
International Law and Armed Conflict Fundamental Principles and Contemporary Challenges in the Law of War

Laurie R. Blank

Clinical Professor of Law
Director, International Humanitarian Law Clinic
Emory University School of Law

Gregory P. Noone

Director, National Security and Intelligence Program
Assistant Professor of Political Science and Law
Fairmont State University



Wolters Kluwer
Law & Business

chapter 2

Basic Principles

Four fundamental principles lie at the heart of the law of armed conflict: military necessity, humanity, distinction and proportionality. Each of these principles is critical for achieving the law's goals of protection of civilians and regulation of the conduct of hostilities. Together the four principles create a framework that can guide examination of the obligations and actions of parties to conflicts and the rights and privileges of individuals in the conflict zone. No less, when viewed as a whole, these four principles clearly underline the delicate balance the law strikes between military necessity and humanity.

JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

(1985)

The International Conventions contain a multitude of rules which specify the obligations of states in very precise terms, but this is not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents. Sometimes we find them expressly stated in the Conventions, some of them are clearly implied and some derive from customary law.

We are acquainted with the famous Martens clause in the preamble to the Hague Regulations, referring to the "principles of the law of nations, as they result from usages established among civilized peoples." A number of articles in the Geneva Conventions of 1949 also refer to such principles, which are as vitally important in humanitarian law as they are in all other legal domains. They serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination. . . .

The principles do not in any sense take the place of the rules set forth in the Conventions. It is to these rules that jurists must refer when the detailed application of the Conventions has to be considered.

A. MILITARY NECESSITY

This principle recognizes that a military has the right to use any measures not forbidden by the laws of war "which are indispensable for securing the complete submission of the enemy as soon as possible."¹ In essence, military necessity is a principle of authority: the authority to use force to accomplish strategic and national security goals. The Lieber Code, the first codification of the law of war, drafted during the U.S. Civil War, provides the earliest statement of military necessity: "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."² In addition,

military necessity does not admit of cruelty — that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district.³

The framing of military necessity as a principle of authority, but limited in scope, is considered in many ways the Lieber Code's greatest contribution, "the final product of the eighteenth-century movement to humanize war through the application of reason."⁴ At the time, the introduction of the principle of military necessity represented a substantial shift in military theory:

Although not readily apparent today, recognition of military necessity as a legal precondition for destruction represented an enlightened advance in the laws of war in the nineteenth century. In the first half of that century, the law of nations permitted the capture or destruction of any and all property belonging to any person owing allegiance to an enemy government, whether or not these measures were linked to military needs.⁵

Critically, military necessity does not justify departures from the law of armed conflict. A doctrine popular among German theorists at the turn of the twentieth century, called *Kriegsraison*, suggested that military necessity should override the

1. DEPARTMENT OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE art. 3 (1956).

2. FRANCIS LIEBER, WAR DEPARTMENT, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 14 (1863).

3. *Id.* art. 16.

4. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998).

5. *Id.* at 217.

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law and that one could abandon the laws of war in situations of extreme danger.⁶ Never accepted, this doctrine remains simply in the archives of legal history. According to the United Kingdom's *Manual of the Law of Armed Conflict*, military necessity has four basic elements:

- The force used can be and is being controlled;
- Necessity cannot excuse a departure from the law;
- The use of force in ways which are not otherwise prohibited is legitimate if it is necessary to achieve, as quickly as possible, the complete or partial submission of the enemy;
- Conversely, the use of force which is not necessary is unlawful, since it involves wanton killing or destruction.⁷

Most important, military necessity is inherent in existing LOAC norms and incorporated into numerous provisions. It does not exist as a norm separate from existing black letter law that can be presented as an alternative approach. Indeed, in this way, military necessity exists in a delicate balance with the second core principle of LOAC, the principle of humanity.

Screen Shot!

