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LL.M. Class of 2019

THE DANGER OF A PERFECT STRIKE
The Unintended Consequences of Restrictive Targeting Regimes

May 2019

Supervised by Professor Gabby Blum

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Sara Plessner Neugroschel*

ABSTRACT

This paper examines the inherent dangers in a new normative framework proscribing civilian casualties. Driven by political fear of alienating domestic audiences, damaging foreign relations, and, media rebuke, States have instituted restrictive targeting regimes. These regimes, while noble, have oft forgotten unintended consequences. The global community aspires to a utopian world of zero civilian casualties. Unfortunately, this is both a dangerous and unrealistic expectation. While targeting restrictions are morally and politically enticing, there are four primary unintended consequences: (1) increased brutality against civilians; (2) amplified civilian endangerment; (3) unrealistic expectations of a perfect war; and, (4) the development of a new norm of proportionality under customary international law (CIL). States must be cognizant of the inherent dangers of positing a policy doctrine of a perfect strike. Because a perfect strike may ultimately be imperfect to a State's ability to protect civilians and defeat an adversary. States comply with IHL even when their adversaries do not; but war remains imperfect and civilian casualties are inevitable. Civilians are subject to the perils of war so long as wars exist. States simply cannot restrict targeting to the extent that it further endangers civilian populations around the globe; it is hypocritical at best and devastating at worst.

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I. Introduction

Seizing on the power vacuum created by the dissolution of the Moaamar Qadaffi regime, the Islamic State of Iraq and the Levant (ISIL) swiftly gained territorial control in Libya. By the summer of 2015, they held a 200-kilometer swatch of land stretching from Sabratha in the west to Benghazi in the east.¹ This was their largest stronghold outside of Iraq and Syria and their base for further expansion on the African continent. By taking over all government facilities and government functionality, ISIL became the de facto government. Mutilations, beatings, and extra-judicial killings became the norm.² The Islamic State forcefully recruited Libyans, committed sexual violence against women and children, and brutally executed hundreds of civilians.³ There were also food shortages and limited access to medical supplies. Thousands of Libyans were trapped in ISIL controlled territory and it was “[h]ell on earth.”⁴

After nearly a year under ISIL control, Sirte entered the international spotlight when Islamic State militants publicly executed 21 men, on a beach, for refusing to join their ranks.⁵ When the newly formed Libyan Government of National Accord (GNA) requested U.S.

¹ See Issandr El Amrani, How Much of Libya Does the Islamic State Control?, FOREIGN POLICY, February 18, 2016, <http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/libya/op-eds/how-much-of-libya-does-the-islamic-state-control.aspx>; “We Feel We Are Cursed” Life under ISIS in Sirte, Libya, HUMAN RIGHTS WATCH, May 18, 2016, <https://www.hrw.org/report/2016/05/18/we-feel-we-are-cursed/life-under-isis-sirte-libya> [hereinafter *We Are Cursed*]; and *Libya in Conflict: IS ‘Ejected’ From Stronghold of Sirte*, BBC NEWS, Dec. 6, 2017, <https://www.bbc.com/news/world-africa-38227543>.

² *We Are Cursed*, *supra* note 1; Nico Hines, *Hell on Earth: Life Under ISIS in Libya*, THE DAILY BEAST, MAY 18, 2016, <https://www.thedailybeast.com/hell-on-earth-life-under-isis-in-libya> [hereinafter *Hell on Earth*], Merrit Kennedy, *New Report Details The Horrors of Life Under ISIS in Sirte, Libya*, NPR, May 18, 2016, <https://www.npr.org/sections/thetwo-way/2016/05/18/478550271/new-report-details-the-horrors-of-life-under-isis-in-sirte-libya> [hereinafter *Life Under ISIS*].

³ Francesca Mannocchi, “Libya’s Sirte in rubble after ISIL battle,” AL JAZEERA, 6 Dec. 2016, <https://www.aljazeera.com/news/2016/12/libya-sirte-rubble-isis-defeat-161206055401188.html>.

⁴ *We Are Cursed* *supra* note 1; *Hell on Earth*, *supra* note 2; *Life Under ISIS*, *supra* note 2.

⁵ Tom Westcott, *In Libya, a City Once Run by Islamic State Struggles to Start Again*, THE NEW HUMANITARIAN, Aug. 21, 2018, <https://www.thenewhumanitarian.org/news-feature/2018/08/21/libya-Sirte-islamic-state-struggles-rebuild>.

military assistance to liberate Sirte from ISIL control, Operation Odyssey Lightning was born.⁶ Beginning August 1, 2016, while GNA-aligned forces conducted block by block clearance of the city, the United States (U.S.) assisted with precision airstrikes.⁷ In all the U.S. carried out over 495 airstrikes.⁸ The majority of the strikes were at the bequest of GNA-aligned forces on the ground and were defensive in nature – collective self-defense – vice offensive.⁹ Because of the difficulties posed by urbanized asymmetric warfare and ISIL’s pervasive use of human shields, an Operation expected to last weeks, instead took months. Approximately 700 Libyan pro-government fighters, 2,000 ISIL members, and anywhere from 11 to 75 civilians died in Sirte between May and December 2016.¹⁰

Sirte is just one example of the atrocities perpetrated by insurgents against civilian populations.¹¹ Since it appeared in 2014, ISIL alone is believed to have inspired or directed over 175 attacks in more than two dozen countries, killing in excess of 2,300 innocent civilians.¹² And while the Islamic State’s brutality knows no bounds, other insurgents are similarly destructive to the civilian populace, including: Boko Haram, al-Shabaab, the Taliban,

⁶ Tony Bertuca, *Libya Effort Named ‘Operation Odyssey Lightning*, INSIDE DEFENSE, Aug. 2, 2016, <https://insidedefense.com/insider/libya-effort-named-operation-odyssey-lightning>.

⁷ Senior Airman Christian Clausen, *Providing Freedom from Terror: RPA’s Help Reclaim Sirte*, AIR COMBAT COMMAND, Aug. 25, 2015, <https://www.acc.af.mil/News/Article-Display/Article/1265247/providing-freedom-from-terror-rpas-help-reclaim-sirte/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Missy Ryan, *Air War in Post-Revolution Libya Has Left at Least 230 Civilians Dead, Report Finds*, THE WASHINGTON POST, Jun. 19, 2018, https://www.washingtonpost.com/world/national-security/air-war-in-post-revolution-libya-has-left-at-least-230-civilians-dead-report-finds/2018/06/19/66aae102-73d5-11e8-b4b7-308400242c2e_story.html?utm_term=.2e64e799a219 (“U.S. Africa Command has said its operations have caused no confirmed civilian casualties in Libya during that period, but Airwars and New America assessed they probably resulted in 11 to 75 noncombatant deaths”).

¹¹ While the terms insurgent, terrorist, and rebel usually designate different political objectives, ideology, or tactics, in general all three connote non-State actors that seek to overthrow, weaken, or extract concessions from State actors. For purposes of this paper the term insurgent(s) will be used to denote all three. See Daveed Gartenstein-Ross & Jacob Zenn, *Terrorists Insurgents, Something Else? Clarifying and Classifying the “Generational Challenge,”* LAWFARE, Jan. 15, 2017, <https://www.lawfareblog.com/terrorists-insurgents-something-else-clarifying-and-classifying-generational-challenge>.

¹² Pamela Quanrud, *The Global Coalition to Defeat ISIS: A Success Story*, Jan./Feb. 2018, FOREIGN SERVICE J., <http://www.afsa.org/global-coalition-defeat-isis-success-story>.

Liberation Tigers of Tamil Eelam (LTTE), and al Qaeda in the Arabian Peninsula (AQAP) among others.¹³

Although Sirte remains in rubble, Operation Odyssey Lightning is considered a success. It stopped the expansion of ISIL in the Sahel and is assessed to have resulted in very few civilian casualties.¹⁴ Sirte is indicative that in today's wars States go to great lengths to avoid killing civilians. They use advanced technology, rely on a multitude of intelligence, and program munitions to minimize collateral damage. However, just like in Sirte, sometimes civilians are killed. For States complying with international humanitarian law (IHL), civilians are never the direct target of an attack but an unfortunate consequence of the reality of war. Although every loss of an innocent life is devastating, the law of armed conflict expressly permits collateral damage so long as it is not expected to be excessive in relation to the anticipated military advantage. This is the core principle of proportionality.

However, despite IHL's allowance for civilian casualties, society believes that killing one civilian is one too many. That it is a natural flaw in the targeting process. There is no societal tolerance for civilian casualties. This has led to the development of a new norm of stricter targeting parameters than the law of war dictates. The United States for instance, has put a premium on avoiding civilian casualties using artificially imposed non-combatant casualty cutoff values (NCVs).¹⁵ NCVs predetermine the number of civilians – oftentimes zero – that can be considered collateral damage, even if their death would legally comply with the law of armed conflict.

¹³ See, *Global Terrorism Index 2018: Measuring the Impact of Terrorism*, INST. FOR ECON. & PEACE, 2018, <http://visionofhumanity.org/indexes/terrorism-index/> [hereinafter GTI 2018].

¹⁴ Peter Bergen & Alyssa Sims, *Seven Years After Obama's 'Worst Mistake,' Libya Killing is Rampant*, CNN, Jun. 20, 2018, <https://www.cnn.com/2018/06/20/opinions/libya-chaos-civilian-deaths-bergen-sims/index.html>. See also, Ryan, *supra* note 10 (While the U.S. reports zero civilian casualties, other entities indicate anywhere from 11 to 75).

¹⁵ Scott Graham, *The Non-Combatant Casualty Cut-Off Value: Assessment of a Novel Targeting Technique in Operation Inherent Resolve*, 18 INT'L CRIM. L. REV., 655, 679-680 (2018).

This paper examines the development of this new normative framework surrounding proportionality and the inherent but unanticipated dangers associated with the continued application of targeting restrictions. In no way do I mean to suggest that the approaches taken by the U.S. and other States are not inherently ethically sound and morally imperative, in fact I applaud their effort to avoid civilian casualties at all costs. International humanitarian law compounded by the international community's aversion to killing civilians demands it. However, this paper examines the inherent danger in a new normative framework proscribing civilian casualties; what can and will ultimately transpire if State policies become too restrictive. I begin my argument, in Part II, with a discussion of IHL focusing on *jus in bello* and modern day asymmetric warfare. Proceed in Part III to an analysis of State policies restricting targeting and the impetus behind their development. And in Part IV turn to heart of the matter, the unintended consequences of these restrictive regimes.

The dangers of restrictive targeting regimes stem from the modern day nature of conflict – asymmetric and urbanized. Asymmetric conflicts present unique strategic, tactical, and moral challenges for States. Insurgents have developed a new combat doctrine enshrining the concept of fighting from within urban areas and using civilians as human shields.¹⁶ Restrictive proportionality regimes immunize areas saturated with civilians from attack, countenancing insurgents to continue brutalizing civilian populations under their control. For as Laurie Blank cautions:

[I]f the bare fact of civilian casualties were to become the measure of whether the overall use of force in self-defense is lawful, the international legal framework governing the use of force in self-defense would be undermined. Any military operation causing civilian casualties would then be considered

¹⁶ Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STAN. L. & POL'Y REV., 93, 126 (2011), see also, Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT'L L. STUD. SERIES U.S. NAVAL WAR C. 307, 322 (2009).

unlawful, even if a valid exercise of self-defense, emasculating state options for protecting their own civilians against attack.

Not only does it emasculate State options for protecting their own civilians, but also undermines the global community's ability to protect civilians in States with less robust defense mechanisms.

II. International Humanitarian Law and Asymmetric Warfare

A party's decision to use force, *jus ad bellum*, is irrelevant to the requirement to comply with international humanitarian law during armed conflict. Thus we will focus on conduct during war, *jus in bello*, for purposes of this paper.¹⁷ *Jus in bello* is synonymous with international humanitarian law, the law of armed conflict, and the law of war. IHL is applicable to both international and non-international armed conflicts, without regard to whether those fighting are State military forces or non-state armed groups.¹⁸

In an ongoing effort to codify the international customs of warfare, Protocols I and II of the 1949 Geneva Conventions were opened for signature in 1977.¹⁹ The Additional Protocols

¹⁷ Jenny Martinez & Antoine Bouvier, *Assessing the Relationship Between Jus in Bello and Jus ad Bellum: An "Orthodox" View*, 100 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L. ANN. MEETING, 109-112 (2006).

¹⁸ *Humanitarian Law, International*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, last updated Dec. 2015, <http://opil.ouplaw.com.ezp-prod1.hul.harvard.edu/view/10.1093/law:epil/9780199231690/law-9780199231690-e488?rskey=aFAp3l&result=1&prd=EPIL> [hereinafter MAX PLANCK IHL]. See also, *What are Jus ad Bellum and Jus in Bello?* INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> (last visited May 2, 2019). See also, *Prosecutor v. Sam Hinga Norman* (Case No. SCSL-2004-14-AR72(E)), Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of May 31, 2004, para. 22., retrieved from <https://sierralii.org/sl/judgment/special-court/2004/18> (Appellate Chamber of the Sierra Leone Special Court holding that "it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.").

¹⁹ See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, arts. 51-52 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, Part IV [hereinafter Protocol II]. See also, Michael J. Matheson, *Session I; 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, 420 (1987) (Although the U.S. has not ratified Protocols I or II, they are recognized as customary international law).

(hereinafter AP I and AP II) further limited parties' choice of means and methods of warfare by focusing on civilian protection.²⁰ The Protocols codify the four fundamental principles of IHL: distinction, military necessity, unnecessary suffering, and proportionality.²¹ Underlying all four of these principles is the admonishment that the conduct of war is not without its limits and that protecting civilians is of the utmost import.²² States are bound by IHL regardless of the enemy they combat. This is particularly important in today's conflicts, where insurgents are apt to reject the entire premise of IHL. After a short discussion on military necessity, unnecessary suffering (humanity), and distinction, the focus will shift to proportionality and the duty to protect civilians under IHL.

