A LEGAL ANALYSIS OF THE ATTACKS ON CIVILIANS AND INFLICTION OF "COLLATERAL DAMAGE" IN THE MIDDLE EAST CONFLICT

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"I cannot hope that heaven will prosper our
cause when we are violating its laws. I shall,
therefore, carry on the war in Pennsylvania
without offending the sanction of a high civilization
and of Christianity."

Robert E. Lee, Lt. Col. U.S.A./Gen. C.S.A.
June, 1863

INTRODUCTION

Over the past several months, Israel has been heavily, sometimes stridently, criticized because of its military responses to the most recent Palestinian "Intifada." This criticism has come from Arab states, activists, the United Nations Human Rights Commission, and the European Union, among others. Although many different charges have been leveled against Israel and its armed forces, the most serious claims involve the killing of Palestinian civilians during Israeli military operations, and the Israeli policy of "targeted killings," which European Union External Affairs Commissioner Christopher Patten has characterized as "extra-judicial killings."[1] Palestinian supporters have, in fact, made a concerted effort to equate Israel's military operations with Palestinian "suicide" bomb attacks, a comparison that has been openly endorsed by officials in several Arab countries and,[2] unfortunately, accepted uncritically by many in the United States.

In fact, the alleged equivalency between Israeli military strikes and Palestinian suicide attacks, is without foundation in international law — particularly in the laws and customs of war governing armed conflicts. Although the death of innocents is always to be regretted, the law makes a clear distinction between attacks that deliberately target civilians (which are emphatically illegal) and civilian casualties that result from otherwise lawful attacks on proper military targets. Such "collateral damage" has been accepted as an inevitable part of armed conflict for centuries, and violates the laws of war only if the number of civilian casualties is wholly disproportionate to the military advantage originally expected from the attack. Moreover, attacks directed by Israel against individual members of armed Palestinian groups constitute lawful acts of war and cannot in any manner be characterized as "extra-judicial" killings.

There is no exception to these established rules for "national liberation movements" dependent on guerrilla tactics. Whether such groups have a "just" cause, or the fact that they may be unable to achieve their goals in the absence of terror, makes no difference. Any group that resorts to armed force (assuming that it has this right in the first instance) must conform the conduct of its operations to the established laws and customs of war. If it does not, its military leaders and their subordinates will be unable to claim the benefits of "lawful" belligerent or combatant status. They become "unlawful combatants" who, upon defeat or capture, may be subjected to severe punishment – up to

and including the death penalty in cases where national law provides for it – for their hostile actions.

Overall, when measured against the applicable international law norms — particularly as those norms have been interpreted and applied by the United States — the military operations undertaken by Israel, in which Palestinian civilians have died, as well at its policy of "targeted killings," are legal. Claims that "suicide" attacks by Palestinian groups on Israeli civilians are equivalent to the civilian deaths resulting from these Israeli strikes can, and should, be understood as the cynical propaganda exercises that they are. Moreover, these claims must be challenged and forcefully rebutted. The acceptance by states of a rule that permitted deliberate attacks on civilians as the practical equivalent of "collateral damage" would severely warp the laws of war, empowering terrorist groups, and legitimizing their methods of warfare.

I. What Rules Apply to the Conflict?

Despite the frequent assertions of activists, international law is not a monolithic code applicable in the same manner, at all times, and in all places. Rather, it is a complex set of principles, rules, and practices. Some of these are grounded in custom, and others are based on treaties. The laws and customs of war are an important subset of international law, and are often referred to generally as the "law of armed conflict." In older texts and treatises, this body of law is usually divided into *jus ad bellum*, dealing with the rules on when states may legitimately use armed force, and *jus in bello*, referring to the actual rules governing how wars are fought. The application *of jus in bello* rules in any particular situation will depend upon the character and identity of the parties involved, as well as upon the nature of their conflict. For example, the law of armed conflict always applies to wars between states. Conflicts involving parties within a single state, however, are not covered by this body of law unless certain intensity and duration requirements, generally characteristic of a "civil war," are present.[3]

The question is even more complicated with respect to the various treaties establishing rules for armed conflicts. Whether and how the Geneva Conventions of 12 August 1949, and the Protocols to those conventions, apply to a particular conflict depends on whether the state or states involved have ratified those instruments, and the nature of any other parties to the conflict.[4] Terrorist organizations, such as al Qaeda, HAMAS, and Hizballah, are not parties to the Geneva Conventions and are not entitled to the rights and protections prescribed by these treaties. At the same time, many of the provisions of the Geneva Conventions represent customary international law norms that do apply, assuming the existence of an "armed conflict," whether or not the parties to a particular conflict are also parties to the Conventions, or the protocols. Where the current conflict between Israel and the Palestinians falls within the matrix is a particularly difficult question.

As a sovereign state, Israel is entitled, both by customary international law and the United Nations Charter,[5] to use armed force to defend itself against either internal or external attack, whether that attack has already been launched or is being anticipated.[6]

However controversial its creation may have been, Israel has maintained its independence for more than fifty years, has been fully recognized by the vast majority of the world's nations, and is a member of the United Nations. Its legal right to use armed force to defend its people and territory is beyond peradventure.[7] However, Israel's relationship to the Palestinian population living in the West Bank and Gaza Strip is less clear. These areas are not part of Israel but, nevertheless, are controlled by Israel to a greater or lesser degree.

Both the West Bank and Gaza, like Israel proper, were part of the post-World War I British Mandate in Palestine, formally recognized by the League of Nations in 1922. At the close of the 1948 Israeli War for Independence, the West Bank was under the control of Jordan, which formally annexed the territory along with the "Old" city of Jerusalem. Gaza was left under Egyptian control. However, neither Jordan nor Egypt offered citizenship to the population of these areas. Palestinians remaining in Israel became Israeli citizens, although a substantial portion of the non-Jewish population living in Israeli territory fled during, or shortly after, the fighting. During the 1967 "Six-Day War," Israeli troops overran the West Bank and Gaza Strip, was well as Egypt's Sinai Peninsula and the Golan Heights, along the border between Israel and Syria.

Israel considers the West Bank and Gaza Strip to be "disputed" territories, but it has never moved to formally annex either area.[8] As a result of agreements concluded in 1979 and 1994 respectively, Israel is today at peace with the states of Egypt and Jordan. The 1979 Israel-Egypt Peace Treaty established Israel's international borders with reference to the original British Mandate boundary, as did the 1994 peace agreement between Israel and Jordan. The final status of the Gaza Strip and West Bank were to be determined through later negotiations, with the object of creating some entity providing self-government to the Palestinian population. Thus, today, although neither the West Bank nor Gaza can be said to be a part of Israel, neither are they clearly foreign territory belonging to another state. It is simply unclear whether the territories can be considered as "occupied" in the technical sense of that term.[9]

In this connection, Israel has refused to accept the *de jure* application of the Geneva Convention IV, which otherwise would govern the treatment of the population in the territories, although it has accepted the *de facto* application of "customary international law applicable to belligerent occupation."[10] Accordingly, Israel has instructed its military, the Israeli Defense Forces ("IDF"), to abide by the substance of both the "Hague Regulations" (drawn from the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, and its Annex), and Geneva Convention IV, even though it believes at least the Geneva Convention to be formally inapplicable, and its Supreme Court has ruled, again with respect to the Geneva Convention IV, that its provisions do not enjoy the status of customary international law.[11]

Further complicating the issue is the status, or lack thereof, of the Palestinian people themselves. They are, at least as a group, citizens of no state (although the Palestinian Authority ("PA") issues passports which have been accepted by many states).

From 1964 to 1993, the Palestinian Liberation Organization ("PLO") was the most prominent group claiming to represent Palestinian interests. As part of the Oslo peace process (beginning in 1993), Israel recognized the PLO as the representative of the Palestinians and, pursuant to a number of later agreements, the PA was created with administrative power over internal affairs in Gaza and much of the West Bank. The PA's security services are composed of para-military and police groups, including the Palestinian Police Force, Palestinian Public Security Force, the Palestinian Civil Police; the Preventative Security Force, the General Intelligence Service, the Palestinian Presidential Security Force, and the Palestinian Coastal Police.[12] Nevertheless, the PA is not a state.

