales to the President, Decision re Application of the Geneva Conventions on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002) (on file with author). Secretary Powell sent a follow-up memorandum to Gonzales renewing his request for reconsideration. Memorandum from Colin Powell to Counsel to the President, Assistant to the President for Nat'l Sec. Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002) (on file with author). On this exchange, see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 820, 820–31 (2004). On the entire affair, see JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008).

> ther atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.[193]

On February 7, 2002, President Bush determined that the provisions did not apply to al Qaeda, and that while he could suspend application of the convention in the conflict with the Taliban, he chose not to do so. Nevertheless, he made a blanket finding that captured Taliban were unlawful combatants and that, therefore, they did not benefit from the relevant protections. For the President, "this new paradigm . . . require[d] new thinking in the law of war."[194] Such machinations are no less disruptive of IHL than those set forth above; on the contrary, they are more nefarious, since it is ultimately states which make law. Fortunately, this counter-legal trend is being slowly reversed.

CONCLUSION

Military necessity and humanity exist in fragile equipoise in international humanitarian law. On the one hand, war cannot be conducted without restriction, for states are responsible for the well-being of their populations (including combatants) and must therefore agree with potential enemies on limitations that safeguard their interests. Moreover, history has demonstrated that undisciplined forces are difficult to lead, sharpen the enemy resolve to fight on, and antagonize the population of areas under their control. Current U.S. counterinsurgency doctrine testifies to the military utility of limits on the use of force.[195] Yet, if humanitarianism reigned supreme, war would not exist. Since the tragic reality is that war does, states must be reasonably free to conduct their military operations effectively.

---

193. Memorandum from Alberto R. Gonzales, *supra* note 186.

194. Memorandum from George W. Bush to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) (on file with author). That said, he ordered that detainees be treated in accordance with the standard promulgated by Rumsfeld—that is, humanely to the extent such treatment comported with military necessity. *Id.*

195. See, for example, the approach taken in the *U.S. COIN Manual*. HEADQUARTERS, DEP'T OF THE ARMY & HEADQUARTERS, MARINE CORPS COMBAT DEV. COMMAND, COUNTERINSURGENCY, FM 3-24, MCWP 3-33.5 (2006). For a general discussion of the subject, see Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 39 ISRAEL YEARBOOK ON HUMAN RIGHTS 99 (2009).

As illustrated by the survey of treaty law, codification has resulted in a progressive trend toward emphasis on the humanity prong of the military necessity-humanity balance. States can be reasonably comfortable with this evolution because they participate in setting the balance through codification and state practice. Those which perceive a prospective norm as unbalanced may opt out of the treaty regime or engage in practice that prevents the emergence of a customary norm.

International tribunals have taken some control over the process from the hands of states. Although their decisions are of technically limited reach, the reality is that they exert significant influence on the general understanding of IHL. While tribunals have usually proved useful in confirming or interpreting IHL norms, it must be remembered that they do not operate from the same perspective as states, for they do not directly bear the consequences of their judgments as to the appropriate balance between military necessity and humanity. Accordingly, their reasoning is less focused on the balance. This explains, to a degree, the discernable preference for normative solutions emphasizing humanity at the expense of military necessity.

NGOs and others are even more unfettered in pushing the balance in the direction of humanity. After all, their *raison d'être* is to do so, and they pay no price for forfeiting a degree of military necessity. The result is, as has been illustrated, a frequent assertion of *lex ferenda* in the guise of purported *lex ferenda*. If not understood for what they are, such efforts risk distorting the prescriptive process.

What is often forgotten is that the state-based process preserves the integrity of IHL's balance by facilitating discovery, whether through codification or practice, of where consensus lies. States are uniquely situated to perform the task since they are directly affected by decisions regarding military necessity and humanity. Only they can clearly grasp the predicament posed by a rebalancing that fails to take full account of the element of military necessity. The greater the likelihood a state is to find itself entangled in armed conflict, the more likely it will be to resist such trends in order to preserve its freedom of action on the battlefield. The less war is on the horizon, the more a state will champion the principle of humanity, if only to cater to public sensibilities. Fortunately, involvement of many European states in Afghanistan and elsewhere has served as a wakeup call for those in the latter category.

In order to maintain an acceptable balance between the two principles, strict fidelity to the existing IHL rules is essential. It is not appropriate, for instance, to supplement express rules with any further re-

quirement to assess military necessity or humanity considerations; the requisite balancing has already taken place. Case-by-case determinations of where the balance should lie would generate disrespect for extant rules on the part of those negatively affected and render the norms to be applied in the fog of war less certain for all. Indeed, the need for normative clarity in part explains why customary law does not emerge until there is both general state practice and *opinio juris*.

Ultimately, the attention being afforded to international humanitarian law is a positive feature of contemporary conflict. That states, tribunals, nongovernmental and intergovernmental organizations, academics, and the general public are involved in the elucidation, dissemination, and enforcement of IHL serves to rebut Sir Hersch Lauterpacht's famous dictum that "if international law is . . . at the vanishing point of law, the law of war is . . . at the vanishing point of international law."[196] The delicate balance between the principles of military law and necessity must be maintained, lest he be proven correct.

196. H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 382 (1952).