The principle of military necessity requires forces to engage in only those acts necessary to accomplish a legitimate military objective, dictating that armed force is only just when required to repel a threat. Part and parcel to military necessity is whether the target of the attack is a valid military objective. Article 52 of AP I describes military objectives as "... those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."²³ The principle of

²⁰ While AP I focuses on international armed conflicts (IACs) and AP II on non-international armed conflicts (NIACs), according to the ICRC gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to NIACs vice required by Treaty. The IHL Database on Customary IHL catalogues these 161 rules of customary international humanitarian law. All citations to API in this documents are reflective of customary international law and thus parties to a conflict (regardless of NIAC are IAC) are bound). See IHL Database on Customary IHL available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. The IHL Database on Customary IHL catalogues the 161 rules of customary international humanitarian law. All citations to API in this documents are reflective of customary international law and thus parties to a conflict (regardless of NIAC are IAC) are bound).

²¹ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR*, 250-285 (2010).

²² Protocol I, *supra* note 19 at 30 (reading that "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.")

²³ Protocol I art. 52, *supra* note 19, at 38.

military necessity legally justifies attacks against targets that are valid military objectives because such attacks are critical to securing the swift submission of the enemy.

The principle of unnecessary suffering, also referred to as humanity, stems from the Hague Convention's restrictions against using weapons to cause suffering or injury manifestly disproportionate to the military advantage realized by the use of a weapon for legitimate military purposes. It was formally codified in AP I, providing, "[i]t is prohibited to employ weapons and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."²⁴ It is a norm aimed at protecting combatants. The International Court of Justice (ICJ), in its Nuclear Weapons Advisory Opinion of 1996, counts this provision among the "intransgressible principles of international customary law."²⁵

We now turn to distinction and proportionality, the two principles dedicated to protecting civilians. The principle of distinction is the bedrock of the law regulating the conduct of hostilities.²⁶ It requires parties to a conflict to distinguish at all times between combatants and civilians. Civilians and civilian objects may not be attacked and operations may only be directed against military objectives.²⁷ AP I, art. 48 mandates that "...[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."²⁸ Art. 51 reiterates the premise that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack,"²⁹ and adds on that "[a]cts

²⁴ Protocol I art. 35(2), *supra* note 19, at 30.

²⁵ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996 I.C.J. at 35, ¶ 79 (July 8, 1996).

²⁶ MAX PLANCK IHL, *supra* note 18.

²⁷ *Id.*

²⁸ Protocol I, *supra* note 19, at 36 (art. 48).

²⁹ *Id.* at 37 (art. 51).

or threats of violence the primary purpose of which is to spread terror among the civilian population are [also] prohibited.”³⁰

The principle of distinction imposes obligations on both sides of the conflict, prohibiting intentional attacks on civilians. It does not however preclude all harm to civilians. Distinction addresses only the deliberate targeting of civilians and not incidental harm. This understanding was made explicit by numerous States in their ratification of API.³¹ The allowance for incidental harm under IHL stems from the principle of proportionality, which is the principle most relevant to today’s restrictive targeting regimes and will be discussed in-depth.

Pursuant to the principle of proportionality, parties to a conflict have a duty to not only refrain from attacking civilians deliberately, but also must make extensive efforts to minimize the incidental harm on civilian populations. Proportionality therefore requires that combatants use only the minimum amount of force necessary to accomplish their military objectives. As reflected in AP I, the principle prohibits attacks “...which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”³²

In providing that attacks against valid military targets are permissible so long as civilian deaths are not excessive to the military advantage gained, the principle implies that some

³⁰ *Id.*

³¹ Australia, Canada, France, Italy, New Zealand and the United Kingdom all expressly stated upon ratification that Article 52(2) of Additional Protocol I was neither intended to address, nor did it address, the question of incidental or collateral damage resulting from an attack directed at a military objective. See PRACTICE (ch. 2) in INT’L COMM. OF THE RED CROSS, CUSTOMARY INT’L HUMANITARIAN L., 2, ¶¶86-91 (2005).

³² Protocol I, *supra* note 19, at 36 (art. 51(5)(b)).

collateral damage is inevitable.³³ This means that the mere fact of civilian casualties, even in significant numbers, does not in and of itself establish a violation of international law. While this may sound indelicate, the fact remains that under IHL civilians can be killed and injured legitimately. Kenneth Watkin, the Canadian Judge Advocate General explained, “although civilians are not to be directly made the object of an attack, humanitarian law accepts that they may be killed or civilian property may be damaged as a result of an attack on a military objective.”³⁴

There is however, an inherent difficulty to assessing proportionality. As Professor Bruce Cronin reminds us, “[p]roportionality is the most difficult of the four principles to assess in practice since it requires balancing two incompatible values, civilian casualties and military advantage, both of which require subjective evaluations.”³⁵ It is the manifestation of the delicate balance between defeating the enemy while mitigating civilian suffering.³⁶ In their review of the North Atlantic Treaty Organization’s (NATO) bombing campaign in the former Yugoslavia, the Committee established to review the campaign articulated the tensions inherent in proportionality assessments:

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. ... Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than

³³ Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT’L L. 431, 462 (2004).

³⁴ Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 Y.B. OF INT’L HUMANITARIAN L. 3, 9 (2005).

³⁵ Bruce Cronin, *Reckless Endangerment Warfare: Civilian Casualties and the Collateral Damage Exception in International Humanitarian Law*, 50(2) J. OF PEACE RESEARCH, 175, 176-177 (March 2013).

³⁶ Kenneth Anderson, *Laurie Blank Follow-up on Gaza, Proportionality, and the Law of War*, THE WASHINGTON POST, Aug. 6, 2014, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/06/laurie-blank-follow-up-on-gaza-proportionality-and-the-law-of-war/?utm_term=.a2aa98a063b2.

it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.³⁷

Additionally, while, AP I attests that civilian losses may not be “excessive” there is no clear cut guidance for what constitutes excessiveness.³⁸ As Luis Morena-Ocampo articulated, while Chief Prosecutor of the International Criminal Court:

Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives when it is known that some civilian deaths or injuries will occur.³⁹

Because this balancing is so fundamentally difficult, IHL mandates the need to assess proportionality from the standpoint of a what was known at the time of the strike using the ‘reasonable’ person standard. Per the International Criminal Tribunal for the Former Yugoslavia, “...it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”⁴⁰

Yoram Dinstein cautions that society, particularly the media, is apt to misconstrue the presence of civilian casualties as violations of international humanitarian law:

It is frequently glossed over (especially in the media) that LOAC takes some collateral damage to enemy civilians virtually for granted as an inescapable consequence of attacks against lawful targets. Such damage is the case owing to the simple fact that lawful targets cannot be sterilized: some civilians and civilian objects will almost always be in proximity to combatants and military objectives. Hence a modicum of collateral damage to civilians cannot

³⁷ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, LEGACY WEBSITE OF THE ICTY ¶ 48, <http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal> [hereinafter NATO Bombing].

³⁸ Protocol I, *supra* note 19, at 38 (art. 51(5)(b)).

³⁹ Cronin, *supra* note 35, at 177.

⁴⁰ *Prosecutor v. Stanilav Galic* (Appeal Judgement), IT-98-29-A, International Criminal Tribunal for the former Yugoslavia (ICTY), Nov. 30, 2006, ¶ 59, available at <http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf>; Case No. STL-11-01/I Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Feb. 16, 2011), ¶ 108, available at <https://www.stl-tsl.org/en/rule-176bis-decision>.

possibility be avoided unless a battle rages in the middle of the ocean or the desert (where no civilians or civilian objects are within range of the contact zone in which the belligerent parties are conducting attacks against each other). Far from imposing an all-embracing prohibition on collateral damage to enemy civilians and civilian objects, LOAC expressly permits it as long as (in the words of Additional Protocol I) it is not expected to be “excessive”, compared to the military advantage anticipated. This is the core of the principle of proportionality (the word “proportionality” itself is not mentioned as such in the Protocol). And “excessive”—we have to keep reminding ourselves—is not synonymous with “extensive.” Extensive civilian casualties (and damage to civilian objects), even when plainly expected, may be perfectly lawful when reasonably determined to be nonexcessive (on the basis of the information at hand at the time of action) once weighed against the military advantage anticipated.⁴¹

His words are an admonishment that civilian casualties, even when extensive, are not automatically indicative of war crimes.

While, the principles of distinction and proportionality are both negative obligations of States to protect civilians, they are only part of the full legal regime. Parties to a conflict also have positive obligations to protect civilian populations. These include prohibiting collocation with civilian populations and the use of human shields. Article 51(7) of AP I⁴² is clear in that:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour [sic] or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁴³

Additionally, necessary precautions require parties to take care to spare the civilian population, civilians and civilian objects.⁴⁴ A requirement of customary international law frequently ignored by insurgents are those of Article 58 of AP I, “...endeavour [sic] to remove

⁴¹ Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, 87 INT’L LAW STUDIES: INT’L LAW AND THE CHANGING CHARACTER OF WAR, 463, 465–66.

⁴² State practice establishes this rule (Precautions in Attack) as a norm of customary international law applicable in both international and non-international armed conflicts. See IHL Database on Customary IHL available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15.

⁴³ Protocol I, *supra* note 19, at 38 (art. 51(7)).

⁴⁴ *Id.* at 41-21 (art. 57).

the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”⁴⁵ and “avoid locating military objective within or near densely populated areas.”⁴⁶ These mandates however, are often ignored during modern day asymmetric warfare.

While the media often treats asymmetric warfare as something novel, this is a misconception; it has been prevalent in recent decades.⁴⁷ As the modern battlefield moves to urban areas, the natural consequence is expanded civilian involvement in hostilities. This places increasing obligations on the parties to minimize harm to civilians, as IHL dictates. But the reality is that today, asymmetric warfare does not necessarily connote the traditional view that one party is military stronger than the other. Instead it has evolved into an indication that one party is observant of IHL while the other party is not.⁴⁸ In modern conflicts insurgents murder civilians, collocate with civilian populations, and use civilians as shields with alarming regularity.⁴⁹

In addition to the abhorrent practice of directly targeting civilians and using civilians as shields, modern day asymmetric warfare is imbued with the utilization of lawfare. Maj. Gen. Charles Dunlap, Jr., USAF (Ret.) introduced the term “lawfare” to describe the use of law as a weapon of war. In Dunlap’s words it is “the exploitation of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting” a superior military power.⁵⁰ According to the Lawfare Project, it is the “negative manipulation

⁴⁵ *Id.* at 42 (art. 58(a)).

⁴⁶ *Id.* at 42 (art. 58(b)).

⁴⁷ Michael Walzer, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS*, xiii (2015) (1977).

⁴⁸ Ami Ayalon, Elad Popovich & Moran Yarchi, *From Warfare to Imagefare: How States Should Manage Asymmetric Conflicts with Extensive Media Coverage*, in *TERRORISM AND POLITICAL VIOLENCE* 254, 257 (2016).

⁴⁹ John F. Murphy, *International Law in Crisis: Challenges Posed by the New Terrorism and the Changing Nature of War*, 44 *Case W. Res. J. Int’l L.* 59, 74 (2012)

⁵⁰ Charles J. Dunlap Jr, *Lawfare Amid Warfare*, *THE WASHINGTON TIMES*, Aug. 3, 2007, <https://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/>.

of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted.”⁵¹

In what became a consistent execution of lawfare, the Taliban systematically inflated civilian casualties to combat the U.S. led coalition in Afghanistan.⁵² A report obtained from the United Kingdom Ministry of Defence indicated that media outlets would report using the inflated casualty numbers bringing condemnation upon Coalition efforts; “[t]he Taliban is engaged in a deliberate policy of disinformation in an attempt to undermine support for the allied attacks on the Taliban and al-Qaeda.”⁵³ THE GUARDIAN reported that “Pentagon officials are dismayed by the extent of Taliban disinformation because of its impact on the battle for ‘hearts and mind’ being fought in the Middle East.”⁵⁴

Insurgents are increasingly pursuing campaigns of lawfare to undermine their State adversaries. Professor John Murphy highlights the irony, “[insurgents] such as al-Qaeda have enjoyed considerable success in utilizing ‘lawfare’ as a strategy against the U.S. and its allies, even as they regularly and unapologetically engage in methods of warfare that clearly violate the law of armed conflict.”⁵⁵ As Michael Gross reflects in THE ETHICS OF INSURGENCY, the catchphrase “we fight by the rules, but they don’t - is nearly axiomatic.”⁵⁶

⁵¹ *The Lawfare Project: What is Lawfare?* LAWFARE, 2012, archived copy available at <https://web.archive.org/web/20130419184924/http://www.thelawfareproject.org/what-is-lawfare.html> (last visited May 4, 2019).

⁵² David Zucchino, *In the Taliban’s Eyes, Bad News Was Good*, LOS ANGELES TIMES, Jun. 3, 2002, <https://www.latimes.com/archives/la-xpm-2002-jun-03-fg-badnews3-story.html>.

⁵³ Macer Hall & David Wastell, *Truth and Lies of Taliban’s Death Claims*, THE TELEGRAPH, Nov. 4, 2001, <https://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1361463/Truth-and-lies-of-Talibans-death-claims.html>

⁵⁴ *Id.*

⁵⁵ Murphy, *supra* note 49, at 78.

⁵⁶ MICHAEL GROSS, THE ETHICS OF INSURGENCY: A CRITICAL GUIDE TO JUST GUERRILLA WARFARE 2 (2015).

III. State Proscriptions on the Use of Force

As discussed, civilian deaths, even when considerable, do not automatically mean there have been violations of IHL. In particular, the principles of distinction and proportionality are only violated when civilians are the intended target, or the harm to civilians is excessive in relation to the anticipated military advantage. However, despite the actual requirement under IHL, society has become increasingly intolerant of civilian casualties. Now even one civilian casualty is one too many. As Professor Samuel Moyn underscores, “the ultimate worry is not that the number of civilians who dies it too high; it is that any civilians die at all.”⁵⁷ This has led States to institute policies restricting targeting; creating a new norm of proportionality, stricter than the law of war dictates. First a look at these new policies, followed by an assessment of the impetus behind their creation.

In the United States there are substantial policy controls for the conduct of military operations to minimize civilian casualties.⁵⁸ In the last two decades, the Bush, Obama, and Trump Administrations have all put a premium on avoiding civilian casualties, instituting policies to minimize collateral damage via prescriptive battlefield rules of engagement. Per Professor Nathan Canestaro, President Bush imposed targeting restrictions “to assuage concerns in the Muslim world about the conduct of war and combat the perception that the campaign was directed against island as a whole.”⁵⁹ The process to nominate and approve targets was extremely labor intensive and required vetting by Department of Defense lawyers. It was also during the Bush era that reliance on precision guided munitions became the norm.⁶⁰

⁵⁷ Samuel Moyn, *A War Without Civilian Deaths*, THE NEW REPUBLIC, Oct. 23, 2018, <https://newrepublic.com/article/151560/damage-control-book-review-nick-mcdonnell-bodies-person>.

