

Saving Lives: The Principle of Distinction and the Realities of Modern War

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I. Introduction

Humanitarian law contains no stronger doctrine than the Principle of Distinction. The principle is as unequivocal as it is inflexible: parties to a conflict must “direct their operations only against military objectives.”¹ When parties target non-military objectives such as civilians, they violate international law. The Principle of Distinction is widely accepted and constitutes the core doctrine of the law of war.²

Yet the Principle of Distinction is bad law. Designed with large-scale interstate wars in mind, Distinction is inapposite to the reality of modern warfare. Distinction rests on an outdated view of the world, and asks the impossible of the weak and little of the powerful. It violates the ideal of equal protection of the laws, the upshot of which is to protect the status quo from change. Instead of bringing order to war and saving lives, the Principle of Distinction precludes the rule of law and endangers the lives of those whom it was designed to protect. The world deserves better.

A. DOCTRINE³

The purpose of the Principle of Distinction is “to shield those who are not directly participating in the conflict from its effects.”⁴ In order to accomplish this goal, the Principle

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1. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 48, U.N. Doc. A/32/144, Annex I, 1125 U.N.T.S. 512, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol I].

2. Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148 (1999). See, e.g., INTERNATIONAL RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswold Beck eds., 2005).

3. Humanitarian law can be divided into two categories: (1) *jus ad bellum* and (2) *jus in bello*. *Jus ad bellum* consists of the rules that govern the decision to use force, while *jus in bello* contains rules about how force may be used once the decision to do so is made. The Principle of Distinction falls in the latter category of *jus in bello*. See Schmitt, *supra* note 2, at 146.

4. *Id.* at 145.

provides what commentators have called “an absolute moral immunity from direct, intentional attack[s]” on civilians and noncombatants.⁵ This is not to say that attacks resulting in civilian deaths necessarily violate humanitarian law; rather, it is a question of intent. The Principle of Distinction provides that nonmilitary persons or objects may not be the intended targets of attacks. If, however, harm to civilians is an unintended result of an otherwise lawful attack, the requirement of distinction has been met.⁶

The prohibition on intentional targeting of civilians is “[t]he most basic principle underlying the law of war. . . .”⁷ It is codified in the Additional Protocol I to the Geneva Conventions.⁸ Although not all states have ratified the Additional Protocol I, most agree that the Protocol’s statements about the Principle of Distinction express customary international law.⁹

The Principle of Distinction does not stand alone. Instead, it serves a gatekeeper role regarding target selection. Each potential target must satisfy the Principle; if it does not, the potential target can never be intentionally attacked. Even when Distinction is satisfied, it remains to be seen if the target can be attacked in a particular instance. Two other principles govern when targets may be attacked.

International law recognizes the Principle of Necessity.¹⁰ Necessity supplements the Principle of Distinction by adding the requirement that destroying the target in question will actually provide an advantage in overcoming the enemy.¹¹ In the words of one of the Nuremberg Tribunals, “[d]estruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.”¹²

The Principle of Proportionality, codified in the Additional Protocol I, prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³ The Principle of Proportionality recognizes that collateral damage is a part of war but attempts to reduce that damage by requiring a balancing of the costs and benefits of a proposed attack.

The Principle of Distinction does not have the final say on whether a particular target may lawfully be attacked in a particular instance; Necessity and Proportionality do that.

5. 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, 146 (2001).

6. *Id.*

7. Schmitt, *supra* note 2, at 145.

8. Article 48 provides that parties to a conflict must “distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Likewise, article 51.2 states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.” Finally, article 52.2 requires that “[a]ttacks shall be limited strictly to military objectives.” See Additional Protocol I, *supra* note 1, arts. 48, 51-52.

9. Schmitt, *supra* note 2, at 148.

10. See Meyer, *supra* note 5, at 147 n.20. Major Meyer argues that the Principle of Necessity can also be found in Additional Protocol I, article 52’s requirement that destruction of the target provide a “military advantage” to the attacker.

11. *Id.* at 147.

12. United States v. List, reprinted in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: NUERNBERG OCTOBER 1946-APRIL 1949 1230, 1253-54 (1950).

13. Additional Protocol I, *supra* note 1, art. 51.5(b).

However, the Principle of Distinction determines what targets can ever be attacked, and carries the heavy burden of protecting innocents from intentional harm.

B. ACCEPTANCE

Although the United States and twenty-nine other countries have not ratified the Additional Protocol I, most governments and commentators have wholeheartedly accepted the Principle of Distinction.¹⁴ For example, the U.S. government recognizes that the Principle of Distinction is a part of customary international law, even though other provisions of the Additional Protocol I remain objectionable.¹⁵

Despite widespread official acceptance of the Principle of Distinction, the Principle is violated time and again by governments and non-state actors. Sudan, Rwanda, the Former Yugoslavia, Northern Ireland, Israel-Palestine, and the Nagoro-Karabakh region of Azerbaijan are all places where the Principle of Distinction has been systematically violated in recent conflicts.¹⁶

Since the end of the Cold War, the increasing frequency of intrastate and other conflicts that do not fit the mold of state versus state has raised concerns about the Principle of Distinction.¹⁷ It can be unclear whether non-state parties to a conflict, who often are practically indistinguishable from the civilian population, are bound by, or protected by, the Principle of Distinction.¹⁸ Furthermore, the weaker parties to asymmetrical conflicts may be tempted to abandon the Principle of Distinction because of the constraints it imposes on their ability to wage war.¹⁹ On top of all that, combatants motivated by notions of morality or ethnicity are particularly indiscriminate in their targeting decisions.²⁰

If rhetoric were all that mattered, the Principle of Distinction would be an ironclad and fundamental doctrine of international law. Yet the reality is far different: the Principle of Distinction is violated across the world, often openly so, and that problem is getting worse. Something must be done.

C. PURPOSE OF THE PAPER

The Principle of Distinction must be abandoned. This paper argues that the Principle of Distinction should be replaced with a more nuanced doctrine—one that is both practicable and fair. After discussing the problems with the Principle of Distinction, this paper ends by suggesting how those problems might be avoided under different legal rules.

It is worth taking a moment to discuss what this paper is not about. It is not about justifications for armed conflict, nor about the criteria for determining whether a state of

14. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 15 (2004).

15. *Id.* at 15 n.99; see, e.g., Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419 (1987); Abraham D. Sofaer, *AGORA: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AM. J. INT'L L. 784 (1988).

16. Schmitt, *supra* note 2, at 158.

17. R.M. ALLEY, *INTERNAL CONFLICT AND THE INTERNATIONAL COMMUNITY: WARS WITHOUT END?* 115 (2004).

18. Watkin, *supra* note 14, at 17.

19. Schmitt, *supra* note 2, at 156-57.

20. *Id.* at 158.

war exists in a given situation. From the outset, this paper will bypass these questions of *jus ad bellum* and focus exclusively on *jus in bello*. Furthermore, the paper is not about wars between powerful states. Such wars are increasingly rare, replaced by smaller, less clear-cut confrontations involving insurgents and weak states. This paper inspects humanitarian law in light of these modern wars, wars that are often between a physically weak party and a much stronger party. Specifically, this paper is about how the realities of asymmetrical warfare should affect the humanitarian law doctrine of the Principle of Distinction. Other points of law, such as the Principles of Necessity and Proportionality, will be discussed only in relation to Distinction.

The central question addressed by this paper thus stands out in sharp relief: who can be attacked? For decades, the Principle of Distinction has answered this question by dividing the world into two categories: military and nonmilitary. The former can be attacked, the latter cannot.²¹

This paper questions that division both morally and practically. Part I summarizes the origins of the Principle of Distinction and how Distinction has developed into the cornerstone doctrine of humanitarian law. Part II examines how the Principle of Distinction is practiced today, both by powerful states and by weaker non-state actors. In Part III, the paper describes a variety of problems with the Principle of Distinction. Most damningly, the Principle violates the ideal of equal protection of the laws, its results are often nonsensical, and it is difficult to apply to real-world situations. Often, Distinction cannot be followed by weaker parties to conflicts. The flawed doctrine of Distinction reduces confidence in international law and leads parties to reject wholesale the laws of armed conflict. The result is disorder instead of the rule of law.

The paper ends by suggesting a new doctrine, one that could take the place of Distinction in humanitarian law. Part IV details that new doctrine, which it labels the Principle of Culpability. That section shows how many of the shortcomings of the Principle of Distinction might be avoided with new rules.

D. TERMINOLOGY

The term “terrorism” is not used in this paper because that word is too emotionally charged. Particularly after September 11, labeling something terrorism tends to foreclose further analysis and eliminate the possibility of a nuanced response. Of even more concern is the lack of a precise definition of what constitutes terrorism. As a technical matter of the laws of war, terrorism might mean violating the Principle of Distinction by attacking civilians. Or, terrorism might mean violating the Principle of Necessity by choosing targets based on political, not military, goals. Without consensus as to what it means, the terrorism label confounds more than it clarifies.

From time to time, the paper will refer to “asymmetrical” warfare or conflicts. This reference means violent conflicts in which one side possesses significantly greater military resources than does the other. Whether the advantage is technological or numerical, asymmetrical warfare is characterized by a material advantage enjoyed by a party over its op-

21. The Principles of Necessity and Proportionality further limit the decision to attack a given target in a given instance, but the Principle of Distinction governs what targets can ever, under any circumstances, be subject to attack.

ponent. Typically, the more powerful party goes to war with troops, aircraft, tanks, and all of the other accoutrements of modern militaries. It relies above all else on superior physical strength to win. The weaker party, on the other hand, may use irregular soldiers and improvised weapons, and often prefers surprise attacks to direct engagements. Examples of asymmetrical warfare are the ongoing post-invasion insurgency in Iraq, the Palestinian-Israeli conflict, and the separatist rebellion in Sri Lanka.