As a result, it would be incorrect to characterize the current conflict as an "international armed conflict." At the same time, it is not a traditional "internal" armed conflict, between parties who are citizens of the same state — although the intensity and duration of the fighting would likely qualify it as such. In any case, Israel has characterized the situation as an "armed conflict," and has described it as follows:

> Israel is engaged in an armed conflict short of war. This is not a civilian disturbance or a peaceful demonstration or a riot. It is characterized by live-fire attacks on a significant scale, both quantitatively and geographically - around 3,000 such attacks over the entire area of the West Bank and the Gaza Strip. The attacks are carried out by a well-armed and organized militia, under the command of the Palestinian political establishment, operating from areas outside Israeli control.[13]

Therefore, it is reasonable to conclude that the customary laws and customs of war are applicable, although the applicability of the 1949 Geneva Conventions remains in dispute. Elements of those Conventions, however, are applicable to the extent that they represent customary rules, as Israel has itself conceded.[14]

II. "Suicide" Attacks as a Method of Warfare.

The laws and customs of war do not proscribe the use of "suicide" attacks by a party to an armed conflict. Such tactics are unusual (for obvious reasons), but have been employed in the past, most notably by Japan during the last months of World War II.[15] So long as a suicide attack is directed at a military target, such as the Allied warships targeted by Japanese Kamikaze pilots, and carried out without violating the rules against treachery and perfidy in warfare, there is little doubt that they are legal.

It is equally certain, however, that the use of "suicide" attacks, such as those Israel continues to suffer, directed against non-military, civilian targets, violate the laws and customs of war. In fact, the rule against deliberate attacks against civilians is one of the oldest legal norms governing the conduct of warfare. As noted by the 18th century international law publicist Emmerich de Vattel, individuals who "make no resistance . . . consequently give us no right to treat their persons ill, or use any violence against them,

much less take away their lives. This is so plain a maxim of justice and humanity, that at present every nation in the least civilized, acquiesces in it."[16]

This customary rule was expressly reaffirmed in Protocol I Additional to the Geneva Conventions of 12 August 1949 (1977) ("Protocol I"). Although this treaty has not been universally accepted (neither the United States nor Israel are parties), a number of its articles are recognized as declaratory of customary international law.[17] Specifically, the injunction that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack" clearly falls within this category.[18] In particular, as noted by the ICRC in its commentaries on Protocol I, this provision "is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage."[19] Violation of this rule is a war crime. Both the individual perpetrators, as well as superiors who ordered or condoned such attacks, are subject to prosecution and punishment based on national legal codes,[20] and perhaps in international criminal courts depending on the location of the attacks and the nationality of the individuals involved.[21]

III. Both Parties to the Intifada Are Bound by the Laws and Customs of War.

As a sovereign state, Israel clearly is bound by the customary laws and customs of war, as well as any treaty-based requirements it has accepted in accordance with its constitutional treaty-making processes. The laws of war are also applicable, however, to non-state actors who take up arms, such as the PA and any other group using armed force to further the Palestinian cause. Any such group that refuses to carry out its operations in accordance with the laws and customs of war, including all of the groups engaged in "terrorist" activities in general, and "suicide" attacks on Israeli civilians in particular, falls into the category of "unlawful belligerent" or "unlawful combatant."[22] Members of such groups not only are subject to prosecution for "war crimes" if they have ordered or carried out deliberate attacks on civilians, they may be prosecuted and punished simply for taking up arms as unlawful combatants in the first instance.[23] They are not entitled to be treated as prisoners of war ("POWs") upon defeat or capture.

A. The Laws and Customs of War as Applied to National Liberation Movements.

It is sometimes asserted that the legal norms applicable to the armed forces of sovereign states cannot be applied with the same force and vigor to national liberation movements which, of necessity, resort to "guerrilla" tactics. Although this view has been promoted at various times in the past fifty years by the governments of developing nations (many of whom are the result of such guerrilla movements), it has never been accepted as a principle of international law. In fact, the most that supporters of this view have accomplished is the relaxation of certain discrete requirements – involving whether an armed group has the right to use force and how that group must distinguish itself from the rest of the population – that are otherwise fundamentally inconsistent with the goal of "national liberation" and the use of guerrilla tactics. Even this "achievement" has not

been universally accepted, and never even purported to offer an exemption from the laws of war protecting civilians from attack.[24]

1. Traditional International Law.

Traditionally, international law recognized only the right of sovereign states to resort to armed force.[25] Individuals who resorted to force without the sanction of a sovereign (generally required to be in the form of a commission), were considered to be outlaws, bandits and pirates. Upon capture or defeat, such individuals were not entitled to the protection afforded by the laws of war to armed forces of states – particularly POW status. Indeed, until the beginning of the 20th century, international law technically permitted such "unlawful" belligerents to be killed out of hand (although national legal systems sometimes provided for a trial), and, even when granted due process of law, they were generally subjected to harsh punishments. By contrast, "lawful combatant" status involved five minimum requirements. These were the following:

1. The group had to enjoy the sanction of a state.

2. The group had to have a recognizable command structure.

3. The group had to wear uniforms, or some other device or design that would distinguish members from the civilian population at large.

4. The group had to carry its arms openly.

5. The group had to conduct its operations in accordance with the laws and customs of war.

If the group failed to meet any one of these requirements, each of its members could be treated as an unlawful combatant.[26]

The same rules obtained even in those instances where armed force was employed by groups attempting to resist foreign domination — whatever the justness of their cause. The recognition of what would today be termed a "national liberation movement" as a lawful belligerent presupposed a number of factors, including

> the existence of a de facto political organization of the insurgents sufficient in character, population, and resources to constitute it, if left to itself, a state among the nations, reasonably capable of discharging the duties of a state; the actual employment of military forces on each side, *acting in accordance with the rules and customs of war* . . . .[27]

Moreover, if that recognition came too early, it would be considered an impermissible act of intervention in the domestic affairs of another sovereign.[28] This would constitute both

an international delict, and could lead to war – just as France's 1778 recognition of the United States brought it into the War of American Independence.

Although these general rules were honored in the breach as well as the observance, the necessity for some form of state sanction for "lawful belligerent" status remained imperative throughout the 19th and early 20th centuries. In instances (such as the American Civil War) where a conflict clearly involved regular armed forces, agreements were reached, formally or informally, based on reciprocity, whereby each side accepted the burdens, and received the benefits, of the laws of war. Similarly, after the French government surrendered to Germany in 1940, the Free French Forces under General Charles de Gaulle, who fought on in North Africa, continued to be recognized as lawful combatants.[29] Such arrangements, however, were far from universal, and forces not sanctioned by a recognized state authority continued to run the risk of being treated as unlawful combatants.

2. Efforts to Grant Lawful Status to Guerrilla Movements

In the wake of World War II, during which there had been an unprecedented amount of partisan or guerrilla activity, an attempt was made to address conflicts where one party does not recognize the legitimacy of the governing authority of one or more of its opponents. In the 1949 Geneva Conventions, POW status was formally extended to forces finding themselves in the position of de Gaulle's troops: "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."[30] However, this provision did little for guerrilla movements in general, which continued to lack any clear (or, at least, beneficial) status under international law.