⁵⁸ Canestaro, *supra* note 33, at 479.

⁵⁹ *Id.* at 477.

⁶⁰ *Id.*

In the early days of the Obama presidency, the Tactical Directives for operations in Afghanistan articulated a goal of zero civilian casualties even if a hindrance to U.S. operations.⁶¹ As the head of U.S. forces in Afghanistan in 2010, General John Allen messaged, “my intent is to eliminate...civilian casualties” clearly exceeding the requirement imposed by IHL.⁶² President Obama went even a step further, issuing restrictions on the use of force outside of areas of active hostilities, such as Somalia and Yemen.⁶³ The PRESIDENTIAL POLICY GUIDANCE (PPG) limited civilian casualties by setting the threshold at zero, requiring that “...before any strike is taken, there must be near-certainty that no civilian can be killed or injured – the highest standard we can set.”⁶⁴ Contemporaneously to the issuance of the PPG, President Obama issued an executive order prioritizing civilian protection and documenting best practices to reduce their likelihood.⁶⁵ Even after the transition from the Obama to Trump Administration, the policy of “near certainty” that no civilians would be injured or killed remained.⁶⁶

Senior U.S. officials continue to administer policies that underscore the protection of civilians.⁶⁷ The Non-Combatant Casualty Cut-Off Value (NCV) is the most recent, and current,

⁶¹ Russel Spivak, *ISIL's Human Shields in Mosul and the U.S. Response*, LAWFARE, Jan. 12, 2017, <https://www.lawfareblog.com/isils-human-shields-mosul-and-us-response>.

⁶² Neta C. Crawford, *Death Toll: Will the U.S. Tolerate More Civilian Casualties in its Bid to Vanquish ISIS?* Jan. 21 2016, WBUR, <https://www.wbur.org/cognoscenti/2016/01/21/civilian-casualties-iraq-syria-us-war-on-isis-neta-c-crawford>.

⁶³ Cora Currier, *White House Finally Releases Its “Playbook” for Killing and Capturing Terror Suspects*, The Intercept, Aug. 6, 2016, <https://theintercept.com/2016/08/06/white-house-finally-releases-its-playbook-for-killing-and-capturing-terror-suspects/>.

⁶⁴ *President's Policy Guidance: Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostility*, May 22, 2013, publicly released Aug. 5, 2015, <https://www.aclu.org/foia-document/presidential-policy-guidance> [hereinafter PPG]. See also, Crawford, *supra* note 62.

⁶⁵ Charlie Savage and Scott Shane, *U.S. Reveals Death Toll from Airstrikes Outside War Zones*, NY TIMES, Jul. 1 2016, <https://www.nytimes.com/2016/07/02/world/us-reveals-death-toll-from-airstrikes-outside-of-war-zones.html?module=inline>.

⁶⁶ Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, NY TIMES, Sept. 22, 2017, <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>.

⁶⁷ Michael A. Cohen, *The Myth of a Kinder, Gentler War*, WORLD POL. J. 75, 84 (2010), see also Crawford, *supra* note 62.

policy imposing targeting restrictions. While instituted during the Obama years it remains a policy of the Trump Administration.⁶⁸ The NCV is a predetermined restriction on proportionally, limiting the acceptable number of civilian casualties by imposing an artificial ceiling on how many civilians can be killed as collateral damage.⁶⁹ If a strike is expected to yield civilian casualties greater than the NCV, it must be aborted.⁷⁰ Today, NCVs are tailored for specific high value targets and areas of operation. They can even be tied to the requirement to use particular munitions and weapons systems.⁷¹

A policy of zero civilian casualties was in place for much of the ISIL campaign. This ultimately resulted in over 75 percent of strikes being called off due to insupportable risks to civilians.⁷² Even when the NCV was increased, meaning targeting restrictions were relaxed, for various phases of the campaign, the Trump Administration's executive order emphasized that U.S. policies regarding civilians populations were "more protective than the requirements of the law of armed conflict..."⁷³ General Joseph Votel, the Commander of U.S. Central Command, also testified before congress that "...[the U.S. has] not relaxed the rules of engagement," in Iraq and Syria.⁷⁴ According to Professor Sam Moyn "it's clear that the U.S. has the most robust CIVCAS [civilian casualty] avoidance policy and process in the world (and in history)."⁷⁵

⁶⁸ Graham, *supra* note 15, at 679-680.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 656 (FN1).

⁷² Kristine Wong, *ISIS Fight Shifts to French Rules of Engagement*, Nov. 19, 2015, THE HILL, <https://thehill.com/policy/defense/260717-seal-lawmaker-us-has-stricter-rules-of-engagement-than-france-in-isis-fight>.

⁷³ Spivak, *supra* note 61.

⁷⁴ Carlos Muñoz, *Gen. Joseph Votel: Rigorous Rules of Engagement Remain Unchanged for U.S. Forces in Iraq, Syria*, Mar. 29, 2017, WASHINGTON TIMES, <https://www.washingtontimes.com/news/2017/mar/29/joseph-votel-rigorous-rules-engagement-remain-unch/>.

⁷⁵ Moyn, *supra* note 57.

While, as Moyn notes, the U.S.' policy may be the most robust, other States have also adopted policies restricting proportionality. In Israel there are policies requiring zero civilian casualties. These targeting restrictions, similar to the U.S., are very much operation and geography specific.⁷⁶ During all combat operations, the Israeli Defense Force (IDF) takes extensive steps to weigh the risk of civilian harm. In the Ministry of Foreign Affairs release of *The Operation in Gaza: Factual and Legal Aspects*, they underscore that on numerous occasions, the IDF called off a strikes against valid military objectives to avoid the possibility of civilian harm, even when the attacks would have been proportionate and complied with IHL.⁷⁷

Australia also operates under strict rules of engagement with the goal of preventing civilian casualties. While unwilling to release their rules of engagement publically, during operations in both Afghanistan and Iraq, Australian officials maintained that their rules of engagement were more stringent than those of the United States.⁷⁸ Publically stating that “[o]ur members operate under strict Rules of Engagement which are specifically designed to avoid civilian casualties and damage to civilian infrastructure...”⁷⁹ Supporting this are the accounts of Australian FA/18 pilots who refused to execute strikes on over 40 missions, despite

⁷⁶ Colonel Eli Baron, *How the IDF Implements LOAC*, Lecture at Harvard Law School, Feb. 20, 2019 (notes available with author).

⁷⁷ *The 2014 Gaza Conflict: Factual and Legal Aspects*, Chapter V. *The Use of Force – The Legal Framework*, Israeli Ministry of Foreign Affairs, ¶¶ 110 and 329, May 2015, https://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Operation_Gaza_factual_and_legal_aspects_use_of_force_legal_framework_5_Aug_2009.aspx [hereinafter 2014 Gaza Conflict]. For example, Israeli forces identified a rocket launcher between two school buildings on 18 January 2009, but refrained from attacking because of its proximity to the schools. The IDF also refrained from attacking Shifa Hospital in Gaza City, despite Hamas’ use of an entire ground floor wing as its headquarters during the Gaza Operation out of concern for the inevitable harm to the civilians also present in the hospital.

⁷⁸ *Rules of Engagement – Afghanistan and Iraq*, NAUTILUS INSTITUTE FOR SECURITY AND SUSTAINABILITY, <https://nautilus.org/publications/books/australian-forces-abroad/afghanistan/rules-of-engagement-afghanistan-and-iraq/>.

⁷⁹ *Id.*

Coalition approval, because of national caveats to the Coalition's rules of engagement and concerns about resulting civilian casualties.⁸⁰

Germany, as a member of the International Security Assistance Forces (ISAF) in Afghanistan, also had "insanely restrictive rules of engagement."⁸¹ They operated in an entirely defensive manner and were unable to offensively engage targets. Even later on in the conflict when revised rules of engagement were issued, Germans were still prohibited from engaging the enemy in anything but self-defense.⁸² Germans operated under much stricter rules of engagement than other NATO-led forces.

Denmark, as one of a handful of States participating in airstrikes against ISIL mandated precautions to keep civilian casualties to a minimum. They did this by placing targeting restrictions in their Tactical Directive.⁸³ These policies ultimately constrained the flexibility inherent in the principle of proportionality, leading to target execution being more restrictive than required by IHL.⁸⁴

In addition to individual national caveats restricting proportionality, Coalitions as a whole also proscribe civilian casualties. NATO restricted targeting in Afghanistan in an attempt to limit civilian deaths by prohibiting the use of certain munitions.⁸⁵ The Counter-ISIL

⁸⁰ Frank Walker, *Our Pilots Refused to Bomb 40 Times*, SYDNEY MORNING HERALD, Mar. 14, 2004, <https://www.smh.com.au/world/middle-east/our-pilots-refused-to-bomb-40-times-20040314-gdijb4.html>.

⁸¹ Max Boot, *German Rules of Engagement?* Jul. 29, 2009, COMMENTARY MAGAZINE, <https://www.commentarymagazine.com/american-society/military/german-rules-of-engagement/>.

⁸² *New Rules of Engagement for German Troops in Afghanistan*, DEUTSCHE WELLE, Jul. 26, 2009, <https://www.dw.com/en/new-rules-of-engagement-for-german-troops-in-afghanistan/a-4519627>

⁸³ Major Steen Kjaergaard & Major Karsten Marrup, *The Use of Kinetic Airpower and the Problem of Civilian Casualties*, Royal Danish Defence College, 15 (2017), <http://www.fak.dk/publikationer/Pages/TheUseofKineticAirpowerandtheProblemofCivilianCasualties.aspx>.

⁸⁴ *Id.* at 21.

⁸⁵ Richard Norton-Taylor & Julian Borger, *NATO Tightens Rules of Engagement to Limit Further Civilian Casualties in Aghanistan [SIC]*, THE GUARDIAN, Sep. 8 2008, <https://www.theguardian.com/world/2008/sep/09/nato.afghanistan>.

Coalition also frequently exercised restraint from strikes likely to result in civilian casualties.⁸⁶

A Coalition spokesman noted “our goal has always been for zero civilian casualties...”⁸⁷

The selection of States discussed above are the restrictive targeting regimes found in open source outlets. Most State specific rules of engagement are classified and therefore not releasable to the public. While the paper mentions only a small subset of States and Coalitions engaged in military action around the world, they are indicative of the increasing normalcy of policies aimed at reducing civilian casualties via restrictive targeting regimes. Under such regimes, the classic proportionality assessment of IHL is no longer required. These new policies mandate a ceiling on civilian casualties authorizing target engagement only if the collateral damage is equal to or less than the prescribed limit. While proponents of NCVs or other restrictive proportionality regimes argue they are a strategically sound measure to control target engagement and mitigate civilian casualties, others assess that these policies restrict warfighters ability to effectively engage the enemy.⁸⁸ Under restrictive targeting regimes, even when engagement is perfectly legal under IHL, policy constraints may preclude the strike.

What is driving the normalization of restrictive targeting regimes and why are they becoming increasingly prevalent? It is simple really - politics. Or more elegantly articulated, these restrictions are driven by political fear of the society’s reaction to civilian casualties.⁸⁹ As concerns about civilian casualties proliferate, State imposed targeting restrictions assuage some of the concerns by mollifying citizenry and preventing media censure.

As Winston Churchill once said, “[a] politician needs the ability to foretell what is going to happen tomorrow, next week, next month, and next year. And have the ability

⁸⁶ Graham, *supra* note 15, at 668.

⁸⁷ Syria: *Australian Military Operations*, PARLIAMENT OF AUSTRALIA, Sep. 20, 2017, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/SyriaMilitaryOps#_Toc493682031.

⁸⁸ Wong, *supra* note 72.

⁸⁹ Canestaro, *supra* note 33, at 433.

afterwards to explain why it didn't happen."⁹⁰ Today civilian casualties are seen as evidence of military failure. Restrictive targeting policies allow States to undercut the eventual condemnation that arises when strikes unintentionally result in collateral damage. These new targeting regimes allow States to counter the narrative by broadcasting that States' policies went above and beyond that required by IHL.⁹¹

If war is an instrument of policy, then so too are battlefield rules of engagement.⁹² And the current political tool of choice are the required use of NCVs and other restrictive targeting directives for the conduct of war. These new regimes reflect political reality just as much as they do legal requirements. It is clear that political fear drives restrictive targeting regimes, but to truly understand this phenomenon it is critical to examine what influences that fear. Political fear has three main drivers: (1) domestic public opinion; (2) concerns about diplomatic relations; and, (3) the CNN effect.

Politicians are driven to respond to their constituencies' opinions in order to maintain their political seat come election day. Therefore, domestic public opinion on the relative success or failure of an operation can influence policy. While the commencement of hostilities typically enjoys domestic support, this support decays over time.⁹³ To politicians, gaining and maintaining domestic support is critical. Denmark for instance, during the campaign against ISIL, created policies ensuring that everything feasible would be done in order to keep civilian casualties to a minimum. A study of these policies concluded that "the protection of civilians objective was a sub-objective amended for political legitimizing purposes,"⁹⁴ and that a

⁹⁰ *Quotes from UK Prime Ministers*, MSN, <https://www.msn.com/en-us/news/politics/quotes-from-uk-prime-ministers-over-the-years/ss-BBAnpI9?fullscreen=true#image=9>.

⁹¹ See Canestaro, *supra* note 33, at 476, and Eric V. Larson & Bogdan Savych, *Misfortunes of War: Press and Publication Reaction to Civilian Deaths in Wartime*, ch. 6: *Implications and Conclusions*, RAND Corporation 205, 2007.

⁹² Canestaro, *supra* note 33, at 467.

⁹³ Spivak, *supra* note 61.