In *Saving Private Ryan*, the American unit charges a German machine gun position and the medic is shot in the course of the assault. The medic dies and one German soldier survives and surrenders. The U.S. soldiers, who are very emotional over the death of their friend, argue about whether they should kill the German captive. They cannot take him along on their mission and they cannot afford to spare a single man to escort the German soldier back to Allied lines. Ultimately, Captain Miller (played by Tom Hanks) ends the debate: he says that they cannot kill him and so tells the soldier to walk towards the Allied lines and surrender to the first unit he encounters. Near the end of the movie, during the penultimate battle scene, the very same German soldier shoots and kills Captain Miller. With nowhere to go, the German soldier drops his weapon and puts his arms up, but this time one of the American soldiers shoots him.

1. This small unit was on an important mission — could they argue that “military necessity” allows them to kill a prisoner because they had no other option? Did they have other options — was Captain Miller’s solution reasonable in light of the law and operational considerations?
2. Does the end result (i.e., the German soldier went back into combat and killed an American soldier) alter your analysis or conclusions?

6. CLAUDE PILLOUD, YVES SANDOZ, CHRISTOPHE SWINARSKI, BRUNO ZIMMERMAN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 391 (1987).

7. UNITED KINGDOM MINISTRY OF DEFENCE, JSP 383: THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 2.2.1 (2004).

B. HUMANITY

The principle of humanity—also referred to as the principle of unnecessary suffering—aims to minimizing suffering in armed conflict. To that end, the infliction of suffering or destruction not necessary for legitimate military purposes is forbidden. Once a military purpose has been achieved, the infliction of further suffering is unnecessary. For example, if an enemy soldier is “out of the fight” by dint of being wounded or captured, continuing to attack him serves no military purpose. Another facet of this core principle is that weapons causing unnecessary suffering, such as dum-dum bullets or asphyxiating gases, are outlawed. Similarly, direct attacks on civilians serve no military purpose; the principle of humanity affirms the immunity of civilians from attack. Humanity is therefore LOAC’s essential counterbalance to the principle of military necessity and serves as a central principle of constraint.

8. CARL VON CLAUSEWITZ, ON WAR 101 (Anatol Rapoport ed., J.J. Graham trans., 1968) (1832). “That Clausewitz was not alone in his condemnation of the idea that international law had any effective role in the humanization of war may be seen in the comment of Lord Fisher: The humanizing of War! You might as well talk of the humanizing of Hell. When a silly ass at The Hague got up and talked about the amenities of civilized warfare and putting your prisoners’ feet in hot water and giving them gruel, my reply, I regret to say, was considered totally unfit for publication. As if war could be civilized! If I’m in command when war breaks out I shall issue my order — ‘The essence of war is violence. Moderation in war is imbecility. Hit first, hit hard, and hit everywhere.’” L.C. Green, *Cicero and Clausewitz or Quincy Wright: The Interplay of Law and War*, 9 A.E. ACAD. J. LEG. STUD. 59, 60 (1998).

9. Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 64 (1994).

Numerous specific provisions in treaty and customary LOAC demonstrate the comprehensive role that humanity plays in this body of law: the prohibition against using any type of coercion against a prisoner of war or civilian internee; the obligation to search for and collect the wounded and sick and ensure that priority of medical care is based solely on medical considerations; the obligation to search for and collect the shipwrecked at sea; the obligation to provide notice of capture of enemy personnel to the enemy state through a neutral intermediary; the obligation to facilitate the efforts of neutral relief agencies; the extensive immunities from attack afforded to places engaged in medical functions; and even the obligation to maintain and record the location of interment of the enemy dead.

The Martens Clause

Found in the preamble to the Hague Convention IV of 1907, the Martens Clause is the primary codification or incarnation of the principle of humanity:

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

Article 1(2) of Additional Protocol I to the Geneva Conventions provides a modern formulation:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Humanity, as set forth in the Martens Clause, is a direct outgrowth of the code of chivalry, itself an early manifestation of the laws of war. Chivalry was a code of conduct for knights during medieval times and included specific rules for fighting, treatment of other combatants, quarter and mercy — all based on loyalty, honor, justice and courage.

