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Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in International Humanitarian Law

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Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in International Humanitarian Law

Stephen Townley*

ABSTRACT

Civil society, the United Nations, and others are subjecting the conduct of hostilities to increasing scrutiny. But they often lack access to internal targeting data and therefore frequently render legal judgments based on the effects of attacks or assertions that particular weapons or methods of combat are inherently unlawful. This Article analyzes the historical development of key provisions of international humanitarian law (IHL) within the framework of two perennial legal debates—that between rules and standards and that between objective and subjective tests. It argues that while targeting provisions have generally reflected a balance between those two dyads, the jurisprudence of the international criminal tribunals has made IHL more “standard-like.” It further argues, however, that the contemporary desire for real-time moral and legal clarity is fueling a yearning for a more objective “rule-like” approach. This Article then uses the prohibition of indiscriminate attacks as a case study and offers specific recommendations for how we might adjust the way we think about that prohibition to respond to the current legal and political environment.

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I. INTRODUCTION

The word “indiscriminate”—not “proportionality”¹—is the new touchstone in the public discourse regarding the conduct of hostilities. In Syria, for instance, a number of states have called for an end to “indiscriminate bombing.”² The United Nations Secretariat has

1. Thomas Franck once said, “[i]n courts and tribunals, political arenas like the United Nations Security Council, and popular and scholarly journals, discursive recourse to the principle of proportionality has become frequent and vehement.” Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 715 (2008).

2. See, e.g., Philip Hammond, Foreign Sec’y, Foreign Secretary: Video Footage Exposes Assad’s Lies on Barrel Bombs

likewise frequently stated that indiscriminate attacks are ongoing in Syria.³ And on October 8, 2016, the Russian Federation vetoed a Security Council resolution that would have expressed alarm at “indiscriminate aerial bombings” in Aleppo.⁴ But it is not just Syria: during a January 2016 open debate in the UN Security Council, of the seventy-one states that spoke, seventeen referred to indiscriminate attacks.⁵ Likewise, the UN Secretary General recently asserted that “in war zones all over the world, parties to conflict are . . . routinely killing civilians in . . . indiscriminate attacks, and showing contempt for human life.”⁶

(May 20, 2015), <https://www.gov.uk/government/news/foreign-secretary-video-footage-exposes-assads-lies-on-barrel-bombs> [<https://perma.cc/FFE5-9JLE>] (archived Sept. 21, 2017); John Kerry, Sec’y of State, Remarks with Russian Foreign Minister Sergey Lavrov and UN Special Envoy Steffan de Mistura at a Press Availability (Sept. 9, 2016), <https://www.state.gov/secretary/remarks/2016/09/261722.htm> [<https://perma.cc/V6SL-U22Q>] (archived Sept. 21, 2017); John Kirby, Spokesperson, Secretary Kerry’s Calls with UN Special Envoy for Syria Steffan de Mistura and General Coordinator of the High Negotiations Committee Riyad Hijab (Apr. 30, 2016), <http://www.state.gov/r/pa/prs/ps/2016/04/256757.htm> [<https://perma.cc/7XQG-C2RE>] (archived Sept. 21, 2017); Press Release, U.S. Dep’t of State, Statement by the Small Group of the Global Coalition to Counter ISIL (Apr. 27, 2016), <http://www.state.gov/r/pa/prs/ps/2016/04/256624.htm> [<https://perma.cc/WC3B-CS83>] (archived Sept. 21, 2017). Indeed, a group of states sent a letter to the President of the UN Security Council asserting that the Syrian regime had used “indiscriminate aerial weapons” and recalling that the indiscriminate use of weapons is prohibited. See Letter from the Permanent Representatives of Belgium, Luxembourg, and the Netherlands, to the United Nations Addressed to the President of the Security Council (June 19, 2015).

3. See, e.g., U.N. Secretary-General, Remarks to the Security Council on the Situation in Syria (Sept. 21, 2016), <https://www.un.org/sg/en/content/sg/statement/2016-09-21/secretary-generals-remarks-security-council-situation-syria> [<https://perma.cc/9BTN-CECN>] (archived Sept. 21, 2017) (“We have seen indiscriminate attacks on civilians and civilian facilities.”); U.N. Secretary-General, Remarks to the Security Council on the Situation in Syria (Dec. 18, 2015), <http://www.un.org/sg/statements/index.asp?nid=9353> [<https://perma.cc/KNB4-TYRK>] (archived Sept. 21, 2017); U.N. Under-Secretary-General for Humanitarian Affairs, Statement to the Security Council on Syria (May 4, 2016), https://docs.unocha.org/sites/dms/Documents/USG_ERC%20Stephen%20Brien%20Statement%20on%20Syria%20SecCo%204%20May%202016%20CAD.pdf [<https://perma.cc/5HSW-V4C6>] (archived Sept. 21, 2017). This criticism is not limited to the Syrian regime. See Statement by the Special Envoy for Syria (Oct. 30, 2016), <https://www.un.org/sg/en/content/sg/note-correspondents/2016-10-30/statement-special-envoy-syria> [<https://perma.cc/YZF3-BJMX>] (archived Sept. 22, 2017).

4. S.C. Res. 846 (Oct. 8, 2016). Most recently, Human Rights Council resolution 36/20 condemned “the Syrian authorities’ indiscriminate use of heavy weapons and aerial bombardments.” See A/HRC/RES/36/20 (Oct. 9, 2017).

5. See U.N. SCOR, 72nd Sess., 7606th mtg., U.N. Doc. S/PV.7606 (Jan. 19, 2016). Likewise, recent Security Council resolutions regarding Darfur have referred to “indiscriminate attacks.” See S.C. Res. 2340, 3 (Feb. 8, 2017); S.C. Res. 2265, 2 (Feb. 10, 2016).

6. See U.N. Secretary-General, Remarks at ‘Stand Together’ Event to Mark World Humanitarian Day 2017 (Aug. 18, 2017), <https://www.un.org/sg/en/content/sg/statement/2017-08-18/secretary-generals-remarks-stand-together-event-mark-world> [<https://perma.cc/9AHZ-NAXJ>] (archived Nov. 8, 2017).

Just as the phrase's usage has increased, so too has the imprecision of that use. In general, it is now being used to mean one of two things: attacks with particular weapons (sometimes under a certain category of circumstances) that are seen as by their nature particularly problematic; or attacks resulting in numerous civilian casualties. By these lights, using "dumb bombs," or mortars in a civilian area, is indiscriminate, and so too is an attack that results in civilian casualties without a readily discernible military objective. The black letter prohibition of indiscriminate attacks under international humanitarian law (IHL)⁷ is narrower. It comprises essentially three possibilities:⁸ (1) use of a specific means or method of combat that is inherently indiscriminate either (a) because it cannot be aimed (for instance, balloon-borne bombs) or (b) because its effects cannot be controlled (for instance, biological weapons or poisoning foodstuffs); or (2) an attack that was not aimed (for instance, an artillery shell blindly fired).⁹

The black letter view, however, does not permit many conclusive judgments, and certainly not many swift ones.¹⁰ So, for instance, most weapons and methods of attack are not inherently indiscriminate, because one could imagine a set of circumstances in which they could be used lawfully (for instance, against a military barracks in a desert with no civilians within miles).¹¹ Moreover, because the effects of a particular means or method of combat are often context-dependent, it is hard to say that one is necessarily unlawful. For instance, while

7. I use the terms 'international humanitarian law' and the 'law of war' interchangeably throughout this Article.

8. I set aside for the moment attacks that are expected to be disproportionate, i.e., attacks that are expected to cause civilian casualties in excess of that which could be justified by the military gains, although a disproportionate attack is also a form of indiscriminate attack, at least under Additional Protocol I. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(5)(b), Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I].

9. See *id.* art. 51(4); 1 INT'L COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW Rule 14 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter *ICRC CUSTOMARY INTERNATIONAL LAW*]. This category also includes use of a weapon that is entirely incapable of being aimed under the prevailing circumstances. See YORAM DINSTEN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 118 (Cambridge University Press, 3rd ed. 2010).

10. See generally GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 526 (2010) ("Charges of indiscriminate targeting will turn on the attacker's state of mind, given the circumstances and the facts known to the commander, after a conscientious gathering of such facts as were available to him at the time.")

11. Cf. OFFICE OF GENERAL COUNSEL U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL §§ 6.7.1-2 (June 15, 2015) [hereinafter *DOD LAW OF WAR MANUAL*] ("The test for whether a weapon is inherently indiscriminate is whether its use necessarily violates the principles of distinction and proportionality, i.e., whether its use is expected to be illegal in all circumstances Few weapons have been understood to be inherently indiscriminate weapons.")

fire can rage out of control, incendiary weapons can also be used in a way in which their effects would be limited. Even “dumb” landmines could have lawfully limited effects if, for instance, they were marked and used as a barrier against an approaching enemy.¹² Likewise, with some exceptions, it can be very difficult conclusively to determine where and what an attacker was aiming at (at least without access to often-classified internal targeting data), making it difficult to conclude that an attack was entirely unaimed.¹³

This has become unsatisfying to some—and an alternative account has arisen—because it is an awkward fit with the contemporary desire for moral and legal clarity in judging attacks in real time. How, the argument goes, can it *not* be said that the devastation in Aleppo and other such places is the result of indiscriminate attacks, especially with the wealth of information available about the effects of attacks almost immediately after they have taken place?

This difference between contemporary discourse and traditional legal understanding is not unique to the prohibition of indiscriminate attacks, although the term “indiscriminate” is particularly susceptible to such dichotomous approaches.¹⁴ Indeed, several years ago, William Fenrick trenchantly predicted, “We may see one version of the law developed by military participants, with an in-depth understanding of relevant facts and relevant technology (i.e., hothouse law) and another version developed by external reviewers denied access to such information,”¹⁵ and his forecast is beginning to come true.¹⁶

12. This is without prejudice to whether greater regulation of landmines is wise policy. Cf. Dep’t of State, U.S. Landmine Policy, <https://www.state.gov/t/pm/wra/c11735.htm> [<https://perma.cc/2DAC-CMKR>] (archived Oct. 25, 2017).

13. The key question is not what objective effect an attack had, but what the intention behind the attack was. So, for instance, in the famous *United States v. List* case the Nuremberg tribunal acquitted General Rendulic despite scorched earth tactics because in his position, he could have concluded that circumstances permitted his actions. 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1296–97 (1947–48). This is of course not to say that a good intention inoculates an attack from criticism; for instance, an attacker could fail to take required, feasible precautions.

14. It neither requires that an observer know or acknowledge that an attacker attacked a military objective (as would be the case with an argument that an attack was disproportionate), nor that the attacker affirmatively sought to attack civilians.

15. William J. Fenrick, *Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities*, 30 B.C. INT’L & COMP. L. REV. 111, 114 (2007).

16. This is also not to say that the internal appreciation of the facts is always superior. Cf. Sarah Knuckey et al., Pentagon Admits Major Investigation Flaw: They Rarely Talk to Air Strike Witnesses or Victims, JUST SECURITY (June 29, 2017), <https://www.justsecurity.org/42675/pentagon-admits-rarely-talks-air-strike-witnesses-victims/> [<https://perma.cc/FU7G-J9UQ>] (archived Oct. 25, 2017) (asserting that the “U.S. government’s failure to regularly interview witnesses is a critical flaw in their investigation methodology”). Rather, the point is simply that external actors lack certain information that those within a government may have.

This Article seeks to explicate this phenomenon. It offers an account of the ways in which IHL—and specifically the core targeting provisions reflected in Additional Protocol I to the Geneva Conventions¹⁷—has historically balanced two different legal dyads: rules versus standards and objective versus subjective tests. The Article further argues that the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) began to shift that balance toward a “standard-like” approach to IHL. It also contends, however, that there is now another shift, in favor of an objective, “rule-like” approach to IHL—or, at least, that the public is pushing in that direction. This Article then examines the prohibition of indiscriminate attacks¹⁸ more closely and argues that contemporary focus on the term “indiscriminate” reflects this desire for objective rules.

The Article then pivots to offer specific policy prescriptions with respect to how to adjust the approach to this specific prohibition in response to the broader shift in sentiment. The aim is to contribute both to a salient contemporary debate about the conduct of hostilities—relevant around the world from South Sudan to Nigeria to Yemen¹⁹—and to a broader discussion of the direction in which IHL may ultimately go.

The Article argues that if policymakers are not better able to respond to the clarion call for clearer IHL rules—ones that can be applied without access to the full scope of information that only states have—there is substantial risk that the goalposts will move in even more profound ways. For instance, there could be a shift toward additional norms taking the form of prohibitions of classes of

17. I do not engage here the question of which targeting provisions of Additional Protocol I are customary international law, whether for international armed conflict or non-international armed conflict. For the U.S. view on provisions of Additional Protocol I that are custom, see Mike Matheson, *Additional Protocol I as Expressions of Customary International Law*, 2 AM. U. J. INTL. L. & POLY. 419, 423–29 (1988).

18. I focus in particular on a specific form of “indiscriminateness.” To illustrate, consider the follow two scenarios: (1) military forces erroneously strike a civilian object with precision guided munitions on the basis of faulty information, which they should have checked more fully; and (2) military forces strike a civilian object with a “dumb bomb” dropped from high-altitude, but assert after the fact that they were targeting a military objective some distance from the civilian object actually struck. There is an element of “indiscriminateness” to both of these scenarios: the former by virtue of a failure to take adequate precautions, which could be indiscriminate in a loose sense of reckless with respect to the status of the object to be attacked; and the latter by virtue of the means or method of combat chosen and context, which gave rise to substantial risk that the attack simply could not be directed as (perhaps) intended. These are both significant modern-day problems, but are conceptually distinct. This Article focuses on the latter.

19. I assume here, for purposes of argument, the application to contemporary non-international armed conflicts of customary international law coextensive with many of the treaty-rules applicable in international armed conflict. Cf. Matheson, *supra* note 17.

weapons, some of which may have wholly appropriate uses, on the ground that they are inherently indiscriminate.²⁰ Likewise, an approach—deeply alarming to many scholars and practitioners—that looks to the effects of attack to judge them could begin to hold (broader) sway in the mind of the public.²¹

This Article proceeds in five Parts. Part II explains the differences between rules and standards and between objective and subjective tests, and it argues that—despite the lack of attention to this issue in the scholarship²²—these hoary legal dyads were well

20. Cf. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 241; Convention on Cluster Munitions, Dec. 3, 2008, 48 I.L.M. 357. I take no position on the desirability of the prohibitions in these two instruments, but only argue that in the absence of a more reticulated understanding of targeting, we may well see efforts to adopt similar such instruments. Cf. International Network on Explosive Weapons, *A Commitment to Act: Protecting Civilians from the Use of Explosive Weapons in Populated Areas*, <http://www.inew.org/site/wp-content/uploads/2015/09/INEW-commitment-to-act-Sep-15.pdf> [https://perma.cc/VZ8T-JPRM] (archived Sept. 23, 2017); U.N. Secretary-General, *Protection of Civilians in Armed Conflict*, ¶ 7, UN Doc. S/2012/376 (2012); INT'L COMMITTEE OF THE RED CROSS, *Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects* 5 (June 15, 2015) (“Areas for clarification would include the degree of accuracy of a weapon that is acceptable under the prohibition of indiscriminate attacks in a given operational situation or more generally.”).

21. This concern was reflected in the reaction to the ICTY Trial Chamber’s judgment in the *Prosecutor v. Gotovina* case. In *Gotovina*, which commentators feared could become “the *Tadic* of targeting law,” see *Prosecutor v. Gotovina*, Case No. IT-06-90-A, Application and Proposed Amicus Brief, at 12 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 12, 2012), <http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Application/NotIndexable/IT-06-90-A/MS07958R0000353013.pdf> [https://perma.cc/KD85-8LKT] (archived Sept. 23, 2017), the issue was whether “a commander [could] be found guilty of illegally targeting civilians or civilian objects based exclusively on a retrospective assessment of the evidence,” and on the basis of an extrinsic metric for assessing whether an attack was unlawful. *Id.* at 16. The Trial Chamber had analyzed the effects of artillery attacks, deeming those impacting further than 200 meters from a lawful objective unlawful attacks, and inferred a culpable intent due to the fact that 4.5% of attacks were unlawful under the Trial Chamber’s metric. Cf. Laurie R. Blank, Operational Law Experts Roundtable on the *Gotovina* Judgment: Military Operations, Battlefield Reality and the Judgment’s Impact on Effective Implementation and Enforcement of International Humanitarian Law at 6, <http://ssrn.com/abstract=1994414> (last visited Sept. 23, 2017) [https://perma.cc/KU6S-7D2U] (archived Sept. 23, 2017); see also *id.* (“Ultimately, it is impossible to ignore the import of this judgment: it encourages a determination of criminality based almost exclusively on effects, without any grasp of what the alleged perpetrator knew or intended at the time of the attack.”).

