

**Privileging Asymmetric Warfare?:  
Defender Duties under International Law**

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I. The Changing Paradigm

The law of armed conflict has moved away from a contractual model to embrace a largely regulatory model. Once the paradigm conflict involved standing armies of warring states clashing in a distinct “battlefield” at some remove from dense civilian settlements. The “law of war” established ground-rules in an effort to limit “unnecessary” slaughter – killing and maiming not necessary to achieving the decisive defeat of the adversary -- and to limit resort to certain weapons that could have enduring devastating effects beyond cessation of the conflict. The rules were kept in place – not by pious invocation of the sanctity of agreement but by the rule of reciprocity: the prospect that non-compliance would incur retaliatory sanctions against the offending state.

The horrific experience of World War II and its immediate aftermath led to a partial shift in emphasis in the 1949 Geneva Conventions (“Geneva”) away from the contractual model inching towards a regulatory model. “International humanitarian law” (“IHL”) was the new name for rules which supplemented the prior law of war with greater protections for prisoners of war, further limits on the range of permissible military targets, and most especially with regard to Geneva IV, an overarching concern with the protection of civilians under occupation and during armed conflicts. Most importantly, for present purposes, the obligations of “High Contracting Parties” were not backed by a rule of reciprocity. These obligations applied “in all circumstances” -- at least as between parties to the Convention, including non-parties agreeing to assume those obligations<sup>1</sup> -- and could not be suspended, or violations excused, because the adversary had flouted the rules of proper warfare.

The model of two warring state armies locked in combat at battlefield that could readily be distinguished from civilian settlements had been battered during the Second War – as cities were treated as targets of legitimate bombing. The model also never did a

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<sup>1</sup> Common Article 1 of the Geneva Conventions states that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Under Common Article 2, even if the conflict is with a non-party to the Convention, “the Powers that are Parties shall remain bound by it in their mutual relations” and shall “be bound by the Convention in relation to [the non-party], if the latter accepts and applies the provisions thereof.” However, even where the conflict is with a non-party that has not assumed the obligations of the Convention, if the conflict is otherwise within the scope of the Convention, obligations would still be owed to persons or property protected by the Convention.

good job of dealing with guerrilla warfare – battle by irregulars not necessarily linked with state armies, typified by the “partisan” forces that often provided the only armed resistance to Nazi occupiers. The essential military theory of guerrilla warfare is to strike the enemy and then merge back into the civilian population, in the hope either of discouraging a counter-attack or, better yet, inviting a military response laying waste to civilian areas and their inhabitants. The latter is often the preferable outcome because, in the battle to win over local populations, civilian devastation at hands of the attacker could be more valuable than causing losses to the attacker. The conventional response of the law of war to guerrilla warfare was that because these irregulars did not adhere to the core principle of “distinction” – they did not adequately distinguish themselves and their operations from civilians -- they were unprivileged combatants not entitled to protection as prisoners of war, their military campaign constituted an illegitimate attempt to operate outside the laws of war, and blame for harm to civilians was attributable to their tactics rather than the lack of care of attackers.

With Yalta’s division of Europe between Western and Soviet spheres of influence and the ensuing nuclear stalemate between the United States and the Soviet Union, states as such stopped fighting each other. But all was not the bright future promised by the Kellogg-Briand pact. What had been “irregular” increasingly became commonplace. Insurgencies became the prototypical armed conflict – “wars of national liberation” fought by communist armies, native groups seeking independence from their colonial overlords, the fight for overthrow of the apartheid regimes of South Africa and what had been called Rhodesia, and the Arab-Palestinian conflict with Israel.