II. History

The ideal of Distinction has always been in tension with the realities of armed conflict. At least since the American Civil War, governments have endorsed the idea that civilians should enjoy special legal protections from attack. Yet military commanders have just as consistently attacked civilian targets, even when they professed to believe in Distinction. Legal reformers responded by making laws about Distinction more explicit and clear-cut, yet violations continued throughout the Twentieth Century.

A. CIVIL WAR TO THE TURN OF THE CENTURY

During the American Civil War, President Lincoln commissioned Dr. Francis Lieber to write a codification of the laws of war based on the customs of nations at the time.²² Lincoln adopted the Lieber Code and issued it to the Union Army as Union Army General Order No. 100.²³ The Lieber Code recognized the Principle of Distinction:

Art. 22. 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.²⁴

The customary Principle of Distinction that Lieber described is not absolute; it applies “as much as the exigencies of war will admit.”²⁵ Furthermore, the Lieber Code acknowledged that enemy civilians may be made to suffer, since “[t]he citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.”²⁶

Civilians did indeed suffer in the Civil War, not only from deprivations of food, supplies, and manpower, but also from direct attack. Most infamously, Union General Sherman destroyed cities, towns, farms, and infrastructure throughout the American South as part of his “march to the sea.” The Union Government may have adopted the Principle of Distinction, but its actions evince different priorities other than protecting civilians. This rift between law and practice would be repeated in every major conflict that followed.

22. Meyer, *supra* note 5, at 148.

23. *Id.*

24. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* art. 22 (1863), reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* (Dietrich Schindler & Jiri Toman eds., Martinus Nijhoff Publishers 1988) (1973).

25. *Id.*

26. *Id.* at art. 21.

In the immediate aftermath of the American Civil War, the Principle of Distinction entered international positive law as part of the St. Petersburg Declaration of 1868.²⁷ The purpose of the Declaration was to prohibit small explosive bullets, but its preamble made the broader claim that “the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy.”²⁸ Although far from an explicit rule of law, this statement summarizes the basic idea that would later grow into a full-fledged doctrine.

B. THE WORLD WARS

In 1907, with the possibility of war already looming on the horizon, European powers tried once again to codify the laws of war. The Hague Peace Conference of 1907 resulted in conventions regarding bombardment from both land and sea.²⁹ The Convention on Land Warfare prohibited attacks on undefended “towns, villages, dwellings, or buildings. . . .”³⁰ The Convention on Naval Forces went into greater detail, distinguishing the majority of undefended locations from those that included industries crucial to an enemy’s military effort.³¹ Such militarily useful targets, even if they were undefended, could be attacked. What it meant for an industry or target to be of military significance is unclear. However, these conventions do demonstrate a growing belief in the difference between civilian and military targets.³² Undefended civilian objects were immune from attack, while undefended military objects were seen as legitimate targets. The conventions envisioned civilian deaths as collateral damage, not the object of attacks. In short, they required a weak form of Distinction.

The First World War tested states’ commitments to Distinction. With conflict on an unprecedented scale and civilian-controlled industries central to the war effort, the temptation to attack non-military targets was great. Nonetheless, Major Jeanne Meyer, a Judge Advocate with the U.S. Air Force, has concluded that, “[t]he bombing campaigns of Britain, France, Germany, Italy, and America all reflect adherence to two, interrelated principles of international law: (1) the only legitimate targets are military objectives; and (2) indiscriminate bombing is prohibited.”³³

That said “military objectives” was interpreted to include war industries, regardless of whether civilian workers would be killed.³⁴ Even more expansively, “the parties in WWI considered affecting enemy morale, including that of civilians, to be a legitimate, and perhaps desirable, consequence of aerial bombardment.”³⁵ Therefore, although civilians were not targeted, there was no effort to avoid killing them either.³⁶ Although they adhered to the letter of the Principle of Distinction, the combatants in WWI did not follow its spirit.

27. Meyer, *supra* note 5, at 149.

28. *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* (1868), reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 24.

29. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351.

30. Convention (IV), *supra* note 29, art. 25.

31. Convention (IX), *supra* note 29, art. 2.

32. Meyer, *supra* note 5, at 149.

33. *Id.* at 154.

34. *Id.* at 155.

35. *Id.*

36. *Id.*

After WWI, it was clear that warfare had changed. Increasingly advanced weapons, particularly aircraft, provided commanders with the ability to strike targets that were distant from the front lines. Civilian populations were at risk like never before, and the international legal community responded by proposing detailed and stringent rules of combat.

The Hague Rules of Air Warfare of 1923 was the most ambitious proposal. Written by jurists at the Hague, the 1923 Rules would have banned terrorizing civilians, damaging private non-military property, injuring non-combatants, and bombing to collect funds.³⁷ In addition, the 1923 Rules provided a list of legitimate targets including “military forces; military works; military establishments or depots; factories constituting important and well-known cent[er]s engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communications or transportation used for military purposes.”³⁸ This list was intended to be exhaustive; attacks on targets that did not fall into one of the enumerated categories were banned under the 1923 Rules. The rules do not endorse attacks against the morale of an enemy’s civilians. Indeed, the ban on terrorizing civilians could be interpreted as specifically forbidding attacks directed against civilian morale.³⁹ In short, the rules were a ringing endorsement of the Principle of Distinction. But not a single country adopted the 1923 Rules.⁴⁰

Instead of adopting laws about Distinction, countries issued non-binding policy statements during the interwar period. British Prime Minister Chamberlain proposed three principles: (1) that it was illegal to bomb or deliberately attack civilians; (2) targets attacked from the air must be identified military objectives; and (3) military objectives must be attacked with reasonable care so civilians are not hurt.⁴¹ The League of Nations adopted these principles in a non-binding resolution in 1938.⁴²

At the same time, military commanders were increasingly willing to attack civilian morale. Sophisticated air forces gave militaries the ability to engage in strategic bombardment, in which they attacked the entire enemy nation, not just fielded troops.⁴³ The idea was to choose targets “not because of any direct or necessary relationship with the enemy’s forces in the field, but because their destruction would undermine the enemy nation’s willingness and capability to wage war at all.”⁴⁴ The commander of the Royal Air Force defined military objectives as “any objectives which will contribute effectively towards the destruction of the enemy’s means of resistance and the lowering of his determination to fight.”⁴⁵

It was as if military commanders and civilian politicians were speaking different languages. On the one hand were statements of principle that seemed to disavow any desire to attack civilians; on the other, the idea of strategic bombardment. This break continued

37. Herman Reinhold, *Target Lists: A 1923 Idea with Applications for the Future*, 10 TULSA J. COMP. & INT’L L. 1, 12 (2002).

38. *The Hague Rules of Air Warfare*, art. 24.2, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 24.

39. *Id.* at art. 22.

40. Reinhold, *supra* note 37, at 13. Delegates from Great Britain, the United States, Italy, France, Holland, and Japan met for three months to discuss the 1923 Rules.

41. *Id.* at 14.

42. *Id.*

43. See ROBERT FRANK FUTRELL, *IDEAS, CONCEPTS, DOCTRINE: BASIC THINKING IN THE U.S. AIR FORCE 1907-1960* 11 (1989).

44. Meyer, *supra* note 5, at 157.

45. SIR CHARLES WEBSTER & NOBLE FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939-45*, 74 (1961).

right up to the beginnings of the Second World War. On September 1, 1939, the day Germany invaded Poland, President Roosevelt sought agreement from European governments that they would not bomb "civilian populations in unfortified cities."⁴⁶ France, England, and Germany agreed.⁴⁷

Perhaps never in the history of armed conflict has a promise been more thoroughly broken. By 1945, both Allied and Axis powers were targeting entire cities with the explicit intention of harming their civilian populations. The Allies firebombed Dresden and Tokyo, Germany attacked London with V-1 and V-2 rockets, and the United States dropped nuclear weapons on Hiroshima and Nagasaki.⁴⁸ Yet attacking civilian targets was not originally the goal of American and British commanders. Rather, the targeting of enemy civilians was something that the Allies gradually decided to do—the Principle of Distinction was weakened before being abandoned.

Ever since the American entrance into the war, both the Royal Air Force and the Army Air Corps practiced strategic bombardment. However, at first they disagreed over the means by which enemy civilian morale should be affected.⁴⁹ The British were initially "more disposed to considering Germany's morale as a specific objective."⁵⁰ The Americans, on the other hand, preferred to affect morale indirectly by attacking the economic systems of Germany and other Axis powers.⁵¹ Under this mixture of direct and indirect approaches, the Principle of Distinction was seriously weakened. By permitting civilian morale to sometimes be the target of attack, it became increasingly difficult to argue that there was a difference between civilian and military targets.

Distinction was abandoned altogether in 1943. In January of that year, President Roosevelt and Prime Minister Churchill met in Casablanca to discuss war strategy. At the end of their meeting, they issued the joint Casablanca Directive, a document that endorsed direct and intentional targeting of German civilian morale.⁵² The Directive adopted the objective of "the progressive destruction and dislocation of the German military, industrial and economic system, and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened."⁵³ Distinction, already watered-down beyond recognition, seemed dead.