22. Commentators tend to be relatively conclusory on this point. See, e.g., Luke A. Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law*, 7 HARV. NAT’L SEC. J. 577, 586 (2016) (“All of the IHL targeting principles are susceptible to a great amount of discretion on the part of the military decision maker.”). Amichai Cohen has undertaken the closest examination of this issue to date. See Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 40 ISRAEL L. REV. 1 (2008). Ashley Deeks has also specifically considered the advantages and disadvantages of a shift from a standard to a rule in the context of the ‘unwilling or unable’ doctrine. See Ashley S. Deeks,

reflected in the development of targeting law. This Part then shows that, while the advent of the international criminal tribunals (in particular the ICTY) pushed IHL targeting norms further in the direction of a standard-like approach, there is now a substantial movement favoring a rule-like, objective system, and it offers potential explanations for why there is such a movement. Part III specifically examines the prohibition of indiscriminate attacks as a case study. Part IV tentatively suggests a way forward with respect to that prohibition: namely, to evaluate at least certain categories of attacks *ex ante* with regard to their risk of being unlawful, an approach drawing on the concept of objective recklessness. This Part both asserts that this may be a constructive way to address the concerns that have been driving the broader conversation and defends this suggestion against potential questions. Part V offers a brief, broader conclusion.

II. THE RULE/STANDARD AND OBJECTIVE/SUBJECTIVE DYADS IN TARGETING LAW

In general, as Duncan Kennedy has suggested, “rules” are those norms with greater formal realizability, i.e., those that require a decision maker “to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.”²³ By contrast, a “standard refers directly to one of the substantive objectives of the legal order. Some examples are good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness.”²⁴ Rules also tend to be elaborated *ex ante* whereas standards can be applied to facts as—or, more generally, after—they arise.²⁵ Like Amichai Cohen,²⁶ this Article uses the terms “rule-like” and “standard-like,” in recognition of the fact that these legal forms exist along a continuum.

Gabriella Blum has asserted that black letter IHL is a mix of rules, such as the prohibition of particular weapons, and standards, such as the prohibition of disproportionate attacks.²⁷ This is

Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483, 514–16 (2012).

23. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976).

24. *Id.* at 1688. For a useful recent exploration of the differences, see Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CAL. L. REV. 447, 456–61 (2016).

25. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 559 (1992); Covey, *supra* note 24, at 459–60.

26. See Cohen, *supra* note 22, at 4.

27. Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L. J. 163, 187 (2011) (“Notwithstanding the many absolute rules in IHL, several IHL obligations are articulated as standards.”); see Duncan B. Hollis, *Setting the Stage: Autonomous*

undoubtedly true. A useful comparison from the earliest days of IHL might be between the 1899 Hague Declaration on Launching Projectiles and Explosives from Balloons,²⁸ which prohibited a particular kind of situational bombardment, and the *Martens* clause.²⁹

But Blum's account is too thin. Certain IHL targeting "rules" also contain standard-like elements. Thus, for instance, consider the prohibition of attacks against civilian objects. So far, so good; it does indeed sound rule-like. But a "civilian object" is defined in contradistinction to a military objective, which in turn requires, at least in part, a standard-like inquiry (as a military objective is an object that by its nature, location, purpose, or use makes an *effective* contribution to military action and whose destruction offers a *definite* military advantage).³⁰

Likewise, some standard-like provisions of IHL also have a germ of rule-likeness. Consider, for instance, the provision that commanders are to do everything feasible to verify their target.³¹ "Feasible," of course, is classically standard-like. But as Geoffrey Corn has put it, "precautions involve a series of concrete steps in a coherent targeting process that can be applied in a systematic manner."³² Likewise, the Joint Staff review of Additional Protocol I characterized Article 57 as a "checklist," which sounds much more rule-like as applied than it might appear on its face.³³ And, indeed, the International Committee of the Red Cross (ICRC) Commentary to Additional Protocol I suggests that in case of doubt, those who plan or decide on attacks must call for additional information, implying that even if the requirement takes the form of a standard, the process for compliance may be rather more rule-like.³⁴ Finally, the definition of a

Legal Reasoning in International Humanitarian Law, 30 TEMPLE INT'L & COMP. L. J. 1, 11–12 (2016).

28. Declaration Prohibiting Launching Projectiles and Explosives from Balloons, July 29, 1899, 32 Stat. 1839 (entered into force 1990).

29. Hague Convention (IV) on Laws and Customs of War on Land, preamble, Oct. 18, 1907, 36 Stat. 2277. I do not here engage the debate concerning the meaning of the *Martens* clause.

30. See Additional Protocol I, *supra* note 8, art. 52(2).

31. See *id.* art. 57(2)(a)(i).

32. Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPP. L. REV. 419, 424 (2014).

33. Memorandum for the Secretary of Defense, Review of 1977 First Additional Protocol to the Geneva Conventions of 1949 at 63, http://www.dod.mil/pubs/foi/Reading_Room/Joint_Staff/1985_JCSM_152-85_Review_of_GC_AP_I.pdf [hereinafter *Joint Chiefs Review*]; see also Richard C. "Rich" Gross, *Planning and Decision-making: Differences in Processes for Pre-Planned Targets, Targets of Opportunity and Troops in Contact Situations. National Perspectives.*, in INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, CONDUCT OF HOSTILITIES: THE PRACTICE, THE LAW AND THE FUTURE 55, 57 (Edoardo Greppi & Gian Luca Beruto eds., 2014) ("very scientific methodology").

34. INT'L COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 2195 (Yves Sandoz et al. eds. 1997) [hereinafter ICRC COMMENTARY]; see also INTERNATIONAL INSTITUTE OF

military objective, which is relatively standard-like, also itself has a rule-like sub-element: that is, military objectives may include those objects that by their *nature* are military.³⁵

A rule or a standard may also be objective or subjective insofar as it may turn, for instance, on a person's intent (subjective), or on an extrinsic way of assessing lawfulness, such as what a reasonable person might have done under similar circumstances (objective).³⁶ Here, again, the story of targeting under IHL is far from simple (even considering only the substantive norms, and not the question of the relevant *mens rea* for a war crimes prosecution, which is set aside for the moment). Take, for instance, the principle of proportionality. A number of states made clear at the time of ratification of Additional Protocol I that the military advantage (against which civilian casualties were to be weighed) was gained not by a single tactical attack, but rather by a broader course of conduct.³⁷ This presupposes that the subjective appreciation of an individual attacker cannot be dispositive.³⁸ Indeed, a number of states have likewise argued that

HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 27 (2006) ("Among the most evident of feasible precautions is the review of intelligence and other forms of information concerning the target and surrounding area."); Jean-François Quéginer, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT'L REV. OF THE RED CROSS 793, 798 (2006) ("[W]hile this provision in no way imposes an obligation of result, it does require that, in case of doubt, additional information must be obtained before an attack is launched.").

35. AGNIESZKA JACHEC-NEALE, *THE CONCEPT OF MILITARY OBJECTIVES IN INTERNATIONAL LAW AND TARGETING PRACTICE* 54 (2015) ("Either the objects *do* qualify . . . or they *do not* Nature is a non-contextual requirement that is incompatible with a determination dependent on circumstances.").

36. To give a familiar example from another area of law, constitutional racial discrimination cases require a showing of discriminatory intent (subjective), see *Washington v. Davis*, 426 U.S. 229 (1976), but Title VII claims may proceed upon a showing of disparate impact (objective), see Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

37. See, e.g., United Kingdom of Great Britain and Northern Ireland, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, INT'L COMMITTEE OF THE RED CROSS (June 8, 1997), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2> [<https://perma.cc/U68S-JMXS>] (archived Sept. 23, 2017) ("In the view of the United Kingdom, the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."). Similar reservations were lodged by Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, and Spain. See Ryan Christian Else, Note, *Proportionality in the Law of Armed Conflict: The Proper Unit of Analysis for Military Operations*, 5 U. ST. THOMAS J. L. & PUB. POL'Y 195, 204 (2010); see generally Michael N. Schmitt, *Targeting in Operational Law*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 245, 254 (Terry D. Gill & Dieter Fleck eds., 2010); cf. Rome Statute of the International Criminal Court 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 ("overall military advantage").

38. As the UK delegation put it during the negotiation of Additional Protocol I, "[s]hould an individual soldier or resistance fighter apply the rule of proportionality in accordance with the facts known to him, or should he try to apply it in the light of facts known to his superiors." See generally Additional Protocol I, *supra* note 8;

the related provision requiring suspension of an attack under certain circumstances can only be applied by those sufficiently high in the chain of command.³⁹ On the other hand, a number of provisions turn on the “object” of an attack, which can presumably only be determined by reference to the intention of the specific attacker.⁴⁰ And the U.S. Operational Law Handbook explicitly notes that a number of recent treaties have been subject to understandings regarding “that person’s” assessment of the facts.⁴¹

The next three subparts show: (1) how these various threads are woven through the negotiating history of targeting law up through the adoption of Additional Protocol I; (2) how the ICTY’s jurisprudence shifted the landscape in the direction of a standard-like approach, while reifying an objective-subjective mix; and (3) how a contemporary trend (at least outside government) in favor of objective rules has emerged.

A. *An Uncertain Targeting Theology up to and at the Diplomatic Conference That Adopted Additional Protocol I*

Consider first the history of the definition of a military objective. There was a first effort to develop a list of legitimate targets in connection with the Hague Convention (IX).⁴² The Hague Rules of Air Warfare of 1923—which were never in effect—also offered a specific list of lawful targets.⁴³ One proposed amendment to the Hague Rules even suggested that a certain class of military objectives only be

Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, CDDH/III/SR.8, Vol. 14, p. 65 [hereinafter CDDH].

39. ICRC COMMENTARY, *supra* note 34, ¶ 2197; *see also Joint Chiefs Review, supra* note 33, at 63.

40. *See, e.g.,* Additional Protocol I, *supra* note 8, art. 51(2).

41. INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 12 (2015).

42. *See generally* Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War art. 2, Jan. 26, 1910, 3 Martens Nouveau Recueil (ser. 3) 604; *see also* W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 18 (1990).

43. Commission of Jurists, *Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare: Hague Rules of Air Warfare*, INT’L COMMITTEE OF THE RED CROSS art. 24 (1923), <https://ihl-databases.icrc.org/ihl/INTRO/275?OpenDocument> [<https://perma.cc/E7JH-GWB6>] (archived Sept. 23, 2017) [hereinafter Hague Rules of Air Warfare]. And in fact this list was criticized for being insufficiently clear. Paul Whitcomb Williams, *Legitimate Targets in Aerial Bombardment*, 23 AM. J. INT’L LAW 570, 577 (1929) (criticizing efforts to distinguish different kinds of factories). Note, however, that the Hague Rules of Air Warfare required that an object *both* be on the list *and* meet more standard-like criteria (that the destruction of the object would constitute a distinct military advantage to the belligerent). IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 45 (2009); *cf.* Draft Convention for the Protection of Civilian Populations Against New Engines of War art. 2 (1938) (defining “belligerent establishment” by a list).

deemed susceptible to attack during the day.⁴⁴ These all are highly rule-like. Indeed, in the post-World War I period, the United States actually rejected (a more standard-like) notion of a “military objective” in favor of a list of permissible objectives.⁴⁵ And, immediately prior to World War II, the United States issued a list of targets that were “not prohibited.”⁴⁶

The 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War defined a military objective as one that is “generally acknowledged” to be of military importance⁴⁷ and appended a list of categories of military objectives that the ICRC believed to be “generally acknowledged” at the time.⁴⁸ The ICRC’s commentary explained that:

[i]t is generally admitted that a military objective is one which is to the enemy’s advantage to destroy. But this is a point which *should not be left to the attacking side alone to judge*. If it were, the outcome would be to justify any destruction which the attacking side, in the tense atmosphere of war, might deem such as to present a military advantage. . . . The vital safeguard lies, it will be seen, in the word “generally.” In other words, the military importance of the category which includes the objective in question must have been recognized by the vast majority of countries and that recognition should be based on jurisprudence or on any other vehicle for the expression of the sentiments of the international community.⁴⁹

This is rather rule-like, although in some ways it masquerades as a standard.⁵⁰

The draft protocol submitted by the ICRC to the Diplomatic Conference retained the word “recognized” in its proposed definition of a military objective.⁵¹ But the definition of a military objective ultimately adopted by the Diplomatic Conference was more open-ended. Article 52 of Additional Protocol I provides that military objectives are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose

44. Williams, *supra* note 43, at 580.

45. JACHEC-NEALE, *supra* note 35, at 20; Parks, *supra* note 42, at 28.

46. Parks, *supra* note 42, at 39.

47. DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR art. 7(2) (1956) [hereinafter DRAFT RULES].

48. COMMENTARY, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR 72–73, https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Draft-rules-limitation.pdf (last visited Sept. 23, 2017) [<https://perma.cc/SFV6-ZFN7>] (archived Sept. 23, 2017).

49. *Id.* at 67–68.

50. It is also rather more objective than the current definition of a military objective. The exact way the two dyads sketched in this Article relate to each other is beyond the scope of this Article.

51. See CDDH, *supra* note 38, Vol. 1, Part III, p. 16. As Ian Henderson has commented, “[i]f this text had been adopted, then certain targets would have been able to be considered as deemed to be military objectives.” HENDERSON, *supra* note 43, at 49.

total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁵² This effected a key change: the determination of whether the objective makes an effective contribution to military action is one that is made a question of case-by-case assessment (the word “recognized” being omitted). (Moreover, the second half of the test, which requires that the objective’s destruction or neutralization offer a military advantage, is explicitly framed as contingent on the circumstances prevailing at the time, which “made the determination of military objectives situation-dependent.”)⁵³ This then became much more standard-like.

The same story—initially more rule-like, ultimately more standard-like—can be told with respect to the proportionality principle. The ICRC’s 1956 Draft Rules provided that when attacking towns, the attack “must not cause losses or destruction beyond the immediate surroundings of the objective attacked,”⁵⁴ seeking to define proportionality geographically rather than by a balancing test. In the same vein, a proposal by a group of experts at the first session of the Conference of Government Experts, which paved the way for the Diplomatic Conference at which Additional Protocol I was adopted, suggested that

“[i]n particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objectives attacked.”⁵⁵

Sweden’s efforts to introduce a similar formulation into Additional Protocol I⁵⁶ were, however, rejected, in favor of a

52. Additional Protocol I, *supra* note 8, art. 52(2).

53. ICRC COMMENTARY, *supra* note 34, ¶¶ 2019, 2036; JACHEC-NEALE, *supra* note 35, at 31; Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, 78 INT’L L. STUD. 139, 144 (2003) (“The process of appraising military advantage must be made against the background of the circumstances prevailing at the time, so that the same object may be legitimately attacked in one temporal framework but not in others.”).

54. DRAFT RULES, *supra* note 47, art. 9 (1956). In fact, some had suggested during discussion of the Draft Rules a 300 meter limit. See COMMENTARY, DRAFT RULES, *supra* note 48, at 89. Similar efforts had been made with the 1923 Air Rules. See Hague Rules of Air Warfare, *supra* note 43, art. 24(4) (discussing “immediate neighborhood” of operations of land forces); see generally ICRC COMMENTARY, *supra* note 34, ¶ 2185 & n.1 (discussing the Draft Rules and characterizing them as evincing an effort at “precision”).

55. CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, REPORT ON THE WORK OF THE CONFERENCE 98 (Geneva, 1971).

56. Compare to Sweden’s proposal, CDDH, *supra* note 38, Vol. 3, p. 204. Norway also supported this approach. *Id.* Vol. 14, p. 59.

proportionality provision that is very much a standard.⁵⁷ At the time, a number of delegations vociferously opposed what became Article 51(5)(b) on the ground that it was too vague.⁵⁸ As any number of authors have noted, “*in bello* proportionality is . . . indeterminate—incluctably so.”⁵⁹

Finally, this is also true of Article 56 of Additional Protocol I, which prohibits attacks against works and installations containing dangerous forces if such an attack “may cause the release of dangerous forces.”⁶⁰ What was proposed to the Diplomatic Conference was an absolute prohibition on attacks against a limited set of objectives.⁶¹ The United States along with others suggested that the determination of whether a work or installation might be attacked should be made on a case-by-case basis based on the expected results.⁶² And the US approach—making it more standard-like—prevailed.⁶³

But the story is not always one where a rule-like provision became more standard-like during negotiations. Consider for instance the prohibition of area bombardment. The ICRC advanced a draft provision on the subject that prohibited attacking as a single objective several military objectives which were “at some distance” from each other. The ICRC felt this was sufficiently clear,⁶⁴ but the United States and others disagreed.⁶⁵ During negotiations, Australia as well as Brazil, Canada, Germany, and Nicaragua proposed that an area containing military objectives separated from each other could not be attacked as one objective if it were “reasonably possible” to attack each objective separately.⁶⁶ (This would have transformed something rather more rule-like into a standard.) Other delegations, however,

57. Likewise, with respect to Article 57(2)(a)(iii), some had suggested that attackers should refrain from attacks “which risk” causing disproportionate damage. Ultimately, states formulated the provision in terms of attacks “which may be expected” to cause such damage. ICRC COMMENTARY, *supra* note 34, ¶ 2209.

58. See, e.g., CDDH, *supra* note 38, Vol. 14, p. 56 (“To permit attacks against the civilian population and civilian objects if such attacks had military advantages was tantamount to making civilian protection dependent on subjective decisions taken by a single person, namely, the military commander concerned.”).

59. Robert D. Sloane, *Puzzles of Proportion and the ‘Reasonable Military Commander’: Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT’L SEC. L. REV. 299, 302 (2015).

60. See Additional Protocol I, *supra* note 8, art. 56(1).

61. CDDH, *supra* note 38, Vol. 14, p. 154.

62. *Id.* at 156 and at Vol. 3, p. 225.

63. Nevertheless, even this was not sufficient to make the U.S. comfortable with the provision, since it did not contain a balancing test where even great risk could be offset by the possibility of great military advantage. See DOD LAW OF WAR MANUAL, *supra* note 11, at 247–48.

64. CDDH, *supra* note 38, Vol. 14, p. 36 (“The methods referred to in Article 46, paragraph 3(a) [what became Article 51, paragraph 5(a)] . . . were moreover sufficiently well known . . .”).

65. *Id.* at 67.

66. CDDH, *supra* note 38, Vol. 3, pp. 201–204.

objected to this proposal on the basis that “this phrase would tend to encourage area attacks, because only the attacking forces could decide whether . . . individual targets were too close together.”⁶⁷ And so the provision remained more like a rule than a standard and prohibited attacks treating as a single military objective “clearly separated and distinct” military objectives in an area with a concentration of civilians or civilian objects.⁶⁸

Likewise, consider the question of reprisals. During negotiation of Additional Protocol I, France suggested that reprisals not be forbidden, but rather be limited (e.g., only where proportionate).⁶⁹ Indeed, during the lead-up to the Diplomatic Conference, as the ICRC Commentary explains, the ICRC offered a standard-like approach to reprisals. They “considered that the restrictions on reprisals imposed by the requirements of humanity in the conduct of hostilities should be forcefully reaffirmed. In this connection [ICRC] mentioned the three principles of subsidiarity, proportionality and humanity.”⁷⁰ Ultimately, however, the Diplomatic Conference adopted not a standard, but a specific set of rules prohibiting reprisals against classes of individuals and objects.⁷¹

The prohibition of perfidy is a final example.⁷² Hague Regulation 23(b) had forbidden killing “treacherously,”⁷³ without further definition.⁷⁴ But Article 37(1) of Additional Protocol I provides a specific list of indicative examples of perfidy (the corollary to “treachery” in the Protocol).⁷⁵ Thus, the best one can say is that the negotiation of Additional Protocol I retained a mix of rule-like and standard-like provisions.

During the negotiation of Additional Protocol I, both objective and subjective tests were also deployed for different provisions.⁷⁶ For instance, Article 35 prohibits means and methods of warfare “which are intended, or *may be expected*,” to cause damage to the

67. CDDH, *supra* note 38, Vol. 15, p. 330.

68. Additional Protocol I, *supra* note 8, art. 51(5)(a).

69. CDDH, *supra* note 38, Vol. 14, p. 65.

70. ICRC COMMENTARY, *supra* note 34, ¶ 3443.

71. See Additional Protocol I, *supra* note 8, art. 51(6) (civilians); art. 52(1) (civilian objects); art. 53(c) (cultural objects and places of worship); art. 54(4) (objects indispensable to the civilian population); art. 55(2) (natural environment); art. 56(4) (works and installations containing dangerous forces).

72. Cf. Hollis, *supra* note 27, at 12 (characterizing perfidy as a rule and contrasting it with proportionality, characterized as a standard).

73. Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 23(b), July 9, 1899, 32 Stat. 1803.

74. DINSTEIN, *supra* note 9, at 230.

75. Additional Protocol I, *supra* note 8, art. 37(1).

76. Just as this Article uses the terms “rule-like” and “standard-like,” not all provisions are neatly classified as objective or subjective. One example, discussed *infra*, is provisions turning on the “reasonable commander.”

environment.⁷⁷ The ICRC commentary states, “The Report of the Rapporteur indicates that . . . [t]he former [phrase “may be expected”] implies an *objective* norm concerning that which a State or an individual considers, or *should consider*, to cause the effects described.”⁷⁸ This is an important point because other targeting provisions—such as Article 51—speak of “attacks,” a term that brings with it a subjective element (“What were you attacking?”).

The history suggests that this was not inadvertent. There was no measure like Article 35 in the draft Protocol submitted to the Diplomatic Conference by the ICRC (nor was there anything akin to what became the environmental provisions of Article 55).⁷⁹ Hungary, East Germany, and Czechoslovakia originally proposed that it be forbidden to *destroy or impair* the natural environment.⁸⁰ Australia made a similar proposal, although the Australian proposal appeared to contemplate a different threshold (using the word “despoil”).⁸¹ The words originally proposed, such as “destroy,” “impair,” or “despoil,” are much more consequential than “attack,” turning, at least somewhat, on what is expected ultimately to transpire rather than on the intent at the time the decision is taken to use force.⁸²

The same is true of Article 51(2), concerning attacks with the primary purpose of spreading terror. During the Diplomatic Conference a number of delegations rejected proposals that would have turned on the “intent” of the attacker.⁸³ Rather, negotiators adopted a test turning on the “primary purpose” of *the act*. Again,

77. *Id.* at art. 35 (emphasis added); *cf.* ICRC COMMENTARY, *supra* note 34, ¶ 123–126.

78. ICRC COMMENTARY, *supra* note 34, ¶ 1458, 419 n.127 (emphasis added). This is also consistent with the discussion in a Working Group at the diplomatic conference, during which it was clear that the desire was to cover not only deliberate harm directed against the environment, but also what the state or individual “ought to realize,” objectively, would cause such harm. CDDH, *supra* note 38, Vol. 15, p. 360.

79. ICRC COMMENTARY, *supra* note 34, ¶ 2129 (“The ICRC draft did not contain provisions aimed at safeguarding the environment specifically.”).

80. CDDH, *supra* note 38, Vol. 3, p. 221.

81. CDDH, *supra* note 38, Vol. 3, p. 220.

82. The ICTY has made clear that an “attack” is a “course of conduct” rather than the result thereof. *See, e.g.*, Prosecutor v. Milorad Krnojelac, Case No IT-97-25-T, Judgment ¶ 184 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

83. CDDH, *supra* note 38, Vol. 14, p. 56 (Egypt); *id.* at 62 (Mauritania) (“the concept of intention and the principle of proportionality should be replaced by more objective terms”); *id.* at 66 (Netherlands) (“rules laid down in paragraph 3 should be made more precise and should contain more objective criteria”); *id.* at 68 (India) (“It seemed unnecessary to look into the intention of a party to a conflict in case of attack when providing protection to the civilian population, or to think in terms of criminal law.”); *cf. id.* at 60 (Sweden) (“With regard to paragraph 1, his delegation agreed with the view that intent was difficult to prove. On the other hand, the alternative suggested by the delegation of the Soviet Union, namely, ‘acts capable of spreading terror’, covered a very broad category indeed.’ Perhaps the Working Group could find a compromised [sic] solutions such as, for example, ‘acts likely to spread terror.’”). *But see id.* at 63 (Australia) (suggesting it would ultimately all be up to commanders); *id.* at 65 (France) (suggesting that attacks inevitably spread terror among civilian populations).

here there is rejection of subjectivity in favor of objectivity. Finally, the same is true of the prohibition of weapons that are “of a nature” to cause superfluous injury or unnecessary suffering.⁸⁴ As Yoram Dinstein has said, “By pointing at the ‘nature’ of the weapon, the accent in Additional Protocol I . . . is placed on the objective character of the armament.”⁸⁵

On the other hand, a significant number of provisions turn on the specific, subjective approach of the commander.⁸⁶ Take, for instance, the rule prohibiting attacks on objects indispensable to the survival of the civilian population *for the specific purpose* of denying them for their sustenance value to the civilian population.⁸⁷ In elaborating the San Remo Manual on Naval Warfare, some experts criticized this, arguing that “it has never been possible to prohibit methods of warfare which rely on a factual establishment of the subjective purpose of belligerents.”⁸⁸ Nevertheless, a corollary provision on blockade was included in the Manual.⁸⁹

Perhaps most tellingly, in discussing the “reasonable commander” test for proportionality, discussed in greater detail *infra*, the ICRC Commentary recognized that this was at least in part ultimately a subjective standard.⁹⁰ Indeed, as the ICTY put it in their

84. Additional Protocol I, *supra* note 8, art. 35(2).

85. DINSTEIN, *supra* note 9, at 64.

86. Indeed, under instruments that laid the groundwork for Additional Protocol I, and in the context of negotiation of the Protocol, the lawfulness of an attack was keyed to the intent of the attacker. See DRAFT RULES, *supra* note 47, art. 8(a), (b) (“The person responsible for ordering or launching an attack shall . . . make sure that the objective, or objectives, to be attacked are military objectives . . . [and] take into account the loss and destruction which the attack . . . is liable to inflict upon the civilian population.”); INT’L COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, BASIC TEXTS 18 (1972) (“Those who order or launch an attack”); INT’L COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, PROTECTION OF THE CIVILIAN POPULATION AGAINST DANGERS OF HOSTILITIES 83–84 (1971) (discussing “[t]hose who order or launch an attack”). More obliquely, but to similar effect, an early ICRC proposal focused on the rule that civilians should be protected against “attacks mounted *directly* against [them].” INT’L COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, PROTECTION OF THE CIVILIAN POPULATION AGAINST DANGERS OF HOSTILITIES 38 (1971) (emphasis added). The question of whether an attack is direct or indirect requires analysis of the attacker’s intent.

87. Additional Protocol I, *supra* note 8, art. 54(2) (emphasis added).

88. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 102 (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

89. *Id.* at 179.

90. ICRC Commentary, *supra* note 34, ¶ 2208 (“[T]his system is based to some extent on a subjective evaluation.”). That said, the ICRC Commentary suggests that damage may never be “extensive,” ICRC COMMENTARY, *supra* note 34, ¶ 1980, appearing to re-insert an objective component. Commentators have rejected this. See

report on NATO's bombing in Kosovo, "Commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would not always agree."⁹¹ And, of course, the principle of proportionality is "forward looking, not retrospective," i.e., turning on the attacker's expectations at the time of attack.⁹²

Finally, this same emphasis on the subjective is also manifested at a more general level in the desire for the commander to be afforded a margin of appreciation. For instance, a number of states expressed their understanding that the presumption of civilian status should not, if there were a small doubt, preclude a commander from attacking.⁹³ And as reflected in the debate surrounding the San Remo Manual, many states and scholars understood the feasible precautions rule as turning on "the information available to [the attacker]."⁹⁴

B. *The Turn to International Criminal Law*

Amichai Cohen has asserted that a move is taking place from more "rule-like" IHL to more "standard-like" IHL.⁹⁵ He asserts that this is the result of courts increasingly scrutinizing the conduct of hostilities. This Article suggests that a further reason for this shift is courts' need to extrapolate from more detailed provisions governing international armed conflict to non-international armed conflict, which has scant applicable treaty law.⁹⁶ All of this is unsurprising given that courts tend to apply the law *ex post*, and that fits most comfortably with a standard-like approach.

A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 18 (1996); cf. Statement of Interest of the United States at 41, *Matar v. Dichter*, No. 05 Civ. 10270, (S.D.N.Y. Nov. 17, 2006) ("In short, questions of proportionality are highly open-ended, and the answers to them tend to be subjective.") (emphasis added).

91. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: FINAL REPORT BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 50 (June 8, 2000) [hereinafter NATO REPORT]; see also Isabel Robinson & Ellen Nohle, *Proportionality and Precautions in Attack: The Reverberating Effect of Using Explosive Weapons in Populated Areas*, 98(1) INT'L REV. OF THE RED CROSS 107, 119–20 (2016) (describing arguments both that it is a subjective standard and an objective standard).

92. Eric T. Jensen, *Targeting of Persons and Property*, in *THE WAR ON TERROR AND THE LAWS OF WAR* 54 (Michael Lewis ed., 2009); ROGERS, *supra* note 90, at 21–22.

93. Schmitt, *supra* note 37, at 249 (citing UK statement).

94. SAN REMO MANUAL, *supra* note 88, at 123 (noting that such a provision in the San Remo Manual was to "correct one of the deficiencies of the text of API which also attracted statements of understanding").

95. Cohen, *supra* note 22, at 15–16 ("IHL by itself and its application have become more standard-like.").

96. Cf. *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, ¶¶ 126–27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (application of IAC provisions "has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.").

Indeed, before the creation of the ICTY, the general approach to accountability had been for the commander to investigate and discipline his or her own troops⁹⁷ or for domestic courts to address the issue. The ICTY, however, has done things such as bring the “reasonable commander” standard for proportionality to prominence.⁹⁸ Analogous to the “reasonable person” in domestic criminal law, the reasonable commander is “the reasonable man in the law of war [and] is based upon the experience of military men in dealing with basic military problems.”⁹⁹ Reasonableness is the quintessential standard.¹⁰⁰ As Thomas Franck has said, proportionality lends itself to second opinions.¹⁰¹

Nor is the “reasonable commander” a construct limited to proportionality. He or she is also deployed to assess judgments regarding whether an objective constitutes a belligerent or military objective.¹⁰² As the ICTY has stated, “The Prosecution must show that

97. ICRC COMMENTARY, *supra* note 34, ¶ 3562 (“act like an investigating magistrate”); see Additional Protocol I, *supra* note 8, art. 87(3).

98. Prosecutor v. Galic, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion ¶ 58 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (“In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”); NATO REPORT, *supra* note 91, ¶ 50 (“It is suggested that the determination of relative values must be that of the ‘reasonable military commander.’ Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.”); see also Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 EUR. J. INT’L L. 531, 535 (2011) (“The report suggests that the decisive yardstick should be the judgment of the ‘reasonable military commander.’ But this is not really a satisfactory solution, at least not unless the reasonable military commander is defined in more civilian terms.”); cf. Joshua Andresen, *Challenging the Perplexity over Jus in Bello Proportionality*, 7 EUR. J. INT’L L. 19, 25–26 (2014) (citing the German *Fuel Tankers Case* for a standard of liability “where the commander ignored any considerations of proportionality and refrained from acting ‘honestly,’ ‘reasonably,’ and ‘competently.’”).

99. Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT’L L. 707, 717 (2007).

100. See Pub. Comm. Against Torture in Israel v. State of Israel, Petition for an Order Nisi and an Interlocutory Order, ¶ 58 (2006) (citations omitted) (“Proportionality is not a standard of precision. At times there are a number of ways to fulfill its conditions. A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch’s decision. That is its margin of appreciation.”).

101. Franck, *supra* note 1, at 737 (“In rendering its ‘second opinion’ as to this balance, the Tribunal placed itself neither in the position of the actual perpetrator at the moment of choosing between available options, nor in that of a person with perfect hindsight, but, rather, in that of an international version of the common law’s reasonable man.”).