As a catalogue of virtues and values, it remains an enviable model for honourable conduct in peace and in war. Divorced from its aristocratic and martial aspects, chivalry's pertinence persists, not only for honourable and therefore humanitarian behaviour in war, but also as a model of responsible conduct in the civil society. Commands to spare the enemy who asks for mercy, to aid women in distress, to keep one's promise, to act charitably and to be magnanimous transcend any one particular historical period or socio-political context.¹⁰

Indeed, "the idea that chivalry requires soldiers to act in a civilized manner is one of its most enduring legacies."¹¹ Although in 1899, the Martens Clause was the first

10. THEODOR MERON, BLOODY CONSTRAINT: WAR AND CHIVALRY IN SHAKESPEARE 108 (2000).

11. *Id.* at 118.

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direct iteration of the principle of humanity as a fundamental incident of LOAC, it linked directly to earlier notions of natural law. In this way, "the Martens Clause establishes an objective means of determining natural law: the dictates of the public conscience. This makes the laws of armed conflict much richer, and permits the participation of all States in its development."¹²

The principle of humanity, through the Martens Clause, provides a means to fill in potential gaps in LOAC stemming from an erroneous belief that anything not prohibited is permitted in conflict. It is thus

much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.¹³

The Martens Clause also serves as a constant reminder that the principle of humanity remains relevant and retains its primacy even as new developments, whether in the types of conflicts, technology or weapons, outpace codification. As the ICJ stated in the *Nuclear Weapons Advisory Opinion*, "the Martens Clause . . . has proved to be an effective means of addressing the rapid evolution of military technology."¹⁴

QUESTIONS FOR DISCUSSION

1. Does the concept of humanity make sense during wartime? Think about the examples offered above of specific provisions incorporating the principle of humanity—why are such obligations important?

2. Consider these quotes from U.S. military leaders, past and present:

- "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. If he violates this sacred trust, he profanes his entire culture . . ."

—General Douglas MacArthur, General of the Army

- "To a Marine, honor is more than just honesty. It means having uncompromising personal integrity and being accountable for all actions. It is the moral courage to do the 'right thing' in the face of danger or pressure from other Marines."

—General Michael Hagee, Commandant of the Marine Corps

- "We are, have been and will remain a values-based institution. Our values will not change, and they are non-negotiable. Our Soldiers are warriors of character. They exemplify these values every day."

—General Peter Shoomaker, Army Chief of Staff

12. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT'L REV. RED CROSS 125, 133 (1997).

13. *United States v. Krupp*, 15 AD 622 (1948).

14. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶ 78 (July 8).

- “Quite contrary to trivial opinion, all professional military men do not walk blind and brutal.”

— General Curtis LeMay, United States Air Force

How does the notion of character or values coincide with the principle of humanity?

C. DISTINCTION

One of the most fundamental issues during conflict is identifying who or what can be targeted. The principle of distinction—sometimes referred to as discrimination—requires that any party to a conflict distinguish between those who are fighting and those who are not, and direct attacks solely at the former. Similarly, parties must distinguish between civilian objects and military objects, and target only the latter.