C. THE COLD WAR . . . AND CODIFICATION

After the 1923 Air Rules were unanimously rejected, there were no more attempts to codify the Principle of Distinction until the 1950s. Prompted by the civilian costs of WWII, the International Committee of the Red Cross (ICRC) proposed expanding the Geneva Conventions of 1949 to include Distinction.⁵⁴ "In particular, members of the ICRC sought to regulate, if not prohibit, the employment of aerial bombardment beyond the immediate

46. Reinhold, *supra* note 37, at 15.

47. J.M. SPAIGHT, *AIR POWER AND WAR RIGHTS* 259-60 (The University Press Aberdeen 3d ed. 1947) (1924).

48. See Reinhold, *supra* note 37, at 16-17.

49. Meyer, *supra* note 5, at 158-59.

50. *Id.* at 158.

51. *Id.* at 159.

52. RICHARD G. DAVIS, *CARL A. SPAATZ AND THE AIR WAR IN EUROPE* 589 (1993).

53. WEBSTER & FRANKLAND, *supra* note 45, app. 8, pt. 28.

54. Meyer, *supra* note 5, at 160-61.

battlefield”⁵⁵ The Institute of International Law and the United Nations also drafted proposals, but “support for the proposals among major powers was tepid, at best.”⁵⁶ None of the proposals were adopted and the issue was eventually dropped.

Distinction made a modest comeback, at least in practice, at the beginning of the Korean War.⁵⁷ American commanders avoided striking civilian targets so that the North Koreans would not be able to gain international sympathy for being subjected to “illegal” attacks.⁵⁸ However, once the Chinese military intervened on behalf of the North, the American Air Force ceased to distinguish between civilian and military targets.⁵⁹ The Air Force attacked “communications systems and towns, cities and villages. . . . Some air attacks were designed to destroy the morale of civilians who supported the enemy. This included bombing targets around Pyongyang, after leaflets had warned residents prior to the attack.”⁶⁰

The Principle of Distinction continued to be ignored in the Vietnam War. Although aerial bombardment of civilians and civilian structures was less common than in Korea, the American infantry destroyed towns and villages, and was widely reported to be intentionally killing civilians.⁶¹ In addition, the use of Agent Orange and napalm resulted in significant damage to civilian food supplies.⁶²

In that context, the idea that the Principle of Distinction should be codified was resurrected in 1974. This time, the ICRC managed to bring a wide range of countries together to form the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (the Diplomatic Conference).⁶³ After three years of deliberation, the Diplomatic Conference drafted and submitted Additional Protocols I and II to the 1949 Geneva Conventions. Additional Protocol I contains explicit provisions limiting targets to military objectives, and protecting civilians from intentional attack.⁶⁴ As discussed in the introduction to this paper, not all states have signed the Additional Protocol I. Nonetheless, most, including the United States, agree that the Protocol’s statements about distinction reflect international custom and *opinio juris*. After a century of inconsistent rhetoric and practice to the contrary, Distinction was law.

D. THE POST-COLD WAR WORLD

In the first Gulf War, American targeting decisions were guided by the ideas of U.S. Air Force Colonel John Warden who advocated destroying an enemy’s “[c]enters of gravity.”⁶⁵ Centers of gravity included “those characteristics, capabilities, or locations from which the

55. W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 64 (1990).

56. Meyer, *supra* note 5, at 161; see also, International Committee for the Red Cross, *Draft Rules for the Limitations of the Dangers Incurred by the Civilian Population in Times of War* (1956), reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 24.

57. Reinhold, *supra* note 37, at 18-19.

58. See Thomas C. Hone, *Strategic Bombing Constrained: Korea and Vietnam*, in *CASE STUDIES IN STRATEGIC BOMBARDMENT* 473 (R. Cargill Hall ed., 1998).

59. Reinhold, *supra* note 37, at 19.

60. *Id.*

61. See *id.*

62. STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, *INCENDIARY WEAPONS* 49-58 (1975).

63. Meyer, *supra* note 5, at 161.

64. Protocol Additional I, *supra* note 1, arts. 48, 51-52.

65. Reinhold, *supra* note 37, at 20, quoting Richard G. Davis, *Strategic Bombing in the Gulf War*, in *CASE STUDIES*, *supra* note 58, at 535.

enemy derives his freedom of action, physical strength, or will to fight."⁶⁶ Warden's broad targeting criteria necessarily included many objects that are primarily civilian in nature, such as power plants, communications facilities, and oil refineries. Indeed, all of these were attacked during the Gulf War.⁶⁷ On the other hand, although civilian structures were targeted by American and coalition forces, "[t]he U.S. used precision-guided munitions to limit civilian deaths."⁶⁸ General Colin Powell, speaking for the Department of Defense, reported to Congress that the Principle of Distinction had been adhered to by the American military in its conduct during the war.⁶⁹

Interventions in Bosnia in 1995 and Kosovo in 1999 continued the sort of targeting decisions made in the Gulf War. Planners for Operation Deliberate Force used the idea of centers of gravity when deciding what targets to attack in Bosnia.⁷⁰ Out of political considerations, if nothing else, they constructed detailed rules of engagement designed to limit civilian deaths and suffering.⁷¹ However, civilian targets were deliberately attacked.⁷² During Operation Allied Force in Kosovo, NATO forces attacked a radio and television station that they considered to be a primary center of gravity for the Serbian government, as well as power stations, factories, and bridges.⁷³ NATO considered the Serbian government's use of these facilities to be classic examples of dual uses, and thus legitimate grounds for attacking civilian objects.⁷⁴

E. THE POINT OF HISTORY

The history of the Principle of Distinction is not just background information. Understanding where the Principle came from sheds light on what it is and why it is that way. "[A]dvances in humanitarian law have tracked major conflicts with great regularity," and nowhere is this more apparent than for the Principle of Distinction.⁷⁵ As wars between states became increasingly violent and civilian suffering increased, lawmakers wrote more explicit protections for civilians into humanitarian law. Additional Protocol I is a direct response to the enormous dangers to civilians during the Cold War, and that is telling because the Cold War, like WWII, WWI and the American Civil War, was a conflict

66. *Id.*

67. See COL. RICHARD T. REYNOLDS, HEART OF THE STORM: THE GENESIS OF THE AIR CAMPAIGN AGAINST IRAQ 54 (1995).

68. Reinhold, *supra* note 37, at 21.

69. GENERAL COLIN POWELL, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR, Pub. Law No. 102-25, at 696-703 (1992).

70. *Id.*; see also Col. Maris McCrabb, *US and NATO Doctrine for Campaign Planning*, in DELIBERATE FORCE: A CASE STUDY IN EFFECTIVE AIR CAMPAIGNING: FINAL REPORT OF THE AIR UNIVERSITY BALKANS AIR CAMPAIGN STUDY 65-81 (Col. Robert C. Owen ed., 2000).

71. *Id.*

72. See, e.g., FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, <http://www.un.org/icty/pressreal/nato061300.htm>.

73. *Id.*

74. For a critique of collateral damage during the Kosovo campaign, see Amnesty International, "Collateral Damage" or Unlawful Killings? Violations of the Law of War by NATO During Operation Allied Force, June 2000, http://www.amnesty.org/ailib/intcam/kosovo/docs/natorep_all.doc; see also Human Rights Watch, *Ticking Time Bombs; NATO's Use of Cluster Munitions in Yugoslavia*, June 1999, <http://www.hrw.org/reports/1999/nato2/index.htm>.

75. Schmitt, *supra* note 2, at 145-46.

between states. Although Vietnam was fresh in the mind of the Protocol's drafters, they created a Principle of Distinction doctrine firmly in line with its predecessors; one premised on the idea of major interstate conflict. The Cold War was a war that would be fought with millions of troops across entire continents, and one in which the goals of the combatants were relatively clear-cut. Because the Principle of Distinction made sense in that context does not necessarily mean that it makes sense today.

III. Current Practice

Wars between powerful states, those conflicts that prompted the development of humanitarian law, are increasingly rare. Instead of large-scale combat between organized militaries, modern warfare is becoming asymmetrical. Insurgencies, not armies, are the norm. Asymmetrical wars are ongoing in Afghanistan, Chechnya, Colombia, the D.R. Congo, Iraq, Israel/Palestine, Indonesia, Nepal, and Sri Lanka, just to name a few. Application of the laws of war to conflicts like these is a major challenge to international law. By looking at the examples of Iraq, Israel-Palestine, and Sri Lanka, this section explores how the Principle of Distinction is applied to asymmetrical conflicts, both in rhetoric and in practice.

A. IRAQ

The American-led invasion and occupation of Iraq has resulted in an asymmetrical conflict. For the first time since the Soviet Union withdrew from Afghanistan, the military strength and technical sophistication of a superpower is coming face to face with a guerrilla insurgency. It has become a truism that "everything changed after September 11," but is that so for Distinction? With urban fighting a reality and insurgents who are often indistinguishable from civilians, the temptation for American forces to ignore Distinction might be high. Likewise, increasing coordination between aid agencies, civilian contractors, and the American military could tempt insurgents to disregard Distinction as well. As the highest-profile conflict in the world today, Iraq provides a snapshot of how Distinction is practiced and how it is preached.