As noted above, an effort was made to grant some protection to guerrilla forces in 1977, with the negotiation of Protocol I. This instrument, however, did not eliminate the category of unlawful combatant, or grant the full protection of the laws and customs of war, including the Geneva Conventions, to guerrilla forces or national liberation movements in all circumstances. In fact, only two meaningful changes were made. First, Protocol I recognized that an authority that had, in the past, represented a state, or that might, in the future, qualify for recognition as such ("claim[ing] to be a State or an entity which is not yet a State"), could sanction the use of force so that its armed fighters could qualify as lawful combatants, *assuming they generally satisfied the other basic requirements of the Hague Regulations*. As explained by the ICRC, the intent was as follows:

> "the non-recognized government or authority must represent, or must claim to represent, a subject of international law recognized as such by the other Party to the conflict; as a rule, the subject of law will have existed prior to the conflict, which will therefore from the outset be of an international character; exceptionally, however, it may also be established in the course of the conflict, either because its recognition as a State by the other party to the

> conflict or because of its recognition as a belligerent, whereby the other Party to the conflict confers upon the recognized subject a certain limited and provisional international personality. *In any case, the mere existence of a government or resistance movement is not sufficient evidence of the international character of the conflict, nor does it establish that character and hence render the application of the present Protocol mandatory*."[31]

Second, two of the requirements codified in the Hague Regulations were modified in the case of guerrilla movements. Under Protocol I, such groups could still qualify as lawful combatants, even if they do not at all times wear uniforms and carry their arms openly (as required of regular armed forces), so long as they do wear a uniform, or some other distinguishing badge or device, and carry their arms openly during the period when they are preparing for or engaging in combat. As the ICRC Commentary explained at the time:

> *To summarize*: the conditions which should all be met to participate directly in hostilities are the following: a) subordination to a "Party to the conflict," which represents a collective entity which is, at least in part, a subject of international law; b) an organization of a military character; c) a responsible command exercising effective control over the members of the organization; d) respect for the rules of international law applicable in armed conflict. These four conditions should be fulfilled effectively and in combination in the field.[32]

All other aspects of the traditional law of war with respect to the distinction between lawful and unlawful combatants were affirmed, with the clear intent that all armed forces, whether regular or irregular, remain "indissolubly bound" by the "rules of international law applicable in armed conflict."[33] In this regard, "the obligation of all combatants to comply with the rules of international law applicable in armed conflict remains in its entirety, for such combatants can be punished in case of breach. This certainly indicates that in this article the Protocol in no way legalizes terrorism, as has sometimes been claimed."[34]

3. Claims of "Necessity."

Despite the clear obligation international law imposes on national liberation movements to honor the laws and customs of war, it is sometimes argued by their spokesmen and supporters that such groups may be excused from compliance on the ground of necessity. The logic here is that, if national liberation movements in general, and the Palestinians in particular, must comply with the law of war – especially the prohibition on attacking civilians and civilian targets – victory against the much more powerful regular forces of Israel will be impossible.[35] Consequently, under this line of thinking, the injunction against targeting civilians for attack must recede before the principle of self-defense/self-preservation.

It is clear that international law does recognize a principle of necessity. Vattel was one of the early and eloquent descriptors of this doctrine. He noted as follows: "[s]ince then a nation is obliged to preserve itself, it has a right to every thing necessary for its preservation, for the Law of Nature gives us a right to every thing, without which we could not fulfil our obligation."[36] This right, as understood by Vattel, extended to the means employed in warfare: "[i]t gives a right of doing against the enemy whatever is necessary for weakening him; from disabling him from making any farther resistance."[37]

At the same time, however, Vattel recognized that this rule of necessity was not unlimited in its reach. In particular, the right of necessity, as arising from natural law, was constrained by natural law, so that it could permit nothing "odious . . . unlawful in themselves, or exploded by the law of nature."[38] This principle was incorporated into the 1907 Hague Regulations, which specifically state that: "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[39] A very strong argument can be made that the rule against deliberate attacks on civilians and civilian targets is so well established in law that it cannot be ignored based on a justification of necessity.

Indeed, since the distinction between combatants, who can be attacked, and non-combatants, who are immune from attack, is so fundamental to the law of armed conflict, it is difficult even to postulate what would remain of *jus in bello* if this distinction was vitiated. At the same time, of course, it is important to acknowledge that the rule of non-combatant immunity has not always been strictly followed in practice. For example, during the Second World War, both the Axis Powers and the Allies engaged in aerial bombing campaigns intended, at least in part, to terrorize the civilian population.[40] To be sure, World War II bombing campaigns were primarily designed to destroy economic targets, with particular emphasis on war-related industries. Since World War II was a protracted affair and involved not just combat between armies in the field, but an intense arms production race, in which the ability of the warring parties to manufacture and deploy ships, tanks and airplanes was a key outcome-determinative factor, counter-industrial targeting made military sense.[41]

The *jus in bello* rule barring deliberate attacks on civilians also came under considerable stress during the Cold War. The doctrine of "mutually assured destruction" (MAD) was premised on the assumption that the civilian populations of opposing Cold War blocks constituted legitimate combat targets. Indeed, for nearly fifty years, the civilian populations of NATO and the Warsaw Pact stood surety for the "good behavior" of their Governments.[42]

The morality of the MAD doctrine, which at bottom is a form of "hostage exchange," can, and has, been questioned.[43] Yet, there is little doubt that a very significant segment of the international community believed it to be legal.[44] If anything, this view is affirmed by claims that the 1972 Anti-Ballistic Missile Treaty between the Soviet Union and the United States, which prevented the development and deployment of anti-ballistic missile defenses that could have protected the civilian population from attack, had become an essential component of international stability.[45]

However, while certain aspects of the World War II strategic bombing campaigns and the decades worth of Cold War adherence to the MAD doctrine have placed considerable stress on the non-combatant immunity principle, the consideration of all of the facts and circumstances surrounding these events does not establish a sufficient record of derogation, such as to vitiate or undermine this principle. Although somewhat battered, it remains a core *jus in bello* principle.

In any case, the doctrine of necessity is also limited by the nature of the necessity itself. In this regard, Vattel explained:

> The lawful end give a true right only to those means which are necessary for obtaining such end. Whatever exceeds this is censured by the law of nature, is faulty, and will be condemned at the tribunal of conscience. Hence it is that the right to such or such acts of hostility varies according to their circumstances. What is just and perfectly innocent in a war, in one particular situation, is not always so in another. Right goes hand in hand with necessity, and the exigency of the case; but never exceeds it.[46]

Applying these general principles to the current conflict in the Middle East, the right of the Palestinian people to self-determination cannot justify the use of force in excess of that necessary to vindicate that right. Given that Israel had, shortly before the most recent Intifada, indicated its willingness to accept the creation of an independent Palestinian State in the West Bank and Gaza, the use of "suicide" attacks on civilians cannot even find a justification in "necessity" – which would not support such methods merely to attain some additional political advantage.[47]

Thus, overall, there is no exception to the laws and customs of war, and particularly the injunctions against deliberate attacks on civilians and civilian targets, for the benefit of "national liberation movements," or any other "cause." And, even under the relaxed requirements of Protocol I, a group that targets civilians as a regular tactic not only violates the laws and customs of war, but loses its right to lawful combatant status.

B. Civilian Casualties of Warfare – the Issue of Collateral Damage.

Israel is, of course, also bound by the laws and customs of war, including the injunction against deliberate attacks on civilians and civilian targets. The IDF could neither adopt a policy permitting such attacks, nor refuse to investigate and punish credible allegations that individual soldiers have engaged in such activity. However, suggestions that such an Israeli policy exists have not withstood serious scrutiny.[48]

To be sure, dozens of Palestinian civilians have been killed by Israeli forces during attacks on Palestinian security forces, or the terrorist groups that have associated themselves with the Palestinian cause. Such killings, however, do not violate the laws of war.[49] As explained in 1582, by the Spanish judge advocate in the Netherlands, Balthazar Ayala:

> [the] intentional killing of innocent persons, for example, women and children, is not allowable in war (if unintentional, as when a town is assaulted with catapults and other engines of war, the case is different, because such things are inevitable in war . . . .)[50]

This rule remains essentially unaltered today. It was applied with full force and effect during the war crimes trials convened after the Second World War – some of the most important evidence of "customary" international law in this area.[51] As explained by Justice Michael Musmanno in *United States v. Ohlendorf, et al.*, Military Tribunal II (Nuremberg, Germany) (8 April 1948) (the "Einsatzgruppen Case"):

> [T]here still is no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.
>
> A city is bombed for tactical purposes: communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purposes of impeding the military. In those operations it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and law, from an armed force marching up to those same railway tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them.[52]

1. The Principle of "Distinction."

Today, the relevant legal issue is not whether "collateral damage" is permissible under the laws of war –it is- but the extent to which any particular military assault complies with the principles of "distinction" and "proportionality. The principle of distinction effectively restates the general rule that civilians cannot deliberately be targeted, and requires that military and civilian objects be distinguished during the process of target selection.[53] "Military objects" have been defined, in the U.S. Army Field Manual, for example, as follows:

> combatants, and 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.[54]

The Field Manual, which is based on the United States' understanding of what customary international law requires, goes on to provide the following examples of "military objectives" lawfully subject to attack:

> factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations.[55]

It is, of course, in the application of this rule that difficulties arise. As the ICRC Commentary on Geneva Protocol I notes, "[m]ost civilian objects can become useful objects to the armed forces."[56] Here, the key question is what the particular facility is being used for at the time an attack is contemplated. As the ICRC Commentary on Protocol I further noted: "a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives."[57]

Thus, the fact that Israeli forces have targeted civilian homes and buildings does not suggest a policy in violation of the laws and customs of war, or mean that the IDF engaged in "war crimes" when it attacked civilian areas in the West Bank, such as the Jenin refugee camp. The relevant question is whether those buildings were used, at the time the attack was planned, for non-civilian purposes.