⁹⁴ Kjaergaard, *supra* note 83, at 15.

restrictive targeting regime was incorporated for “political and strategic reasons to secure Danish political imperatives.”⁹⁵ This was particularly prudent of Danish politicians since studies indicate a relationship between domestic support for the use of force and collateral damage, with public support decreasing as the collateral consequences of war rise.⁹⁶

Paul Bernstein’s study on the impact of public opinion on domestic policy indicates that, “[t]he more salient an issue is to the public, the stronger the relationship between public opinion and policy.”⁹⁷ Civilian casualties are a particularly salient issue in contemporary society as indicated by its extensive media coverage. In the United States, attacks that risk killing civilians are opposed by more than 52% of the public.⁹⁸ Another study found that across both the U.S. and the United Kingdom that support for military action was lower when the civilian death toll – projected or actual – was higher.⁹⁹ Even during NATO’s involvement in Kosovo, a Post-ABC News Poll found that “disapproval of the air war increased by 21 percentage points ... among Americans highly concerned about civilians being hurt or killed by the NATO attacks.”¹⁰⁰

Another reason for increased public censure on military action resulting in civilian casualties can be credited to Human Rights Organizations (HROs). HROs have become major players in the political arena, exercising their influence through political advocacy and public discourse.¹⁰¹ Their extensive resources provide placement and access to senior politicians

⁹⁵ *Id.* at 19.

⁹⁶ Ayalon, *supra* note 48, at 260, Major Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 (1) A.F. L. Rev. 1, 102 (2005).

⁹⁷ Ayalon *supra* note 48, at 260.

⁹⁸ Peter Moore, *American Support Drone Attacks – But Only Without Civilian Casualties*, YOUgov, Oct. 28, 2013, <https://today.yougov.com/topics/politics/articles-reports/2013/10/28/americans-support-drone-attacks-only-without-civil>.

⁹⁹ *Id.* See also, Robert Johns & Graeme A. M. Davies, *Civilian Casualties and Public Support for Military Action: Experimental Evidence*, 63 J. of Resol. 251 (2017).

¹⁰⁰ Richard Morin, *Americans Grow Weary of War in Kosovo*, WASHINGTON POST, May 24, 1999, <https://www.washingtonpost.com/wp-srv/politics/polls/wat/archive/wat052499.htm>.

¹⁰¹ Larson, *supra* note 91, at 206.

allowing them to shape narratives and drive policy.¹⁰² As conflicts are inevitable, HROs will continue to take a critical eye to State military action and influence policies related to military action.

Killing civilians, even if legally justified, can also erode international support and affect foreign policy.¹⁰³ In a letter sent to then Secretary of Defense James Mattis, national security experts highlighted that “[e]ven small numbers of unintentional civilian deaths or injuries...can cause partners and allies to reduce operational collaboration, withdraw consent, and limit intelligence-sharing; increasing violence from militant groups; and foster distrust among local populations that are crucial to accomplishing the mission.”¹⁰⁴ This is particularly true in asymmetric conflicts that have a natural political element built in – winning the hearts and minds of the local populace.

Destroying the lives and property of civilians is self-defeating when their protection is the ultimate priority.¹⁰⁵ Even when unintentional collateral, civilian casualties present a strategic problem potentially driving the local populace to support the insurgents. Targeting restrictions are aimed not only at reducing civilian casualties but also fomenting local support.¹⁰⁶ The United States’ use of NCVs in Afghanistan is demonstrative of this very issue. Since civilian casualties were considered a liability to strategic efforts, an NCV of zero was imposed.¹⁰⁷ The 2010 Tactical Directive admonished that “[e]very Afghani civilian death

¹⁰² Gerald M. Steinberg, *The Politics of NGOs, Human Rights and the Arab-Israel Conflict*, 14 (2) ISRAEL STUDIES, 24, 27 & 44 (2011) (discussing the increased power of NGOs in the realm of policy creations).

¹⁰³ Spivak, *supra* note 61. See also Canestaro, *supra* note 33, at 468.

¹⁰⁴ Benjamin Haas, *The Pragmatic Reasons for Strict Rules of Engagement*, JUST SECURITY, Apr. 20, 2017, <https://www.justsecurity.org/40128/pragmatic-reasons-military-maintain-strict-rules-engagement/>.

¹⁰⁵ Walzer, *supra* note 47, at xix.

¹⁰⁶ *Civilian Casualties & Collateral Damage*, LAWFARE, <https://www.lawfareblog.com/civilian-casualties-collateral-damage>.

¹⁰⁷ Nick McDonnell, *Civilian Casualties Are Not Inevitable. The Military Sets an Acceptable Number in Advance*, LA TIMES, Mar. 31, 2017, <https://www.latimes.com/opinion/op-ed/la-oe-mcdonnell-civilian-casualties-ncv-20170331-story.html>.

diminishes our cause.”¹⁰⁸ Even at United States Central Command’s Headquarters, officials were allegedly “deathly afraid” of collateral damage because of the political ramifications to the entire campaign.¹⁰⁹ As civilian casualties have increased, animosity from the local populace and consternation from international partners have shaped State targeting policies.

Related to domestic public opinion and foreign policy, the advent of persistent global news coverage also influences policy. This is commonly referred to as the CNN Effect, a term first used during the Gulf War.¹¹⁰ The CNN Effect is seen as policy forcing; the media does not create policies, instead they direct their creation.¹¹¹ As Colin Powell observed “[l]ive television coverage does not change the policy, but it does create the environment in which the policy is made.”¹¹² This is accomplished by focused broadcasting. In recent years that focus has been on civilian deaths and other collateral damage around the world.¹¹³ Civilian casualties are particularly newsworthy because violence and terror glue people to the television.¹¹⁴

Instantaneous news coverage means immediate public awareness and scrutiny of military operations, making the media an important policy influencer in conflicts around the globe.¹¹⁵ As President Barak Obama stated, “[i]n our digital age, a single image from the battlefield of troops falling short of their standards can go viral and endanger our forces and undermine our efforts to achieve security and peace.”¹¹⁶ U.S. Ambassador to the United Nations Madeline Albright similarly offered, “[a]ggression and atrocities are beamed into our living rooms and cars with astonishing immediacy. No civilized human being can learn of these horrid

¹⁰⁸ Spivak, *supra* note 61.

¹⁰⁹ Canestaro, *supra* note 33, at 479.

¹¹⁰ Etyan Gilboa, *Global Television News and Foreign Policy: Debating the CNN Effect*, 6 INT’L STUD. PERSP. 325, 328 (2005).

¹¹¹ *Id.* at 328.

¹¹² *Id.* at 330.

¹¹³ Canestaro, *supra* note 33, at 433.

¹¹⁴ Ayalon, *supra* note 48, at 259.

¹¹⁵ Kenneth Payne, *The Media as an Instrument of War*, 35 (1) PARAMETERS, 81, 92 (2005).

¹¹⁶ Michel D. Shear, *Obama Calls for ‘Moral Courage’ at Naval Academy Graduation*, NY TIMES, May 25, 2013, <http://www.nytimes.com/2013/05/25/us/politics/obama-naval-academy-commencement.html>.

acts occurring on a daily basis and stand aloof from them.”¹¹⁷ It therefore makes sense that the advancement of restrictive targeting regimes is in part due to the CNN effect and the media’s penchant for broadcasting civilian casualties.¹¹⁸

Insurgents also use the media to their strategic advantage in the conduct of information operations as part of their lawfare campaigns. Now the adversaries use of media can similarly influence policies. Even when the coverage is subsequently revealed to have been nothing more than information warfare, it may be too late. After the Goldstone Report¹¹⁹ was revealed to have been based on false information, Jeffrey Goldberg, the Editor-in-Chief of THE ATLANTIC commented, “[w]ell, I’m glad he’s cleared that up. Unfortunately, it is somewhat difficult to retract a blood libel, once it has been broadcast across the world.”¹²⁰ The media’s coverage of lawfare is becoming ubiquitous, adding an additional level of pressure for politicians.¹²¹

While noble and driven in part by ethical considerations, it is clear that targeting restrictions are not entirely altruistic. Political concerns are the predominate factor and the commitment to minimize collateral damage has been shaped by political fear. It is a fear of alienating constituencies, the international community, and media censure. This fear has led States to adopt restrictive targeting regimes. Given the importance that society ascribes to minimizing civilian casualties, it is no wonder that States make efforts to avoid collateral damage. But while these policies may be ethically and morally sound, there are oft forgotten unintended consequences.

¹¹⁷ Gilboa, *supra* note 110, at 330.

¹¹⁸ Canestaro, *supra* note 33, at 433.

¹¹⁹ The Goldstone Report was the Report issued by Judge Richard Goldstone who headed the fact-finding committee into allegations of war crimes by the United Nations Human Rights Council (UNHRC). The report accused both Hamas and Israel of war crimes and deliberately targeting civilians. *See*, Conal Urquhart, *Judge Goldstone Expresses Regrets About His Report into Gaza War*, THE GUARDIAN, Apr. 3, 2011, <https://www.theguardian.com/world/2011/apr/03/goldstone-regrets-report-into-gaza-war>.

¹²⁰ Jeffrey Goldberg, *Judge Richard Goldstone: Never Mind*, THE ATLANTIC, Apr. 2, 2011, <https://www.theatlantic.com/international/archive/2011/04/judge-richard-goldstone-never-mind/73366/>.

¹²¹ Nidra Poller, *The Muhammad al-Dura Hoax and Other Myths Revived*, MIDDLE EAST Q. 72, 76 (2011).

IV. Unintended Consequences

The global community aspires to a utopian world of zero civilian casualties. Unfortunately, this is both a dangerous and unrealistic expectation. While targeting restrictions are morally and politically enticing, there are four primary unintended consequences. They are: (1) increased brutality against civilians; (2) amplified civilian endangerment; (3) unrealistic expectations of a perfect war; and, (4) the development of a new norm of proportionality under customary international law (CIL).

It is a strange logic to limit lethal force against insurgents while allowing them to continue endangering civilian populations. Yet that is exactly what happens with restrictive targeting regimes. Due to the political ramifications of civilian casualties, insurgents are rarely engaged with fully military force.¹²² While States fight by the rules of IHL, insurgents do not, and violence against civilians is one of many tactics they use as a means of altering the strategic landscape.¹²³ Proscriptions on State action provide insurgents with increased freedom of maneuver to carry out brutal attacks on civilian populations. Thus, State imposed targeting restrictions unintentionally result in continued harm to civilians.¹²⁴

In the last few decades, insurgents have become prodigious killers, perpetrating suicide attacks and car bombings; killing thousands of civilians. As Professor Benjamin Valentino explains, “[c]ivilians are not merely bystanders to armed conflict; they play a central, if often involuntary, role as the underwriters of war’s material, financial, and human requisites. Sometimes they become the object of war itself.”¹²⁵ Violence against civilians has become a common part of asymmetric warfare. As Wickham-Crowley observed, “terror against civilians

¹²² Canestaro, *supra* note 33, at 433.

¹²³ Reynolds, *supra* note 96, at 79.

¹²⁴ Kjaergaard, *supra* note 83, at 24.

¹²⁵ Benjamin A. Valentino, *Why We Kill: The Political Science of Political Violence Against Civilians*, ANNU. REV. POL. SCI. 89, 94 (2014).

is apparently a far more regular, even ‘natural,’ concomitant of modern guerilla warfare than of modern conventional warfare.”¹²⁶

The Islamic State alone has killed thousands of innocents. Their malicious actions against civilians are universally condemned. The UN Security Council in Resolution 2249 (2015) “unequivocally condemn[ed]” the gross, systematic and widespread abuse of human rights and violations of humanitarian law perpetuated by ISIL, calling their actions against civilians and civilian infrastructure “barbaric.”¹²⁷ The international community became regrettably familiar with an individual known as Jihadi John¹²⁸ who between 2014 and 2015 gained notoriety with the release of various videos depicting western hostages in ISIL custody. In the videos that reverberated around the world and caused international condemnation, Jihadi John joined by other members of the Islamic State, violently executed innocent civilians. These included humanitarian aid workers,¹²⁹ journalists,¹³⁰ and other innocent members of society.

In response to the Islamic State’s brutality, the Jordanian representative to the 7565th meeting of the United Nations Security Council stated that ISIL “wreak[s] havoc and evil across the globe” and are unfaltering in “their odious intentions towards humankind in targeting

¹²⁶ Timothy P. Wickham-Crowley, *Terror and Guerilla Warfare in Latin American, 1956-1970*, 32 (2) COMP. STUD. SOC. HIST. 201, 225 (1990).

¹²⁷ S.C. Res. 2249, ¶ 1, U.N. Doc. S/RES 2249 (Nov. 20, 2015).

¹²⁸ Dominic Casciani, *Islamic State: Profile of Mohammed Emwazi aka ‘Jihadi John,’* BBC, Nov. 13, 2015, <https://www.bbc.com/news/uk-31641569>.

¹²⁹ David Haines and Alex Henning, both British aid workers, were killed by the Islamic State. Haines was abducted in Mar. 2014 in Syria. A video of the lead-up and aftermath of David Haines’ beheading, entitled “*A Message to the Allies of America*,” was released by ISIL on Sep. 13, 2014. Henning was captured in Al-Dana Syria in Dec. 2013. A video of Henning’s beheading was released by ISIL on Oct. 3, 2014. Also killed was Peter Kassis, a former U.S. special forces soldier. See, Victoria Ward, *Jihadi John’s Victims: Who Were They?*, THE TELEGRAPH, Nov. 13, 2015, <https://www.telegraph.co.uk/news/worldnews/islamic-state/11992798/Jihadi-Johns-victims-who-were-they.html>.

¹³⁰ James Foley and Steven Sotloff, two American journalists, were killed by the Islamic State. Foley was abducted on November 22, 2012 in northwestern Syria, and executed. Sotloff was kidnapped in Aleppo, Syria in 2013. On September 2014, a video was released purporting to show Jihadi John beheading Sotloff. <https://www.telegraph.co.uk/news/worldnews/islamic-state/11992798/Jihadi-Johns-victims-who-were-they.html>.

civilians.”¹³¹ In 2017 alone, ISIL intentionally killed more than 2,080 civilians.¹³² Of these, 1572 civilian deaths and 254 attacks perpetrated against civilians occurred inside the then ISIL controlled city of Mosul.¹³³ While the Islamic States’ brutality is of a level rarely seen, they are not alone in the intentional targeting of civilians. In 2017 the four organizations responsible for the most civilian deaths included not only the Islamic State, but also the Taliban, al-Shabaab, and Boko Haram.¹³⁴

The Taliban has a long history of perpetrating crimes against civilians.¹³⁵ Since 2016 they have increasingly focused their attacks in urban areas killing thousands of innocent civilians. According to Human Rights Watch, “suicide attacks, including car and truck bombings, caused at least one-third of these casualties. Hundreds of civilians are going about ordinary activities – walking down the street, working in a shop, preparing food at home, or worshipping in a mosque – have experienced sudden and terrifying violence.”¹³⁶ In January of 2018, the Taliban conducted two egregious attacks against the civilian population in Kabul resulting in the deaths of well over a hundred individuals. The first on 20 January was an attack at the Intercontinental Hotel. The attack lasted almost 24 hours and resulted in the death of 21 civilians.¹³⁷ A week later, an ambulance bomb killed more than 103 people and injured another

¹³¹ U.N. SCOR 70th Sess., 7565th mtg. at 2. U.N. Doc S/PV.7565 (Nov. 20, 2015) (Statement by Mrs. Kawar, Jordanian representative to the United Nations Security Council 7565th meeting).