Although the United States is not a party to Additional Protocol I, the American military establishment openly endorses the Principle of Distinction. American armed forces include that endorsement in their training materials, ensuring that every member of the U.S. military is aware that civilians may not be targeted. For example, the U.S. Air Force provides every one of its employees, military and civilian alike, with a copy of the *Airman's Manual*, a small paperback instructional book.⁷⁶ The *Airman's Manual* puts Distinction simply by saying "Do Not . . . Attack noncombatants who include civilians. . . ."⁷⁷

The U.S. Army includes the Principle of Distinction in its training materials as well. The first chapter of the *Soldier's Manual of Common Tasks*, a guide for evaluating the performance of individual soldiers, is about the laws of war.⁷⁸ The Manual explains that the Hague conventions and customary international law limit targeting decisions, and that the latter prohibits "targeting or attacking civilians."⁷⁹ It goes on to state that civilians are protected

76. U.S. AIR FORCE, *AIRMAN'S MANUAL* (2004).

77. *Id.* at 14.

78. HEADQUARTERS DEPARTMENT OF THE ARMY, *SOLDIER'S MANUAL OF COMMON TASKS: SKILL LEVEL 1* (2003).

79. *Id.* at 3-17.

from “all acts or threats of violence. . . .”⁸⁰ Likewise, the Army’s field manual on the law of land warfare says that “[a]ttacks [a]gainst the [c]ivilian [p]opulation as [s]uch [are] [p]rohibited.”⁸¹

Of course, prohibiting attacks directed at civilian targets begs the question: what are considered civilian targets? American military commanders continue to make targeting decisions based on the notion of an enemy’s “centers of gravity.” Major Herman Reinhold, of the U.S. Air Force, summarizes that approach as “everything may be destroyed if there is a military reason to destroy it.”⁸² For example, American targeting guidelines allow attacks against an enemy’s ability to “sustain” itself, a conceit beyond traditional definitions of what constitutes a military target.⁸³

The American-led invasion and occupation of Iraq has resulted in numerous civilian deaths. Since the U.S. military does not track civilian deaths, precise numbers are impossible to verify.⁸⁴ Iraqbodycount.net provides estimates based on news reports and places the number of civilian dead between 23,589 and 26,705 as of August 16, 2005.⁸⁵ But a peer-reviewed study based on interviews with randomly selected Iraqi families suggests a much higher civilian death toll of up to 100,000.⁸⁶

Because the insurgency in Iraq is composed of many disparate groups and movements, it is impossible to pinpoint a unitary insurgent policy regarding Distinction.⁸⁷ However, Abu Musab al-Zarqawi, the most infamous leader of the insurgency, outlined his policies in a letter to his followers.⁸⁸ Zarqawi’s work plan includes targeting not only Americans, but Kurds, agents of the Iraqi government, and the Shiite community.⁸⁹ Particularly, with regards to Shiite targets, Zarqawi’s rejection of Distinction is clear—he advocates attacking

80. *Id.* at 3-24.

81. DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE* (1956). Although published in 1956, this remains the Army’s current field manual on this topic.

82. Reinhold, *supra* note 37, at 41.

83. The U.S. Air Force Intelligence Targeting guide says that

[m]ilitary objectives include those objects that by their nature, location, purpose, or use make an effective contribution to military action, or whose total or partial destruction, capture, or neutralization offers a definite military advantage. The key factor is whether the object contributes to the enemy’s war fighting or war sustaining capability.

Catherine Wallis, *Legitimate Targets of Attack: Considerations when Targeting in a Coalition*, in *THE ARMY LAWYER* 44, 49-50 (Dec. 2004); U.S. Department of Air Force, *USAF Intelligence Targeting Guide*, Feb. 1998, para. 1.71; see also U.S. Department of Navy, *The Commanders Handbook on the Law of Naval Operations*, Oct. 1995, para. 8.1.1.

84. See John Allen Paulos, *Last Word: the Vital Statistics of War*, *THE GUARDIAN*, Dec. 16, 2004, available at <http://www.guardian.co.uk/life/lastword/story/0,,1374187,00.html>.

85. See *The Iraq Body Count Database*, <http://www.iraqbodycount.net> (last visited on Sept. 11, 2005). This site collates reports from major news publications. It requires two independent news agencies to report a civilian death before it is counted.

86. Les Roberts et. al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, 364 *THE LANCET* 1857 (2004). Of the civilian deaths recorded, only 5% were due to coalition small arms fire, the majority were the result of attacks from coalition artillery and aircraft.

87. Walter Pincus, *CIA Studies Provide Glimpse of Insurgents in Iraq*, *WASH. POST*, Feb. 6, 2005, at A19. The Central Intelligence Agency (CIA) divides the insurgents into: (1) former Baathists; (2) newly radicalized Sunnis; (3) Iraqi nationalists; and (4) foreign fighters associated with Zarqawi.

88. Letter attributed to Abu Musab al-Zarqawi, (Feb. 12, 2004), <http://www.iraqcoalition.org/transcripts/index.html>.

89. *Id.*

religious symbols and the Shia themselves. Zarqari intends to pull out the teeth of the Shia population in anticipation of a Sunni-Shia civil war.⁹⁰ The insurgency has followed through on its plans to attack civilians. There have been numerous instances where insurgents have detonated bombs in civilian markets and along busy civilian streets. Sometimes these attacks are intended to kill U.S. soldiers in the area, but other attacks are conducted with no apparent connection to military targets. For example, insurgents bombed a Baghdad restaurant on December 31, 2003, killing five civilians and wounding thirty. Shi'a pilgrims celebrating the Ashura religious holiday were attacked with roadside bombs on March 2, 2004, in Karbala, killing eighty-five and wounding 230.⁹¹

On August 30, 2003, a car bomb exploded outside the holiest Shi'a Muslim site in Iraq, the Imam Ali Mosque in Najaf. The blast killed 124—including one of Shi'a Islam's most prominent clerics, Ayatollah Mohammad Bakir al-Haqim—and wounded 142 more. This attack was not an isolated incident—there have been numerous other car bombings of Iraqi mosques in recent months, including one that detonated outside a Shi'a mosque in Baghdad on January 9, 2004, killing five and wounding thirty-seven, and a bombing against a Baghdad mosque on March 2, 2004, that killed fifty-eight and wounded 200.⁹²

The Lancet study attributed approximately 2.7 percent of the violent deaths recorded “to anti-coalition forces. . . .”⁹³

In addition to killing Iraqi civilians, insurgents also take civilian hostages.⁹⁴ Human Rights Watch estimates that during a single week in April 2004, insurgents took between thirteen and forty non-Iraqis hostage.⁹⁵ Hostages are often aid workers or civilian contractors, and frequently, they are killed by their captors.⁹⁶ Even if hostages are ultimately released, taking civilian hostages violates the Principle of Distinction. Distinction forbids combatants from directing operations against civilians; yet that is precisely what hostage-takers do.

B. ISRAEL AND PALESTINE

The Palestinian-Israeli conflict is one of the longest-running asymmetrical wars in the world.⁹⁷ For over fifty years, there has been ongoing violence between the Israeli government and Palestinian militants.⁹⁸ The violence has been more or less intense at times, but it has never ended.⁹⁹ Before the American invasions of Afghanistan and Iraq, the Palestinian-

90. *Id.*

91. Nathan A. Canestaro, “*Small Wars*” and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT’L L. 73, 126-27 (2004).

92. *Id.*

93. Roberts et al., *supra* note 86, at 1860-61. Figure obtained by adding total violent deaths after invasion outside of Falluja (21) to total violent deaths after invasion in Falluja (52) and dividing by the number of violent deaths attributable to anti-coalition forces.

94. Human Rights Watch, *Iraq: Avoid Harm to Civilians*, Apr. 16, 2004, <http://hrw.org/english/docs/2004/04/16/iraq8446.htm>.

95. *Id.*

96. See T. Christian Miller, *The Conflict in Iraq: To Rebuild Amid Danger: an Alliance; Private contractors work with U.S. forces, sharing intelligence and workload, in their ‘combat reconstruction’ of the Volatile Nation*, THE L.A. TIMES, Feb. 21, 2005, at A4.

97. See, e.g., BERNARD REICH, A BRIEF HISTORY OF ISRAEL (2005). At the time of writing, a semi-formal ceasefire is in effect. Regardless, sporadic violence continues.

98. *Id.*

99. *Id.*

Israeli conflict was the highest profile conflict anywhere, yet neither international attention nor international law has persuaded either side to distinguish between civilians and non-civilians.

Israel has not ratified Additional Protocol I.¹⁰⁰ Nonetheless, Israel Defense Force (IDF) statements suggest agreement with Distinction. "IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property."¹⁰¹ However, the IDF conspicuously omits international law from its lists of binding authorities stating that "IDF soldiers will operate according to the IDF values and orders, while adhering to the laws of the state and norms of human dignity, and honoring the values of the State of Israel as a Jewish and democratic state."¹⁰² The Israel Ministry of Foreign Affairs acknowledges the laws of war, but justifies military operations against civilian targets as being allowed by military necessity.¹⁰³

Israel, through the IDF, targets and destroys Palestinian homes, both as punishment and as a preventative measure.¹⁰⁴ Since the 1967 Arab-Israeli war, Israel has destroyed nearly 2,500 Palestinian homes in the Gaza Strip and the West Bank.¹⁰⁵ The pace of home destruction increased during the latest round of Palestinian attacks as evidenced by statistics showing that "[s]ince . . . September 2000, Israel has destroyed 675 Palestinian homes as punishment for Palestinian attacks, leaving 4,239 people homeless."¹⁰⁶ Home destruction is not merely the policy of the Israeli military—it has been approved by Israel's highest court.¹⁰⁷ The Israeli High Court of Justice has rejected constitutional and international law arguments against a plan to destroy hundreds of Palestinian homes near the Egyptian border in order to create a buffer zone ahead of Israel's withdrawal from the Gaza Strip.¹⁰⁸ The Court also ruled in favor of Israel's policy of destroying the homes of suicide bombers' families.¹⁰⁹ Although at the present time Israel has halted the destruction of Palestinian homes, the fact remains that Israel is willing to destroy civilian objects when it deems it expedient. Nothing suggests that Israel has changed its fundamental interpretation of its right to self-defense. Therefore, from Israel's point of view, self-restraint is more an act of grace than of following the law.