2. The Principle of Proportionality.

In addition to the principle of distinction, the principle of proportionality provides that, even when selecting proper military objectives to attack, consideration must be given to the likely effects on the civilian population. In brief, even a legitimate military objective may not be attacked if the likely damage to civilians, or civilian objects, would be disproportionate to the military advantage to be achieved. In this regard, as described by the U.S. Army Field Manual:

> loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.[58]

Proportionality is an inherently subjective determination, and, by its very nature, the calculation changes depending on the importance of the military advantage involved. Thus, although the destruction of a tactically insignificant enemy position might not justify any risk to civilians in the area, the destruction of an important installation might well justify a very great risk to the surrounding civilian population. In this regard, for

example, there is a compelling argument that Israel's recent attack on Salah Shehade (which resulted in a number of civilian casualties) was fully justified because Shehade was a highly important HAMAS commander and was responsible for numerous attacks on Israeli targets.

It is also worth noting that in considering whether, in any particular instance, the balance required by the laws of war justifies going forward with an attack, the claims and assertions of human rights organizations, such as Human Rights Watch and Amnesty International must be treated with great caution. Such groups are advocacy organizations, seeking to push the law's development in a particular direction. They are not impartial observers. When attempting to determine what the actual rule of international law is on any particular issue, including application of the laws of war, the most important indicator is the actual practice of states. As one commentator noted regarding the efforts of such groups to restrict the definition of "military objective" in Protocol I's Article 52(2): "the majority of those redefining the scope of 52(2) are not state actors or militaries, but, rather, various non-governmental organizations."[59]

Significantly, state practice in this area suggests a far broader range of acceptable military targets, including targets designed to undermine the enemy's morale, than the international humanitarian rights community would claim. For example, both Human Rights Watch and Amnesty International took the position that NATO's targeting of bridges and communication facilities during the 1999 Kosovo Conflict violated international humanitarian law. This, however, was not the view of the NATO member states, a number of whom (including Great Britain, France and Germany) have ratified Protocol I. As Major Meyer concluded in her study of this issue, regarding the use of air power:

> [T]he practice of states over time has been to use air bombardment to achieve not only immediate tactical military advantages, but also strategic and psychological advantages over their enemies. The overarching goal of such attacks is to undermine not only the enemy's capability to continue the war, but also his will to continue the war.[60]

The fundamental differences of approach between states and their militaries (who ultimately make international law) and non-governmental advocacy groups (who do not) was, in fact, recognized and highlighted in a 1999 report prepared by the Prosecutor's Office of the International Criminal Tribunals for the Former Yugoslavia and Rwanda ("ICTYR"). After undertaking an investigation (or "review") of NATO's campaign against Serbia, the ICTYR Prosecutor declined to bring indictments. The report, however, noted that:

> The answers to these questions [regarding the principle of proportionality and collateral damage] are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the

> decision-maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.[61]

In the context of the Middle East conflict, as suggested by the ICTYR Prosecutor above, human rights groups have indeed drawn the elusive line defining disproportionate impact far more restrictively that has the IDF. Human Rights Watch ("HRW"), for example, in its report May 2002 report on the IDF military operations in Jenin, concluded that: "the Israeli military actions in the Jenin refugee camp included both indiscriminate and disproportionate attacks."[62] This conclusion was based on HRW's assertions that Israeli helicopters fired "at random" at the camp, and the extent of the damage to buildings in the Hawashin district.

The group dismissed Israel's rationale for that destruction, namely that many of these houses were booby-trapped by the Palestinian fighters who had used them, by simply asserting that "speculation concerning the extent of improvised explosive devices in the area and reasons of expediency were not sufficient grounds to meet the 'absolutely necessary' standard required by international humanitarian law."[63] In assessing such unsupported claims, it is important to recall the ICTYR Prosecutor's common sense warning that human rights activists and military experts are unlikely to agree on these issues, and the fact that international law vests the determination of whether or not excessive force has been used in any particular instance with the government of the state involved.[64]

Moreover, it also is important to note that, once a civilian object is occupied by combatants, or otherwise converted to some military use, it loses its civilian character and protected status, and becomes a lawful military target, which may be attacked and destroyed.[65] To the extent that the principles of discrimination and proportionality apply in such circumstances, it is only with respect to individuals and objects remaining in the area that have not been converted to some military use. "Civilians" who actively assist in the fighting, committing "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces," become combatants and legitimate targets.[66] It is, in fact, one of the primary functions of the laws of war *to force individuals to choose* between one status and another. As explained in the British Military Manual in force during the World Wars:

> It is one of the purposes of the laws of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both; in particular, that an individual shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured, or in danger of life, to pretend to be a peaceful citizen.[67]

Thus, individual civilians who take up arms, becoming belligerents or combatants, lose their civilian status and become legitimate targets of attack. Moreover, if such individuals have violated the laws and customs of war in the context of this combatancy, they are subject to prosecution and punishment for these acts.[68]

IV. "Targeted Killings."

The practice of "targeted killings" is considered by many as one of the most controversial tactics employed by Israel in its conflict with the Palestinians. This policy has been labeled as one of "assassination" by some, and it has been condemned by both international non-governmental organizations ("NGOs") and a number of states.[69] Despite this rhetoric, however, when measured against the laws and customs of war, Israel's policy of deliberately targeting members of Palestinian terrorist groups is entirely lawful. It is neither a policy of assassination, nor of extra-judicial killing. The individuals, who have been attacked and killed pursuant to this policy, have been legitimate military targets.

In the context of an armed conflict, whether in the form of a declared war, or in the form of an international or internal armed conflict to which international law applies, every combatant is a lawful target for attack.[70] This includes individual soldiers, officers, and any other individual who is in the military chain of command.[71] Targeted attacks on such individuals are no more assassinations than killing soldiers during a firefight in the field.[72] To the extent that "assassinations" are prohibited in war, this ban is a narrow injunction against using private individuals to carry out killings — effectively imposing a status of outlawry on the opponent — or attacking the target "treacherously," which is forbidden under Article 23 of the Hague Regulations.[73] Among other things, that provision prohibits the use of poison and efforts to "kill or wound treacherously individuals belonging to the hostile nation or army."[74] As explained in the U.S. Army Field Manual, however, this does not prevent the targeting of specific enemy combatants:

> This article [23] is construed as prohibiting assassinations, proscription, or outlawry of an enemy, or putting a price on the enemy's head, as well as offering a reward for an enemy "dead or alive." It does not, however, preclude attack on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.[75]

This rule is, in fact, fully supported by actual state practice. During World War II, for example, the United States successfully targeted Japanese Admiral Isoroku Yamamoto, the principal Japanese naval commander in the South Pacific, and the man who had commanded the strike force that attacked Pearl Harbor in December, 1941. The United States had intercepted Japanese communications indicating Yamamoto's precise travel plans — he was engaged at the time in an inspection of Japanese forces in and around the Solomon Islands. A U.S. fighter squadron was dispatched to find and destroy Yamamoto's plane, which was accomplished on April 18, 1943.