102. Prosecutor v. Galic, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion ¶ 495 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (emphasis added) (“It is unclear whether manufacturing was still on-going at the time of the

in the given circumstances a *reasonable person* could not have believed that the individual he or she attacked was a combatant.”¹⁰³ The ICTY has specifically identified a number of factors—again, very standard-like—that are relevant to the question of whether an individual should reasonably have been deemed to have been a combatant, including:

questions of distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight.¹⁰⁴

Likewise, with respect to acts the primary purpose of which is alleged to have been to spread terror, the ICTY has suggested evaluating the “circumstances of the acts or threats, that is . . . their nature, manner, timing and duration.”¹⁰⁵ Finally, in discussing IHL provisions regarding environmental damage, the committee established by the ICTY Prosecutor to consider NATO activities in Kosovo said,

In order to fully evaluate [targeting decisions], it would be necessary to know the extent of the knowledge possessed by NATO as to the nature of Serbian military-industrial targets (and thus, the likelihood of environmental damage flowing from their destruction), the extent to which NATO could *reasonably* have anticipated such environmental damage (for instance, could NATO have reasonably expected that toxic chemicals of the sort allegedly released into the environment by the bombing campaign would be stored alongside that military target?) and whether NATO could *reasonably* have resorted to other (and less environmentally damaging) methods for achieving its military objective of disabling the Serbian military-industrial infrastructure.¹⁰⁶

While the move to a more standard-like approach is apparent and unsurprising, the ICTY’s approach to the question of whether tests should be objective or subjective is less clear. This, too, is unsurprising, since criminal law more generally is a mix of the objective and the subjective. Recklessness and criminal negligence,

incident but in any case it is *not reasonable* to consider that the employees of such a manufacturing plant would be considered legitimate targets.”)

103. Prosecutor v. Galic, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion ¶ 55 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (emphasis added); see generally Prosecutor v. Naser Oric, Case No. IT-03-68-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia, June 30, 2006).

104. Prosecutor v. Galic, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion ¶ 188 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

105. Prosecutor v. Stanislav Galic, Case No. IT-98-29-A, Judgment, ¶ 104 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

106. NATO REPORT, *supra* note 91, ¶ 24 (emphasis added).

for instance, turn on the facts known to the actor.¹⁰⁷ While the “facts known to the actor” has its origins in a desire for an objective test for criminal liability,¹⁰⁸ it is necessarily at least somewhat subjective.¹⁰⁹

In this vein, in the context of determining whether an object constituted a military objective, the ICTY has looked to what the commander knew.¹¹⁰ And again, although there is a reasonableness overlay, there is a difference between the “reasonable commander” and the “reasonable person” that makes the former a more subjective entity. That is, the latter individual is generally constructed on the basis of what “the great mass of mankind would have done” or cost efficiency,¹¹¹ but the “reasonable commander” is someone who is supposed to know a great many more things, factual and legal,¹¹² than does the reasonable person,¹¹³ and thus an element of subjectivity is introduced.¹¹⁴

107. See MODEL PENAL CODE § 2.02(2)(c)–(d) (AM. LAW. INST. 1962) (discussing “the circumstances known to [the actor]”).

108. See Eric A. Johnson, *Knowledge, Risk, and Wrongdoing: The Model Penal Code’s Forgotten Answer to the Riddle of Objective Probability*, 59 BUFF. L. REV. 507, 517–18 (2011).

109. See Janina Dill, *The Definition of a Legitimate Target of Attack: Not More than a Moral Plea?*, 103 AM. SOC’Y INT’L L. PROC. 229, 231–32 (2009) (“Even a military commander deciding in good faith has to rely on personal judgment to establish what he or she considers a proportionate anticipated loss of human life in relation to the expected military advantage.”). The most useful analogy may be to the Fourth Amendment, pursuant to which courts will look to the information (subjectively) known by an officer and measure it against an (objective) standard such as probable cause. See Johnson, *supra* note 108, at 534–35 (“[T]he probabilities at issue are ‘objective’ ... [and] are derived objectively from a body of facts defined by what the actor knows.”); cf. Geoffrey S. Corn, *Targeting, Command Judgment and a Proposed Quantum of Information Component*, 77 BROOK. L. REV. 437, 478 (2012).

110. See *Prosecutor v. Prlic*, Case No. IT-04-74, Judgment, ¶ 1354 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2003) (“[T]he HVO command was aware that the ABiH was using the bridge for this purpose.”); *id.* ¶ 1357 (“In light of the its [sic] previous considerations, the Chamber considers that the HVO armed forces were aware that the ABiH was using the Old Bridge for military purposes and that its destruction was a strategic advantage because it completely isolated the Muslim enclave on the right bank and prevented the ABiH from supplying the front line.”).

111. Allen D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 325–26 (2012).

112. See *Reasonable Military Commanders and Reasonable Civilians*, in LEGAL AND ETHICAL LESSONS OF NATO’S KOSOVO CAMPAIGN, 78 INT’L L. STUD. at 211, 212 (Andru Wall ed., 2002) (“What was the thought of a reasonable man? A reasonable man is the man on a downtown bus; that is not the reasonable soldier. One of the reasons that I don’t like civilian judges trying military offenses is that they don’t know the circumstances that were prevailing at the time that led to the soldier’s actions. The question of what is reasonable in times of conflict depends on what is reasonable in the eyes of the man who is involved in that conflict.”).

113. See NATO REPORT, *supra* note 91, ¶ 50 (“It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants.”).

114. Cf. Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1 (2012) (describing the use of “reasonable person” and “reasonable woman” standards in Title VII sexual harassment lawsuits).

This trend line—toward a standard-like approach—is by no means entirely consistent, especially in the non-judicial space. The San Remo Manual on International Law Applicable to Armed Conflicts at Sea, adopted in 1994, for instance, is rather more rule-like than Additional Protocol I. But this analysis suggests that there has been such a trend line.

C. Contemporary Trends

If IHL targeting provisions have historically included both rule-like and standard-like elements, and if the ICTY's application of those aspects of IHL was often standard-like, the contemporary winds are blowing in the opposite direction. This Part makes the case that a preference is emerging—at least in some quarters—for a rule-like approach to targeting.

To give one example, what might in years past have been considered disarmament issues are increasingly being asserted as IHL. Disarmament has tended to be a rule-based system insofar as it has generally prohibited or specifically regulated particular weapons. Historically, however, disarmament and IHL were distinct.¹¹⁵ Indeed, at the time of negotiation of Additional Protocol I, in expressing a negative view of a proposal to have a committee review the legality of weapons, the United States said that “[i]t was difficult for any reasonable Government to place restrictions on weapons on the ground of their illegality: any agreement on prohibition or restriction of use of such weapons had to be based on decisions taken for humanitarian reasons alone.”¹¹⁶ Likewise, a group of experts at the

115. The ICRC, for instance, said at the time of the negotiation of Additional Protocol I, “the prohibition of . . . weapons, *in themselves*, falls principally within the competence of the United Nations [and its work on disarmament]. It is proper for the Red Cross . . . to consider weapons more from the point of view of their employment.” CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, *supra* note 55, at 20; *see also* CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, I, REPORT ON THE WORK OF THE CONFERENCE 127 (Second Session, Geneva, 1972) (“[A] representative of the ICRC stated the basic reasons which had led the ICRC to limit Article 30 to general principles, without including specific prohibitions of particular weapons.”) [hereinafter *REPORT ON THE WORK OF THE CONFERENCE*]. Where the ICRC did see a role for itself was in seeking to ensure that weapons had features that permitted them to be controlled (as that permitted them potentially to be used in compliance with IHL). *See* COMMENTARY, DRAFT RULES, *supra* note 48, at 12 (arguing for prohibition on weapons that “could . . . escape . . . from the control of those who employ them.”); REPORT ON THE WORK OF THE CONFERENCE 152 (proposal of group of experts on safety devices); *see generally* FRITS KALSHOVEN, ARMS, ARMAMENTS AND INTERNATIONAL LAW 228–29 (1986).

116. CDDH, *supra* note 38, Vol. 7, p. 21. Likewise, it was clear to the proponents of the proposal that it would have drawn a link between IHL and prohibitions and restrictions on particular weapons. *See id.* at 47 (“The Romanian delegation fully appreciates the principles that motivated the sponsors of this proposal,

first session of the Conference of Government Experts suggested that napalm be prohibited where it might affect the civilian population and delayed-action weapons (such as mines) be prohibited where they would be likely to cause suffering,¹¹⁷ but these questions were ultimately deferred to a disarmament process separate from the negotiation of the Protocols, at which even more intricately defined rules were considered.¹¹⁸

Yet in the negotiation of what could have been a Protocol VI to the Convention on Conventional Weapons regarding cluster munitions, drawing a link between IHL and disarmament was much more widely accepted, and a significant number of states took the view that the prohibition of cluster munitions contained in the Oslo Convention¹¹⁹ reflected a rule of IHL (as opposed to a restraint that went beyond what IHL required). On this basis, a number of states resisted the possibility of a Protocol VI to the CCW (which would have regulated but not banned cluster munitions) because they saw it as “legitimizing” the use of cluster munitions under IHL.¹²⁰

Nor are cluster munitions the only example. Consider, for instance, the international response to the Assad regime’s use of

whose main aim is to establish a precise legal link between international humanitarian law applicable in armed conflicts and the prohibition or restriction of the use of certain conventional weapons.”); *id.* at 38 (Austria) (supporting a requirement that “a link should be established between international humanitarian law and any instruments that might be adopted in the future on the prohibition or restriction of the use of certain particularly cruel weapons.”).

117. REPORT ON THE WORK OF THE CONFERENCE, *supra* note 115, at 107; *see also* CDDH, *supra* note 38, Vol. 4, p. 232–33 (Swedish proposal on behalf of a group of delegations to prohibit incendiaries unless intended for use against specified targets).

118. *See* CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS 34 (Lucerne, 1974) (proposing a prohibition on the use of incendiary weapons in populated areas); CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS (SECOND SESSION) 181–82 (Lugano, 1976) (suggesting forbidding incendiaries except when directed at the following targets or for the following purposes: close combat support, bunkers, military airfields, armor, in repelling seaborne attacks); *see also* REPORT ON THE WORK OF THE CONFERENCE, *supra* note 115, at 107 (suggesting additional possible targets). The eventual result was Protocol III to the CCW, which prohibits the use of air-delivered incendiary weapons against military objectives located within a concentration of civilians; it likewise forbids such attacks unless the military objectives are clearly separated from the concentration of civilians in cases of non-air-delivered incendiaries. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, arts. 2(2)–(3), Oct. 10, 1980, 1342 U.N.T.S. 171.

119. *See generally* Convention on Cluster Munitions, Dec. 3, 2008, 48 I.L.M. 357.

120. Statement of Costa Rica, CCW Fourth Review Conference, 24 November 2011, at 1, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/803027DB1CD6D1EDC125796B003C9CBB/\\$file/MCII_CostaRica_GroupStmnt.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/803027DB1CD6D1EDC125796B003C9CBB/$file/MCII_CostaRica_GroupStmnt.pdf) [https://perma.cc/9FAZ-FBYJ] (archived Sept. 21, 2017); Statement of ICRC, CCW Fourth Review Conference, 15 November 2011, at 3, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/C3DE092D8814F07BC1257965005C058B/\\$file/4thRevCon_ICRC.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/C3DE092D8814F07BC1257965005C058B/$file/4thRevCon_ICRC.pdf) [https://perma.cc/45A6-E8HC] (archived Sept. 21, 2017).

chemical weapons. At the time the regime used chemical weapons, Syria was not a party to the Chemical Weapons Convention.¹²¹ Yet President Obama said on September 10, 2013 that chemical weapons use was a violation of the laws of war.¹²² That is, the United States staked out the position that the ban on chemical weapons was not simply a feature of disarmament policy and treaty law, but also derived from IHL.

A final illustrative example is the debate surrounding Lethal Autonomous Weapons Systems (LAWS). Autonomous weapons would clearly not be unlawful in *all* circumstances as a matter of IHL. For instance, imagine if they were used undersea, against an isolated tank formation, or in the case of machine-on-machine warfare.¹²³ The risk of systemic targeting errors would be substantially reduced and it would be hard to argue that they were necessarily indiscriminate in such circumstances. Nevertheless, some have suggested that because of the level of *risk* of use of LAWS, this class of weapons should be prohibited. This is because, on their account, identifying those to be held accountable when things go wrong will be very difficult—for instance, they ask whether a programmer can or should be held criminally accountable¹²⁴—and, even beyond that, any prosecution would face other technical difficulties given the need to demonstrate *mens rea* (which a commander might have, albeit likely in the form of recklessness rather than an intent to shoot the wrong target, but a robot would not).¹²⁵ Those who have such concerns move from those

121. See *Member States – Syria*, Organisation for the Prohibition of Chemical Weapons, <https://www.opcw.org/about-opcw/member-states/member-states-by-region/asia/member-state-syria/> [<https://perma.cc/PTN5-HAP3>] (archived Oct. 13, 2017) (indicating entry into force on October 14, 2013).

122. Press Release, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <https://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria> [<https://perma.cc/JAH3-VXNL>] (archived Sept. 21, 2017).

123. See Paul Scharre, *Autonomous Weapons and Operational Risk* 4, Center for a New American Security (Feb. 2016), http://www.cnas.org/sites/default/files/publications-pdf/CNAS_Autonomous-weapons-operational-risk.pdf [<https://perma.cc/4XPK-YRAV>] (archived Oct. 12, 2017); see also Kenneth Anderson & Matthew C. Waxman, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can* 6, HOOVER INSTITUTION (2013).

124. See John Lewis, Comment, *The Case for Regulating Fully Autonomous Weapons*, 124 YALE L. J. 1309, 1312 (2016) (arguing that LAWS cannot comply with distinction and proportionality, but elsewhere arguing for a regulatory regime); see, e.g., *Food-for-Thought Paper 3* (Lethal Autonomous Weapons Systems Informal Meeting of Experts), [http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/4423082AB7EF30E4C1257F7A00501844/\\$file/LAWSMX_FoodforThoughtFinal.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/4423082AB7EF30E4C1257F7A00501844/$file/LAWSMX_FoodforThoughtFinal.pdf) [<https://perma.cc/WL38-VFKX>] (archived Sept. 21, 2017).

125. See Bonnie Doherty, *Mind the Gap: The Lack of Accountability for Killer Robots*, HUM. RTS. WATCH (Apr. 8, 2015), <https://www.hrw.org/report/2015/04/09/mind-gap/lack-accountability-killer-robots> [<https://perma.cc/L6UJ-PN5M>] (archived Sept. 21, 2017); Informal Meeting of Experts on Lethal Autonomous Weapons Systems, *Toward a 'Compliance-Based' Approach to LAWS* 5–6 (Informal Working Paper Submitted by

concerns to argue that LAWS are “inherently indiscriminate.”¹²⁶ Again, this is an effort to characterize what in the past¹²⁷ might have been understood as a (potential) disarmament rule to something compelled by IHL.

Likewise, going beyond disarmament, a number of prominent practitioners have revisited the possibility of a list of military objectives (rather than the standard-like black letter approach). The *Commander's Handbook on the Law of Naval Operations* includes lists of military objectives, as does the *HCPR Manual on International Law Applicable to Air and Missile Warfare* (by way of illustration).¹²⁸ And Yoram Dinstein has asserted that “[t]he present writer believes that only a composite definition—combining an abstract statement with a non-exhaustive catalogue of concrete illustrations—can effectively avoid vagueness, on the one hand, and inability to anticipate future scenarios, on the other.”¹²⁹

There may now also be a trend in favor of an objective approach to IHL (and away from the objective-subjective mix that has hitherto characterized targeting law). One good example is recent thinking on assistance to third states. States are taking a risk-based approach to the question of whether to provide such assistance. The black letter rule is that a state is only responsible for the unlawful acts of a third state if it had knowledge of the relevant unlawful conduct (a more subjective approach).¹³⁰ Thus, in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice found that there was no state responsibility because Serbia lacked knowledge of the intent of

Switzerland), <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2016/meeting-experts-laws/documents/Switzerland-compliance.pdf>. [https://perma.cc/XB7T-G82T] (archived Sept. 21, 2017).

126. See Doherty, *supra* note 125.

127. For instance, when presenting Protocol IV to the CCW to the U.S. Senate, the Executive characterized the prohibition of blinding lasers as consistent with U.S. policy. See Message from the President Transmitting Protocols to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Treaty Doc. 105-1, at 42 (Jan. 7, 1997); cf. Burrus M. Carnahan & Marjorie Robertson, *The Protocol on 'Blinding Laser Weapons': A New Direction for International Humanitarian Law*, 90 AM. J. INT'L L. 484, 485 (1996) (noting that “a diversity of legal opinion can be expected over whether specific weapons violate the unnecessary suffering standard”); *id.* at 486 (noting U.S. legal opinion that blinding lasers may be lawful); *id.* at 490 (asserting that one basis for the Protocol was “the possible postwar social costs and demands they would place on national economies and social services”).

128. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE § 23 (2010).