The IDF's operations also result in numerous civilian deaths. For example, Israeli incursions into the Jabaliya refugee camp in the Gaza Strip in the fall of 2004 resulted in the

100. INTERNATIONAL COMMITTEE OF THE RED CROSS, STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 7 (2004) [hereinafter STATES PARTY]

101. Israel Defense Force, Doctrine, <http://www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=32> (last visited Sept. 12, 2005).

102. *Id.*

103. Israel Ministry of Foreign Affairs, *The Demolition of Palestinian Structures Used for Terrorism—Legal Background*, May 18, 2004, <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/>.

104. See Greg Myre, *Israel Halts Decades-Old Practice of Demolishing Militants' Homes*, N.Y. TIMES, Feb. 18, 2005, at A4. At the time of this writing, Israel has halted home demolitions. Whether this marks a permanent change in Israeli policy remains to be seen; the fact that Israel has destroyed homes until now indicates that Israel considers this to be a legitimate form of self-defense.

105. *Id.* (citing the human rights group B'Tselem).

106. *Id.*

107. See Harvey Morris, *Gaza Crisis Casts Pall Over New US Search for Peace*, THE FIN. TIMES (London ed.), May 17, 2004, at 7.

108. *Id.*

109. Molly Moore and John Ward Anderson, *Israel Widens its Range of Reprisals*, THE WASH. POST, Aug. 7, 2002, at A12.

deaths of twenty children.¹¹⁰ Of course, civilian deaths are not necessarily indicative of violations of the Principle of Distinction. Large-scale civilian deaths can occur even when proper military objectives are targeted. So-called “collateral damage” is illegal under international law only when it violates either the Principles of Proportionality or of Necessity.¹¹¹ But when collateral damage is very great in relation to military goals, the attacks in question begin to seem more like violations of Distinction than of Proportionality or Necessity.

It is difficult to identify consistent policies of Palestinian militant organizations regarding distinction. The three major groups, Hamas, Islamic Jihad, and the al Aqsa Martyrs Brigade, do not make their targeting policies public. Nonetheless, Hamas’ public statements do provide some guidance.

Hamas does not accept the Principle of Distinction. Hamas does not accept any part of international law as binding: it is only willing to be governed by its interpretations of Islam. Discussing the permissibility of suicide attacks, Hamas holds that

[t]he criteria used to determine whether such operations are lawful and justified must and can only be an Islamic one. That is, the judgment must be made according to Quran and Sunnah, and them alone. All other criteria or standards of judgment must be rejected. To do otherwise, is un-Islamic.¹¹²

Hamas claims that it is justified in attacking Israeli civilians as retaliation for Israeli attacks on Palestinian civilians.¹¹³ The Qassam Brigades, a military wing of Hamas, in its standard press release regarding attacks against Israeli settlements, states, “[t]his is a natural reaction [to] the Zionist aggression against our innocent civilians. . . .”¹¹⁴

Hamas and other organizations have indicated that they are willing to consider some form of distinction. Adnan Asfour, a spokesperson for Hamas, has said that Hamas would stop targeting civilians if Israel were to do likewise.¹¹⁵ Hamas is, therefore, at least potentially willing to acknowledge some difference between civilians and non-civilians. Most recently, Hamas and Islamic Jihad have agreed to halt attacks within “the occupied Palestinian land of 1967.”¹¹⁶ This was an extension of an earlier pledge to cease attacks against civilians in Israel itself.¹¹⁷ The fact that these organizations conceptually separate Israelis in Israel from Israelis in Palestine demonstrates a willingness to at least make distinctions within the civilian population itself.

110. Press Release, Amnesty International, *Israel/Occupied Territories: Excessive use of Force* (Oct. 5, 2004), available at <http://web.amnesty.org/library/Index/ENGMD150952004?open&of=ENG-ISR>. [hereinafter *Israel/Occupied*]

111. *Id.*

112. Hamasonline, Islamic Resistance Movement, *Martyrdom Operations in Islam*, <http://hamasonline.org/index.php?page=Qassam/martyrdom%20operations> (last visited on Sept. 11, 2005).

113. Hamas Spokesman: *Shedding Palestinian Blood Leads to Shedding Jewish Blood*, <http://hamasonline.com>.

114. Ezzedeen Al-Qassam Brigades, *Firing Five Mortar Shells on the Enemy Sites of South Gaza Strip*, Nov. 19, 2004, www.alqassam.info/english/statements/49.htm.

115. *Asfour Before His Arrest: We Are Ready to Spare Civilians*, Dec. 23, 2003, www.hamasonline.com. Although it is impossible to verify that this is actually a website run by Hamas, its materials are consistent with public statements of that organization.

116. Joel Greenberg, *Fatah Signals Readiness for Mideast Truce; Prisoner Release Still on the Table*, *THE CHICAGO TRIBUNE*, Feb. 2, 2005, at 3.

117. *Id.*

Militant Palestinian organizations have killed hundreds, if not thousands, of civilians in Israel and the occupied territories. Although specific policies of the various groups differ, the major armed groups share a willingness to target civilians in pursuit of their goals. For example, the Qassam Brigades has repeatedly attacked Israeli settlements in the Gaza Strip with homemade rockets.¹¹⁸ In May of 2003, Islamic Jihad claimed responsibility for killing a pregnant Israeli civilian and her four children.¹¹⁹ On January 13, 2005, the al Aqsa Martyrs Brigade killed five Israeli civilians with a bomb at a border crossing between Israel and Gaza.¹²⁰ All three groups use suicide bombers to attack Israeli civilians in both Israel and the Palestinian territories.¹²¹ The U.S. Department of State estimates that in the year 2003, the most recent year for which figures are available, Palestinian militants killed almost 200 people; in 2002, that number was 350.¹²²

C. SRI LANKA

For over twenty years, the government of Sri Lanka has been engaged in a civil war with separatist insurgents.¹²³ The conflict is based on ethnicity, with Tamil populations in the north trying to secede from the Sinhalese majority.¹²⁴ The insurgency is led by the Liberation Tigers of Tamil Elam (LTTE), a well-organized force that, as of this writing, exercises effective control over large portions of northern Sri Lanka.¹²⁵ The parties continue to observe a 2002 ceasefire, although sporadic violence continues, with limited progress towards a final solution.¹²⁶ Since the conflict began, hundreds of thousands of civilians, mostly Tamils, have fled Sri Lanka.¹²⁷

The parties' attitudes towards Distinction are ambiguous. Sri Lanka is not a party to Additional Protocol I; therefore, although Distinction's status as customary international law binds it as a technical matter, the government has never formally accepted the Principle of Distinction.¹²⁸

118. See, e.g., *Qassam Brigades Fire 90 Missiles at Zionist Settlements in Three Days*, Apr. 23, 2004, <http://www.hamasonline.com>.

119. Eric Silver, *Palestinians Murder Pregnant Israeli and Her Four Daughters*, THE INDEPENDENT, May 3, 2004, at 19.

120. Ian MacKinnon, *Eight Die in Gaza Raid*, THE TIMES (London ed.), Jan. 14, 2005, at 44.

121. U.S. DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 (Apr. 2004), available at <http://www.state.gov/s/ct/rls.pgrtpt/2003>.

122. *Id.*

123. For an overview of the conflict, with particular emphasis on the 2002 Ceasefire Agreement between the LTTE and the Sri Lankan government, see The Sri Lankan Monitoring Mission, <http://www.slmm.lk/> (last visited Sept. 12, 2005); see also The BBC, Country profile: Sri Lanka, http://news.bbc.co.uk/2/hi/south_asia/country_profiles/ (last visited Sept. 12, 2005); see also Zachary E. McCabe, *Northern Ireland: the Paramilitaries, Terrorism, and Sept. 11*, 30 DENVER J. INT'L L. & POL'Y, 547, 566 (2002).

124. Tamils make up approximately 18% of the Sri Lankan population, while Sinhalese constitute 74%. These ethnic groups are not evenly distributed; Tamils concentrate in the northern coastal areas, while Sinhalese dominate the south and the interior. Sri Lankan Monitoring Mission, *supra* note 123.

125. See Tamil Eelam Homepage, <http://eelam.com/> (last visited Sept. 12, 2005).

126. McCabe, *supra* note 123, at 566.

127. BBC Country Profile, *supra* note 123; see also Human Rights Watch, *Canada: Prime Minister Should Call on Tamil Tigers to End Child Soldier Use*, Feb. 9, 2005, <http://hrw.org/english/docs/2005/02/09/canada10151.htm>.