Indeed, there is a compelling argument that a policy of such "targeted" killings is a far more humane means of conducting warfare than engaging in pitch battles in which the object is to subdue the enemy by main force or attrition. To the extent that the principal purpose of warfare is to eliminate the enemy's ability and will to resist, a policy of targeting officers and other important officials may also be more effective than attempting to destroy the rank and file.[76]

Thus, Israel's policy of "targeted killings," at least to the extent that it has been carried out in the context of the current armed conflict, does not violate the applicable norms of international law. The individuals who have been targeted, including members of various Palestinian militant organizations, fall into the category of "combatant," and are subject to attack to the same extent as any other combatant in time of war. Moreover, the means Israel has chosen, primarily missile attacks, are neither treacherous nor perfidious. The characterization of these actions as "assassinations" or "extra-judicial killings" is incorrect as a matter of law.

Conclusion

Overall, the deliberate attacks on Israeli civilians, whether involving suicide elements or not, carried out by various Palestinian organizations and groups, constitutes a profound violation of international law. The individuals engaged in such attacks, whether as planners, facilitators, or actual participants, are unlawful combatants, who are not entitled to the status and privileges of honorable soldiers. Both they, and their political and military commanders, are war criminals. These attacks are in no way comparable to the tragic deaths of civilians that have taken place as a result of lawful Israeli military operations in the West Bank and Gaza. International law makes a clear and absolute distinction between the purposeful targeting of civilians, and civilian who are killed during attacks that target proper military objectives. Moreover, attacks targeting individual political and military leaders, in the context of the armed conflict between Israel and various Palestinian militant groups, are lawful acts of war.

Claims, whether by state officials, NGOs, or the media, that there is an equivalency between the attacks mounted on Israeli civilians and the military response by the Israeli government are incorrect as a matter of law, and merely serve to legitimize terror as a form of warfare. Whatever the cause for which they fight, "national liberation" movements are fully bound by the laws of war and, in this respect, the acknowledged suffering of the Palestinian people over the past fifty years does not render the actions of Palestinian terrorist organizations any less illegal.

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[1] *See* Speech by The Rt. Hon. Chris Patten, Plenary Session of the European Parliament – Strasbourg, 9 April 2002 (accusing Israel of "blockading an entire population, withholding tax revenues, extra-judicial killings, destruction of infrastructure and arable land."). Overall, European opinion has been especially harsh.

[2] As noted by the State Department, states such as Syria and Lebanon refuse "to recognize Hizballah, HAMAS, the Palestinian Islamic Jihad and other Palestinian rejectionist groups for what they are – terrorists. They and other Arab Muslim countries

held the view that violent activities by these groups constitute legitimate resistance. They sometimes even condone Palestinian suicide bombings and other attacks against civilian targets within Israel, the West Bank, and Gaza Strip." U.S. Department of State, *Patterns of Global Terrorism* 51 (2001) [hereinafter *Patterns of Global Terrorism 2001*].

[3] *See* Antonio Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law," 3 *Pac. Basin L. J.* 55, 105, 112 (1984); "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts," *Current Problems of International Law: Essays on United Nations Law and the Law of Armed Conflict* 288 (A. Cassese Ed. 1975). *See also* Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* 629-30 (1754) (Dublin: Luke White ed. 1792) [hereinafter *Vattel's Law of Nations*]; International Committee of the Red Cross, *Commentary on Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* 36 (1958) ("[s]peaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities — conflicts, in short, which are in many respects similar to an international war, but take place in the confines of a single country.") [hereinafter ICRC Commentary on Geneva Convention IV].

[4] The Geneva Conventions of 12 August 1949 are four separate treaties: (1) the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (2) the Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; (3) the Geneva Convention III Relative to the Treatment of Prisoners of War; and (4) the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

[5] The UN Charter specifically reaffirmed the "inherent" rights of states to use force in self-defense in Article 51, and Article 2 actually prohibits the use of force only if the objective is territorial gain or some form of imperial conquest. *See* UN Charter, Art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"); Art. 2 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations*"), reprinted in, Basic Documents in International Law* 1, 3-4, 17 (Ian Brownlie, ed.) (4th ed. 1995) [hereinafter *Basic Documents*]

[6] For a brief discussion of the anticipatory self-defense doctrine, see, *e.g.*, David B. Rivkin, Jr., Lee A. Casey and Darin R. Bartram, "Remember the Caroline", *National Review*, July 1, 2002, 17-19.

[7] The opposing view is set forth in Henry Cattan, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (1973). However, since the time Professor Cattan wrote, even Egypt and Jordan, the principal "frontline" Arab states opposing Israel, have accepted its right to exist, entered treaties of peace, and normalized relations.

[8] *See generally*, Brigadier General Uri Shoham, "Note: The Principle of Legality and the Israeli Military Government in the Territories," 153 *Mil. L. Rev*. 245 (1996). The exact status and future of these areas is as much a matter of debate in Israel as anywhere:

> The Israeli control of what is collectively referred to as 'the territories' has been the subject of deep-rooted controversy within Israeli society itself. The extreme parties of Israeli politics have advocated either annexation (on the extreme right) or immediate establishment of an independent Palestinian state (on the extreme left). In between, the majority of the Israeli population probably view the Israeli control of the Territories as a necessary, albeit uncomfortable, situation imposed on Israel by the military-political condition of the Middle East.

Id. at 246.

[9] Under the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, [hereinafter Geneva Convention IV] the protection provided to the population of an "occupied" territory ends with a "political act," such as annexation, accepted by the community of nations at large. *See* ICRC Commentary on Geneva Convention IV, *supra* note 3, at 63.

[10] The U.S. State Department has asserted that the "international community" considers Geneva Convention IV, *supra* note 9 to be applicable to the West Bank and Gaza. *See* U.S. Department of State, Country Reports on Human Rights Practices — 2001, Israel and the Occupied Territories, 21 (March 4, 2002), http://www.state.gov/g/drl/rls/hrrpt/2001/ [hereinafter Country Human Rights Report, Israel and the Occupied Territories]. Although this indeed appears to be the position of the United States, and the European Union, *see* Foreign & Commonwealth Office, *Human Rights Annual Report 2001* § 1.5; http:// hrpd.fco.gov.uk/reports.asp, it is less clear whether the approximately 175 other nation-states, who make up the "international community," agree.

[11] *See* Shoman, *supra* note 8, at 250. This conclusion is probably correct. As Shoman notes: "[t]his result, although relatively unpopular in the international legal community, is not as surprising as it may seem if one takes into consideration that, as far as Israel is aware, it is the only country in the world which has actually applied the provisions of the convention on a continuing basis." *Id.* As in the case of each of the other Geneva Conventions of 12 August 1949, and Protocol I and II Additional, each individual provision of these treaties must be considered on its own merits to determine whether it does, or does not, represent customary international law.

[12] *See* Country Human Rights Reports (Israel and the Occupied Territories), *supra* note 10, at 22.

[13] The Response of the Government of the State of Israel to the Report of the UN High Commissioner for Human Rights (29 November 2000, E/CN.4/2001/114) ¶ 28 (11 February 2001), http:// /mfa/go.asp?MFAH0jik0 [hereinafter Israel's Response to Report of UN High Commissioner].

[14] This probably includes Common Article 3, which establishes an obligation of humane treatment in all armed conflicts taking place "in the territory of one of the High Contracting Parties." Although it does not, strictly speaking, apply to the current Israeli/Palestinian conflict, since Israel has not annexed the West Bank or Gaza which are not, therefore, the territory of a high contracting party, there is a strong argument that Common Article 3's requirements nevertheless apply as customary international law. In this regard, the ICRC Commentary noted:

> The Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the municipal law of the States in question, long before the Convention was signed. . . . no Government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.

ICRC Commentary on Geneva Convention IV, *supra* note 3, at 36.

[15] Beginning in January 1945, individual Japanese "Kamikaze" pilots attacked Allied warships. At the time, Allied Governments claimed that these attacks were generally ineffectual. In fact, very severe damage was done to U.S. forces. Between January 4-13, 1945, alone, seventeen United States Navy vessels were sunk and fifty others were damaged. About forty United States ships were ultimately destroyed by Kamikaze attack.

[16] *Vattel's Law of Nations*, *supra* note 3, at 524.