129. Dinstein, *supra* note 53, at 142.

130. See INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, WITH COMMENTARIES art. 16 (2001).

Bosnian Serb forces.¹³¹ But the Arms Trade Treaty (ATT), for instance, applies a more objective risk analysis. Under Article 7 of the ATT, state parties are required to assess the potential that arms to be exported could be used to commit or facilitate, *inter alia*, a violation of IHL.¹³² If there is an “overriding risk” of the negative consequence, the export shall not proceed. Likewise, the Council of Europe Guide to the Common Position on Exports of Military Technology and Equipment provides that exports shall be denied where “there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.”¹³³ And the ICRC has long urged that exports not be authorized where there is a clear risk that the exported weapons will be used to commit IHL violations.¹³⁴

Another example is the ICRC’s ill-fated effort to “quantify” unnecessary suffering. The gist of this project was to establish objective, medical criteria for qualifying weapons as unlawful.¹³⁵ As the ICRC explicitly put it, the project was a reaction to the fact that “[j]udgements as to whether a specific weapon causes ‘superfluous injury or unnecessary suffering’ have most often been made primarily on the basis of subjective influences.”¹³⁶

Other evidence of this trend is the increasing number of commentators who propose “more objective” tests. For instance, Geoffrey Corn has argued for a sliding scale (based on context,

131. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 2007, Reports of Judgments, Advisory Opinions, and Orders, ¶ 421 (Feb. 26).

132. See Arms Trade Treaty, adopted as G.A. Res. 67/234B, art. 7(1)(b)(i) (Apr. 2, 2013).

133. USER’S GUIDE TO COUNCIL COMMON POSITION 2008/944/CFSP DEFINING COMMON RULES GOVERNING THE CONTROL OF EXPORTS OF MILITARY TECHNOLOGY AND EQUIPMENT, at 39 (2009), <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%209241%202009%20INIT> [hereinafter COE standard] [<https://perma.cc/MBN9-9HQQ>] (archived Sept. 21, 2017). Although the court ultimately dismissed a claim that the UK should not have transferred weapons to Saudi Arabia, the detailed judicial review of the evidence confirms the objective nature of the test. See *R on the application of Campaign Against Arms Trade v. Secretary of State*, [2017] EWHC 1726 (QB) (July 10, 2017), <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/r-oao-campaign-against-arms-trade-v-ssfit-and-others1.pdf> [<https://perma.cc/AD5X-ZE4S>] (archived 25 Oct., 2017).

134. INT’L COMMITTEE OF THE RED CROSS, ARMS TRANSFER DECISIONS: APPLYING INTERNATIONAL HUMANITARIAN LAW CRITERIA 3 (2007), https://www.icrc.org/eng/assets/files/other/icrc_002_0916.pdf. [<https://perma.cc/S7F9-WFFD>] (archived Sept. 21, 2017).

135. INT’L COMMITTEE OF THE RED CROSS, THE SIRUS PROJECT 14 (1997) (“They now propose these criteria as a basis for determining which effects of weapons constitute ‘superfluous injury or unnecessary suffering.’”).

136. Robin M. Coupland & Peter Herby, *Review of the Legality of Weapons: A New Approach: The SIRUS Project*, INT’L REV. OF THE RED CROSS, No. 835 (1999) (“The ICRC considers that the data provided by the SIRUS Project constitute a tool for determining which weapons may be deemed abhorrent.”).

including whether the enemy resembles the traditional uniformed enemy of past international armed conflicts, and modeled on the Fourth Amendment) for the quantum of information a commander should have in deciding to launch an attack.¹³⁷

D. Rules, Objective Tests, and the Desire for Clarity

This Article contends that the desire for objective rules is driven by a fundamental shift in the nature of accountability for compliance with IHL—from courts to the public sphere. While courts continue to play a critical role, the role of civil society has grown by leaps and bounds. As one commentator has simply put it, “NGOs have become much more vigorous critics of ongoing military combat activity.”¹³⁸ Another has said there has been “a remarkable increase in interest, understanding, and analysis of this law. No state, or even non-state group, is immune from the increasingly informed critique of its planning and execution of military operations.”¹³⁹

This subpart explains how increasing non-governmental organization (NGO) and other actor involvement, coupled with a continuing difficulty in obtaining targeting information from states and an increasing uncertainty in the law, is driving public sentiment toward objective rules.

1. Expectations of the International Community

The first premise is that there is increasing pressure to assess whether or not an attack complied with the principle of distinction or was proportionate in real time—or at least not to wait until substantially after the fact. This is much more easily done with a rule than with a standard, and with an objective approach rather than with a subjective approach.

This is in part simply one aspect of a salutary trend of greater civil society involvement on IHL issues.¹⁴⁰ Consider three contemporary conflicts: Syria, Yemen, and Israeli actions in Gaza in 2014. These conflicts have produced an incredible wealth of on-the-ground reporting on the conduct of hostilities. With respect to Syria, there are near-real-time reports on regime strikes from entities like

137. See, e.g., Corn, *supra* note 109, at 479 (suggesting Fourth Amendment analogies and arguing that “[t]he further attenuated the nominated object of attack becomes from a uniformed enemy (or his equipment or facilities), the greater the risk that the decision will result in an erroneous deprivation of life (or property)”).

138. Fenrick, *supra* note 15, at 112.

139. Corn, *supra* note 32, at 419–20.

140. See generally Brian Rappert et al., *The Roles of Civil Society in the Development Standards Around New Weapons and Other Technologies of Warfare*, 94 INT’L REV. OF THE RED CROSS, No. 886 (2012).

the Syrian Observatory for Human Rights and the “white helmets.”¹⁴¹ Likewise, with respect to Yemen, Human Rights Watch has analyzed the targeting of particular attacks¹⁴² and the means (weapons) used.¹⁴³ And with respect to Gaza, there was a stunning amount of public discussion of the particular precautions Israel took and whether or not they were sufficient (e.g., “knocking on the roof”)¹⁴⁴ as well as of the Israeli rules of engagement.¹⁴⁵

But this is not just about NGOs. The UN Human Rights Council has increasingly arrogated to itself a role in adjudicating the lawfulness of the conduct of hostilities. In its early days, some states resisted the notion that the Human Rights Council had the mandate to inquire into potential violations of IHL.¹⁴⁶ But this resistance appears to have significantly abated. For instance, the Commission of Inquiry on Syria had as its original mandate to investigate violations of *international human rights law*. However, it interpreted its mandate to include IHL, once the threshold of armed conflict was reached.¹⁴⁷ Nor did anyone object when the Office of the High Commissioner for Human Rights understood a mandate to

141. For recent examples, see the website of the Syrian Observatory. SYRIAN OBSERVATORY FOR HUM. RTS., <http://www.syriahr.com/en/>. [https://perma.cc/NT54-HC2R] (archived Sept. 21, 2017). The White Helmets were the subject of a recent Netflix documentary. See THE WHITE HELMETS (Netflix 2016).

142. *Yemen: Houthi Artillery Kills Dozens in Aden*, HUM. RTS. WATCH (July 29, 2015), <https://www.hrw.org/news/2015/07/29/yemen-houthi-artillery-kills-dozens-aden> [https://perma.cc/G37U-U8BP] (archived Sept. 21, 2017) (“Pro-Houthi forces have repeatedly fired mortar shells and rockets indiscriminately into populated areas . . .”).

143. *Yemen: Cluster Munitions Wounding Civilians*, HUM. RTS. WATCH (Feb. 14, 2016), <https://www.hrw.org/news/2016/02/14/yemen-cluster-munitions-wounding-civilians> [https://perma.cc/879F-CWFZ] (archived Sept. 21, 2017).

144. William Booth & Ruth Eglash, *Israeli Drones Hunt Hamas as Militants Fire Rockets Deeper into Israel*, WASH. POST (July 9, 2014), https://www.washingtonpost.com/world/israel-steps-up-offensive-against-hamas/2014/07/09/bb366894-074c-11e4-a0dd-f2b22a257353_story.html [https://perma.cc/4TZ8-5GBX] (archived Sept. 21, 2017); William Saletan, *Civilian Deaths in Gaza*, SLATE (July 11, 2014), http://www.slate.com/articles/news_and_politics/frame_game/2014/07/gaza_civilian_casualties_a_closer_look_at_the_death_toll_israel_s_warnings.html [https://perma.cc/38XH-HH47] (archived Sept. 21, 2017).

145. Cf. Emily Harris, *Israeli Soldiers: Lax Rules In Gaza War Led To Indiscriminate Fire*, NPR (May 4, 2015), <http://www.npr.org/sections/parallels/2015/05/04/403110251/israeli-soldiers-lax-rules-in-gaza-war-led-to-indiscriminate-fire> [https://perma.cc/5A8M-G2P4] (archived Sept. 20, 2017).

146. See Rep. of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, at 7–9, UN Doc. A/HRC/4/20 (Jan. 29, 2007) (rejecting assertion by the United States that IHL was outside the scope of the Special Rapporteur’s mandate).

147. Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, at 45–47, UN Doc. A/HRC/21/50 (Aug. 16, 2012).

investigate “alleged serious violations and abuses of human rights and related crimes” in Sri Lanka to cover violations of IHL.¹⁴⁸

The Security Council also increasingly expresses itself on the subject. For instance, in a sequence of resolutions on Syria, the Security Council has “[d]emand[ed] that all parties immediately cease all attacks against civilians, as well as the indiscriminate employment of weapons in populated areas, including shelling and aerial bombardment, such as the use of barrel bombs.”¹⁴⁹ And Security Council-related bodies, such as sanctions panels of experts, do too. The Yemen panel of experts in particular has devoted considerable attention to alleged violations of IHL.¹⁵⁰

In the United States, too, while courts have generally been reluctant to second-guess potential future uses of force,¹⁵¹ and the US government has argued that this reluctance is indeed appropriate,¹⁵² there are robust academic debates about the possibility of some form of *ex ante* review of uses of force. Some have gone so far as to propose a so-called drone court,¹⁵³ and President Obama signaled during his administration that the idea at least warranted study.¹⁵⁴ And in Israel, the Turkel Commission suggested that greater transparency was needed in the conduct of internal investigations into potential IHL violations.¹⁵⁵

148. See Human Rights Council Res., 25/1, at 4 (March 27, 2014); *cf.* Rep. of the OHCHR Investigation on Sri Lanka, at 5, UN Doc. A/HRC/30/CRP.2 (Sept. 16, 2015) (“[T]he investigation report has attempted to identify the patterns of persistent and large scale violations of international human rights and humanitarian law that occurred.”) (emphasis added).

149. S.C. Res. 2139, at 3 (Feb. 22, 2014).

150. See generally Final Rep. of the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140, UN Doc. S/2016/73 (Jan. 26, 2016).

151. See *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 80 (D.D.C. 2014) (dismissing *Bivens* claim based on “special factors”); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 37 (D.D.C. 2010).

152. See also Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141, 148 (2012) (“I agree with Judge Bates of the federal district court in Washington, who ruled in 2010 that the judicial branch of government is simply not equipped to become involved in targeting decisions.”).

153. See Amos N. Guioria & Jeffrey S. Brand, *Establishment of a Drone Court: A Necessary Restraint on Executive Power*, THE LEGITIMACY OF DRONES (forthcoming); *cf.* Alberto R. Gonzales, *Drones: The Power To Kill*, 82 GEO. WASH. L. REV. 1, 46–58 (2013).

154. See Press Release, White House, Remarks of President Barack Obama (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama> [<https://perma.cc/T7PX-BJFQ>] (archived Sept. 20, 2017) (“For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority.”).

155. See The Public Comm’n to Examine the Maritime Incident of 31 May 2010, ISRAEL’S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW, at

Taken together, this amounts to a new level of scrutiny of uses of force, which in turn feeds a public demand for greater information and analysis.¹⁵⁶ This snowballing effect has been compounded by the fact that the UN—and in particular the Special Rapporteurs on Extrajudicial, Summary, or Arbitrary Execution and Counterterrorism—have taken up the call for transparency.¹⁵⁷ It is also affected by the fact that technology facilitates “near instantaneous communication around the world of incidents that raise legal issues.”¹⁵⁸

Second, coupled with this desire for nearer-term assessment of targeting, despite some limited increases in transparency, the fact remains that internal targeting information is often unavailable in real time to outsiders.¹⁵⁹ For instance, NATO does not routinely disclose a full spectrum of targeting data regarding operations in Afghanistan,¹⁶⁰ despite increased transparency with respect to civilian casualties, and the same was true of operations in Libya.¹⁶¹

145–46 (2013), <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf> [https://perma.cc/ND2U-2DT4] (archived Sept. 20, 2017).

156. For a good recent example, consider the debate regarding the U.S. strike of March 16, 2017, which some alleged struck a mosque. The Department of Defense offered one account while human rights organizations offered another. All of this led one prominent commentator to suggest that “Secretary James Mattis and the Department of Defense should now make every effort to get out in front of this issue.” See Ryan Goodman, *Making Sense of the Allegations that U.S. Military Struck a Mosque in Syria*, JUST SECURITY (Apr. 21, 2017), <https://www.justsecurity.org/40185/making-sense-allegations-u-s-military-struck-mosque-syria/> [https://perma.cc/7HYN-RT4Z] (archived Oct. 25, 2017).

157. See Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/68/389, ¶ 45 (Sept. 18, 2013) (“[T]he principle of transparency should apply to the preliminary factfinding inquiries required in any case where there are grounds to believe that civilians may have been killed or injured. Subject to redactions on grounds of national security, a full explanation should be made public in each case. In the view of the Special Rapporteur, this obligation ought to be viewed as an inherent part of the State’s legal obligations of accountability under international humanitarian law and international human rights law.”); Rep. of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, UN Doc. A/68/382, ¶ 98 (Sept. 13, 2013) (“The various components of transparency require that the criteria for targeting and the authority that approves killings be known and that drone operations be placed in institutions that are able to disclose to the public the methods and findings of their intelligence, criteria used in selection of targets and precautions incorporated in such criteria.”).

158. Jensen, *supra* note 92, Foreword at vii.

159. See generally *id.* at 62 (“Much of the information about the targeting process is available only within the military and is kept secret from the outside world.”). I take no view on how best to strike this balance, recognizing both the importance of informed public debate and the need to keep military secrets.

160. Cf. Bill Roggio & Patrick Megahan, *ISAF launches 2 raids targeting al Qaeda-linked commanders*, THE LONG WAR J. (Dec. 5, 2012), http://www.longwarjournal.org/archives/2012/12/isaf_launches_two_se.php [https://perma.cc/RE3X-MTGC] (archived Sept. 20, 2017).

161. See Letter from Peter Olson, NATO Legal Adviser, to Judge Kirsch, Chair, International Commission of Inquiry on Syria, at 8 (Jan. 23, 2012) (“[s]ome of the

To give one salient recent example, the United States recently released a summary of civilian casualties outside areas of active hostilities from January 2009 through 2015,¹⁶² and an Obama Administration Executive Order requires such reporting on an ongoing basis;¹⁶³ but the reporting has been criticized as insufficient to permit a strike-by-strike public analysis.¹⁶⁴

As this Article has sought to explain, in order to determine whether an unlawful attack occurred it is not a question of the “body count,” but rather a question that turns (albeit not exclusively) on what the attacker knew and sought to do.¹⁶⁵ Yet what outsiders can generally see are the *effects* of attacks. And, indeed, NGO reports generally are predicated upon witness interviews on the ground.¹⁶⁶ While this is powerful and relevant data, it may not be sufficient for purposes of analyzing the attacker’s intent. One of the more controversial episodes that illuminates this difficulty was the Goldstone report on Israel’s Operation Cast Lead in Gaza in 2009.¹⁶⁷

specific information sought by the Commission cannot be made public. Video footage in particular is the property of the individual Nations . . .”); *see also id.* at 5 (“Please note that it is longstanding NATO policy not to provide information as to which Nation may have conducted a particular military action . . .”).

162. See Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities, <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF> [<https://perma.cc/V9UH-TW6S>] (archived Sept. 20, 2017).

163. See Exec. Order No. 13732, 81 Fed. Reg. 44,483 (2016).

164. See Sarah Knuckey, *The Good and the Bad in the U.S. Government’s Civilian Casualties Announcement*, JUST SECURITY (July 2, 2016), <https://www.justsecurity.org/31785/good-bad-governments-civilian-casualties-announcement> [<https://perma.cc/HK5J-ZMUZ>] (archived Sept. 20, 2017) (“Individualized, case-specific information is not provided at all, even in redacted form to take into account security, intelligence-gathering, and confidentiality concerns. It is this kind of case specific information that is necessary to answer the many specific allegations of civilian harm put forward by victims and NGOs.”).