128. STATES PARTY, *supra* note 100.

The LTTE's leader, Velupillai Pirapaharan, has explicitly denied targeting civilians.¹²⁹ Although his comments to this effect were made in 1986 at the beginning of the insurgency, they remain the LTTE's clearest statements regarding Distinction. Pirapaharan has said, "[t]he LTTE has never killed any civilians. We condemn such acts of violence."¹³⁰ However, this embrace of Distinction is limited. In its rhetoric, the LTTE distinguishes between civilians who are not involved in the ethnic conflict and those who are, either by virtue of their having taken up arms against Tamils or by settling in "Tamil portions" of the island.¹³¹ When Sinhalese attack Tamils or "forcibly occupy" Tamil land, the LTTE no longer considers those Sinhalese civilians and will attack them.¹³²

In practice, the LTTE appears more willing to target civilians than Pirapaharan acknowledges.¹³³ Once the ceasefire with the government went into effect in 2002, the LTTE began a campaign to consolidate its position within the Tamil community. According to Human Rights Watch and Amnesty International,

At least 22 people with links to Tamil political parties opposed to the LTTE have been killed in politically motivated attacks since the government of Sri Lanka and the LTTE signed a ceasefire in February 2002. Many others have been abducted, their fate still unknown. In several instances, witnesses have identified the perpetrators as members of the LTTE. All available evidence points to a systematic campaign by the LTTE to silence opposition voices.¹³⁴

Under the terms of the ceasefire, the international Sri Lanka Monitoring Mission receives and rules on complaints against both the government and the LTTE. Between January 2, 2002 and November 30, 2004, the Monitoring Mission received a total of 5319 complaints against the LTTE and 1001 complaints against the government.¹³⁵ Of these, the Monitoring Mission determined that the LTTE had committed fifty-five "[h]ostile acts against the civilian population" and that the government committed nine such acts.¹³⁶

129. Interview by Jasvinger Singh with Velupillai Pirapaharan, Tamil National Leader (Mar. 23, 1986), available at <http://eelam.com>; Interview by Sudip Mazumdar with Velupillai Pirapaharan, Tamil National Leader (Aug. 11, 1986), available at <http://eelam.com>.

130. Mazumdar, *supra* note 129.

131. Singh, *supra* note 129.

132. *Id.*

133. The LTTE's use of child soldiers also impinges on the Principle of Distinction. Reports suggest that the LTTE forcibly recruits child soldiers, often by intimidating their families. Although the use of child soldiers does not fit the traditional notion of the law of the Principle of Distinction because it does not involve targeting an enemy, it is an example of violence against civilians. For a statement opposing forceful recruitment of child soldiers, see Human Rights Watch, Sri Lanka: Tamil Tigers Forcibly Recruit Child Soldiers, <http://hrw.org/english/docs/2004/11/10/slanka9651.htm> (last visited Sept. 12, 2005).

134. Human Rights Watch, Sri Lanka: Rights Groups Say LTTE-linked Killings Continue with Impunity, <http://hrw.org/press/2003/08/srilanka080703.htm> (last visited Sept. 12, 2005) [hereinafter Sri Lanka: Rights Groups]; see also Amnesty International, Open letter to Liberation Tigers of Tamil Eelam (LTTE), Sri Lanka Monitoring Mission (SLMM) and Sri Lankan Police concerning recent politically motivated killings and abductions in Sri Lanka, <http://web.amnesty.org/library/Index/ENGASA370042003?open&of=ENG-LKA> (last visited Sept. 12, 2005).

135. Sri Lankan Monitoring Mission, *supra* note 123.

136. *Id.* Figures for the years prior to 2002 are not available because the Monitoring Mission did not come into existence, and thus begin receiving complaints, until that time.

D. SUMMARY OF PRACTICE

The Principle of Distinction has not fared well in recent conflicts. Neither the United States, nor Israel or Sri Lanka is a party to Additional Protocol I.¹³⁷ Of the many parties involved in the three conflicts profiled, only the United States has resolved to be bound by the international laws of armed conflict. Israel and the United States both endorse distinguishing between civilians and non-civilians, yet Israel targets civilian property as a matter of course. Israel and the United States each conduct operations that involve high levels of civilian casualties.

While states press the boundaries of the Principle of Distinction, insurgents openly violate it. Iraqi insurgents, Hamas, Islamic Jihad, al Aqsa Martyrs Bridage, and the LTTE all target people who are protected civilians under international law.¹³⁸ Thousands of civilians have been intentionally killed by insurgents in Iraq, Israel-Palestine, and Sri Lanka.¹³⁹

However, insurgents' rejections of Distinction are not absolute. Of the three insurgent groups profiled, only those in Iraq appear totally unwilling to place limits on target selection. Because Zarqawi's goal is ethnic conflict between Iraq's Muslims, he actually places a premium on attacking Shiite civilians.¹⁴⁰ Yet ethnic elements to a conflict need not preclude distinction. Palestinian and Tamil insurgents have stated a willingness to distinguish between different segments of the Israeli and Sinhalese civilian populations.¹⁴¹ Palestinian militant organizations have said that they see a difference between Israeli civilians in Israel and Israeli civilians in Palestine.¹⁴² Likewise, the LTTE argues that Sinhalese civilians who attack Tamils or occupy Tamil land do not deserve the same protections as Sinhalese civilians who do neither.¹⁴³ It is not that insurgents always reject distinction—it is that they reject the categorical Principle of Distinction that is currently law.

IV. Problems with Distinction

The Principle of Distinction is a seriously flawed legal doctrine. In many situations, it is ambiguous. Even when Distinction's requirements are clear, they are often illogical. Applied to the real world, Distinction benefits powerful states to the disadvantage of weaker actors. It thus entrenches the status quo, leading insurgents and weak states to reject the law and wage war without restraints.

A. DUAL-USE TARGETS

Although Distinction is normally expressed as a blanket prohibition on targeting civilians and civilian objects, it is unclear what that prohibition means in practice. The most common criticism of the Principle of Distinction is that it is uncertain how to apply the Principle to dual-use targets.¹⁴⁴ If dual-use targets can be attacked, it begs the question: what uses count?

137. See Matheson, *supra* note 15; Sofaer, *supra* note 15.

138. See Martyrdom, *supra* note 112.

139. See Paulos, *supra* note 84; Israel/Occupied, *supra* note 110, Sri Lanka: Rights Groups, *supra* note 134.

140. See al-Zarqawi, *supra* note 88.

141. See Greenberg, *supra* note 116.

142. *Id.*

143. See Singh, *supra* note 129.

144. See, e.g., Watkin, *supra* note 14, at 15-18; Schmitt, *supra* note 2 At 149.

Civilian assets contribute to military strength in a variety of ways, and humanitarian law has tried to respond by limiting the reach of Distinction's protections. Confusion has been the result, and what appears to be a simple rule turns out to be ambiguous.

Distinction limits attacks to military objectives.¹⁴⁵ Yet in many situations, potential targets serve both military and civilian functions, such as power plants, bridges, and communication facilities, to name a few. The strict separation of military and civilian assets envisioned by Distinction simply does not exist in the real world. Applying Distinction therefore depends upon what interpretation of the Principle one holds. As discussed above, the American military resolves the question in favor of a weak interpretation of Distinction: it considers all dual-use targets fair game.¹⁴⁶ However, this weak interpretation erodes the fundamental ideal of Distinction—that civilians should be protected. Indeed, the dual-use exception to Distinction might devour the Principle itself. Modern militaries rely on extensive civilian production, supply, communications, and logistical facilities. If Distinction allows attacks against any target that contributes to an enemy's military strength, it hardly provides any limitations on targeting at all.

The ICRC adopts a stricter interpretation of Distinction.¹⁴⁷ In its commentary to Additional Protocol I, the ICRC explains that it would only allow attacks against "objects 'directly used by the armed forces' (e.g., weapons and equipment), locations of 'special importance for military operations' (e.g., bridges), and objects intended for use or being used for military purposes."¹⁴⁸ This is a much more limited reading of dual-use than the American interpretation. Under this interpretation, most dual-use targets would be off-limits. Yet that reading of Distinction has its own problems. It would shield much of an enemy's military complex from attack, thus potentially prolonging an otherwise terminable war. Worse, it would encourage mixing civilian and military assets in order to secure the protection of the Principle of Distinction. By creating incentives to use human shields, the strict interpretation of Distinction might do more harm than good.

There is no consensus about what definition of military objectives is authoritative. Different countries follow different interpretations, and no definition is problem free.¹⁴⁹ The lack of consensus about what Distinction means hampers military operations that involve coalitions.¹⁵⁰ More fundamentally, it weakens the Principle itself. Without a clear definition of what it means to distinguish between civilian and military objectives, international humanitarian law is difficult to apply and even harder to enforce.

When prosecutors at the International Criminal Tribunal for the Former Yugoslavia considered bringing charges against NATO forces, they were stymied by the ambiguity of the Principle of Distinction. The reviewing committee noted that, "[w]hen the definition [of military objective] [sic] is applied to dual-use objects which have some civilian uses and some actual or potential military use (communications systems, transportation systems, petrochemical complexes, manufacturing plants of some types), opinions may differ."¹⁵¹

145. Additional Protocol I, *supra* note 1, art. 48.

146. See Reinhold, *supra* note 37; see also Wallis, *supra* note 83.

147. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 636 (1987).

148. Schmitt, *supra* note 2, at 149.

149. See Wallis, *supra* note 83, at 49 (regarding differences between American and allied policies, such as those of New Zealand).

150. *Id.*

151. Final Report, *supra* note 72, at IV(A)(iv)(c).

Because the law is vague, “[s]election of certain objectives for attack may be subject to legal debate.”¹⁵² The committee ultimately recommended against prosecuting NATO forces for two reasons: (1) that further investigation was unlikely to result in sufficient evidence and (2) that “the law is not sufficiently clear.”¹⁵³ The Principle of Distinction is just too ambiguous to enforce.¹⁵⁴

B. OVER BREADTH

The Principle of Distinction is not always so difficult to apply. Regarding civilians themselves, instead of civilian objects, the Principle is clear: civilians may not be targeted unless they take a “direct part in hostilities.”¹⁵⁵ Yet doctrinal clarity does not guarantee rationality. Some civilians, by virtue of their own choices, are crucial actors in wars. Modern militaries rely on civilian contractors for a wide range of services, even in areas of active combat. Occupying powers use civilian settlers to consolidate their control over land. Even when they go unarmed, contractors and settlers are as important to the prosecution of wars as soldiers, and there is little reason that they should enjoy the same protections as other civilians.