¹³² *How Islamic Extremists Target Civilians*, TONY BLAIR INSTITUTE FOR GLOBAL CHANGE, <https://institute.global/insight/co-existence/how-islamist-extremists-target-civilians> (last visited May 2, 2015) [hereinafter INSTITUTE FOR GLOBAL CHANGE].

¹³³ GTI 2018, *supra* note 13, at 16.

¹³⁴ Global Terrorism Database [Data file], NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (START) (2018) retrieved from <https://www.start.umd.edu/gtd> [hereinafter GTD].

¹³⁵ Taliban, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/threat/taliban> (last visited May 5, 2019).

¹³⁶ “No Safe Place” Insurgent Attacks on Civilians in Afghanistan, HUMAN RIGHTS WATCH, May 8, 2018, <https://www.hrw.org/report/2018/05/08/no-safe-place/insurgent-attacks-civilians-afghanistan> [hereinafter No Safe Place].

¹³⁷ *Id.*

200 when it detonated at a busy Kabul intersection.¹³⁸ In 2017 alone, over 4,000 civilian casualties were attributed to the Taliban.¹³⁹

In Nigeria and other areas of Northwest Africa, Boko Haram, with alarming regularity have perpetrated attacks against civilian populations.¹⁴⁰ In 2015, they executed a multi-day massacre in the town of Baga and its surrounding villages, killing upwards of 2,000 civilians. In 2017, over 71 percent of their attacks were targeted against civilians.¹⁴¹ One of these was an attack against a refugee camp in Nigeria killing over 150 innocents.¹⁴² In March of 2018, they attacked another displacement camp killing at least three Nigerian aid workers and abducting three others. The three International Committee of the Red Cross (ICRC) aid workers abducted in the attack were later executed.¹⁴³ Since 2009, Boko Haram has killed approximately 20,000 civilians, and their violence against civilians is on the rise.¹⁴⁴

In Somalia and Kenya, al-Shabaab also commonly perpetrates violence against civilian populations, assassinating journalists, international aid workers, and other civilians.¹⁴⁵ In 2013, al-Shabaab was responsible for the attack on the Westgate Mall in Nairobi, Kenya killing 67 civilians.¹⁴⁶ Two years later in 2015, militants stormed the Garissa University College in

¹³⁸ *Id.*

¹³⁹ *Afghanistan Protection of Civilians in Armed Conflict, Annual Report 2018*, United Nations Assistance Mission in Afghanistan 5 (2018), <https://unama.unmissions.org/protection-of-civilians-reports>.

¹⁴⁰ Boko Haram, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/threat/boko-haram> (last visited May 2, 2015).

¹⁴¹ BLAIR INSTITUTE FOR GLOBAL CHANGE, *supra* note 132.

¹⁴² *Id.*

¹⁴³ Boko Haram Fast Facts, CNN, last updated Apr. 24, 2019, <https://www.cnn.com/2014/06/09/world/boko-haram-fast-facts/index.html>.

¹⁴⁴ U.S. Dept. of State, *Country Reports on Terrorism 2017*, ch. 5 Foreign Terrorist Organizations, <https://www.state.gov/j/ct/rls/crt/2017/282850.htm> [DoS Report on Terrorism 2017], *See also, Annex of Statistical Information Country Reports on Terrorism 2017*, NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (START), Sept. 2018 [hereinafter START Report on Terrorism 2017].

¹⁴⁵ Al-Shabab, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/threat/al-shabab> (last visited May 2, 2015).

¹⁴⁶ *Al-Shabab 2004-2009*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/timeline/al-shabab> (last accessed May 3, 2019).

Garissa, Kenya holding over 700 civilians hostage, eventually murdering 148.¹⁴⁷ Al-Shabaab perpetrated the deadliest attack in all of 2017 when a truck bomb detonated in central Mogadishu killing almost 600 civilians and injuring an additional 300.¹⁴⁸ In total, more than 1,400 civilians were killed by al-Shabaab in 2017.¹⁴⁹

70 percent of all civilian deaths perpetrated by insurgents in 2017 took place in five countries: Iraq, Syria, Afghanistan, Somalia, and Nigeria.¹⁵⁰ Together, the Islamic State, the Taliban, Boko Haram, and al-Shabaab slaughtered 10,632 civilians in 2017 alone.¹⁵¹ They are not alone; groups such as the Lord's Resistance Army in Uganda, Liberation Tigers of Tamil Eelam (LTTE), Tehrik-i-Taliban Pakistan (TTP), and Lashkar-E-Taiba (Let), all kill civilians with disturbing frequency.¹⁵²

Children, in particular, suffer unspeakable atrocities in armed conflicts. In the past decade, according to one estimate, one out of every six children is affected by conflict.¹⁵³ Children are murdered, tortured and raped, oftentimes simply for entertainment. Thousands of children have also been kidnapped. In 2014 Boko Haram infamously kidnapped 276 female students in Nigeria, highlighting their deliberate targeting of children.¹⁵⁴ The group continues to abduct children on regular basis. These children are forced to become child brides, subjected to domestic servitude, and with alarming frequency used to carry out suicide attacks in civilian

¹⁴⁷ *Id.*

¹⁴⁸ DoS Report on Terrorism 2017. *See also*, GTI 2018, *supra* note 13.

¹⁴⁹ START Report on Terrorism 2017, *supra* note 144.

¹⁵⁰ *Id.*

¹⁵¹ GTI 2018, *supra* note 13.

¹⁵² Reed M. Wood & Jacob D. Kathman, *Debating the Benefits of Rebel Brutality*, THE WASHINGTON POST, Sept. 3, 2014, https://www.washingtonpost.com/news/monkey-cage/wp/2014/09/03/debating-the-benefits-of-rebel-brutality/?utm_term=.0e390ad7a8b4 *See also*, GTI 2018, *supra* note 13.

¹⁵³ *One in Six Children 'Affected by Conflict' – Save the Children*, BBC, Feb. 15, 2018, <https://www.bbc.com/news/world-43059413>.

¹⁵⁴ Boko Haram Fast Facts, *supra* note 143.

communities.¹⁵⁵ Children are also conscripted into military service. Al-Shabaab alone recruited 1,770 children in 2017, using threats to tribal elders and parents as a forcing mechanism.¹⁵⁶

Sexual violence is another ruthless weapon employed by insurgents. Sexual violence is used to intimidate and terrorize the civilian population.¹⁵⁷ There have been instances where women and children were forced to trade sexual favors for food, shelter or physical protection.¹⁵⁸ In one case, a 15-year-old boy was raped over three consecutive nights by an ISIL commander.¹⁵⁹ In another a 17-year-old Yazidi girl was sexually abused by multiple ISIL members before being forced to manufacture bombs.¹⁶⁰ Boko Haram alone abducted, raped, or forcibly married 116 girls and nine boys in 2017.¹⁶¹ Unfortunately, these are common accounts since over 900 cases of rape and other forms of sexual violence against children were verified by the United Nations in 2017.¹⁶²

As the numbers and accounts demonstrate, insurgents commit brutal acts of violence against civilians. Targeting restrictions only make it easier for insurgents to continue their carnage.¹⁶³ When insurgents' freedom of maneuver goes unchecked, it allows them to continue inflicting egregious harm against civilian populations.¹⁶⁴ As Laura Seligman, FOREIGN POLICY'S Pentagon correspondent, writes, "[p]lacing too much emphasis on avoiding collateral damage can be dangerous; as States concern themselves on perfectly executing targets to an extent that well exceeds the requirements of the law of armed conflict, insurgents are busy

¹⁵⁵ *Id.*

¹⁵⁶ The Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 144, delivered to the Security Council and the General Assembly, U.N. Doc. S/2018/465, A/72/865 (May 16, 2018) [hereinafter UN Children & Armed Conflict Report 2018].

¹⁵⁷ The Secretary-General, *Report of the Secretary-General on Conflict Related Sexual Violence*, ¶¶ 2-3, 8-9, delivered to the Security Council, U.N. Doc. S/2017/249 (Apr. 15, 2017).

¹⁵⁸ *Id.*

¹⁵⁹ UN Children & Armed Conflict Report 2018, *supra* note 156, at ¶ 79.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at ¶ 228.

¹⁶² *Id.* at ¶ 9.

¹⁶³ Kjaergaard, *supra* note 83, at 24.

¹⁶⁴ Graham, *supra* note 15, at 668.

murdering innocent civilians.”¹⁶⁵ Focusing on the Islamic State, Seligman rhetorically asks “[w]hat is the logic of a policy that limits the application of force to get rid of the evil that is the Islamic State while allowing them to kill innocent men, women and children?”¹⁶⁶

Maj. Gen. Dunlap refers to this as the moral hazard of inaction. He cautions that “these more-than-what-the-law requires policies are getting civilians killed.”¹⁶⁷ States impose targeting restrictions in order to save civilian lives. Meanwhile, the insurgents that were spared live on to terrorize innocent civilians. Left unrestricted, innocent civilians will continue to be aggressed. Imagine if the U.S./Libyan coalition had not liberated Sirte from ISIL control, residents would have continued to be conscripted, slaughtered, and used as sex slaves, the local populace would still be living in ‘hell.’ Dunlap is correct that policies restricting the use of force against insurgents are “self-defeating at best, and counterproductive at worst.”¹⁶⁸ As French Foreign Minister Laurent Fabius said, the cost of inaction against IS “would be to say to these butchers, ‘Go ahead, you have a free pass.’ We won’t accept that.”¹⁶⁹ The unfortunate consequence of restricted targeting regimes is that when insurgents are not killed, civilians face even greater harm.

In addition to the outright physical harm perpetrated by insurgents, restrictive targeting regimes unintentionally increase civilian endangerment. These regimes encourage insurgents to commingle with civilian populations, use humans as shields, and utilize lawfare to combat

¹⁶⁵ Laura Seligman, *Fighting ISIS: Is Pentagon Using Air Power’s Full Potential?* DEFENSE NEWS, Oct. 11, 2015, <https://www.defensenews.com/air/2015/10/11/fighting-isis-is-pentagon-using-air-power-s-full-potential/>.

¹⁶⁶ *Id.*

¹⁶⁷ Charles J. Dunlap, Jr., *A Squarable Circle?: The Revised DoD Law of war Manual and the Challenge of Human Shields*, JUST SECURITY, Dec. 15, 2016, <https://www.justsecurity.org/35597/squarable-circle-revised-dod-law-war-manual-challenge-human-shields/> [hereinafter Dunlap JUST SECURITY].

¹⁶⁸ Charles J. Dunlap, Jr., *Sadly, We Have to Expect More Civilian Casualties if ISIS is to be Defeated*, LAWFIRE, Mar. 26, 2017, <https://sites.duke.edu/lawfire/2017/03/26/sadly-we-have-to-expect-more-civilian-casualties-if-isis-is-to-be-defeated/> [hereinafter Dunlap LAWFIRE].

¹⁶⁹ Laura Westcott, *What Countries Are Fighting ISIS, and Who is Sitting on the Sidelines*, NEWSWEEK, Sept. 16, 2014, <https://www.newsweek.com/us-resumes-bombing-against-isis-positions-it-builds-coalition-270845>.

State military superiority. How this develops can be seen in the narrative of the al-Amiriyah Bunker strike during the First Gulf War. On 13 February 1991, the United States executed an attack against an assessed military command and control (C2) center located in Baghdad.¹⁷⁰ According to military intelligence, the bunker was camouflaged, surrounded by barbed wire, and protected by armed guards. Unbeknownst to the U.S. at the time of the attack, civilians - potentially family of senior military and intelligence officials - had been admitted to the top floor the night prior.¹⁷¹ The results of the strike were catastrophic, with over 400 innocent civilians killed.¹⁷²

Whether the United States' intelligence was flawed or whether the Iraqis were purposefully commingling military assets with civilians, or some combination of the two, is irrelevant for purposes of this paper. What matters is the result. Per the White House:

The Iraqis quickly realized that placing military assets – including tanks, missiles, and command-and-control facilities – close to civilians and civilian infrastructure could yield substantial benefits. By shielding military assets with civilians and civilian infrastructure, Saddam understood that coalition forces would either avoid attacking targets close to civilians or risk severe political damage from unintended civilian deaths at what would have appeared to be a purely military site.¹⁷³

The unintentional devastation of the al-Amiriyah attack demonstrated to Saddam Hussein that collocation of military assets and the use of human shields was a winning combination. If civilians were killed it was an even more favorable outcome, allowing him to paint the U.S. as

¹⁷⁰ See, Tim Arango, *After 25 Years of U.S. Role in Iraq, Scars are Too Stubborn to Fade*, NY TIMES, Feb. 16, 2016, <https://www.nytimes.com/2016/02/17/world/middleeast/25th-anniversary-of-us-involvement-passes-quietly-for-iraqis-unsure-of-future.html>;

¹⁷¹ See Nora Boustany, *Bombs Killed Victims as They Slept*, WASHINGTON POST, Feb. 14, 1991, https://www.washingtonpost.com/wp-srv/inatl/longterm/fogofwar/archive/post021391_2.htm; and, *The Battle for Hearts and Minds*, WASHINGTON POST, 1998, <https://www.washingtonpost.com/wp-srv/inatl/longterm/fogofwar/vignettes/v8.htm>.

¹⁷² Arango, *supra* note 170 (“The destruction of the Amiriya bomb shelter, in a middle-class Baghdad neighborhood, on Feb. 13, 1991, at the outset of the Persian Gulf war, killed some 408 civilians in the worst way possible: Most were burned alive”).