165. See DINSTEIN, *supra* note 9, at 127; *cf.* Benjamin Wittes & Yishai Schwartz, *What to Make of the UN’s Special Commission Report on Gaza?*, LAWFARE (June 24, 2015), <https://www.lawfareblog.com/what-make-uns-special-commission-report-gaza> [<https://perma.cc/RD6Y-4B7B>] (archived Sept. 20, 2017) (“It is impossible rigorously to analyze whether a given strike or set of strikes complies with IHL without a detailed investigation of what the operators and commanders in the moment knew and why they decided to act as they did. It is always tempting to look at large numbers of dead civilians and assume that the fact of the bodies implicates a targeting decision. But that’s rarely right. Without knowing who the target was, what calculations as to civilian deaths commanders made, and what the expected military advantage of the strike was, a rigorous investigation simply can’t be done.”).

166. See, e.g., *Nowhere Safe for Civilians: Airstrikes and Ground Attacks in Yemen*, AMNESTY INT’L (Aug. 2015); *Syria: Indiscriminate Attacks Ongoing Despite “Cessation of Hostilities,”* HUM. RTS. WATCH (Apr. 12, 2016), <https://www.hrw.org/news/2016/04/12/syria-indiscriminate-attacks-ongoing-despite-cessation-hostilities> [<https://perma.cc/4WU9-NY7S>] (archived Sept. 21, 2017).

167. Another interesting episode identified by one commentator is the Eritrea-Ethiopia Claims Commission’s assessment of Ethiopian air strikes on a reservoir, regarding which she said that there can be “practical problem[s] of establishing the

Two years after publication of the report, Justice Richard Goldstone wrote in the *Washington Post* that, had he known at the time of the report what he knew in 2011, “the Goldstone Report would have been a different document.”¹⁶⁸ He went on explicitly to say that “[t]he allegations of intentionality [in terms of targeting civilians] by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion.”¹⁶⁹ Goldstone’s statement that his report would have differed had he to do it over again was based on the fact that over the several years after its publication, Israel made public additional information about some of the incidents described in the report.¹⁷⁰ Too often, observation of effects leads to a conclusion that the target was not a military objective (because the result was the death of civilians) or that an attack was disproportionate (because, as Yoram Dinstein has put it, “[m]any confuse excessive with extensive”).¹⁷¹ These difficulties are compounded when it comes to proportionality analysis, which requires measuring human life against a (not wholly objective) assessment of military advantage that is likely very hard for an outside observer to quantify.¹⁷² The result is that in many cases, witness interviews and examination of the effects of attack are used to create a presumption of illegality that only additional transparency—often not forthcoming—might rebut.¹⁷³

information on which the decision to attack is taken.” See JACHEC-NEALE, *supra* note 35, at 71.

168. See Richard Goldstone, *Reconsidering the Goldstone Report on Israel and war crimes*, WASH. POST (April 1, 2011), https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html?utm_term=.f791b51a3416 [https://perma.cc/8UYB-Z29B] (archived Sept. 21, 2017); see also Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, at 404–420 (Sept. 25, 2009) (concluding that Israel had deliberately targeted civilians), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [https://perma.cc/566G-5WBE] (archived Sept. 21, 2017).

169. See Goldstone, *supra* note 168.

170. See *id.* (noting that a subsequent report found that “Israel has dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza”).

171. MICHAEL NEWTON & LARRY MAY, *PROPORTIONALITY IN INTERNATIONAL LAW* 164 (2013) (citing Dinstein).

172. See *id.* at 23 (“[I]t seems to be rare indeed that such calculations will be ‘clear’ in the sense that they are beyond controversy, and in a criminal law setting ‘beyond a reasonable doubt.’”).

173. See Laurie R. Blank, *The UN Gaza Report: Heads I Win, Tails You Lose*, *LAWFARE* (June 29, 2015), <https://www.lawfareblog.com/un-gaza-report-heads-i-win-tails-you-lose> [https://perma.cc/ZRJ7-7J35] (archived Sept. 21, 2017). And, indeed, a Human Rights Council Commission of Inquiry on Gaza said the following about its conclusion that attacks had been directed against civilians: “[i]n many of the cases examined by the commission, as well as in incidents reported by local and international organizations, there is little or no information as to how residential buildings, which are *prima facie* civilian objects immune from attack, came to be regarded as legitimate military objectives.” See Independent Comm’n of Inquiry on the 2014 Gaza Conflict, UN Doc. A/HRC/29/CRP.4, ¶ 215 (June 24, 2015) [hereinafter *Gaza COI*].

Taken together, this increasing scrutiny of the conduct of hostilities and the outside world's still-limited ability to perform the requisite analyses in the traditional way is pushing the public discourse toward changing standards to rules, and the objective-subjective mix to an objective one, that is, by trying to identify *kinds* of attacks that, even without access to targeting information, but on the basis of their extrinsically discernable characteristics, can safely be labelled unlawful.

2. Uncertainty in the Law

The second issue—in some ways the corollary to the first, which has to do with trying to make external judgments in the face of factual uncertainty—is that there is uncertainty in the law with respect to exactly how to determine whether individuals or objects are or were civilian. This makes case-by-case scrutiny—a feature of standards—increasingly difficult, even where the relevant information is known.

Some question whether membership in an organized armed group is sufficient¹⁷⁴ to make an individual a lawful target or whether one has to perform a certain function. Even if membership is considered sufficient, there are additional questions about how to determine whether an individual is indeed a member of an organized armed group. For instance, the United States has taken the view that the test of whether an individual is a member of an armed group may be functional, in addition to formal.¹⁷⁵ (In an international armed conflict, the test would be predominantly formal, having to do with whether an individual is a member of the enemy's armed forces.)

174. See *Will I Be Next: U.S. Drones Strikes in Pakistan*, AMNESTY INT'L, at 45–46 (Oct. 2013) (“Membership in an armed group alone is not a sufficient basis to directly target an individual.”), <http://www.amnestyusa.org/sites/default/files/asa330132013en.pdf> [<https://perma.cc/H8FX-6P5V>] (archived Sept. 21, 2017); *Between a Drone and Al Qaeda: The Civilian Cost of U.S. Targeted Killing in Yemen*, HUM. RTS. WATCH, at 84 (Oct. 2013) (“Combatants include members of armed groups who are directly participating in hostilities.”), https://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload.pdf [<https://perma.cc/25WG-8DRG>] (archived Sept. 21, 2017); cf. INT'L COMMITTEE OF THE RED CROSS, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, at 33 (May, 2009) [hereinafter ICRC INTERPRETATIVE GUIDANCE] (“[M]embership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”).

175. See *generally* *Hamlily v. Obama*, 616 F. Supp. 2d. 63, 75 (D.D.C. 2009) (“But this Court will, by necessity, employ an approach that is more functional than formal, as there are no settled criteria for determining who is a “part of” an organization such as al Qaeda.”).

Likewise, there are differences of view regarding whether certain preparatory activities constitute direct participation in hostilities.¹⁷⁶

Similarly, with respect to military objectives, there is dispute regarding whether objectives involved in “war sustaining” should be considered targetable.¹⁷⁷ One recent example is the targeting of ISIL oil facilities.¹⁷⁸ State Department Legal Adviser Brian Egan said, “[T]he United States has interpreted this definition to include objects that make an effective contribution to the enemy’s war-fighting or war-sustaining capabilities.”¹⁷⁹ But as one commentator has put it, “Does the fact that some of the proceeds of a particular industry or operation contribute to the war effort mean that the operation itself is a ‘military objective’ and thus a legitimate target?”¹⁸⁰ More generally, as Eric Jensen stated, there is “increased difficulty in applying the core principles of targeting to a terrorist conflict.”¹⁸¹

Finally, there are disputes not only about the principle of distinction, but also about the application of the principle of proportionality. For instance, some have sought to argue for a “least restrictive means” test, that is that capture must be attempted before killing.¹⁸² Likewise, there are questions about how remote civilian

176. Compare Michael N. Schmitt & Eric W. Widman, ‘On Target’: Precision and Balance in the Contemporary Law of Targeting, 7 J. OF NAT’L SEC. & POL’Y 379, 388 (2014) (“Additionally, civilians who directly support engagement, like those providing early warning for an impending ambush or transporting fighters to and from an attack, are also direct participants”), with ICRC INTERPRETATIVE GUIDANCE, *supra* note 174, at 53 (“[I]ndividual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities.”), and Schmitt, *supra* note 37, at 251.

177. See Schmitt & Widman, *supra* note 176, at 394 (“[C]ontroversy surrounds whether so-called ‘war-sustaining’ objects are lawful military objectives.”).

178. Marty Lederman, *Is it Legal to Target ISIL’s Oil Facilities and Cash Stockpiles?*, JUST SECURITY (May 27, 2016), <https://www.justsecurity.org/31281/legality-striking-isils-oil-facilities-cash-stockpiles/#more-31281> [<https://perma.cc/BT6A-8SSA>] (archived Sept. 21, 2017); Kenneth Watkin, *Sustaining the War Effort: Targeting Islamic State Oil Facilities*, JUST SECURITY (Oct. 3, 2014), <https://www.justsecurity.org/15890/sustaining-war-effort-targeting-islamic-state-oil-facilities/> [<https://perma.cc/ZA99-55GX>] (archived Sept. 21, 2017). Another recent controversial example has been alleged targeting of Taliban ‘war sustaining’ drug facilities.

179. Brian J. Egan, *International Law, Legal Diplomacy, and the Counter ISIL Campaign, Remarks*, 92 INT’L L. STUD. 235, 242 (2016) (*emphasis added*), <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1668&context=ils> [<https://perma.cc/947P-FATX>] (archived Sept. 21, 2017).

180. Lederman, *supra* note 178. For an excellent discussion of this, see Ryan Goodman, *Targeting ‘War Sustaining’ Objects in Non-International Armed Conflict*, 110 AM. J. OF INT’L LAW (forthcoming); see also University Center for International Law (Geneva), Report, Expert Meeting on ‘Targeting Military Objectives’ 3–7 (2015), <https://www.scribd.com/document/99787937/REPORT-EXPERT-MEETING-TARGETING-MILITARY-OBJECTIVES> [<https://perma.cc/C6CA-MFUX>] (archived Oct. 12, 2017) (subscription required) [hereinafter *Geneva Expert Report*].

181. Jensen, *supra* note 92, at 37.

182. Cf. NEWTON & MAY, *supra* note 171, at 152.

harm must be before it can be excluded from the proportionality calculus. For instance, should explosive remnants of war and their effect on the civilian population be included in the proportionality analysis?¹⁸³ Further, questions about the qualification of an object as a military objective may also raise proportionality complications, such as how to count other floors of a house if only one floor is used by belligerents as a command center.¹⁸⁴ And, finally, there may be an emerging question about whether or not the civilian value of a dual-use object should be counted in the proportionality equation.¹⁸⁵

These kinds of uncertainties in the law make the application of a standard-like approach ever more difficult. If the legal relevance of particular facts is contested, an argument might go, why not try to lay down some clear, general parameters that could be applied objectively; otherwise there may be no way to agree on the legality of a wide variety of practices.

III. CASE STUDY: INDISCRIMINATE ATTACKS

A. *Indiscriminate Attacks in the Modern IHL Lexicon*

Perhaps the leading edge of the effort to redefine IHL in rule-like, objective ways is the increasing use of the word “indiscriminate.” Consider in particular its use in the context of Syria. The International Syria Support Group statement of November 14, 2015 “reaffirmed the devastating effects of the use of indiscriminate weapons on the civilian population,” citing Security Council resolution 2139.¹⁸⁶ Except Security Council resolution 2139—although somewhat ambiguous—did not actually condemn

183. See *Geneva Expert Report*, *supra* note 180, at 49–50; cf. Responses to Document CCW/GGE/X/WG.1/WP.2 Entitled IHL and ERW, Dated 8 March 2005, Response of Sweden, UN Doc. CCW/GGE/XI/WG.1/WP.8 (July 29, 2005) (“Sweden shares the opinion of the ICRC that it remains to be determined if the long-term effects of ERW following an attack must be taken into consideration while applying the principle of proportionality.”); *ICRC Q&A on the Issue of Explosive Weapons in Populated Areas*, 98(1) INT’L REV. OF THE RED CROSS 97, 103 (2016) (“[T]he ICRC considers that those reverberating effects which are foreseeable in the circumstances must be taken into account.”) [hereinafter *ICRC Q&A*]; Robinson & Nohle, *supra* note 91, at 109 (“[T]here is still no consensus on the scope of this obligation [to take account of reverberating effects] as it applies to the rules on proportionality and precautions in attack.”). *But see* DOD LAW OF WAR MANUAL, *supra* note 11, at 244 & n.308.

184. Noam Lubell, *Current Challenges with Regard to the Notion of Military Objective -- Legal and Operational Perspectives*, in CONDUCT OF HOSTILITIES, *supra* note 33, at 79, 84.

185. See Lederman, *supra* note 178.

186. Statement of the International Syria Support Group Vienna, UN Department of Political Affairs (14 November 2015), <http://www.un.org/undpa/en/Speeches-statements/14112015/syria> [<https://perma.cc/3N9Z-MRYC>] (archived Nov. 8, 2017).

“indiscriminate weapons” but rather the indiscriminate *employment* of weapons in populated areas.¹⁸⁷ So which was it that was meant? Was it that the Assad regime was using weapons that were incapable of being directed or limited in their effects? Or was it that the regime was using weapons in an unlawful way, for instance by firing them without regard to target? Likewise, evincing the same confusion, when a group of states wrote to the President of the Security Council in June 2016, they referred both to barrel bombs as “such indiscriminate aerial weapons,” but also to the indiscriminate *use* of weapons.¹⁸⁸ Finally, the Human Rights Council Commission of Inquiry (COI) has stated that the Assad regime has violated the prohibition on indiscriminate attacks because it has treated a number of military objectives located within a concentration of civilians as a single objective. On this account, the COI is using the word “indiscriminate” to describe a practice specifically prohibited by Additional Protocol I.¹⁸⁹ At the same time, however, the COI has judged that barrel bombs are inherently indiscriminate—i.e., can never be used lawfully, regardless of targeting.¹⁹⁰ Again, there is confusion between judgements regarding weapons *vel non* and analysis of particular attacks.

The Syria COI really seems to mean to say something along the following lines: the *kinds* of attacks the Assad regime is orchestrating are, under the *general* set of circumstances in which they are being conducted, unlawful. So, the COI characterizes the behavior of the regime as indiscriminate because, “[d]espite their proven ability to conduct information-led and precise attacks on military objectives, they have continued to target these areas with imprecise and unguided ammunition.”¹⁹¹ To put it more precisely, the COI and others appear to be asserting an objective rule akin to the following:

187. See S.C. Res. 2139, ¶ 3 (Feb. 22, 2014) (demanding “that all parties immediately cease all attacks against civilians, as well as the indiscriminate employment of weapons in populated areas, including shelling and aerial bombardment, such as the use of barrel bombs”).

188. See Letter from the Permanent Representatives of Belgium, Luxembourg, and the Netherlands, to the United Nations the President of the Security Council, *supra* note 2, at 2.

189. Additional Protocol I, *supra* note 8, art. 51(5)(a). Note that this reference to Additional Protocol I is for illustrative purposes as in a non-international armed conflict it would not apply by its terms.

190. Statement by Mr. Paulo Sergio Pinheiro, Chair of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic (Mar. 2015), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/CoISyriaIndiscriminateBombardment12032015.pdf> [https://perma.cc/7YJ4-WZUR] (archived Sept. 21, 2017) [hereinafter Pinheiro Statement].

191. *Id.* at 1. This could also be a violation of their precautions obligations. *Cf.* Additional Protocol I, *supra* note 8, art. 57(2)(a)(ii). While beyond the scope of this Article, it may be that a further element of the confusion this Article describes is an effort to recast precautions violations as indiscriminate attacks.

“dropping barrel bombs from helicopters over civilian-populated areas is unlawful.”

The Syria COI is not the only entity to appear to wish to use the word “indiscriminate” to describe the use of particular weapons in particular kinds of circumstances, without regard to analysis of the attacker’s intention or subjective appreciation of facts.¹⁹² In Yemen, for instance, the United Nations and civil-society organizations have suggested that both Houthi and anti-Houthi forces have engaged in indiscriminate attacks by using heavy explosives in and around residential areas.¹⁹³ This same sentiment has animated reporting on Gaza. The Human Rights Council COI has said:

192. Human Rights Watch, for instance, has labeled certain weapons “indiscriminate when used in populated areas – such as rockets, heavy artillery, fuel-air explosives and, increasingly, improvised barrel bombs.” See *‘He Didn’t Have to Die’: Indiscriminate Attacks by Opposition Groups in Syria*, HUM. RTS. WATCH (Mar. 22, 2015), <https://www.hrw.org/report/2015/03/22/he-didnt-have-die/indiscriminate-attacks-opposition-groups-syria> [<https://perma.cc/WC7P-LSCS>] (archived Sept. 21, 2017).