## II. 1977 Additional Protocols to Geneva Conventions

The 1977 Additional Protocols to Geneva (“AP I” and “AP II”) reflect an attempt to update IHL to address this new prototype of warfare. Given the absence of a traditional battlefield and the dangers to civilians inherent in the guerrilla-warfare strategy, one might have hoped that this revision of IHL would have focused on how best to protect civilians during these conflicts. Sadly, despite Western sponsorship of the overall effort, what the parties achieved seemingly did more to privilege the guerrilla strategy than to protect civilian victims. In response, the United States and several of its Western allies, including Israel, refused to ratify AP I. Over time, however, the allies broke ranks and the sole significant remaining holdouts are the United States and Israel. Both countries claim, moreover, to adhere to AP I to the extent it reflects customary international law (“CIL”). The International Committee of the Red Cross (“ICRC”), which see itself as the guardian and advocate of the Geneva process, has over the years documented state practices in line with AP I prescriptions in order to lay the case for the essential equivalence between AP I and customary law.

What the United States opposed, and presumably still opposes, is AP I’s legitimatization of irregular warfare in the definition of covered conflicts and its protection of combatants who do not adhere to the traditional criteria for distinguishing

themselves from civilians.<sup>2</sup> Objection was also raised to particular rules that, because of their amorphous reach, would hamper the ability of the United States and other attackers to achieve military objectives without inviting scrutiny for alleged “war crimes”.<sup>3</sup> We also know from recent controversy over U.S. treatment of detainees captured in Iraq and Afghanistan that it remains hotly contested whether Geneva III and AP I, in combination, permit a category of unprivileged combatants who are entitled neither to prisoner-of-war nor civilian non-combatant protections.<sup>4</sup>

I would like to focus here less on whether or how AP I hamstring attackers but rather on what AP I seeks to do or might be read to accomplish with respect to the duties of defenders. Dangers to civilians during armed conflict are a joint product of both attackers and defenders and minimization of such harm – presumably the overriding mission of IHL – requires establishing the right incentives for both attackers and defenders. The net effect of AP I may be to make it easier for defenders to pursue the essential guerrilla strategy of situating their armed elements within the civilian population in order to invite attacks that kill civilians and thus generate further support for their cause. AP I does create an exception from the principle of distinction in certain conflicts,<sup>5</sup> outlaws all use of reprisals against civilians,<sup>6</sup> even the threat thereof, to punish violations of the rules of war,<sup>7</sup> and makes it difficult for attackers to launch attacks against irregulars hiding among civilians without encountering accusations of war crimes.

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<sup>2</sup> See Ronald Reagan, The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal, 81 A.J.I.L. 910 (1987); Abraham D. Sofaer, The Rationale for the United States Decision, 82 A.J.I.L. 784 (1987).

<sup>3</sup> Interestingly, the United States supported codification of the principle of proportionality in Article 57 of AP I. See R. R. Baxter, Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law, 16 Harv. L.J. 1, 21-22 (1975). Despite the refusal to ratify AP I, the United States claims to adhere to Article 57 as a matter of customary law. See William J. Fenrick, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 Mil. L. Rev. 91, 103 (1982); William H. Taft, IV, The Law of Armed Conflict After 9/11: Some Salient Features, Yale J. Intl. L. 319, 322 (2003) (suggesting U.S. adherence to AP Articles 48-52 and 57 as a matter of CIL).

<sup>4</sup> Compare Curtis A. Bradley, The United States, Israel & Unlawful Combatants, 12 The Green Bag 2d 397 (2009), and Taft, *supra* note 1, at 320-21, with David Glazier, Playing by the Rules: Combating Al Qaeda within the Law of War, 51 Wm. & M. L. Rev. 957 (2009); Ryan Goodman, The Detention of Civilians in Armed Conflict, 103 A.J.I.L. 48 (2009), and Derek Jinks, The Declining Significance of POW Status, 45 Harv. Intl. L. J. 367 (2004).

<sup>5</sup> AP’s Article 44(3) allows insurgents to fail to distinguish themselves in occupied territory and in conflicts in Article 1(4). See Waldemar A. Solf, A Response to Douglas J. Feith’s *Law in the Service of Terror – The Strange Case of the Additional Protocol*, 20 Akron L. Rev. 261, 276-77 (1986) (views of state delegations that “the situations described in the second sentence of Article 44(3) are very exceptional and can exist only in occupied territory and in conflicts described in Article I(4).”). With the resolution of the anti-Apartheid struggle, this means that to the extent Hamas and other organizations are fighting Israeli occupation (itself unclear after the Israeli withdrawal from Gaza), they are permitted by AP I to violate the core principle of distinction and still retain prisoner-of-war protections.