¹⁷³ *Apparatus of Lies: Saddam's Disinformation and Propaganda 1990-2003*, THE WHITE HOUSE, Jan. 2003, <https://georgewbush-whitehouse.archives.gov/ogc/apparatus/>.

the murderer of innocents. The United States was so scarred by the images “of the charred bodies of children being pulled out of the ruins of the bunker,” that all future proposed strikes in Baghdad had to be approved by the Chairmen of the Joint Chief of Staff.¹⁷⁴

Since the First Gulf War, warfare is even more urbanized. Insurgents, similar to Saddam Hussein, understand the strategic benefits of ignoring the requirements of IHL and commingling military assets and civilian populations. Concealment warfare has become commonplace, offering insurgents unique tactical and strategic advantages. Tactically, collocating with civilian populations makes it difficult for States to distinguish insurgents from civilians, increasing insurgents’ freedom of maneuver. As States become more technologically advanced, concealment warfare provides a significant military advantage at little to no cost. Thus, insurgents are frequently utilizing concealment warfare to level the playing field.¹⁷⁵ In recent conflicts, commingling with civilian populations has been operationalized. It is now normal to see ISIL, al-Shabaab, Hamas, and others camouflaging themselves as part of civil society.

While in no way meant to minimize the violence perpetrated by both sides during the Gaza Wars, the fact remains that Hamas deliberately launched rockets from within urban areas, oftentimes located near schools and other protected facilities such as mosques and hospitals.¹⁷⁶ As the Israeli Ministry of Defense learned during their lengthy review of the Gaza Operation:

Many of the civilian deaths and injuries, and a significant amount of the damage to property during the Gaza Operation, was attributable to Hamas’ tactic of blending in with the civilian population and its use of, or operations near, protected facilities and civilian property. ...[Hamas] operatives admitted, for example, that they frequently carried out rocket fire from schools (such as the Sakhnin school in the area of Abu Halima, and another school in the al-

¹⁷⁴ Canestaro, *supra* note 33, at 482.

¹⁷⁵ Canestaro, *supra* note 33, at 480.

¹⁷⁶ Walzer, *supra* note 47, at xviii.

Amal neighbourhood [sic]), precisely because they knew that Israeli jets would not fire on the schools.¹⁷⁷

Hamas actions, though clear violations of IHL, were and continue to be a standardized practice.

Similarly, the use of human shields has become an increasingly prevalent tactic for insurgents despite its prohibition under IHL. Conventionally, insurgents use shields as a form of immunity from military engagement, they are an easily available mechanism to exploit a States' adherence to IHL. By broadcasting the presence of civilians, insurgents aim to prevent attacks against them; an effective tool against adversaries concerned with the public perception of civilian casualties. The tactic allows for a technologically weaker party to change the strategic landscape. Michael Gross explains, "[b]ound by international law and their own military ethos, state armies find themselves hamstrung when confronting [insurgents] willing to draw their own civilians into battle."¹⁷⁸

As highlighted by Saddam's actions in the wake of the al-Amiriyah attack and the more recent 2014 discovery of a Hamas handbook, insurgents now recognize that States are discouraged from executing attacks when there is a potential for collateral damage.¹⁷⁹ When specific targeting restrictions become public, it simply incentivizes insurgents to forcefully use as many civilians as necessary to shield themselves. Insurgents are more strategic than once assumed, for they indubitably pay attention to State policies and exploit them.¹⁸⁰ Maj. Gen. Dunlap calls this polifare, "[w]hen a warfighting entity is able to use (or exploit) policies or political directives that exceed what the law would dictate as effective substitutes for traditional military means..."¹⁸¹

¹⁷⁷ 2014 Gaza Conflict, *supra* note 77, at ¶ 119.

¹⁷⁸ Gross, *supra* note 56, at 128.

¹⁷⁹ Canestaro, *supra*, note 33, at 480.

¹⁸⁰ Reynolds, *supra* note 96, at 79.

¹⁸¹ Dunlap JUST SECURITY, *supra* note 167.

When the Obama Administration declassified the Presidential Policy Guidance it resulted in insurgents modifying their tactics.¹⁸² Adversaries everywhere gained a tactical advantage by simply ensuring collocation with noncombatants due to requirement of ‘near certainty’ that no civilians would be injured or killed. And while State policies and rules of engagement are often meant to remain classified, WikiLeaks has taught us that is seldom the case. For instance, when asked about NCVs, a senior U.S. military official responded “we don’t put those numbers out” because of the possibility of exploitation by insurgents.¹⁸³ However, shortly thereafter, the Associated Press reported that operations against the Islamic State “may authorize strikes where up to 10 civilians may be killed.”¹⁸⁴

When States’ policies are telegraphed to the enemy, it provides incentive to exploit these policies. According to Charles Dunlap, this explains why ISIL’s use of human shields has “proliferated to such an unprecedented degree.”¹⁸⁵ In the battle to liberate Mosul, ISIL “encircled by Iraqi forces, herded civilians deeper into the heart of the historic city to use as human shields as it made its last stand.”¹⁸⁶ It is clear that State policies unintentionally increased the use of civilians as shields. And while their use by ISIL reached unprecedented proportions, it is a tool frequently employed other insurgent groups.¹⁸⁷ As Charles Dunlap and Hays Parks remind us, if States reward an enemy’s use of civilian shields by imposing targeting restrictions, it rewards (rather than condemns) the enemy for their illegal actions.¹⁸⁸

¹⁸² Dunlap LAWFIRE, *supra* note 168.

¹⁸³ McDonell, *supra* note 107.

¹⁸⁴ *Id.*

¹⁸⁵ Dunlap LAWFIRE, *supra* note 168.

¹⁸⁶ Jane Arraf, *More Civilians Than ISIS Fighters are Believed Killed in Mosul Battle*, NPR, Dec. 19, 2017, <https://www.npr.org/sections/parallels/2017/12/19/570483824/more-civilians-than-isis-fighters-are-believed-killed-in-mosul-battle>.

¹⁸⁷ Rubinstein, *supra* note 16, at 96-98 (Hamas, Hezbollah, Taliban, among others have incorporated the use of human shields into their tactical plans).

¹⁸⁸ Dunlap JUST SECURITY, *supra* note 167.

For insurgents, using human shields and commingling with civilian populations are easy tactical and strategic wins against States concerned with civilian casualties. If an insurgents goal is to live another day, deterring an attack by using civilians as shields is any easy way to accomplish their objective. Imposing targeting restrictions assures the continued use of concealment warfare and perversely increases the potential harm to civilians.¹⁸⁹ Human shields have become the most pervasive problem of modern conflict and restricted targeting regimes will only ensure their continued use.

Related to the use of human shields is the advent of lawfare. As briefly discussed *supra*, lawfare is the use of law as a weapon of war.¹⁹⁰ Restricted targeting regimes result in an intensified resort to lawfare by insurgents in order to shift the strategic narrative. This becomes a necessity when insurgents can no longer exclusively rely on a magnitude of civilian casualties caused purely by State military action. While the prototypical use of human shields was deterring attacks, insurgents have now turned their use into an even more sordid affair; a weapon of lawfare to disrepute State action. Human shields are now being used with the expectation that civilians will be killed, bringing condemnation down on the States executing the attack.¹⁹¹ Instead of publicizing civilian presence to avoid attack, insurgents surreptitiously hide them within military facilities and discredit State operations once civilian casualties are revealed.

Urban warfare is ideal for this, as the concentration of civilians and military objectives naturally increases the likelihood of civilian casualties.¹⁹² ISIL for instance, clandestinely placed civilians inside military facilities. When these civilians were inadvertently killed,

¹⁸⁹ Reynolds, *supra* note 96, at 79.

¹⁹⁰ Dunlap, *supra* note 50.

¹⁹¹ Gross, *supra* note 56, at 144.

¹⁹² Canestaro, *supra* note 33, at 480.

Dabiq¹⁹³ used their deaths in an attempt discredit the coalition, characterizing the strikes as murder.¹⁹⁴ A Pentagon official noted that “[w]hat you see now is not the use of civilians as human shields. Now, it’s something much more sinister. ISIS is smuggling civilians into buildings so we won’t see them, trying to bait the coalition to attack, to take advantage of the public outcry and deter action in the future.”¹⁹⁵ This new approach has become a premeditated attempt to cause harm to civilian populations, an outright violation of the requirements under IHL.

Insurgents utilize these casualties to change the strategic narrative and shift the blame entirely to the States executing the attack, oftentimes with success.¹⁹⁶ As General Votel acknowledged, “[t]he enemy ... has little regard for human life and does attempt to use civilian casualty allegations as a tool to hinder our operations.”¹⁹⁷ The heightened risk of collateral damage can offset technological superiority, thus insurgents will increasingly exploit civilian casualties for their own strategic gain. As Hays Parks said the “...defender has accomplished his mission if he makes the attacker miss the target.”¹⁹⁸

Lawfare also has an overt face to it. It entails more than just the secretive placement of civilians in military facilities. Overt tactics employed include fighting from protected facilities including hospitals, mosques, and schools. Israel’s Ministry of Defense assessed that:

Hamas launched rockets from near schools, used hospitals as bases of operation, stored weapons in mosques, and booby-trapped entire neighbourhoods [sic], all in contravention of clear and specific prohibitions of international law. Hamas’ strategy was two-fold: (1) to take advantage of the

¹⁹³ Dabiq is the ISIS propaganda publication printed in several languages aimed at recruiting members. See *Islamic State’s (ISIS, ISIL) Horrific Magazine*, CLARION PROJECT, Sept. 10, 2014, <https://clarionproject.org/islamic-state-isis-isil-propaganda-magazine-dabiq-50/>,

¹⁹⁴ Graham, *supra* note 15, at 680.

¹⁹⁵ Terri Moon Cronk, *ISIS Hostage-Taking Caught on Video; Mosul Deaths Go to Formal Investigation*, DEP’T OF DEF. NEWS, Mar. 30, 2017, <https://dod.defense.gov/News/Article/Article/1135598/isis-hostage-taking-caught-on-video-mosul-deaths-go-to-formal-investigation/>.

¹⁹⁶ Gross, *supra* note 56, at 145.

¹⁹⁷ Jim Garamone, *Votel Details Mosul Strike Investigation to Congressional Committee*, DEP’T OF DEF. NEWS, Mar. 29, 2017, <https://dod.defense.gov/News/Article/Article/1134150/>.

¹⁹⁸ W. Hays Parks, *Air War and the Law of War*, 32 (1) A.F. L. Rev. 1, 191 (1990).

sensitivity of the IDF to civilian casualties on the Palestinian side, in an attempt to deter the IDF from attacking legitimate military targets; and (2) where the IDF did attack, to wield an excellent propaganda weapon against Israel, featuring civilian casualties as well as damage to homes and public institutions. In other words, Hamas chose to base its operations in civilian areas not in spite of, but because of, the likelihood of substantial harm to civilians.¹⁹⁹

Other insurgents employ similar tactics, purposefully endangering civilian populations.²⁰⁰

Media manipulation also plays an enormous role in the execution of lawfare. Insurgents are eminently media savvy and are able to manipulate the narrative, highlighting State ‘brutality’ directly to the international community using print, the internet, and social media platforms.²⁰¹ Insurgents broadcast false messaging that State and Coalition forces intentionally kill innocent civilians. By fabricating war crimes and exploiting the narrative created by unintentional civilian casualties, insurgents seek to undermine international support and change the strategic landscape.²⁰² According to Graham, it was the Islamic State’s use of lawfare that eroded Canadian public support and resulted in the Canadian government withdrawing strike assets from Iraq in 2016.²⁰³

Danish Karokhel, the Director of the first internationally recognized independent news agency in Afghanistan indicated:

90 percent of the information that the Taliban provide to the media is false: when only one Afghan soldier gets killed in an attack, the insurgents call the media and claim that 10 foreign soldiers are killed. They are not responsible to anyone for their false claims and misinformation while, on the other side, the government and the international forces have many responsibilities and obligations and can’t give false information.²⁰⁴

¹⁹⁹ 2014 Gaza Conflict, *supra* note 77, at ¶ 154.

²⁰⁰ See Chirine Mouchantaf, *ISIS Tactics That Have Left Iraqi Special Forces Weakened*, DEFENSE NEWS, May 8, 2018, <https://www.defensenews.com/digital-show-dailies/sofex/2018/05/08/the-isis-tactics-that-have-left-iraqi-special-forces-weakened/> (ISIS would take control of civilian homes and target Coalition forces from the upper floors keeping the civilians in the residence).

²⁰¹ Gross, *supra* note 56, at 213.

²⁰² Graham, *supra* note 15, at 665.

²⁰³ *Id.*

²⁰⁴ Abdulhadl Halran, *A Profile of the Taliban’s Propaganda Tactics*, HUFFINGTON POST, May 5, 2011, https://www.huffpost.com/entry/a-profile-of-the-talibans_b_442857.

To insurgents, any suggestion that propaganda enhances deterrence or promotes political volatility is an express benefit.

If the primary purpose of lawfare is to place the onus of indiscriminate warfare on States, then the unfortunate truth is that it is an effective technique. Orde F. Kittrie, in his book *LAWFARE*, writes:

Hamas's battlefield lawfare against Israel has proven to be one of the most valuable weapons in its arsenal, heavily influencing the behavior of Israel, other state actors, and the international community as a whole. It has led to Israel being condemned by much of the international community (including traditionally allied states) and being pressured to make concessions to Hamas. On the battlefield, it has required Israel to sacrifice the benefit of surprise and otherwise fight Hamas with one hand tied behind its back, including by deterring Israeli attacks against Hamas's headquarters in Shifa Hospital and, on many occasions, against Hamas fighters and weapons elsewhere.²⁰⁵

As the examples above reflect, modern wars fought in urban areas offer insurgents tremendous opportunities to use lawfare and exploit State military efforts.²⁰⁶ Meanwhile, States get no exemptions from IHL; they are expected to maintain the distinction between combatants and civilians even when insurgents deliberately blur the distinction.²⁰⁷ As Kenneth Anderson so eloquently summarized, “[f]acilitating insurgents exploitation of the law for its own defensive and propaganda purposes in this way gravely endangers the very persons the law of war seeks to protect—the civilians caught up in the combat zone—and thus undermines the essential fabric of the law of war.”²⁰⁸

While it is clear that States fight by rules that insurgents do not, States' dedication to reduce civilian casualties continues.²⁰⁹ However, these restrictions will continue to incentivize the practice of commingling with civilian populations, using humans shields, and utilizing

²⁰⁵ ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 330 (2016).