193. For instance, the UN Security Council’s panel of experts on Yemen concluded that “all parties to the conflict in Yemen have violated the principles of distinction, proportionality and precaution, including through their *use of heavy explosive weapons in, on and around residential areas* and civilian objects, in contravention of international humanitarian law.” See Final Report of the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014), UN Doc. S/2016/73, at 36 (Jan. 26, 2016); see also *id.* at 37 (suggesting unlawful activity by virtue of “use of Katyusha rockets in and around civilian areas and objects in Ta’izz”). Amnesty International and other NGOs have made similar points. See, e.g., *‘Nowhere Safe for Civilians,’ supra* note 166, at 6 (“In the southern region of the country, Huthi and anti-Huthi armed groups battling for control of Yemen’s second and third largest cities, Aden and Ta’iz, and surrounding areas have routinely launched attacks *into densely populated residential neighbourhoods, using imprecise weapons* which cannot be aimed at specific targets and which should never be used in residential areas, killing and maiming scores of civilians.”) (emphasis added); *id.* at 10 (“Parties must choose appropriate means and methods of attack when military targets are located within residential areas. This requirement rules out the use of certain types of weapons and tactics. The use of means of combat that cannot be directed at a specific military objective – such as using imprecise explosive weapons on targets located in densely populated civilian areas – may result in indiscriminate attacks and is prohibited.”); *id.* at 21 (discussing use of Grad rockets); see also *Blind Air Strikes: Civilian victims of Saudi-led coalition’ air strikes in Yemen*, MWATANA ORGANIZATION FOR HUMAN RIGHTS, at 11 (Dec. 2015), <http://www.mwatana.org/sites/default/files/pdf/Blind%20Airstrikes%20Report.pdf> [<https://perma.cc/PXW3-MU9P>] (archived Sept. 21, 2017) (“[I]ts [sic] prohibited to use methods and means of combat that are difficult to direct at a specific military objective and that could lead to indiscriminate attacks (such as unguided bombs that are dropped on targets located in densely populated civilian areas).”). In their most recent report, the Yemen Panel of Experts again conflated the question of the legality of weapons *per se* and their particular use, asserting that “[g]iven that the final impact locations of the missiles and free-flight rockets cannot be accurately predicted owing to the inherent inaccuracy of these weapon systems, it is not possible for the users to adequately distinguish between civilians and military objectives, *making them indiscriminate by nature*, which is a violation of international humanitarian law. In this connection, the Panel considers the use by the Houthi-Saleh alliance of these weapon systems in *attacks on civilian-populated areas* to be a violation of international

In relation to the use of the GBU-32/MK-82, 1000lb bomb or the GBU-31/MK-84, 2000lb bomb, . . . regardless how precise the bomb is, it remains extremely questionable whether a weapon with such a wide impact area allows its operators to adequately distinguish between civilians and civilian objects and the military objective of the attack, when used in densely populated areas. Attacks, which used this type of weapon in densely populated, built up areas of Gaza, are therefore likely to constitute a violation of the prohibition of indiscriminate attacks.¹⁹⁴

Human Rights Watch has likewise criticized the use of particular weapons in particular circumstances.¹⁹⁵ And this is true outside of these three conflicts, too.¹⁹⁶

The next two subparts explore why the term “indiscriminate” has become such a touchstone and show that the history of the debate regarding the prohibition of indiscriminate attacks is consistent with this Article’s broader account of the efforts to shift toward objective rules.

B. *Indiscriminate Attacks and Contemporary Armed Conflict*

Attacks are increasingly being characterized as indiscriminate both because that term suits the kinds of conflicts (non-international, with force often used in populated areas) and kinds of attacks (often by air or artillery) that are increasingly prevalent and because it is conceptually simpler than suggesting that an attack either was intentionally directed at civilians or was disproportionate. This subpart further elucidates these reasons.

First, the last few years have seen a proliferation of conflicts between states and armed non-state actors—beyond the US conflict against Al Qaeda, which has long been a focus—ranging from the Multinational Joint Task Force against Boko Haram to the Syrian

humanitarian law.” See Final Report of the Panel of Experts on Yemen, UN Doc. S/2017/81, ¶ 85 (Jan. 31, 2017) (emphasis added).

194. *Gaza COI*, *supra* note 173, ¶ 226; see also *id.* ¶ 388 (“Mortars are considered a wide-area weapon which, if used in a built-up, densely populated area, are likely to strike military objectives and civilians without distinction – particularly given a scenario in which over 50 per cent of the 120 mm mortar shells fired are likely to fall between 136 and 300 metres from the intended target. Combined with the impact of the blast and fragmentation of the shell, this type of weapon is likely to injure or kill persons several hundred meters from the intended target.”).

195. See *Israel: In-Depth Look at Gaza School Attacks*, HUM. RTS WATCH (Sept. 11, 2014), <https://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks> [<https://perma.cc/354Y-M35A>] (archived Sept. 21, 2017) (“The use of high explosive heavy artillery in a populated residential area, such as around the Jabalya school, is unlawful due to the weapon’s indiscriminate effect. High explosive 155mm artillery shells have an error radius of 25 meters. In addition, the weapon inflicts blast and fragmentation damage up to 300 meters from the site of impact.”).

196. See, e.g., 1 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA ¶ 29 (Sept. 2009) (“[D]uring the Georgian offensive on Tskhinvali cluster munitions on whatever scale and GRAD MLRS were both used, amounting to indiscriminate attacks by Georgian forces, owing to the uncontrollable effects of such weaponry and its use in a populated area.”).

regime against various non-state actors and the Saudi-led Coalition against the Houthis in Yemen, to name a few. These conflicts have been characterized by the use of air power in civilian-populated areas, and the result has been significant civilian casualties. And these conflicts have been heavily scrutinized, with considerable pressure to evaluate particular attacks. The term “indiscriminate attack” has been the simplest way to characterize attacks for much the same reason that courts have generally not prosecuted the crime of disproportionate attacks.¹⁹⁷

Second, the prohibition of indiscriminate attacks straddles the principles of distinction and proportionality.¹⁹⁸ But it requires neither that one assert that an attack was intentionally targeted at civilians (potentially difficult in the absence of targeting information) nor that it was disproportionate (a characterization that some disfavor because it essentially assumes that the attack was directed at a

197. Cf. Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 86–87 (2013).

198. The principle of proportionality is, at least in Additional Protocol I, treated as a subset of the prohibition of indiscriminate attacks. Cf. Additional Protocol I, *supra* note 8, at art. 51(5)(b). At the same time, it is not obvious why a disproportionate attack – an attack directed against a belligerent or military objective but with unacceptable collateral damage – would fall under the strict terms of Article 51(4). (Indeed, the ICRC treats the rules prohibiting indiscriminate and disproportionate attacks as distinct in their customary international law study.) The International Court of Justice, on the other hand, has suggested that the prohibition of indiscriminate attacks flows from the principle of distinction. Cf. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Reports, 226, 257 (Jul. 8) (“States must never make civilians the object of attack and *must consequently* never use weapons that are incapable of distinguishing between civilian and military targets.”) (emphasis added). Such a view has a certain appeal, since an attack that is not directed at a military objective does indeed violate the principle of distinction; but that approach would not account for the persistent desire, manifested in regulations that have been adopted to cover the use of particular weapons in particular circumstances, and reflected in the choice of the word “means of combat,” to generalize, and not only to analyze each attack on its facts. See DINSTEIN, *supra* note 9, at 68 (“[E]xperience shows that some situations are fraught with special danger to civilians. In order to eliminate or reduce that danger, LOAC may impose restrictions”); see, e.g., *id.* at 128 (discussing conducting bombing raids at night when visibility is impaired). Moreover, that approach would be hard to square with the desire to criminalize indiscriminate attacks separate and apart from the criminalization of attacks against civilians, presumably to account for those cases where it may not be possible to assert that the commander affirmatively intended to target civilians. Cf. KNUT DORMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY* 130–31 (2003) (discussing under Article 8(2)(b)(i) of the Rome Statute the requirement that the attack be intentionally directed against civilians). *But see id.* at 131–32 (suggesting that Article 8(2)(b)(i) should also be understood as covering attacks not directed at all). Finally, as William Boothby has trenchantly noted, on its face, the question of “[w]hether an attack was purposively directed at a civilian . . . is an issue that is distinct from the discriminating, or otherwise, nature of the attack.” WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 65 (2012).

lawful target but that collateral damage was excessive). It therefore is conceptually attractive.¹⁹⁹

Third, new means and methods of warfare are being used—and some that have not been used for many years are reappearing—for which the term “indiscriminate” appears especially appropriate. In the case of many of these, that is because the principles of distinction (in the form of the prohibition of directing attacks against civilians) and proportionality are unclear or hard to apply.

Consider, for instance, sieges. The Assad regime has used sieges.²⁰⁰ And in Yemen, Houthis have besieged the city of Aden.²⁰¹ While the law of sieges²⁰² has evolved considerably since World War II, sieges remain potentially lawful.²⁰³ But how does one think about a siege of a town that is held by belligerents but that also includes a large civilian population? One can imagine difficulties in making the case that the intention of the attacker is to starve the civilian population, which is the specific act criminalized by the Rome Statute.²⁰⁴ What if the attacker claims that despite the devastating effect on civilians, the objective is in fact the surrender of the belligerents in the town? Would such a siege be considered disproportionate even if not “directed against” civilians? There is very little in the way of law on the question of how to assess the proportionality of a siege. Moreover, the black letter provisions on proportionality are ill-suited to assessing sieges. One can imagine a commander making the case that forcing the opposing party to surrender a key town would be a significant military advantage. Nor does the analogous law of blockade solve this problem. Under blockade law, when starvation is a result (if not the intent), the obligation to provide free passage for foodstuffs is triggered.²⁰⁵ There

199. The other emergent area is violations of the obligation to take feasible precautions.

200. See for instance the Siege Watch reports published by PAX, <https://www.paxforpeace.nl/publications> [<https://perma.cc/G3JK-7A6E>] (archived Sept. 21, 2017).

201. See Ghaith Abdul Ahad, *Life Under Siege: Inside Taiz, the Yemeni City Being Slowly Strangled*, *GUARDIAN* (Dec. 28, 2015), <https://www.theguardian.com/world/2015/dec/28/life-under-siege-inside-taiz-yemen-houthi> [<https://perma.cc/AP2C-Q6B6>] (archived Sept. 21, 2017).

202. For a useful analysis of the evolution of siege warfare law, see Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 *VA. J. INT'L L.* 353 (1999); see also Beth Van Schaack, *Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime*, *JUST SECURITY* (Feb. 4, 2016), <https://www.justsecurity.org/29157/siege-warfare-starvation-civilians-war-crime> [<https://perma.cc/Q44N-3YS6>] (archived Sept. 21, 2017).

203. Michael Schmitt notes that “the prohibition of starvation does not ban lawful methods of warfare – such as siege warfare . . . that have a military purpose, but which incidentally cause the civilian population to be deprived” Schmitt, *supra* note 37, at 267.

204. See Rome Statute art. 8(2)(b)(xxv).

205. *SAN REMO MANUAL*, *supra* note 88, at 180.

is no comparable provision in Additional Protocol I (or in custom applicable to non-international armed conflicts – at least not that has been broadly accepted by states to date).²⁰⁶ So if there are difficulties in proving that horrifying sieges constitute the intentional starvation of civilians (what if for instance they reflected a callous indifference to civilian suffering?), and if the proportionality calculus might be difficult, should particular kinds of sieges—e.g., those that affect a significant civilian population, coupled with obstruction to humanitarian access—instead be called indiscriminate?

Likewise, consider cyber warfare. As with sieges, target determination may be a difficult exercise (again, consider how many networks are likely to be dual-use and the possibility that this might mean—at the extreme—that almost the entirety of the internet could be targetable under a classical approach to targeting).²⁰⁷ Moreover, a cyber-attack may cause both a range of direct (expected) and indirect effects.²⁰⁸ Some of these indirect effects may be quite attenuated.

Consider, for instance, how difficult it might be to anticipate the exact consequences²⁰⁹ of a cyber-attack on a dual-use network²¹⁰ that is classified as a military objective in light of the use to which it is put by military actors. Moreover, even assuming the consequences of a cyber-attack were precisely knowable, as with sieges there are difficulties in applying the standard proportionality equation. Thus, for instance, some authors have posed the excellent question: “How should the temporary incapacity of critical systems be evaluated?”²¹¹ What kinds of harm rising above the level of mere inconvenience but below the threshold of bodily injury or death should be counted? With respect to damage to civilian objects, do disruptions in functionality count?²¹² So, like sieges, certain forms of cyber warfare appear susceptible to an “indiscriminate” critique.

206. Cf. Additional Protocol I art. 70(1), *supra* note 8; Dapo Akanda & Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, 92 INT’L L. STUD. 483, 489 (2016). Some argue that IHL requires that consent not be arbitrarily withheld for relief supplies. *See generally id.* at 489–92.

207. Cf. Eric Talbot Jensen, *Cyber Warfare and Precautions Against the Effects of Attacks*, 88 TEX. L. REV. 1533, 1542–43 (2010).

208. *See* Cordula Droege, *Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and Protection of Civilians*, 94 INT’L REV. OF THE RED CROSS 533, 572–73 (2012); Eric Talbot Jensen, *Cyber Attacks: Proportionality and Precautions in Attacks*, 89 INT’L L. STUD. 198, 207 (2013).

209. *See* Oona Hathaway et al., *The Law of Cyber-Attack*, 100 CAL. L. REV. 817, 851 (2012) (“An ex ante in bello proportionality analysis for a DDOS attack may therefore carry a much greater degree of uncertainty than would a conventional attack.”).

210. *See* Droege, *supra* note 208, at 539, 541.

211. Hathaway et al., *supra* note 209, at 851.

212. Cf. Jensen, *supra* note 208, at 207 (arguing that the functionality approach “seems to be the best application of the proportionality rule to the cyber

Finally, the increasing pace of technological development has raised expectations regarding the conduct of hostilities, and those attacks that do not fit the image of a precise and modern military are increasingly being characterized as indiscriminate.²¹³ Indeed, as the *HPCR Manual on International Law Applicable to Air and Missile Warfare* commentary notes,

The assessment of what “cannot be directed” [i.e., is indiscriminate] may change over time with advances in technology. In other words: technological developments, and the wider availability of systems with increased precision, may shift general understandings as to when a weapon is incapable of being directed. In particular, improvements in the accuracy of weapons may heighten expectations of the general public as to precision.²¹⁴

This confluence of factors helps to explain why the term “indiscriminate” is being so often used.

C. *The History of the Prohibition of Indiscriminate Attacks*

1. Indiscriminate Attacks Before and During the Negotiation of Additional Protocol I

This subpart explores the structure and history of the prohibition of indiscriminate attacks and describes how it fits the narrative this Article outlines. The prohibition itself (at least on the black letter account) has elements that are both rule-like and standard-like. It is rule-like insofar as it precludes the use of particular weapons. It is standard-like insofar as it incorporates the principle of proportionality.

Perhaps more interestingly, the negotiation of this prohibition clearly reflects the objective-subjective debate. The proposal for a prohibition on indiscriminate attacks presented by the ICRC to the second session of the Conference of Government Experts discussed “[a]ttacks which, *by their nature*, are launched against civilians and military objectives indiscriminately.”²¹⁵ During the debate in

realm” and against including merely “effects on civilians that have caused inconvenience”).

213. See Eric Talbot Jensen, *Shelling in Urban Area: When Does Imprecision Become Indiscriminate?*, Proceedings of the 16th Bruges Colloquium: Urban Warfare 129, 136 (2015), <https://ssrn.com/abstract=2883536> [<https://perma.cc/7272-S7MZ>] (archived Sept. 21, 2017).

214. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 64 (2010), http://assets.cambridge.org/97811070/34198/frontmatter/9781107034198_frontmatter.pdf [<https://perma.cc/KL9D-QEWL>] (archived Oct. 25, 2017).