Yet under the Principle of Distinction, contractors and settlers do receive the same protections as members of the general public.¹⁵⁶ The ICRC defines “tak[ing] a direct part in hostilities” as engaging in “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.”¹⁵⁷ This restrictive doctrine protects contractors and settlers unless they join in the fighting themselves.

Never before have civilian contractors been so important to waging war. “Contractors are currently supporting U.S. military forces in eleven countries. . . . Support ranges from the operation of high-technology assets to maintenance of biological and chemical weapons equipment. . . .”¹⁵⁸ The American occupation of Iraq involves thousands of civilian security personnel, truck drivers, and construction workers.¹⁵⁹ The Christian Science Monitor estimates that 20,000 contractors in Iraq are armed.¹⁶⁰ Moreover, the American military relies on contractors to maintain and deploy its own weapons and vehicles.

In Afghanistan and Iraq, contractors are providing vital support on technologically advanced military assets. Operation of the Predator un-manned aerial vehicle, for example, requires

152. *Id.* at (V).

153. *Id.*

154. Even if this statement is a whitewash on the part of prosecutors, it is the Principle of Distinction’s ambiguity that provided the opportunity for evasion. Disagreement over the meaning of the Principle of Distinction is quite real, particularly so regarding dual-use targets and sophisticated weapons systems. *See, e.g.* Wallis, *supra* note 83.

155. Additional Protocol I, *supra* note 1, art. 51.3.

156. That is, they are protected unless they take a “direct part in the hostilities.” *Id.*

157. *Id.*

158. Blake W. Mobley, *Outsourcing Post-Conflict Operations: Designing a System for Contract Management and Oversight*, 15 J. of Pub. & Int’l Aff, 21, 30 (2004); *see also* Maj. Michael E. Guillory, *Civilianizing the Force: is the United States Crossing the Rubicon?*, 51 A.F.L. Rev. 111, 123 (2001); Maj. Lisa L. Turner & Maj. Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F.L. Rev. 1 (2001).

159. *See* Danna Harman, *Firms Tap Latin Americans for Iraq*, THE CHRISTIAN SCI. MONITOR, Mar. 3, 2005, at 6.

160. *Id.*

contractor support because the vehicle is still in development. The military has not yet trained Air Force personnel to use the Predator and therefore is dependent on contractors to execute its proper operation. . . . In fact, many key assets, including the F-117 stealth fighter, the M1A1 tank, the Patriot missile, and the Global Hawk unmanned drone, depend on contractor maintenance and operation. . . .¹⁶¹

In short, contractors are critical partners of the armed forces. They are involved in every aspect of wars, including tasks that, until recently, were carried out by the armed forces themselves.¹⁶² Yet contractors are immune from attack unless they take “direct part in the hostilities.”¹⁶³

Even when they do not engage in acts of war, lumping military contractors in with the rest of the civilian population is not an inevitable feature of humanitarian law. International law already acknowledges that some captured civilians, including contractors, deserve POW status because of their level of involvement in wars.¹⁶⁴ Thus, some of the laws of war already acknowledge that not all civilians are equally distant from the armed forces. Distinction, however, ignores that reality. Given “[t]he close connection between these civilians and military operations, and the often consensual nature of their involvement in the form of contracts,” it is not at all clear that contractors deserve the same level of protection as uninvolved civilians.¹⁶⁵ Yet such is the law.

A similar illogic protects settlers as well. Civilians who settle in occupied lands enjoy the full protections of Distinction, regardless of their instrumental roles in solidifying control over captured land. Even when settlers are sponsored and supported by the occupying power, they may not be targeted unless they take a “direct part in hostilities.”¹⁶⁶

Hundreds of thousands of settlers live in occupied land around the world. In Israel/Palestine alone, 440,000 Israelis live on land claimed by Palestinians.¹⁶⁷ The 8000 settlers in Gaza have been removed, but another 230,000 in the West Bank and 200,000 in East Jerusalem remain supported by the Israeli government.¹⁶⁸ These are not small outposts; the largest settlement houses 25,000 people.¹⁶⁹

Nor are they independent of the Israeli government. Settlements in Gaza and the West Bank are on land captured by the Israeli military during the 1967 and 1973 wars and sold to Israeli citizens at discounted prices.¹⁷⁰ Settlers were encouraged to move into the occupied lands with government subsidies, particularly by Likud Party governments.

The Likud governments, eager to keep the West Bank as part of Israel, actively promoted the growth of the settler population through large subsidies—cheap land, low-interest mortgages

161. Mobley, *supra* note 158, at 24.

162. See *generally id.* (Cooking, cleaning, base operations, mail, vehicle maintenance, and refueling, are only some of the tasks now performed by contractors).

163. Additional Protocol I, *supra* note 1, art. 51.3.

164. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(4), 5, available at <http://www.unhcr.ch/html/menu3/b/91.htm>. Provides POW status for captured supply contractors, war correspondents, members of labor units, civilian crews of military and civilian aircraft, and the crews of the merchant marine.

165. See Watkin, *supra* note 14, at 16.

166. Additional Protocol I, *supra* note 1, art. 51.3.

167. Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 *YALE J. INT'L L.* 1, 15 (2005).

168. Steve Erlanger, *Lawmakers Back Sharon on Plan for Leaving Gaza*, *N.Y. TIMES*, Oct. 27, 2004, at A6(1).

169. Korobkin & Zasloff, *supra* note 166, at 15.

170. David Newman, *How the Settler Suburbs Grew*, *N.Y. TIMES*, May 21, 2002, at A2 (21).

and lower income tax rates for individuals, as well as subsidies to local government councils. (Labor governments attempted to cut back on these subsidies but often met with political opposition from their coalition partners.) Israelis moving to the West Bank side of the green line could exchange a small three- or four-room apartment in a crowded Israeli town for a bigger house in a low-density community, with government benefits not available to people living just a few miles away inside Israel proper.¹⁷¹

As one academic puts it, Israeli settlements are “basically a case of suburban colonization.”¹⁷²

Israel’s strategy is not unique; the Sri Lankan government also uses civilian settlements to control Tamil areas of its territory. Government resettlement efforts have resulted in thousands of Sinhalese moving to Tamil-dominated portions of Sri Lanka.¹⁷³ The effects have been to reduce Tamil control over eastern provinces and to break up Tamil lands into discontinuous areas.¹⁷⁴ The settlement policy has been taken to its most extreme form in the government’s Mahaweli project, planned since the 1960s. That program’s goal is to use 74 percent of Tamil-settled areas for Sinhalese migrants.¹⁷⁵

Settlements in occupied land are not mere villages, shopping centers, and business districts. They are instruments of the occupation itself. By displacing local populations and building the infrastructure of governance, they increase an occupier’s control over land. In Israel and Sri Lanka, government-sponsored settlement takes place in the context of armed insurgencies; they are responses to insurgency. Although the tools are civilian, the results are military: pacification and de facto annexation. Like armies, settlements are tools of conquerors. Yet because they are civilians, settlers, unlike soldiers, cannot be attacked.

C. MIXING AMBIGUITY WITH CLARITY

As a doctrinal matter, the Principle of Distinction protects both civilians and civilian objects. Yet Distinction does not apply in the same way to these two categories. Regarding civilians themselves, the requirements of Distinction are certain; regarding civilian objects, Distinction’s requirements are disputed. Distinction is thus precise and imprecise and ambiguous and clear at the same time. This dichotomy benefits powerful actors.

Distinction’s ambiguity regarding dual-use targets gives wealthy and powerful states the freedom to attack enemies’ infrastructure, often using advanced weapons that avoid placing their own soldiers in harm’s way. A ban on targeting civilians themselves is little hindrance to these actors, who can literally destroy their enemies’ ability to fight.

The situation is quite different for weak actors, particularly those who lack the ability to project force against their enemies’ civilian objects. The upshot of Distinction for these combatants is that they are severely limited in their targeting decisions. Powerful states can pay contractors to fight their wars and encourage settlers to effect their occupations, but Distinction places these civilians off-limits to the insurgent. Weak actors are left with almost no legal targets.

171. *Id.*

172. *Id.*

173. Stephen Klingebiel, *The OECD, World Bank and International Monetary Fund: Development Activities in the Crisis Prevention and Conflict Management Sphere*, 10 INT’L DEV. R. CTR. (2001).

174. S.I. Keethaponcalan, *Analysis and Application: Social Cubism: a Comprehensive Look at the Causes of Conflict in Sri Lanka*, 8 ILSA J. INT’L & COMP. L. 921, 925-26 (2002).

175. Klingebiel, *supra* note 173.

Meanwhile, modern armies can legally attack insurgents. Without resources or wealth, weak parties cannot use the civilian sector to help fight their wars; they must engage in combat on their own, and thus become legitimate targets under the laws of war. “[T]he ‘haves’ . . . are the ones taking greatest advantage of the economies and efficiencies offered by an advanced civilian economy,” and under the Principle of Distinction, that shields them from attack.¹⁷⁶ Powerful states can follow the law of Distinction because it barely restrains them at all; Distinction’s mix of ambiguity and clarity plays to the strengths of powerful actors.