Distinction has a long pedigree, forming a central tenet of warfare for thousands of years. Many ancient codes of conduct during wartime differentiated in some way between those who could be killed and those who must be spared.¹⁵ For example, in his orders to his commanders, the first Caliph, Abu Bakr, stated, “[t]he blood of women, children and old people shall not stain your victory.”¹⁶ The Greeks considered the temples, embassies, priests, and envoys of the opposing side inviolable.¹⁷ Beginning with Augustine and St. Thomas Aquinas, early legal theorists began to set forth a framework for who could be killed during armed conflict—the early underpinnings of today’s principle of distinction. Thus, St. Thomas Aquinas declared that “it is no way lawful to slay the innocent.”¹⁸ During the Enlightenment, Jean-Jacques Rousseau advanced the analysis significantly, focusing primarily on distinguishing between those who bore arms and those who did not. In this way, Rousseau formulated the principle of noncombatant immunity in terms that remain vital and recognizable today:

Since the purpose of war is to destroy the enemy State, it is legitimate to kill the latter’s defenders *so long as they are carrying arms*; but as soon as they lay them

15. As Michael Walzer explains, “the general conception of war as a *combat between combatants* . . . turns up again and again in anthropological and historical accounts.” MICHAEL WALZER, *JUST AND UNJUST WARS* 42 (2000). For example, the *Mahabharata* text tracing the history of the Kurukshetra War explained, “he is no son of the Vishni race who slayeth a woman, a boy or an old man.” PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 8 (1908). Similarly the prophet Elisha warned the king against the killing of civilians: “When thou comest nigh unto a city to fight against . . . thou shalt smite every male thereof with the edge of the sword. But the women and the little ones, and the cattle, and all that is in the city . . . thou shalt take unto thyself. . . .” L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 26 (1998). And the Code of Hammurabi ordered the “protection of the weak against oppression by the strong and ordered that hostages be released on payment of a ransom.” Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1, 16 (Dieter Fleck ed., 2009).

16. Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT* 1, 14 (Dieter Fleck ed., 1995).

17. *Id.* at 13; see also L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 69 (1998).

18. 6 THOMAS AQUINAS, *SUMMA THEOLOGICA* 159 (2007) (1265).

down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.¹⁹

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

In the modern law of war, distinction was first set forth in Article 22 of the Lieber Code:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.²⁰

A few short years later, the international community reinforced the rule in the St. Petersburg Declaration, which stated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."²¹ Although the overall purpose of the St. Petersburg Declaration was the prohibition of weapons causing unnecessary suffering for combatants, this provision confirms the immunity of the civilian population from attack.

Neither the Hague Conventions of 1899 and 1907 nor the Geneva Conventions of 1949 contain specific statements of the principle of distinction, but its force as customary law remained in effect. By 1977, when the Additional Protocols were drafted, the nature of warfare demonstrated the need for a clear restatement of the principle of distinction and reinforcement of its central role in LOAC.

Article 48 of Additional Protocol I: The Basic Rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.²²

19. Daphné Richemond-Barak, *Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity*, in *NEW BATTLEFIELDS/OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* 113 (William Banks ed., 2011) (citing JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* 111 (1762)).

20. FRANCIS LIEBER, *WAR DEPARTMENT, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* art. 22 (1863).

21. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, pmbl., Nov. 29, 1868, *reprinted in Official Documents*, 1 AM. J. INT'L L. SUPP. 87, 95 (1907).

22. Article 48 is considered customary international law. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 40 (3d ed. 2009).

Distinction thus lies at the core of LOAC's seminal goal of protecting innocent civilians and persons who are *hors de combat* (literally "out of the fight"). The purpose of distinction—to protect civilians—is emphasized in Article 51 of Additional Protocol I, which states that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack." Article 51 continues, stating:

Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Furthermore, Article 85(3) of Protocol I declares that nearly all violations of distinction constitute grave breaches of the Protocol, including:

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

Location: Baghdad, Iraq

This was during the "Shock and Awe" phase of the war. This particular event started in Sadr City and concluded in Baghdad.

Our unit just arrived in Baghdad after encountering fierce fighting during our push from Sadr City. We just traversed through what many have described as the world's largest drive by — a 2-3 mile strip of road with buildings on both sides the entire way, infested with enemy fighters. Concealed by the cover of night, the enemy unleashed an unbelievable volume of fire consisting of RPGs [rocket-propelled grenades] and heavy machine guns. Through my NVG's [night vision goggles], it truly looked like a scene from *Star Wars* with all the green flashes streaking through the air in every direction.