²⁰⁶ Walzer, *supra* note 47, at xviii.

²⁰⁷ *Id.* at xiv.

²⁰⁸ Anderson, *supra* note 36.

²⁰⁹ Canestaro, *supra* note 33, at 479; Reynolds, *supra* note X, at 79.

lawfare to combat State military dominance. With restrictive targeting regimes, insurgents have no incentive to comply with IHL, for doing so would be a repudiation of their entire strategy. As Walzer says “[i]t cannot be the case that guerillas can hug the civilian population and make themselves invulnerable.”²¹⁰

In addition to the increased civilian endangerment stemming from restricted targeting regimes, these regimes also create an impractical standard of victory - one of no civilian casualties. Never in history has there been a perfect war. This is because war is imperfect. War is also chaotic. While certain consequences of war are revealed immediately, others take longer to be exposed. The immediate effects of war are the casualties and destruction of urban areas. But no less devastating are the long term effects of war, the displacement of millions, starvation, and resulting psychological issues. Restrictive targeting regimes set an unrealistic expectation for warfighters, and the global community writ large, that wars can be won without civilian casualties.

Conducting warfare against an enemy in an urban environment is extraordinarily difficult. It is an environment that does not support a requirement for perfection. The United States realized this and increased the NCV for individual targets and geographic areas during select urban fights against the Islamic State.²¹¹ The nature of urbanized asymmetric warfare does not support zero civilian casualties, especially given the ubiquitous presence of civilians. It would have been impossible to liberate Mosul or Raqqa, or even Sirte, without inflicting a single civilian casualty. Casualties result from both those conducting ground offensives and those providing air support. The reality is that war is dangerous, and deadly. There will always be some risk to civilians but it is up to States to mitigate that risk as much as possible.

²¹⁰ Walzer, *supra* note 47, at 195.

²¹¹ Crawford, *supra* note 62.

This mitigation has occurred with the advent of precision guided munitions. The U.S. Department of Defense defines precision guided munitions as a “guided weapon intended to destroy a point target and minimize collateral damage. Also called PGM, smart weapon, smart munition.”²¹² Undoubtedly, the introduction of precision weapons systems has been one of the most important developments in the history of warfare. Aerial bombing campaigns – the days of Dresden and the Blitz - are no longer the norm. Precision-guided munitions are more effectively delivered on target, reducing the likelihood of civilian casualties. However, the ability of PGMs to minimize collateral damage has resulted in the erroneous belief that civilian casualties can be eliminated altogether.

While eliminating civilian casualties entirely is a commendable aspiration; it is unattainable. Precision weapons systems are fallible. Even the most advanced weapon system can go off course and result in unanticipated civilian casualties. Additionally, as Reynolds points out “[relying too heavily on precision technology may result in an overestimation that it cannot be rendered errant by guidance system jamming or other counter-measures employed be an adaptive adversary.”²¹³ Technologically advanced weapons systems are imperfect.²¹⁴ Yet, States have created an expectation that precision guided munitions (PGMs) will hit their intended target every time. Canestaro noted this risk as early as 2004, underscoring:

Ironically, precision warfare might be a victim of its own success in this regard. ... [C]reated an unrealistic public expectation of swift and low-casualty military campaigns. With a "no casualty campaign" arguably now the de facto standard for any U.S. military operation, air power has come to be judged by a nearly impossible standard. Every instance of unintended collateral damage, no matter how reasonable or unavoidable, is interpreted by some as evidence of a military failure.²¹⁵

²¹² *Dictionary of Military and Associated Terms*, DEP'T OF DEF. 174, <https://www.jcs.mil/Doctrine/DOD-Terminology-Program/>.

²¹³ Reynolds, *supra* note 96, at 101.

²¹⁴ Canestaro, *supra* note 33, at 483.

²¹⁵ Canestaro, *supra* note 33, at 476.

States now insist on a level of perfection that cannot be reliably delivered even with technologically advanced weapons. Charles Kels cautions that “[t]he stark reality is that any time combat power is employed innocents are likely to be harmed, no matter how cutting-edge the technology, prescriptive the policy framework, or conscientious the warfighters.”²¹⁶ While the goal of minimizing civilian casualties is laudable, the expectation that they can be eliminated altogether is unrealistic.

Even if precision munitions could prevent civilian casualties, death and injury from conflicts often occur weeks or months after combat operations cease; the casualties of indirect harm.²¹⁷ According to Professor Neta Crawford, “[i]ndirect harm occurs when wars’ destruction leads to long term, “indirect,” consequences for people’s health in war zones, for example because of loss of access to food, water, health facilities, electricity or other infrastructure.”²¹⁸ Indirect deaths are the eventual result of State action, and while not considered civilian casualties for purposes of State execution of a strike, these victims of war are certainly civilian casualties nonetheless.

Although the indirect death toll is difficult to estimate, research indicates that “between three and 15 times as many people die indirectly for every person who dies violently [during a combat operation].”²¹⁹ Deaths caused by a fractured health care system, malnutrition and psychological trauma far outnumber deaths from combat.²²⁰ According to the United Nation’s 2018 REPORT ON THE PROTECTION OF CIVILIANS, conflicts result in “...reverberating effects on

²¹⁶ Charles Kels, *Civilian Casualties and the Law-Policy Conundrum*, OPINIOJURIS, July 6, 2017, <http://opiniojuris.org/2017/06/07/civilian-casualties-and-the-law-policy-conundrum/>.

²¹⁷ *Human Costs*, WATSON INST. INT’L & PUB. AFF., <https://watson.brown.edu/costsofwar/costs/human> (last visited May 4, 2019).

²¹⁸ Neta Crawford, *Human Costs of the Post-9/11 Wars: Lethality and the Need for Transparency*, WATSON INST. INT’L & PUB. AFF. 2 (Nov. 2018).

²¹⁹ Neta Crawford, *War Related Death, Injury, and Displacement in Afghanistan and Pakistan 2001-2014*, WATSON INST. INT’L & PUB. AFF. 20 (May 22, 2015).

²²⁰ *Civilians Killed and Wounded*, WATSON INST. INT’L & PUB. AFF., <https://watson.brown.edu/costsofwar/costs/human/civilians> (last visited May 4, 2019).

water and electricity systems that increase the risk and spread of disease and food insecurity. Civilians are displaced and may lack access to lifesaving and other assistance and remain exposed to further violence.”²²¹

Widespread trauma is another legacy of conflicts. Columbia University’s Michael Wessells found that:

Conflicts create extensive emotional and psychosocial stress associated with attack, loss of loved ones, separation from parents and destruction of home and community. Many children develop problems, such as flashbacks, nightmares, social isolation, heightened aggression, depression and diminished future orientation. These problems of mental health and psychosocial functioning persist long after the fighting has ceased and make it difficult for children, who may comprise half the population, to benefit fully from education or to participate in post-conflict reconstruction.²²²

But war trauma extends to a population greater than just children. A review of research findings found that “among the consequences of war, the impact on the mental health of the civilian population is one of the most significant. ... Women are affected more than men. Other vulnerable groups are children, the elderly and the disabled.”²²³ Additionally, to further compound the devastating effects of combat, a recent study indicates that individuals now indirectly exposed to terror may develop psychological issues.²²⁴

Displacement is also an ongoing reality for those affected by conflicts. According to the United Nations Refugee Agency (UNHCR) the global community is witnessing the highest

²²¹ The Secretary-General, Report of the Secretary-General on Protection of Civilians in Armed Conflict, ¶ 42, *delivered to the Security Council*, U.N. Doc. S/2018/462 (May, 14, 2018).

²²² Michael G. Wessells, *Children, Armed Conflict and Peace*, 35(5) J. OF PEACE RES., 635, 638 (1998).

²²³ R. Srinivasa Murthy & Rashmi Lakshminarayana, *Mental Health Consequences of War: A Brief Review of Research Findings*, 5(1) WORLD PSYCHIATRY 25, 25 (Feb. 2006).

²²⁴ Marianne Bang Hansen, Marianne Skogbrott Birkeland, Alexander Nissen, Ines Blix, Øivind Solberg & Trond Heir, *Prevalence and Course of Symptom-Defined PTSD in Individuals Directly or Indirectly Exposed to Terror: A Longitudinal Study*, 80(2) Psychiatry 171, (2017) (Study found that individuals indirectly exposed to terrorism may develop symptoms of PTSD. Accordingly, due to the large number of individuals that may be indirectly exposed to terrorism, even a low risk of PTSD may result in high numbers of individuals with substantial posttraumatic stress).

levels of displacement on record, with 68.5 million people around the world forced from their homes.²²⁵ The United Nations reports that:

Refugees and internally displaced persons were exposed to serious protection risks, including killings, sexual and gender-based violence, torture, forced recruitment, trafficking in persons, early and forced marriage and arbitrary arrest and detention. Children, especially unaccompanied or separated children, are particularly vulnerable. Several attacks on camps or sites for internally displaced persons were reported, including in Iraq, Myanmar, Nigeria, South Sudan and the Syrian Arab Republic.²²⁶

These refugees and internally displaced persons face a lack of health care, food and water scarcity, homelessness, no access to sanitation, as well as a host of other concerns. These issues affect the millions impacted by conflict. By the end of 2017, there were 12.6 million forcibly displaced Syrians. Other large displaced populations included Iraq (3.3 million), Somalia (3.2 million), and Nigeria (2.0 million).²²⁷

THE GUARDIAN estimates that over 34,000 displaced persons, many of them emanating from conflict zones, have died.²²⁸ These deaths occur in detention centers and during the daunting journey both on land and at sea. If you do not recall the name Alan Kurdi you will surely recognize the photograph of him; the image of the dead Syrian toddler lying face down in the surf.²²⁹ Alan was from Kobani, Syria. His family fled during the fighting between the Islamic State and Kurdish forces. His brother and mother also died when their dinghy sank off

²²⁵ *Figures at a Glance*, THE U.N. REFUGEE AGENCY (UNHCR), <https://www.unhcr.org/en-us/figures-at-a-glance.html>.

²²⁶ The Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 65, delivered to the Security Council, U.N. Doc. S/2017/414 (May 10, 2017).

²²⁷ *Global Trends: Forced Displacement in 2017*, THE U.N. REFUGEE AGENCY (UNHCR) 6 (2017).

²²⁸ Holly Watt, Diane Taylor & Mark Rice-Oxley, *Drowned, Restrained, Shot: How These Migrants Died for a Better Life*, THE GUARDIAN, June 20, 2018, <https://www.theguardian.com/world/2018/jun/20/drowned-restrained-shot-life-stories-migrants-case-studies>.

²²⁹ Anne Barnand & Karam Shoumali, *Image of Drowned Syrian, Aylan Kurdi, 3, Brings Migrant Crisis Into Focus*, N.Y. TIMES, Sept. 3, 2015, <https://www.nytimes.com/2015/09/04/world/europe/syria-boy-drowning.html?hp&action=click&pgtype=Homepage&module=a-lede-package-region®ion=top-news&WT.nav=top-news&r=0>.

the Turkish coast.²³⁰ Alan is just one story of the thousands. The perils and tribulations facing displaced persons can never be overemphasized.

Restricted targeting regimes create an expectation of bloodless and deathless wars. But when combat operations are over, civilian populations are left to deal with the remnants of war. While anything more than zero civilian casualties has become unpalatable, wounds from war are not confined to the battlefield. As Sandro Galea, Dean of Boston University's School of Public Health recognizes:

It is in the nature of war to degrade the fabric of the societies it affects. The destruction is comprehensive—it wears away at a country's economy, its environment, its infrastructure, and the physical and mental health of its population. The plight of those displaced by wars, who become refugees for years and decades, is heart-breaking...²³¹

However much society wishes it were so, modern day wars cannot be won without civilian casualties. Even with remarkable advancements in technology, a State cannot win a war without inflicting collateral harm, both direct and indirect. The only way to avoid civilian casualties is to stop going to war. It is an unfortunate reality that civilians die in war, but it is a reality nonetheless.

The last unintentional consequence of restrictive targeting regimes is likely the one most relevant to international legal scholars, the development of a new standard of proportionality under customary international law (CIL). The theory of CIL defines custom as a practice that emerges and which individuals, organizations, and states follow in the course of their interactions, out of a sense of legal obligation.²³² Customary international law is capable of creating universally binding rules. This binding force rests on the implied consent of States

²³⁰ *Id.*

²³¹ Sandro Galea, *The Population Health Consequences of War*, B.U. SCHOOL OF PUB. HEALTH, Apr. 10, 2016, <https://www.bu.edu/sph/2016/04/10/the-population-health-consequences-of-war/>.

²³² Vincy Fon & Francesco Parisi, *Stability and Change in International Customary Law*, 17(1) SUP. CT. ECON. R., 279, 281-282 (February 2009).

expressed via action and practice.²³³ And though customary international law results from a general and consistent practice of States, it can be developed rapidly in quickly evolving areas of the law.²³⁴

Article 38(1)(b) of the International Court of Justice Statute defines customary international law as "a general practice accepted as law." The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW states that "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligations."²³⁵ Both definitions mandate two formative elements for the creation of CIL, the quantitative element and the qualitative element.²³⁶ The quantitative element focuses on the general and consistent practice of States. This is the element that is more objective and readily discernible. The qualitative element focuses on the sense of legal obligation or in Latin *opinio juris sive necessitatis*. This is the element that is more subjective. When both the quantitative (objective) and qualitative (subjective) elements are present, the international practice gains the status of international customary law and States are considered bound by the resulting custom.²³⁷

As to the first formative element, State practice, general practice suffices to generate customary rules binding on all States.²³⁸ Meanwhile, the ICJ has indicated that the most important practice is that of "States whose interests are specially affected."²³⁹ Thus the existence of CIL is not solely a numbers game. It may be enough that the practice be

²³³ *Id.*, at 279-280.

²³⁴ Tullio Treves, *Customary International Law*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (November 2006).

²³⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT].

²³⁶ Fon and Parisi, *supra* note 232, at 282.

²³⁷ *Id.*

²³⁸ Customary International Humanitarian Law, INT'L COMM. OF THE RED CROSS (ICRC) Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in.