[17] As discussed more fully below, although the United States initially signed Protocol I, President Reagan effectively "de-signed" the treaty in 1984, when he made clear that the United States would not proceed with the ratification of the instrument. However, the Department of the Army's Field Manual on The Law of Land Warfare was nevertheless amended in 1976 to make clear that: "[c]ustomary international law prohibits the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such." Department of the Army, *The Law of Land Warfare FM27-10* (18 July 1956), Change No. 1 ¶40 (15 July 1976) [hereinafter U.S. Army Field Manual].

[18] *See* Protocol I Additional to the Geneva Conventions of 12 August 1949, Art. 51 (1977) [hereinafter Protocol I). For example, as noted in the manual governing the British Armed forces, and those of Canada and Australia, during World War II: "[p]eaceful inhabitants, on the other hand, may not be killed or wounded, nor as a rule taken prisoners." *Manual of Military Law 1929*, Amendment (No. 12) (1936), Ch. XIV, ¶ p. 19 [hereinafter *British Military Manual*].

[19] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 618 (1987) [hereinafter ICRC Commentary on Protocol I].

[20] *See, e.g.*, 18 U.S.C. Sec. 2441 ("grave breaches" of the Geneva Conventions of 1949 defined as "war crimes").

[21] For example, criminal liability is provided under the Statute of the United Nation's International Criminal Tribunal for the Former Yugoslavia for the willful killing of civilians in violation of the Geneva Convention IV, and for other violations of the laws or customs of war. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 2, Art. 3. Similarly, the recently established International Criminal Court clearly can prosecute nationals of state parties to the 1998 Rome Statute (and asserts an even broader jurisdiction over the nationals of non-state parties in certain

circumstances), for "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities." *See* Rome Statute of the International Criminal Court, art. 8, sec. 4(b)(i).

[22] The groups that have been clearly identified with deliberate attacks against civilians in Israel and/or in the West Bank include HAMAS, Palestine Islamic Jihad, The Popular Front for the Liberation of Palestine, and the al-Aqsa Martyrs Brigade. *See Patterns of Global Terrorism, supra* note 1, at 54.

[23] The United States Supreme Court applied this rule in *In re Quirin,* 317 U.S. 1 (1942). There is no doubt, despite the incorrect claims to the contrary of commentators like South African judge Richard Goldstone, that international law fully recognizes the unlawful combatant designation and the right of states to punish such individuals. *See United States v. Lindh*, Cr. No. 02-37-A, 17, 21-22 (E.D. Va. Mem. Op. Filed July 11, 2002). For a general discussion of unlawful combatancy and its legal implications, see Lee A. Casey, David B. Rivkin, Jr., and Darin R. Bartram, "Detention and Treatment of Combatants in the War on Terrorism", Federalist Society for Law and Public Policy, 2002.

[24] Nevertheless, even this limited relaxation of the rules in favor of guerrilla movements has been rejected by the United States. President Reagan made this clear when he effectively "de-signed" Protocol I, by stating that the United States would not move forward to ratify that instrument. In the letter transmitting Protocol II to the Senate for its advice and consent, the President stated:

> I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict . . . I am referring to Protocol I additional . . ., which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. . . . It would give special status to 'wars of national liberation,' an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.

Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, 1977 U.S.T. LEXIS 465 (Jan. 29, 1987).

[25] As Vattel explained: "[a]s nature has given to men the right of using force, only when it becomes necessary for their defence, and the preservation of their rights the inference is manifest, that since the establishment of political societies, a right to so dangerous an exercise, no longer remains with private persons, except in those kinds of encounters, where society cannot protect or defend them." *Vattel's Law of Nations*, *supra* note 3, at 438.

[26] All of these requirements were based on longstanding custom and practice. The last four criteria were formally codified in the Hague Regulations. *See* Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) [hereinafter "Hague Regulations"].

One of the few exceptions here is recognized for a "levee en masse" — civilians who *spontaneously* take up arms to oppose the advance of an invading army. So long as such groups comply with the requirements that they carry arms openly and conduct their operations in accordance with the laws and customs of war, they must be treated as lawful combatants. *See e.g.*, *British Military Manual, Amendment 12*, *supra* note 18, at 10. The application of the exception to the West Bank and Gaza Strip, however, is highly dubious, since these areas have been controlled by the Israeli military for years, and any uprising by local residents would not, therefore, qualify as the spontaneous response to an invasion.

[27] Note of Mr. Dana, Dana's Wheaton, Sec. 23, p. 34, *quoted in* 1 John B. Moore, *A Digest of International Law* 166, H.R. Doc. No. 551, 56th Cong., 2d Sess. (1906) (emphasis added) [hereinafter *Moore's Digest*].

[28] *Id.* at 167. *See also Moore's Digest*, *supra* note 27, at 73.

[29] The Free French Forces were also accorded the benefits of the Geneva Convention of 1929, based on the fiction (accepted by both sides) that the Free French were actually fighting under the sanction of Great Britain. *See* International Committee of the Red Cross, *Commentary on Geneva Convention III Relative to the Treatment of Prisoners of War* 62-63 (1958) [hereinafter ICRC Commentary on Geneva Convention III].

[30] *See* Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, Art. 4(3).

[31] ICRC Commentary on Protocol I*, supra* note 19, at 508 (emphasis added).

[32] *Id.* at 517.

[33] *Id.* at 513.

[34] *Id.* at 526. Under some interpretations of Protocol I, even widespread violation of the laws and customs of war by a group may not, in and of itself, be sufficient to deprive the group of lawful belligerent status, so long as it continues to accept the overall applicability of those rules. This, obviously, creates a problem of "lip-service." Israel was aware of this problem at the time, and made very clear that its interpretation of these provisions required real, rather than pro-forma, compliance:

> Israel wishes to declare that the enforcement of compliance with the rules of international law applicable in armed conflict is a *conditio sine qua non* for qualification as armed forces. Moreover, it is not sufficient that the armed forces be subject to an internal disciplinary system which can enforce compliance with the laws of war, but – as the expression 'shall enforce' indicates – there has to be effective compliance with this system in the field.

ICRC Commentary on Protocol I, supra, note 19, at 513 n.22.

[35] It is worth noting that, from the earliest time in its history, the United States has not been hospitable to the view that national liberation movements were entitled to a different

set of *jus in bello* rules. George Washington, for example, always considered that the Army of the United States was bound by the laws and customs of war, even when things were going very badly. However, perhaps the most eloquent statement of the American view on the point is found in the following exchange between Confederate Generals Isaac R. Trimble and Robert E. Lee upon the 1863 advance of the Army of Northern Virginia into Pennsylvania:

> He [Lee] then alluded to the conduct of our army in Pennsylvania, said he "had received letters from many prominent men in the South urging retaliatory acts while in the enemy's country, on property, etc., for ravages and destruction on Southern homes." He said, "What do you think should be our treatment of people in Pennsylvania?" I [Trimble] replied "General, I have never thought a wanton destruction of property of non-combatants in an enemy's country advances any cause. That our aims were higher than to make war on the defenseless citizens or women and children.
>
> General Lee at once rejoined with that solemnity and grandeur so characteristic of the man. "These are my own views, I cannot hope that heaven will prosper our cause when we are violating its laws. I shall, therefore, carry on the war in Pennsylvania without offending the sanction of a high civilization and of Christianity."

Major General Isaac R. Trimble, C.S.A., "The Battle and Campaign of Gettysburg From the Original MS. Furnished by Major Graham Daves, of North Carolina," 26 *Southern Historical Society Papers* 116-128.

[36] *Vatte's Law of Nations*, *supra* note 3, at 22.

[37] *Id.* at 519.

[38] *Id.*

[39] Hague Regulations, *supra* note 26, at Art. 22.

[40] It is ironic that the underlying motivation for the World War II bombing campaigns may have been quite "humanitarian" in nature and was driven by the popular and elite aversion to the enormous combatant casualties suffered by all sides during World War I. As one respected American strategist argues "[i]t is a matter of record that the Combined Bomber Offensive which laid waste much of urban Germany was the practical end result of a rather romantic notion that bombardment from the air offered a clear path to victory, obviating the necessity for bloody attrition in ground conflict". Colin S. Gray, *War, Peace, and Victory: Strategy and Statecraft for the Next Century*, 153 (1990).