D. FAIRNESS AND EQUALITY

It is unfair to create a legal standard that handicaps insurgents. Societies that are under occupation are occupied not just by soldiers, but also by civilian contractors and settlers. Preventing insurgents from attacking these people does nothing but protect powerful states; it entrenches the status quo. If the international community is willing to recognize that some insurgencies are legitimate—and it has done so in the past—then it must also be willing to grant those insurgencies the tools they need to achieve their goals.¹⁷⁷ Unless the law changes, insurgents will be forced to reject the laws of war, because to do otherwise would mean defeat.¹⁷⁸ The result is warfare without rules or restraints. The Principle of Distinction is not only unfair; it is also unwise.

Nonetheless, Distinction has its defenders. Michael Schmitt argues that the laws of war exist to save lives, not to level the playing field between adversaries. “One would certainly hope that those who share humanitarian commitment would not advocate sacrificing the all-too-limited protection non-participants in armed conflict enjoy, merely to render war more equitable.”¹⁷⁹ According to Schmitt, fairness and equality arguments simply miss the point. Under that view, pressure to change the law “result[s] from treating humanitarian law as if it were designed to ensure a fair fight rather than protect non-participants from the effect of hostilities, a dangerous trend from the humanitarian perspective.”¹⁸⁰ Yet Schmitt has lost sight of the prize.

Schmitt’s rejection of equality and fairness as criterion by which to judge Distinction is too positivist, and is inconsistent with constitutional jurisprudence in many countries. American constitutional law, for example, often gives far greater weight to procedural values such as equality than to details of legislation: witness the Fourteenth Amendment.¹⁸¹ Our

176. Schmitt, *supra* note 2, at 171.

177. For example, the anti-apartheid struggle in South Africa and the American Revolution.

178. Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425, 437, (1993).

The rules of war do not adequately reflect the reality of warfare between a third-world country [or non-state actor] and a superpower. Compliance with the rules of war is a prescription for disaster. This lesson was learned a long time ago in places such as Vietnam and Afghanistan. To assert that massive aerial bombardment—with its inevitable civilian casualties—complies with the international laws of warfare, but that reciprocal efforts by a third-world country to put civilian populations at risk violate international law only reveals one’s own political interests. One cannot take this position and realistically expect the international legal system to gain the respect of countries that are more likely to be the victims than the allies of great powers.

179. Schmitt, *supra* note 2, at 182.

180. *Id.* at 169.

181. U.S. CONST. amend. XIV.

society has decided that laws that apply unequally, particularly those that disproportionately benefit the powerful, are inherently unjust regardless of their policy justifications.

Furthermore, it is by no means clear that the Principle of Distinction actually protects any civilians from attacks. Insurgencies in Iraq, Israel-Palestine, and Sri Lanka all target civilians without regard to international law. Major powers already target civilian objects, reasoning that they have dual uses. Abandoning Distinction would not increase the risks to civilians, and creating a doctrine to which insurgencies could subscribe would only help matters. Rejecting the Principle of Distinction does not mean abandoning humanitarian law, but changes do need to be made.

V. Conclusion

The Principle of Distinction is not protecting civilians from harm. Insurgencies ignore it, major powers bend it to suit their needs, and all the while innocent people pay the price. Distinction might even make wars more dangerous by encouraging insurgents to reject humanitarian law. Distinction, therefore, must go. Yet Distinction cannot simply be discarded; it should be replaced.

A. THE NEED FOR A REPLACEMENT

If Distinction was abandoned and no doctrine took its place, targeting decisions would still be governed by the Principles of Necessity and Proportionality. These Principles alone are inadequate. Imagine an asymmetrical war between an insurgency and a technologically sophisticated opponent.¹⁸² For the insurgent, it might be militarily useful to attack any of the opponent's civilians, regardless of their connection to the war itself. The insurgent reasons that by raising the civilian cost of the war, it would increase anti-war sentiment among the opponent's population and lead to withdrawal. If the insurgent had few other tactics available to it, attacks on random civilians could rise to the level of military necessity. Furthermore, a few hundred deaths, or even a few thousand, might be proportionate in light of the goals to be obtained. After all, far higher death tolls occur during conventional warfare and humanitarian law does not blink an eye. This sliding-scale interpretation of Necessity and Proportionality is entirely rational, though not widespread. Regardless, Distinction forbids this desperate calculus from ever taking place, and rightly so.

Necessity and Proportionality are each context-dependant. Because they follow balancing approaches to target selection, they permit weak actors to attack almost anything or anyone associated with an enemy. The weaker the actor, the more powerful his attacks can be. In other words, these principles barely restrain insurgents at all. What is needed is a rigid third doctrine that, like Distinction, places some targets off-limits no matter the circumstances. But unlike Distinction, that new doctrine should be realistic and recognize that (1) insurgents sometimes have legitimate reasons to attack civilians and (2) not all civilians deserve the same level of protection.

B. THE PRINCIPLE OF CULPABILITY

This paper suggests that the Principle of Distinction be replaced with the Principle of Culpability. Focusing on the potential target's association with the war, it provides that

182. One might call such a place Iraq or Israel.

It is impermissible to intentionally attack civilians or civilian objects unless the target voluntarily:

- a) Enters or remains in a contested area or area of combat and*
- b) Performs actions intended to achieve military goals of the combatants*

The biggest difference between Culpability and Distinction is that Culpability classifies potential targets individually.¹⁸³ Whereas Distinction lumps all civilians together, Culpability looks at what roles each potential target plays in the conflict. Culpability pairs this detailed scrutiny with a voluntariness requirement, based on the moral assumption that it is unjust to attack targets who are not responsible for their participation in the war.

The requirement that the target enter or remain “in a contested area or area of combat” serves two functions. The first is notice—it ensures that civilians will not become valid targets without knowing that they are subject to the laws of war. The second is to prohibit attacks on civilian targets that, although they contribute to the war effort, are physically located outside the war itself. Humanitarian law is inherently a compromise between containing violence and allowing justified use of force. Because modern militaries are premised on maintaining an enormous civilian military-industrial capacity, the list of potential targets includes much of the civilian world. Drawing a doctrinal line around the battlefield prevents violence from consuming entire societies.

The requirement that the target “performs actions intended to achieve military goals of the combatants” limits attacks to those civilians who have chosen to become part of the conflict. It protects aid workers, journalists, and trapped civilians, and provides complete immunity for all civilians unless they act as adjuncts to a military. This requirement is premised on the notion that civilians who pursue military goals are not logically distinct from the military itself. Furthermore, it ensures that wealthy or powerful combatants cannot immunize themselves from attack by outsourcing their wars to civilians.

In practice, the Principle of Culpability would both permit and forbid attacks that the Principle of Distinction allows. For example, Culpability would permit attacks against settlers in contested areas because they pursue the military goal of occupying territory. Likewise, Culpability would permit attacks against contractors employed by the military in war zones because these contractors engage in precisely the same conduct as their military colleagues; there is no rational basis on which to distinguish them from each other. Culpability would resolve the question of dual-use facilities by protecting them from attack.¹⁸⁴ Although this limitation might prolong some conflicts, that is the price for containing violence.

The voluntariness requirement itself would constitute a major change in the laws of war because it would apply to soldiers as well as civilians. Conscripts would receive the same protections as uninvolved civilians because, as conscripts, it cannot be said that their participation in the conflict is voluntary. Initial attacks against a conscript military would therefore have to be directed at the elements of the enemy that did become involved voluntarily,

183. A similar result could be obtained by interpreting Distinction’s “taking a direct part in hostilities” standard to include civilian actions such as settling land or providing support to armed forces in the field of combat. Such a redefined Principle of Distinction would approach the Principle of Culpability that is described. However, it would be less honest. Culpability openly rejects the categories of “civilians” and “combatants.” Redefining Distinction, while simultaneously continuing to profess the immunity of civilians from attack, would at best be misleading. Better to change the law than to bend an old law to meet new needs.

184. Assuming that they are outside the contested area or area of combat.

such as officers specifically, and command and control targets generally.¹⁸⁵ Once those leadership targets were disabled, any conscripts who continued to fight could be presumed to do so voluntarily now that their coercers were removed. Conscripts would then be subject to attack.

Although application of Culpability might be unclear in some instances, this uncertainty is not as destructive as that attending Distinction. Unlike Distinction, whose core uncertainty is masked by the deceptive public face of categorical prohibition, Culpability would bring debate about the ethics of targeting into the open. Distinction sweeps difficult moral issues under the rug preferring an unfair standard to hard questions about who deserves to be attacked. But so long as we are willing to kill other people, we should face those questions. Culpability makes us do so by requiring individualized targeting decisions based on real facts, not false categories.

Culpability represents a major shift in international law in favor of weak actors. This is inevitable because the problems with Distinction stem from the fact that it was written by and for powerful states. In fact, Distinction is so skewed in favor of the powerful that weak actors must reject it. Legal reforms have to address this imbalance in order to succeed. By responding to this problem, Culpability would result in systemic benefits that make reform worthwhile. It would create a system of humanitarian laws that insurgents could follow without crippling themselves. Hopefully, this would encourage insurgents to follow the laws of war and even if it did not, it would make enforcing these laws against insurgents fairer and more legitimate. Although many would find it imperfect, at least they might find it acceptable. The result would be increased rule of law, regulation of conflicts, and less violence.

The Principle of Culpability is not the only legal reform that is possible. However, Culpability highlights the serious shortcomings of the law as it is. Distinction has failed, and until it is replaced innocent civilians will continue to die.

185. This might not require significant changes in military tactics. American military planners already emphasize attacks against an enemy's leadership, as witnessed in the initial days of both Gulf Wars.