²³⁹ North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. at 43, ¶ 74 (Feb. 20).

representative, so long as it includes States whose interests are specially affected.²⁴⁰ As the MAX PLANCK ENCYCLOPEDIA states, “the practice relevant for establishing the existence of a customary international rule must neither necessarily include all States nor must it be completely uniform.”²⁴¹ This allows for emerging norms within State clusters of multilateral practice that are expected to become pervasive over time.²⁴²

The second formative element generally requires that State actions are carried out because of a legal obligation. States act in compliance with norms not merely due to ethical reasons, convenience or habit, but rather out of a sense of legal obligation. The subjective element has been described as “the philosopher’s stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules.”²⁴³ However, what qualifies as *opinio juris* and even if it is truly required is a debate that continues amongst legal scholars.

Karol Wolfke takes a traditional approach arguing that “the essence of customary law lies in the legalization, mainly by means of acquiesce, of certain factual uniformity in international relations.”²⁴⁴ In Wolfke’s estimation CIL is not intentionally created, instead “[a]n international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law.”²⁴⁵ Maurice Mendelson argues that *opinio juris* is irrelevant given that most supporters of the framework normally accept that widespread and representative practice is enough and that *opinio juris* can be inferred from that practice.²⁴⁶ Mendelson’s argument is

²⁴⁰ Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT’L & COMP. L. 305, 315 [hereinafter Scarf CIL].

²⁴¹ Treves, *supra* note 234. See also North Sea Continental Shelf 1969 I.C.J. at 218, 231 [Dissenting Opinion of Judge Lachs] arguing that generality must include States representing the main legal, economic, and political orientations and geographical areas.

²⁴² Fon & Parisi, *supra* note 232, at 282-283.

²⁴³ TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 76 (1998).

²⁴⁴ KAROL WOLFE, CUSTOM IN PRESENT INTERNATIONAL LAW 164 (1993).

²⁴⁵ *Id.* at 53.

²⁴⁶ Maurice Mendelson, *Does Customary International Law Require Opinio Juris in Customary International Law* [Discussion Paper], THE ROLE OF OPINIO JURIS IN CUSTOMARY LAW DUKE-GENEVA INSTITUTE IN

that this redundancy makes *opinio juris* obsolete. Professor Frederic Kirgis take a more nuanced approach suggesting that there is a “sliding scale” relationship between the amount of State practice and *opinio juris* needed to produce CIL.²⁴⁷ The greater the quantity of States that concur in the practice, the less the need for evidence of *opinio juris*.²⁴⁸

Norman and Trachtman postulate that instead of a “sense of legal obligation,” the RESTATEMENT formulation refers to an “intent to create or accept a rule of law.”²⁴⁹ Fon and Parisi concur stating that “[p]rior to the solidification of practice into binding custom, States engage in actions on a purely voluntary basis, taking into account costs and benefits of the actions and their interest in establishing a customary rule that will bind for the future.”²⁵⁰ These positions are further supported by Article 38(1)(b) of the ICJ Statute that speaks of a “sense of incipient legal obligation.”²⁵¹ The RESTATEMENT language can thus be interpreted as not referring to a fully formed legal obligation, but rather a perception that a new rule would be beneficial to society. As Judge Lachs wrote in *NORTH SEA CONTINENTAL SHELF*:

... [T]he motives which have prompted States to accept it [the conviction that something is law] have varied from case to case. It could not be otherwise. At all events, to postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction – and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated²⁵²

TRANSNATIONAL LAW, UNIVERSITY OF GENEVA CONFERENCE, May 30, 2013, <https://law.duke.edu/cicl/opiniojuris/schedule/> (Written for The Role of *Opinio Juris* in Customary International Law July 12-13 2013, Co-Sponsored by the American Society of International Law).

²⁴⁷ Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 149 (1987). John Tasioulas has also endorsed Kirgis’ sliding scale concept, see John Tasioulas, *In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. OF LEGAL STUD. 85, 109 (1996)

²⁴⁸ Kirgis, *supra* note 247, at 149.

²⁴⁹ George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 (3) AM. J. INT’L L. 541, 570 (2005).

²⁵⁰ Fon & Parisi, *supra* note 232, at 286-287.

²⁵¹ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 ICJ REP. 14, ¶ 207 (June 27) (“Reliance by a State on a novel right, or an unprecedented exception to the principle, might if shared in principle by other States, tend towards a modification of customary international law.”)

²⁵² *North Sea Continental Shelf*, 1969 I.C.J. at 232 [Judge Lach’s dissent].

Thus, CIL in essence is the normalization of conduct, or the realization of social conduct, through multilateral action.

While traditionally only State conduct and *opinio juris* have been used to define whether an emergent norm has attained CIL status, according to Matthew Scharf there is an overlooked third factor. This third factor is “a context of fundamental change—that can serve as an accelerating agent” enabling CIL to develop rapidly. Scharf argues, in part relying on the International Court of Justice’s North Sea Continental Shelf Case,²⁵³ that seismic shifts in the international system can lead to the rapid development of international law, challenging the once held notion of its protracted formation.²⁵⁴ New principles of CIL can thus arise with “exceptional velocity.”²⁵⁵

Scharf calls these Grotian Moments and explains them as “a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.”²⁵⁶ Per Scharf, a Grotian Moment:

[C]onstitutes of an acceleration of the custom-formation process due to states’ widespread and unequivocal response to a paradigm-changing event in international law, such as the unprecedented human suffering from the atrocities of World War II and the related recognition that there could be international criminal responsibility for violations of international law.²⁵⁷

²⁵³ *Id.* at ¶¶ 71, 73–74 (Feb. 20) (North Sea Continental Shelf involved the delimitation of the continental shelf areas in the North Sea between Germany and Denmark and Germany and Netherlands beyond the partial boundaries previously agreed upon by these States. The parties requested the Court to decide the principles and rules of international law that are applicable to the above delimitation because the parties disagreed on the applicable principles or rules of delimitation. The North Sea Continental Shelf Cases dispelled the myth that duration of the practice (i.e. the number of years) was an essential factor in forming customary international law. Court held that “...the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule...” at 43, ¶ 74.

²⁵⁴ Scharf CIL, *supra* note 240, at 307.

²⁵⁵ *Id.* at 332.

²⁵⁶ Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L. J. 439, 439 (2010) [hereinafter Scharf Grotian Moment].

²⁵⁷ *Id.* at 446.

They respond to technological, economic, or societal change. The MAX PLANCK ENCYCLOPEDIA concurs with Scharf observing that, “recent developments show that customary rules may come into existence rapidly...[t]his can be due to the urgency of coping with new developments of technology...or it may be due to the urgency of coping with widespread sentiments of moral outrage.”²⁵⁸

We may be in the midst of a Grotian Moment as there is no greater moral outrage in today’s wars than the killing of innocent civilians. Additionally, that only a handful of States have restricted targeting regimes is irrelevant as in a multilateral setting, it is enough that formative elements of a custom are present for “specially affected” States.²⁵⁹ Furthermore, rapidly formed CIL does not have to be fully fleshed out or rigidly fashioned.²⁶⁰ Grotian Moments merely require some underpinning of State practice.²⁶¹

States must heed the warning of the possibility of rapidly formed customary international law resulting from the morale outrage of civilian casualties. Potentially, public release of State rationale for targeting restrictions may be used to claim persistent objector status or rebut *opinio juris*. However, without the acknowledgement of State’s moral imperative driving these policies the global community may mistakenly believe that a new legal obligation is being formulated. If the U.S. and other States want to ensure that targeting restrictions remain a voluntary practice they must continue to express – both in words and in deeds – that prescriptive policies are an attempt to hold themselves to stricter standards than the law of war dictates; not change the law of war.

A new frame of proportionality under CIL would forever change war. States would be hamstrung in their ability to defeat an adversary if even the unintentional death of one civilian

²⁵⁸ Treves, *supra* note 234.

²⁵⁹ North Sea Continental Shelf, *supra* note 239, at 42-43, ¶ 73, 74.

²⁶⁰ Scharf CIL, *supra* note 240, at 338.

²⁶¹ *Id.* at 340.

was seen as a violation of international law. Warfare would be prolonged due to State fear of miscalculation, and the world would watch as civilian populations were brutally massacred by insurgents. These bespoke norms may eventually develop into a new form of customary international law, forever undermining the intrinsic right of States to defeat an adversary and hindering their ability to protect civilian populations.

V. Conclusion

It is a year in the not too distance future. A bloody civil war in Libya has just abated, leaving the country in chaos. The successor to the Islamic State - whomever they may be - has used the power vacuum created by the civil war to take control of a vast swatch of territory. The world watches as this new organization slaughters innocent civilians. The international community is pummeled with videos, social media posts, and news articles of beheadings, mutilations, rapes, and mass executions. The world response is overwhelmingly supportive of liberating the civilian population. The United Nations Security Council even issues an Article VII Resolution²⁶² calling for ‘any and all means necessary’ - allowing military action.

Strike assets are in the air and special forces are on the ground; where they wait. Reconnaissance footage shows insurgents taking over schools, hospitals, mosques, power plants, and civilian homes – creating military communications nodes or weapons depots in each location. These insurgents are tactically and strategically savvy; they surround themselves with civilians knowing that the Coalition’s precision guided munitions are accurate within meters. Society mandates a conflict without civilian casualties and now the Coalitions’ hands

²⁶² *United Nations Security Council Actions with Respect to Threats to the Peace, Breaches of Peace, and Acts of Aggression*, UNITED NATIONS, <https://www.un.org/securitycouncil/content/repertoire/actions> (last accessed May 3, 2019). Chapter VII of the Charter of the United Nations provides the framework within which the Security Council may take enforcement action. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to make recommendations or to resort to non-military and military action to "maintain or restore international peace and security."

are tied, they cannot possibly liberate the city without inflicting civilian casualties. The urbanized nature of the fight, and the tactics of the adversary will not allow it.

This narrative unfortunately sounds all too familiar and all too realistic. In today's wars States take extreme measures to avoid harm to civilian populations. They use precision weaponry, heed the advice of military lawyers, and have introduced proscriptions on targeting. Professor Gabby Blum reminds us that States today are "more restrained, and more constrained" in their methods of warfare and they are "more concerned...with the wellbeing of the civilians they affect."²⁶³ However, State measures will never be enough to eradicate war's harms to civilians; they are inherent in the nature of war.

It is understandable that the concept of proportionality in IHL is puzzling and controversial to society. It makes sense to live in a society that does not condone the killing of innocents. However, while that is an honorable aspiration, it is not the law. IHL instead recognizes the brutality and reality of war. It mandates that parties to a conflict conduct a delicate balancing act between civilian casualties and military advantage. But we cannot fault States for restricting proportionality, it is after all the moral thing to do.

However, these restrictions are not entirely altruistic. State policies exist because of a political choice. A choice driven by fear of alienating domestic audiences, damaging foreign relations, and, media rebuke. State policies restricting proportionality and capping the civilian death toll make sense in a world where politicians have to answer for State actions. And while the advent of targeting restrictions that go beyond what IHL requires may be seen as a step towards minimizing the collateral consequences of war – one supported by general society, States are naïve if they do not acknowledge the risks these same policies pose to civilians in particular and to the conduct of war generally.

²⁶³ Gabriella Blum, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, 56 (4) Houston Law Review, 737, 773 [Draft].

First is the increased brutality to civilians. Restrictions on State action provide insurgents with increased freedom of maneuver to carry out vicious attacks on civilians. Assassinations, beatings, and detention will be the norm. Sexual violence against women and children will be rampant. The moral hazard of inaction will ring particularly true if States are incapable of targeting the enemy. States must pay homage to the idea that inaction ultimately poses risks to civilian populations. If insurgents are neutralized, they are no longer a threat to civilian populations. States save lives by killing insurgents.

Second is amplified civilian endangerment. Restrictive targeting regimes incentivizes commingling with civilian populations, the use of human shields, and the practice of lawfare to combat State military power. Insurgents will continue to take advantage of State policies and utilize civilian populations to immunize themselves from strikes. Targeting restrictions also perversely induces the abhorrent lawfare practice of sending civilians to their death by hiding them in military facilities for the sole purpose of inducing military engagement. Insurgents are then able to condemn State action as the murder of innocents. Targeting restrictions remove any incentives insurgents have for complying with IHL; now doing so will put them at both a tactical and strategic disadvantage.

Third, targeting restrictions create an unrealistic expectation of a perfect war. Precision weaponry is not infallible and it may never be. Additionally, war's reverberations are felt long after battles have abated. Psychological trauma, limited access to water, food, and healthcare, and the displacement of millions will continue even if States are inexplicably able to execute kinetic warfare without civilian casualties. States policies restricting targeting have inadvertently set an unachievable standard for war; one now expected from society. A world of no civilian casualties is a world with no war.

Fourth, this new normative framework may forever change the concept of proportionality under international law. If restrictive targeting and the requirement for zero civilian casualties evolves into customary international law it will forever change the nature of war. States will be stymied in their ability to engage the enemy and wars will be prolonged evolutions. A State's ability to defeat an adversary will be inherently undermined as concerns about unintentionally violating the new law will permeate operations. The conduct of war would be irrevocably changed.

In the words of Yoram Dinstein, "war is hell." International humanitarian law has "not undertaken a mission impossible of purporting to eliminate the hellish consequences of war. What [IHL] strives to do is reduce these consequences."²⁶⁴ Today, States have placed themselves in an untenable position, promising society they will do more, while simultaneously hamstringing their own ability to protect civilian populations; a dangerous position for everyone concerned – except the insurgents.

States must be cognizant of the inherent dangers of positing a policy doctrine of a perfect strike. Because a perfect strike may ultimately be imperfect to a State's ability to protect civilians and defeat an adversary. States comply with IHL even when their adversaries do not; but war remains imperfect and civilian casualties are inevitable. Civilians are subject to the perils of war so long as wars exist. Given the United Nations' mandate of a responsibility to protect,²⁶⁵ States simply cannot restrict targeting to the extent that it further endangers civilian populations around the globe; it is hypocritical at best and devastating at worst.

²⁶⁴ Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert it*, 87 U.S. Naval War College Int'l War. Stud., 483, 487.

²⁶⁵ G.A. Res. 60/1, ¶ 139, U.N. Doc. A/Res/60/1 (Oct. 25, 2005) (The 2005 World Summit outcome resulted in G.A. Res. 60./1, ¶ states that the international community has the responsibility "to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."