<sup>6</sup> AP Art. 51(8): “Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take precautionary measures provided for in Article 57.”

<sup>7</sup> See Sofaer, *supra* note 2, at 785 (AP I “eliminates significant remedies in cases where an enemy violates the Protocol. The total elimination of the right of reprisal, for example, would hamper the ability of the United States to respond to an enemy’s intentional disregard of the limitations established by the Geneva Conventions of 1949 or Protocol I, for the purpose of deterring such disregard.”); Guy B. Roberts, The New Rules for Waging Wars: The Case Against Ratification of Additional Protocol I, 26 Va. J. Intl. L. J.

This is all well understood and perhaps explains the continued non-accession of the United States and Israel. Unfortunately, that ship has left port and is not likely to return soon. Amendments to multilateral conventions are extremely difficult. The political economy of such an effort likely spells failure because the United States and Israel are, for all practical purposes, the only encumbered parties: Most of the developed nations do not themselves engage in, or (like the United Kingdom) will soon disengage from, armed conflict and also derive some benefit from moral criticism of the encumbered states; most undeveloped nations have little to fear from IHL because their repression of internal conflicts are not likely to meet Geneva IV or AP I thresholds for coverage. AP I is thus likely to set the prevailing legal framework for the law of armed conflict for many decades to come.

### III. Duties of Defenders in IHL

Politics is the art of the possible; I would suggest our work as academics and publicists is within the same domain. What needs to be addressed is whether, under current law, defenders are under real obligations to minimize risks to civilians; and, if so, what can be done within the realm of the politically possible to change the narrative of the international law community so that defender violations are taken seriously and sanctioned.<sup>8</sup>

#### A. Sources of Duties

In undertaking this effort, the sources of defender duties would seem to include –

##### 1. The Prohibition of Civilian Shields

- Geneva IV Art. 28: “The presence of a protected person may not be used to render certain points or areas immune from military operations.”<sup>9</sup>
- AP Article 51(7): “The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the

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109, 142 (1985) (“Indeed, the new restrictions imposed by Protocol I would virtually eliminate reprisals as a lawful method of enforcing the laws of war, leaving enemy combatant troops and military property as the only lawful objectives against which reprisals could be taken.”).

<sup>8</sup> The Palestine Liberation Organization (“PLO”) has acceded to Geneva and AP I and is bound by their terms. AP Article 96(3). Hamas presumably has not, which raises the interesting question whether the PLO binds all Palestinian armed forces by its accession or whether Hamas is bound by Geneva and AP I to the extent they reflect CIL.

<sup>9</sup> Geneva IV Art. 28, ICRC Commentary, p. 209: “The prohibition is expressed in an absolute form and applies to the belligerents’ own territory as well as to occupied territory, to small sites as well as to wide areas.”

civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.”

## 2. The Prohibition of Perfidy

- AP Article 37(1): “It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: ... (c) the feigning of civilian, non-combatant status ...”

## 3. The Duty to Protect the Civilian Population Against Dangers from Military Operations<sup>10</sup>

- AP Article 51(1): “The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”<sup>11</sup>
- AP Article 57(1): “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”<sup>12</sup>
- AP Article 57(4): “In the conduct of military operations at sea or in the air, each Party to the conflict shall in conformity with its rights and duties under the rules of international law applicable to armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”

## 4. The Duty to Remove Civilians from and Not Locate Military Objectives in the Vicinity of Military Objectives

- AP Article 58: “The parties to the conflict shall, to the maximum extent feasible: (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian

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<sup>10</sup> Since this paper focuses on defender duties, provisions dealing with the duty to minimize harm to civilians during “attacks” are omitted.

<sup>11</sup> What follows is a list of specific rules “[t]o give effect to this protection,” but without suggestion that list exhausts the content of the duty to provide “general protection against dangers arising from military operations.”