[41] For a useful historical discussion about the nature of allied air operations against Germany, *see e.g.*, Charles Webster and Noble Frankland, *Official History of the Second World War, the Strategic Air Offensive Against Germany*, London: H.M.S.O., 1961; Wesley Frank Caven and James L. Cate, editors*, The Army Air Forces in World War II*, Chicago, University of Chicago Press, 1948 – 55 (official 7 volume series). The state of available military technology made widespread civilian casualties inevitable whenever industrial targets, *e.g.*, factories, railroad marshalling yards, ports, were attacked, especially when allied airforces switched to nighttime raids to minimize losses caused by German air defenses.

[42] One can, of course, argue that, whatever the U.S. declaratory strategy might have been, its actual nuclear employment plans and force deployments were never driven by pure MAD logic. Indeed, by the late 1960s, American planners began to emphasize the importance of destroying with a high degree of confidence Soviet military targets – the so-called counterforce strategy – and began to acquire strategic forces capable of accomplishing this task. The counterforce strategy was greatly refined in a series of major doctrinal upheavals during the 1970s and 1980s, under Presidents Nixon, Ford, Carter and Reagan, and became the primary policy driver for U.S. targeting plans and force procurement, as well as the major component of U.S. declaratory strategy. Soviet military writings have routinely described the counterforce strategy as the major force shaping the evolution of American nuclear weapons policy and have discounted the importance of MAD-related imperatives. *See e.g.*, R.G. Bogdanov*, Yadernoe Bezumie V Range Gosudarstvenoi Politiki* [Nuclear Madness at the Level of State Policy], Moscow: Izdatelstvo Politicheskoi Literaturi [Political Literature Publishing House]; 1984; A.S. Orlov, *V Poiskah 'Absolutnogo' Oruziya* [In Search of the Absolute Weapon], Moscow, Molodaya Guardiya, [Young Guard Publishing House], 1989.

Ironically, during much of the Cold War period, actual U.S. targeting plans were not shaped by MAD-related considerations. While U.S. nuclear war plans have been among the most highly classified documents prepared by the United States Government, sufficient information has been provided over the years in various open-source analyses to enable defense analysts to conclude that the so-called Single Integrated Operational Plan ("SIOP") – the American nuclear targeting blueprint — grew from hundreds of targets in the 1950s, to a few thousand targets in the 1960s, over 20,000 targets by the 1970s, and well over 40,000 targets by the early 1980s. For a good account of early U.S. war plans, see, *e.g.*, David Alan Rosenberg, "The Origins of Overkill: Nuclear Weapons and American Strategy: 1945-1960," *International Security*, Vol. 7, No. 4, Spring 1983. Growth in the number of targets aside, as time went on, the SIOP's emphasis on flexibility, versatility and intricacy of various targeting scenarios also became much more pronounced. *See*, *e.g.*, Leon Goure, "The U.S. 'Countervailing Strategy' in Soviet Perception," 9 *Strategic Review* 51-64 (1981). Moreover, since the Soviet leaders cared very little about the survival of their population, but were preoccupied with the protection of their own power base, U.S. targeting plans took into account Moscow's own strategic priorities and values, by threatening to attack Soviet military forces and command and control targets. For a good discussion of this issue, *see*, *e.g.*, Leon Sloss and Marc Dean Millot, "U.S. Nuclear Strategy in Evolution," 12 *Strategic Review* 19-28 (1984), especially at 24-25; Lawrence Freedman, *The Evolution of Nuclear Strategy*, London: McMillan, 1981. Yet, despite these facts, the picture remained sufficiently mixed to continue to pose moral and legal qualms. Up until the last days of the Cold War, a significant percentage of American political elites, and nearly all of our allies, continued to insist that MAD had to remain a key component of our overall nuclear deterrence posture and that any effort to disclaim an intent to attack Soviet cities would make war more palatable, and hence, more likely, thereby undermining the quality of our deterrence. Ironically enough, their claims were strategically myopic, since they failed to take into account the value system of Soviet leaders, who cared about the preservation of

their political power, backed by economic and military assets, a lot more than they cared about the well-being of their citizens.

[43] For an eloquent critique of MAD, see *e.g.,* Albert Wohlstetter, "Bishops, Statesmen, and Other Strategists on the Bombing of Innocents", *Commentary* Vol. 75, No. 6 (June 1983), 15-23; Albert Wohlstetter,'" Between an Unfree World and None: Increasing Our Choices," *Foreign Affairs*, Vol. 63, No. 5 (Summer 1985). The ethical issues implicated by the use, and the threat of use, of nuclear weapons, are discussed by, among others, William V. O'Brien, *The Conduct of Just and Limited War*, New York: Praeger Publishers, 1981; Joseph S. Nye, Jr., *Nuclear Ethics*, New York: Free Press, 1986 and Gregory S. Karka, *Moral Paradoxes of Nuclear Deterrence*, Cambridge: Cambridge University Press, 1987.

[44] The International Court of Justice was called upon to determine whether the use, or threatened use, of nuclear weapons violated international law. It ultimately concluded that there was no definitive answer to this question, and specifically acknowledging the "practice referred to as 'policy of deterrence,' to which an appreciable section of the international community adhered to for years." *Legality of the Threat or Use of Nuclear Weapons* ¶ 96 (International Court of Justice) (8 July 1996).

[45] See *e.g.*, *Secretary-General regrets United States decision to withdraw from ABM Treaty*, UN Press Release SG/SM/8080, December 14, 2001(" The Secretary-General has noted with regret the decision of the United States to withdraw unilaterally from the 1972 [ABM] Treaty... The ABM Treaty has served for many years as a cornerstone for maintaining global peace and security and strategic stability. He is concerned that the annulation of this treaty may provoke an arms race, especially in the missile area, and further undermine disarmament and non-proliferation regimes. He calls upon all states to explore new binding and irreversible initiatives to avert such unwelcome effects."); "Preservation of and Compliance with the Treaty on the Limitation of Anti-Ballistic Missile Systems," UN Gen. Ass, A/Res/54/54 (10 Jan. 2000) ("the implementation of any measure undermining the purposes and the provisions of the [ABM] Treaty also undermines global strategic stability and world peace and the promotion of further strategic nuclear arms reductions.").

[46] *Vattel's Law of Nations, supra*, note 3 at 518.

[47] Indeed, perhaps recognizing that, even as a matter of political rhetoric, suicide bombings can be hardly justified in the context of a negotiated "two state" solution, or perhaps out of disdain for the world public opinion, the spokesmen for Hamas, Islamic Jihad and other groups that sponsor such bombings, routinely acknowledge that their real goals are quite different. They assert that Jews do not belong in Palestine and "should return to where they came from." Statement by a Hamas spokesman, *quoted* in Cal Thomas, "Deadly Demand from Hamas," *The Washington Times*, August 4, 2002, p. B1. The fact that suicide attacks on Israeli civilians are part and parcel of a planned ethnic cleansing does not render them any more legally palatable.

[48] Allegations, for example, that Israeli troops "massacred" Palestinian civilians in the Jenin refugee camp – which prompted U.N Secretary General Kofi Annan to organize an abortive investigative team – have since been proven false; comically false in some instances. *See* Douglas Davis, "Massacre of the Truth," *The Spectator* (20 July 2002) ("As further proof of the 'massacre', the good people of Jenin staged a series of highly emotive funeral processions (the parades ended only when a 'body' was twice tipped out

of its stretcher on the way to the cemetery, at which point the 'martyr' stood up and walked off in disgust."). *See also* Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/10, A/ES-10/186 ¶ 56 (30 July 2002) ("A senior Palestinian Authority official alleged in mid-April that some 500 were killed, a figure that has not been substantiated in the light of the evidence that has emerged."); Human Rights Watch, *Israel, The Occupied West Bank and Gaza Strip, and the Palestinian Authority Territories, Jenin: IDF Military Operations* (May 2002) [hereinafter *HRW Report*].