Casualties were mounting and continued as we fought to gain a foothold in the city. Eventually, we made our way to Saddam's Presidential Palace, which we secured to establish a fighting position and to medevac our casualties. Just moments before arriving, my AAV was hit with 2 RPG's, gravely wounding several Marines.

While the fighting in the streets continued throughout the city, an alarming number of civilians began entering the streets and started looting, taking anything they could get their hands on. As a result, our tactical picture became blurred, making it hard to distinguish combatants from civilians due to the melting pot of fighters we were encountering — most of whom didn't wear uniforms, making it difficult to identify Iraqi civilians from enemy combatants. This was not something that was anticipated nor was there any direction on how to proceed during greater civilian involvement.

In addition to looting, vehicular traffic started to increase around the palace, becoming an additional concern. My unit made a hasty roadblock at the front of the palace using anything we could find to pile into the streets to prevent traffic from funneling in our direction: furniture, tires, scrap wood, metal appliances, etc. There wasn't time or the resources to make signs or use a traditional barrier system which might have been more obvious to traffic; this was very primitive, essentially a pile of garbage in the middle of the street that we hoped would discourage inbound traffic away from the palace. And if that wasn't enough, hopefully the backdrop of heavily armed Marines and fighting vehicles would make them choose more cautiously.

Shortly after the roadblock was established, we were approached by a series of vehicles. The first was a small truck with three men inside that appeared to be unarmed. They pulled up to our hasty roadblock and stopped within sight of us

23. Ann Scott Tyson, *In Afghanistan, A Test of Tactics Under Strict Rules to Protect Civilians, Marines Face More Complex Missions*, WASH. POST, Aug. 13, 2009, at A6.

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and sat motionless inside of their truck. We yelled and waved our hands for them to turn around, but it failed to produce any type of response. One of our gunners decided to shoot warning shots towards them, after which the driver hit the gas and accelerated towards us at an alarming rate of speed. We held our fire for as long as we reasonably could and then decided to engage the vehicle with our weapons, rendering it inoperable.

As the truck came to a stop, it was obvious all were either dead or critically injured. But before anyone could assess the actual conditions, we were approached by a van. The van, unfortunately, even with the bullet-ridden truck in front of them, would make the same series of decisions, which ended in the same manner. This would also be the case for the third vehicle, which resembled a Greyhound bus with many passengers. In total, more than 30 people were killed, every one of them civilians.

We didn't know if they were suicide car bombers or if they were going to veer off at the last moment down an adjacent street that wasn't known to be frequented by civilians. We tried to deter them by designating one Marine to shoot tracer rounds only, even though the rules of engagement (ROEs) stated otherwise. But unfortunately each time we fired tracer rounds it resulted in the driver accelerating towards us a high rate of speed, leaving us no other choice but to identify them as hostile and engage them as if they were intending to kill us. It was obvious the tactical picture was changing, but the current ROEs didn't have a chance to catch up.

— U.S. Marine

D. PROPORTIONALITY

The principle of proportionality requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. It is important to note that this *jus in bello* principle of proportionality differs substantially from the *jus ad bellum* proportionality discussed briefly in Chapter 1. This principle balances military necessity and humanity, and is based on the confluence of two key ideas. First, the means and methods of attacking the enemy are not unlimited. Rather, the only legitimate object of war is to weaken the military forces of the enemy. Second, the legal proscription on targeting civilians does not extend to a complete prohibition on all civilian deaths. The law has always tolerated "the incidence of some civilian casualties . . . as a consequence of military action,"²⁴ although "even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack."²⁵ That is, the

24. Judith Gardham, *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 283-284 (Laurence Boisson de Chazoumes & Philippe Sands eds., 1999).

25. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 936 (July 8) (Dissenting Opinion of Judge Higgins).

law requires that military commanders and decision-makers assess the advantage to be gained from an attack and assess it in light of the likely civilian casualties.²⁶

This principle stems from St. Thomas Aquinas' "doctrine of double effect," which explains that it is morally permissible to perform an act having both a good effect and an evil effect, as long as the intended good effect outweighs the evil effect, which is simply foreseen rather than intended.²⁷ In essence, "double effect is a way of reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity."²⁸ Even before codification in the various Hague and Geneva Conventions, and the modern formulation of proportionality in Additional Protocol I, the laws of war incorporated these notions.²⁹

Additional Protocol I contains three separate statements of the principle of proportionality. The first appears in Article 51, which sets forth the basic parameters of the obligation to protect civilians and the civilian population, and prohibits any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." This language demonstrates that Additional Protocol I contemplates incidental civilian casualties, and appears again in Articles 57(2)(a)(iii)³⁰ and 57(2)(b),³¹ which refer specifically to precautions in attack.

The Rome Statute also incorporates the principle of proportionality in criminalizing war crimes. Article 8(2)(b)(iv) forbids

[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or

26. The term "collateral damage" is often used in the media and by the public to refer to the incidental (meaning not deliberate) civilian casualties from an attack on a military target.

27. SUMMA THEOLOGICA II-II, Qu. 64, Art. 7.

28. Mirko Bagaric & John Morss, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, 29 SUFFOLK TRANSNAT'L L. REV. 157, 174-175 (2006).

29. For example, the Lieber Code includes the following concepts: "[m]ilitary necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of the war"; "[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war"; and "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." FRANCIS LIEBER, WAR DEPARTMENT, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD arts. 14, 15, 22 (1863). Although the Lieber Code does not include a specific statement of the principle of proportionality, we can see the early underpinnings of it in these three statements.

30. "With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: . . . (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

31. "[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

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widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.³²

Both formulations emphasize that proportionality is not a mathematical concept, but rather a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that will cause excessive civilian deaths. The principle of proportionality is well-accepted as an element of customary international law applicable in all armed conflicts.³³

Proportionality?

- During the first Gulf War, the U.S. bombed the Al Firdus bunker, a former air raid shelter then used as a bunker. It was camouflaged, surrounded by barbed wire, guarded day and night, and used as a command and control post. U.S. reconnaissance recorded military vehicles, command and control radio traffic and other evidence of its use as a military post—but no evidence of any civilians. On February 12, 1991, two U.S. F-117s bombed the bunker, destroying it. When morning came, news footage of over 200 dead civilians being removed from the bunker flashed around the world.
- During the 1982 Falklands War, the Royal Navy sunk the Argentine cruiser *General Belgrano*, killing 368 Argentine sailors and seamen, the largest single loss of life of the entire conflict.
- In Afghanistan, U.S. soldiers and Marines face attacks from Taliban militants who fire from residential compounds. If the U.S. soldiers and Marines fire back, they will likely endanger, injure or kill civilians living in those compounds.
- During the 2006 war between Israel and Hezbollah in Lebanon, Hezbollah used villages in southern Lebanon as bases, storing weapons in and firing rockets from civilian houses. Attacking Hezbollah fighters and stopping the rocket attacks often meant bombing civilian houses and villages.
- The Battle of Fallujah in 2004 was one of the harshest battles of the second Gulf War. In fighting to root out hardcore Sunni insurgents who controlled the city (and supported and harbored the killers of four U.S. civilian contractors), the U.S. anticipated heavy civilian casualties.

Which of these scenarios implicates the principle of proportionality? Why or why not?

32. Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90.

33. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 588 (July 8); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46 (3d ed. 2009); Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 292 (Susan Breau & Agnieszka Jachec-Neale eds., 2006); Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare*, 1997 ISR. Y.B. HUM. RTS. 1, 7 (citing Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 63, 77 (P. Rowe ed., 1993)).