<sup>12</sup> Paragraphs 2-3 and 5 apply to “attacks” but the first and fourth paragraphs speak more generally of “the conduct of military operations,” which should include actions and omissions of defenders.

population, individual citizens and civilian objects under their control against the dangers resulting from military operations.”<sup>13</sup>

#### 5. The Duty to Avoid Methods or Means of Warfare that Cause Unnecessary Injury or Suffering

- AP Article 35:
  1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
  2. It is prohibited to employ ... methods of warfare of a nature to cause superfluous injury or unnecessary suffering.<sup>14</sup>

#### B. Implications

##### 1. Relevance of Compliance with Defender Duties to Attacker Duties

It is clear that attackers cannot because of defender violations claim excuse for their non-compliance with, say, their duty to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects” under AP Article 57(2)(a). But the feasibility inquiry, it would seem, necessarily requires that account be taken of whether defenders have disguised military operations as civilian operations or have deliberately embedded their military assets in close proximity to civilian areas, all in violation of defender obligations under IHL. Similarly, the duty to provide “effective warning ... of attacks which may effect the civilian population, unless circumstances do not permit” under Article 57(2)(c) must take account of defender actions; the effectiveness of a warning is a joint product both of the message and its mode of delivery and what defenders do, including what they tell civilians, upon receipt of the warning.<sup>15</sup>

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<sup>13</sup> It has been suggested that the wording of the provisions contained in Article 58 indicates they are merely hortatory, not obligatory. See W. Hays Parks, *Air War and Law of War*, 32 A.F.L. Rev. 1, 159 (1990). The ICRC does not suggest the provisions are hortatory but does acknowledge (p. 693) that “a Party to the conflict cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary...”

<sup>14</sup> “Methods or means of warfare” should include the defender strategy of shooting missiles from batteries located in dense civilian populations and other decisions to locate military objects in close proximity to civilians.

<sup>15</sup> Similar considerations may have informed the Obama administration’s view of the legality of the use of drone attacks against high-level al-Qaeda leaders: “As you know, this is a conflict with an organized terror enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations.” Harold Hongju Koh, *The Obama Administration and International Law* (remarks at Annual Mtg. of the American Society of International Law, Wash. D.C., March 25, 2010), available at [www.state.gov/s/1/releases/remarks/139119.htm](http://www.state.gov/s/1/releases/remarks/139119.htm) (last visited, May 7, 2010). They also help explain conclusions in the Final Report of the ICC Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257, 1271 (2000).

## 2. Urging Investigation of Defender Actions as a Necessary Concomitant of any Investigation of Attacker Actions

Scholarship and advocacy needs to bring defender duties to the forefront of any discussion and investigation of armed conflicts. The necessarily joint contribution of attackers and defenders alike to civilian harm must be recognized. Any investigation of an armed conflict must focus on the duties of both parties and evaluate the feasibility of attacker compliance with some of the more open-ended obligations of IHL, such as the so-called duty of proportionality, as a function in part of the extent of defender compliance with its duties.

## 3. Urging Linkage of Attacker and Defender Duties in the Further Elaboration of IHL

There are open areas in IHL. States that have acceded to AP I are not necessarily bound by ICRC interpretations and they and states that have declined to ratify AP I can play an active role in formulating and urging others to adopt rules of practice that strike the right balance between attacker and defender duties. Even if, for example, there is widespread international recognition that, at some abstract level, the duty of proportionality is grounded in customary law, the content of that duty is not necessarily identical to the wording contained in AP Article 57. The effectiveness of such a duty, including the ability of military commanders to implement it in the air and on the ground, may well depend on serious consideration, elaboration and implementation of defender duties, for defenders are often in the superior position to minimize civilian exposure to the dangers of military operations.<sup>16</sup>

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Defender duties in armed conflicts is a neglected area of IHL. This needs to change if the overall mission of this body of law – minimization of harm to civilians – is to have any reasonable prospect of being realized.

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<sup>16</sup> Although revision of AP I is highly unlikely, perhaps agreement could be reached on the drafting of a new protocol addressing in a more comprehensive fashion defender duties under IHL.