[49] In this regard, an analysis of the Palestinian and Israeli infitada-related casualties provides several important insights. For example, "[a]ccording to data compiled by the Jerusalem Media and Communications Center, a Palestinian organization, 1, 296 Palestinians were killed by Israelis in the period between September 30, 2000 and May 7, 2002. Of that number, 37 were women, or 2.8% of the total. ..[among] 496 Israeli deaths… to Palestinian terrorism over the same time frame… were 126 women. That's a little over 25% of the gross toll." Bret Stephens, "Silence of the Lambs," *The Jerusalem Post*, May 24, 2002. The article quoted other Palestinian groups, which indicate that, gender aside, over 75% of the Palestinians killed "were between the [weapon bearing] ages of 16 and 39." By contrast, almost 35% of the Israeli casualties "were above the age of 40." Also, a disproportionate number of Israeli casualties, but not the Palestinian ones, were very young children. These numbers clearly support an inference that the Israelis have not been engaged in indiscriminate attacks on the Palestinians and that the civilian casualties were inflicted in the course of legitimate Israeli military operations. For a detailed analysis of the fatalities data, *see also* Don Radlauer "The 'al-Aqsa Intifada – An Engineered Tragedy," International Policy Institute for Counter-Terrorism, June 20, 2002.

[50] Balthazar Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline* 33 (1582) (John Pawley Bate, trans. 1912) (Vol. 2).

[51] More recently, of course, a number of ad hoc tribunals have been established by the United Nations Security Council, in particular the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. These bodies now have a substantial body of decisions, which may be helpful as secondary sources in analyzing a particular question regarding the prevailing rule of international law. However, it is highly important to recall that these institutions do not act on behalf of individual states, and cannot, therefore, add or subtract from the already extant norms of international law in this area.

[52] *Id.* at 72.

[53] The principle is restated in Protocol I as follows: "the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Protocol I, *supra* note 18, Art. 48.

[54] *See U.S. Army Field Manual, supra* note 17, Change No. 1, ¶ 40(c). A similar definition is contained in Protocol I: "military objectives are limited to 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." *See* Protocol I, *supra* note 18, at Art. 52.

[55] See *U.S. Army Field Manual, supra* note 17, Change No. 1, ¶ 40(c). In particular, the extent to which facilities such as communications networks and power grids, which primarily serve the civilian population, but which also have obvious military uses, can be attacked, is a matter of debate. *See, e.g.*, Major Jeanne M. Meyer, "Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine," 51 *A.F.L. Rev.* 143 (2001).
[56] *ICRC Commentary on Protocol I, supra* note 19, at 636.
[57] *Id.*
[58] *U.S. Army Field Manual, supra* note 17, Change No. 1, ¶ 41.
[59] Major Jeanne M. Meyer, "Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine," 51 *A.F. L. Rev.* 143, 164 (2001).
[60] *Id.* at 170.
[61] Final Report to the Prosecutor by the Committee Established to Review NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 50, UN Doc. PR/P.I.S./510-E (2000) (released June 13, 2000).
[62] *HRW Report, supra* note 48, at 43.
[63] *Id.*
[64] In addition, the balancing may well be different when confronting a guerrilla-driven insurgency, rather than regular armed forces. Given the nature of such insurgencies, it may well be entirely justifiable to weigh the destruction of a comparatively smaller number of combatants against the large numbers of civilian dead and wounded that are likely to occur once an insurgency gathers steam and a full-fledged civil war ensues.
[65] As noted in the ICRC Commentary to Protocol I: "it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings . . . will inevitably become military objectives because they offer a definite contribution to the military action." ICRC Commentary on Protocol I, *supra* note 19, at 621.
[66] *See* ICRC Commentary on Protocol I, *supra* note 19, at 619. Here, Protocol I specifically provides that "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." Protocol I*, supra* note 19, Art. 51.
[67] *British Military Manual, supra* note 18, at ch. XIV, ¶ 17.
[68] *Id.*
[69] *See supra* note 1.
[70] Here it is important to note that an "armed conflict" does not cease merely because there is no shooting on any particular day. Once an armed struggle reaches the threshold of an "armed conflict," the law of armed conflict applies until such time as the conflict is resolved, either by the defeat of one side, or through agreement. *Cf. The Prosecutor v. Tadic, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction),* ¶¶ 67-70 (ICTY 2 Oct. 1995).
[71] As one scholar noted in discussing historic state practice: "[i]t was generally accepted that in time of war every enemy combatant was subject to attack, anywhere and at any time, so long as the method of attack was consistent with the law of war. It was immaterial whether a given combatant was 'a private soldier, an officer, or even the monarch or a member of his family.'" Patricia Zengel, "Assassination and the Law of Armed Conflict," 134 *Mil. L. Rev.* 123 (1991). This rule remains in full force and effect.

[72] The question with respect to political leaders is, of course, more complicated. As noted above, a political leader who is also within the military chain of command, is a legitimate target in the context of an armed conflict. Absent an armed conflict, however, political leaders (including those within the chain of command) are not lawful targets of attack and enjoy additional protections under international law. In particular, under the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, heads of state, heads of government, foreign ministers, and certain other officials, are protected from attack when traveling abroad. Such protections, however, would not benefit private individuals, such as the leadership of a terrorist organization.

[73] Operations that depend on the element of surprise do not constitute treachery. In addition, while the use of non-uniformed soldiers strips those individuals of lawful combatant status (if they are caught), the use of such individuals does not, in and of itself, constitute assassination. *See* W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, Army Law., Dec. 1989, at 6 (Dept. of the Army Pamphlet 27-50-204). Falling within the bounds of treachery are many of the same practices that are banned by traditional laws of war, such as fighting under false pretenses (for example, flying the enemy's flag (or that of the Red Cross), or pretending to surrender with the hope of luring a target). Other ruses of war, however, are entirely proper from the legal perspective, including the use of snipers, land mines, traditional deception, camouflage, and other sneaky tactics. Thus, the prohibition of "treacherous" killings in the context of targeted killings seems no broader than in the context of other types of military operations.

[74] *See* Hague Regulations, Art. 23, *supra* note 26, at 365.

[75] U.S. Army Field Manual, *supra* note 17, at 17.

[76] Some arguments have been advanced supporting even a genuine policy of assassinations, based on the potential good they might accomplish. As long ago as 1516, Thomas More observed that "assassinations" – *i.e.*, killings of internationally protected persons in peacetime - could be a useful tool of statecraft, and also had the benefit of sparing individual citizens from the hardships of wars that their leaders brought on. Horatio F. Brown, Studies in the History of Venice 225-229 (1907). For its part, the United States has had a mixed history with assassinations. In 1975, the Senate Select Committee on Intelligence (commonly known as the Church Committee, after its chairman, Senator Frank Church) reported that the CIA had apparently undertaken at least five actual or attempted assassinations in the 1960s and 1970s. These ranged from President Eisenhower's plan to "remove" Rafael Trujillo, the dictator of the Dominican Republic, based on his perceived sympathy to communism, and his plan to assassinate Congolese Prime Minister Patrice Lumumba after he approached the Soviet Union for military assistance. Shortly afterwards, President Kennedy, in 1961, ordered the CIA to remove Iraqi dictator Abdul Karim Qassem from power, although he was overthrown by a coup before a CIA-commissioned poison-soaked handkerchief arrived. President Kennedy's CIA also launched "Operation Mongoose," which involved at least eight attempts to kill Cuban dictator Fidel Castro. It is not clear whether the CIA was behind the death of South Vietnamese dictator Ngo Dinh Diem under Kennedy or the death of Che Guevara in 1967 at the hands of Bolivian soldiers. In any case, in 1976, President Ford signed Executive Order 11905 prohibiting "political assassinations." Since then,

this order has been embraced by every U.S. President. It should be noted, however, that the CIA operations (which had prompted congressional investigations), whatever their political wisdom, policy merits or legal implications, generally did not occur during the time of armed conflict. (In the case of Diem, while there was an armed conflict underway in Vietnam at the time he was killed, at least for the U.S. purposes, Diem was not an enemy combatant.) Hence, they were not governed by the laws of war, which allow targeted strikes at all legitimate enemy targets, including senior enemy commanders.