215. INT’L COMMITTEE OF THE RED CROSS, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Second Session), *Report on the Work of the Conference*, at Art. 45 ¶ 3, Vol. 2, Annexes, (1972) (emphasis added) [hereinafter *ICRC Annexes*].

Commission III at the second session, experts acknowledged that this provision did not focus only on the commander's intent (because of the phrase "by their nature").²¹⁶ And, indeed, the United States, along with Belgium, Canada, West Germany, and the United Kingdom, proposed to reformulate what was then Article 45(3) as "[a]ttacks which are *intentionally* launched indiscriminately against civilians and military objectives shall be prohibited."²¹⁷ The United States also offered an explanatory statement that "indiscriminate attacks" should be understood as "*those attacks* which have no specific military objective,"²¹⁸ focusing on the attacker by referring specifically to the objective of the attack, as opposed to its nature.

In its draft presented to the Diplomatic Conference, ICRC proposed to forbid "[t]he employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives."²¹⁹ A number of states supported similar formulations.²²⁰ Notably, these formulations also omit reference to the actor or to the act of attacking and so again suggest the possibility that there could be categories of attacks that might be deemed indiscriminate (objectively). On the other hand, Brazil (on behalf of a group of states) proposed to refer to "attack[ing] an adversary by using means or methods"²²¹ And, ultimately, when Article 51 emerged from the Diplomatic Conference, it referred explicitly to the way in which attacks were "directed," putting the onus back on the commander, and, because it referred to "attacks," it was generally understood to cover means and methods of warfare that might be lawful under certain circumstances but unlawful in others, leaving those questions to be resolved on a case-by-case basis.²²²

216. See INT'L COMMITTEE OF THE RED CROSS, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Second Session), *Report on the Work of the Conference*, at 149 ¶ 3.160, Vol. 1, (1972) ("The criterion of deliberate intention, defining or limiting the provision, was proposed also for the following paragraph [i.e. paragraph 3] by an expert who maintained that attacks launched intentionally and indiscriminately against civilians were forbidden. Another expert, however, maintained the objective criterion in an amendment").

217. *ICRC Annexes*, *supra* note 215, at 83, Art. 45 ¶ 2.

218. *Id.* (emphasis added).

219. CDDH, *supra* note 38, Vol. 1, Part IV.

220. See CDDH, *supra* note 38, Vol. 3, p. 200 (Czechoslovakia, German Democratic Republic, Hungary, Poland all supporting similar language to forbid the use of strikes that affect civilian populations); *id.* at 201 (Romania) ("strike or affect"); *id.* at 203 (Australia) ("strike or affect").

221. CDDH, *supra* note 38, Vol. 3, p. 202.

222. See KALSHOVEN, *supra* note 115, at 246-47; CDDH, *supra* note 38, Vol. 15, p. 274; *id.* at Vol. 6, p. 164 (explanation of the vote of the United Kingdom) (the paragraph "was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances it took account of the fact that the lawful use of means of combat depended on the

2. Indiscriminate Attacks at the ICTY

The jurisprudence of the ICTY has made the prohibition of indiscriminate attacks more standard-like. It has done this by collapsing the question of whether an attack was indiscriminate into the questions of whether it was disproportionate and whether it was directed against civilians.²²³

One move has been to determine whether an attack was discriminate on the basis of a judgment about how far into the proportionality "gray zone" a course of conduct might have been. Thus, in *Prosecutor v. Kupreskic*, the Trial Chamber concluded that:

it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul [of IHL]. However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law.²²⁴

The idea of a gray area can only compound the already standard-like nature of the proportionality analysis.

The ICTY has also approached the concept of indiscriminate attacks from the principle of distinction side. That is, they have said that indiscriminate attacks may be tantamount to attacks against civilians.²²⁵ Ordinarily, one would imagine that this would make the application of the prohibition of indiscriminate attacks more rule-like, or at least a mix of rule- and standard-like to the extent that the questions of whether someone is a civilian and whether something is a civilian object have standard-like elements. But the ICTY has also suggested in this context that attacks against civilians require only a *mens rea* of recklessness,²²⁶ which pushes the norm back in a standard-like direction by importing concepts of foreseeability.

circumstances"); *id.* at 164–65 (Explanation of Vote of Italy); *id.* at 179 (Canada); *id.* at 187–88 (Germany).

223. *Cf.* Ohlin, *supra* note 197, at 92–93 (arguing that "[the ICTY] ha[s] effectively conflated the distinction between intentionally targeting civilians and unintentionally causing disproportionate damage to civilians.").

224. *Prosecutor v. Zoran Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 526 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000). This position was criticized by the ICTY panel considering NATO actions in Kosovo. NATO REPORT, *supra* note 91, ¶ 52.

225. *Prosecutor v. Galic*, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) ("The Trial Chamber agree[d] with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.").

226. *Prosecutor v. Galic*, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion ¶ 54 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (relying uncritically on the ICRC commentary).

Finally, the ICTY has also assessed whether an attack was directed against civilians or indiscriminate by analyzing the risk posed by the use of particular weapons under the circumstances, again a standard-like inquiry.²²⁷ For instance, in *Prosecutor v. Martić*, the Trial Chamber “conclude[d] that the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets.”²²⁸ While this bears some superficial similarity to the course this Article proposes policymakers take,²²⁹ it is fundamentally an *ex post*, rather than an *ex ante*, exercise and the result of a case-by-case analysis, which is characteristic of a standard-like approach.

The ICTY’s standard-like approach is also clear from the way it has handled impact analysis. This issue arose most prominently in two cases—*Prosecutor v. Stanišić and Galić* and *Prosecutor v. Ante Gotovina*. In *Galić*, the ICTY considered the shelling of a street and a neighborhood park that were at some distance from a building operated by a military unit. The court relied on the fact that the shells did not land progressively closer to the military installation as a basis for concluding that the attack was indiscriminate.²³⁰ Likewise, in considering another shelling incident, the court again relied on the fact that shells did not fall progressively closer to a putative target in ruling out that such an asserted potential military objective might have been the actual target.²³¹ Again, this approach—relying on a range of factors regarding the results of an attack from which to try

227. See *Prosecutor v. Blaskić*, Case No. IT-95-14, Judgment, ¶ 512 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004) (“The ‘baby-bombs’ are indeed ‘home-made mortars’ which are difficult to guide accurately. Since their trajectory is ‘irregular’ and non-linear, they are likely to hit non-military targets.”).

228. *Prosecutor v. Martić*, Case No. IT-95-11, Judgment, ¶ 463 (Int’l Crim. Trib. for the Former Yugoslavia, June 12, 2007).

229. See *infra* Part III.

230. See *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion ¶¶ 344-45 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (identifying the location of the shells as landing various distances from the base, and that the distance did not become progressively closer).

231. See *id.* ¶¶ 382-83 (concluding that the shells landed in almost the same spot and did not get closer to the alleged target of the attack); see also *Prosecutor v. Stanišić and Galić*, Case No. IT-98-29-A, Appeals Judgment, ¶ 282 (citing the trial court’s decision that military targets were unoperational or too far away to be considered as the true objective); PAX, *Unacceptable Risk: Use of Explosive Weapons in Populated Areas Through the Lens of Three Cases Before the ICTY*, at 47 (Nov. 2014), <https://www.paxforpeace.nl/media/files/pax-rapport-unacceptable-risk.pdf> [<https://perma.cc/QX9Y-LRBV>] (archived Sept. 21, 2017) (“Similar to the *Gotovina* case, the Trial Chamber [in *Galić*] used the distance between an alleged military objective and shell impact locations as an indicator (among others) the unlawfulness of a specific attack. The distance indicated both the probable target of attack and whether the attack was directed and its effects limited as required under IHL.”).

to reverse engineer the attacker's intent—is only possible *ex post* and is not susceptible to *ex ante* rule-making.²³²

In contrast to this case-by-case approach, in *Gotovina*, the ICTY Appeals Chamber rejected an effort by the Trial Chamber to articulate a brighter-line rule (albeit one still to be applied after the effects of the attack are known)—namely, that artillery attacks that impacted within two hundred meters of a lawful target were presumed to have been fired at that target, whereas artillery shells that fell outside the radius served as evidence of an unlawful attack.²³³ Not only did the Appeals Chamber reject the two hundred-meter standard on the merits, but it also noted that it was implausible to apply it across the board to all attacks, given the range of differences entailed in the circumstances of each attack.²³⁴ As one commentator has argued, “[A]ccuracy standards must be tailored to the facts and circumstances of each attack by indirect fire.”²³⁵ Indeed, the Appeals Chamber specifically declined to offer an alternative standard. As Judge Pocar put it in his dissent, “Does the Majority consider that the correct legal standard was a 400-metre standard? A 100-metre standard? A 0-metre standard? The Appeal Judgement provides no answer to this question.”²³⁶

232. I do not engage deeply here the question of how much one can infer based on the results of an attack. Cf. Gary D. Solis, *The Gotovina Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78, 97–98 (2013) (arguing that LOAC “requires proof of intent to attack civilians at the time of attack and rejects an inference of intent based solely on battle damage, civilian casualties, or other terminal effects at the impact point”).

233. See *Prosecutor v. Ante Gotovina*, Case No. IT-06-90-A, Appeals Decision, ¶ 61 (Nov. 16, 2012). In some ways, the Trial Chamber’s proposed approach would have been consonant with the approach taken by the *Galic* Appeals Chamber. In that case, noting testimony that the closest military objective to a market that was shelled was 300 meters away, and that artillery crews could reach between 200 and 300 meters of their intended target on the first shot, the court held, “whether the SRK was aiming for the market itself or for some other target within the surrounding 300 m, it was aiming for a target within a civilian area, and this shelling incident was thus an example of shelling that deliberately targeted civilians.” *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-A, Appeals Judgment, ¶ 335. But *Gotovina* clearly rejected this approach (and, at least arguably, *Galic* deployed its impact analysis in the context of a specific incident). Cf. *id.* ¶ 133; Walter B. Huffman, *Margin of Error: Potential Pitfalls of the Ruling in The Prosecutor v. Ante Gotovina*, 211 MIL. L. REV. 1, 26 & n.112 (2012).

234. See *Prosecutor v. Ante Gotovina*, Case No. IT-06-90-A, Appeals Decision, ¶ 60; cf. Gary D. Solis, *supra* note 232, at 88 (2013) (“[T]he Trial Chamber failed to explain how a single standard of accuracy could apply to the differing circumstances of each attack on four different towns by different batteries at different distances.”).

235. Solis, *supra* note 232, at 95.

236. *Prosecutor v. Ante Gotovina*, Case No. IT-06-90-A, Dissenting Opinion of Judge Fausto Pocar, ¶ 13.

IV. WAY FORWARD

A. A New Approach to Indiscriminate Attacks

Where does this then leave things with respect to the prohibition of indiscriminate attacks? Is the ICTY's jurisprudence sufficient to address the growing desire for clarity? This subpart argues that the answer is no and offers a different solution. While the ICTY's approach has permitted prosecution of indiscriminate attacks, principally by virtue of applying the *mens rea* of recklessness, which lowers the bar somewhat, the ICTY's approach is also inapt,²³⁷ unsatisfying, and likely unsustainable. Rather, this subpart urges policymakers to agree that certain categories of attack should be treated as indiscriminate based on the objective risk they pose. This approach, the Article suggests, would better enable states to get ahead of the curve, responding to the desire for more rule-like, objective tests.

First, the ICTY's approach is risky because it blurs the question of the *mens rea* of an attacker with respect to the status of a target²³⁸ and the *mens rea* of an attacker with respect to the choice of means or methods of combat. That is, this ignores that there may be a difference between an attacker's understanding of whether the target he or she is attacking is civilian or military (whether the attacker knows, or perhaps is reckless with respect to the likelihood that, an individual who is the object of an attack is a civilian) and an attacker's understanding of the likelihood of the particular means or method selected for carrying out the attack actually striking the desired target.²³⁹ Second, the International Criminal Court (ICC)

237. See Adil Ahmad Haque, *Protecting and Respecting Civilians: Correcting the Substantive and Structural Defects of the Rome Statute*, 14 NEW CRIM. L. REV. 519, 536 (2011) ("[I]ndiscriminate attacks and attacks with civilians as their intended object are conceptually distinct.").

238. A number of states have legislation that clearly refers to recklessness with respect to the status of the target. For instance, under Australian criminal law, a person may be prosecuted for the war crime of attacking a protected person if they are reckless as to the status of the individual. 18 U.S.C. § 2441. In non-international armed conflict, the recent amendments to the War Crimes Act likewise provide for recklessness with respect to the question of whether a person is a member of an organized armed group. *Id.* And in Canada, in *R v. Finta*, the Canadian Supreme Court suggested that willful blindness as to the relevant facts would suffice for a war crimes prosecution. See S.C. Res. 701 (July 31, 1991) ("Alternatively, the *mens rea* requirement of both crimes against humanity and war crimes would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.").

239. Again, this second possibility bears some relation to precautions questions. For instance, the Inter-American Court for Human Rights concluded that Colombia had violated its precautions obligations by virtue of the combination of weapon chosen and method of deployment of the weapon. *Case of the Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits, and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 259, ¶ 227 (Nov. 30, 2012). There is also even a third possibility – the

uses purpose or knowledge, and not recklessness, as the relevant *mens rea*, and the Rome Statute's elaboration of war crimes has been incorporated into the domestic law of a number of states party to the Rome Statute.²⁴⁰ Thus, the ICTY's approach may not be sustainable in the long term insofar as the ICC's jurisprudence will increasingly frame international expectations. Third and finally, the ICTY's jurisprudence has generally looked to the effects of an attack in determining whether an attack was indiscriminate, providing little *ex ante* guidance to the warfighter.

If the ICTY's treatment of indiscriminate attacks seems unlikely to salve concerns that are being expressed, doing nothing also seems unwise. The current trend lines seem likely to exacerbate differences of views. Such a divergence may be bad for states. In the past, differences of view between states and civil society might have favored states (if they were able to rely on the more permissive, state-preferred approach), but given the contours of public debate today, it seems more likely that the public will take civil society's side. The "CNN effect"²⁴¹ (that is, the extent to which public perception of combat is shaped by news coverage) will exert an additional pull, driving the conversation further in the direction of labeling a range of attacks "indiscriminate." And the fact that the world is increasingly moving toward deeming the responsibility for the effects of attack to rest with the attacker, and not also with defenders who may co-locate military objectives with population centers,²⁴² will only make the position of warfighters more difficult.

Moreover, there is normative and practical value to clarity, even if it is more limiting.²⁴³ As Geoffrey Corn has rightly pointed out, there are dangers inherent in "the lack of a consistent framework for *post hoc* critique of the reasonableness of the commander's

question of an attacker's *mens rea* with respect to whether an attack will strike civilians – that the ICTY's jurisprudence has raised. Cf. Jens David Ohlin, *Was the Kunduz Attack a War Crime?*, OPINIO JURIS (May 1, 2016), <http://opiniojuris.org/2016/05/01/was-the-kunduz-hospital-attack-a-war-crime> (last visited Sept. 21, 2017) [<https://perma.cc/NBX2-CC8P>] (archived Sept. 21, 2017).

240. U.S. courts have also interpreted the U.S. war crimes act to distinguish "intentionally" from "recklessly." See *In re Xe Services Alien Tort Litigation*, 665 F.Supp.2d 569, 590–91 (E.D. Va. 2009).

241. As William Boothby has put it, "footage led some to deduce that when attacks hit something other than military objectives, this must have been deliberate, and thus the result of a criminal event." BOOTHBY, *supra* note 198, at 9. I don't engage here the question of 'effects-based operations,' i.e. operations that are judged on the effect (including indirect) they will have. But I do note that it is in some ways the converse of effects based judgments being rendered by human rights and other groups.

242. At times, the U.S. Department of Defense has suggested that the responsibility for implementing the principle of distinction should rest primarily with the party exercising control over the relevant territory. Cf. Burrus M. Carnahan, *The Law of Air Bombardment in the Historical Context*, 17 AIR FORCE L. REV. 39, 59 (1975) (citing statement by the General Counsel of the Department of Defense).

243. Michael W. Lewis, *Battlefield Perspectives on the Laws of War*, in THE WAR ON TERROR, *supra* note 92, at 209, 221 ("[S]implicity and clarity are vital. Law is better served when aircrew are given concrete guidance.").

decision.”²⁴⁴ Likewise, former ICRC President Jacob Kellenberger has noted that application of IHL “in practice is sometimes difficult due to the fact that the provisions are framed in rather abstract terms, thus leaving room for divergent interpretations.”²⁴⁵

Rather than either the ICTY’s approach or the black letter understanding of the prohibition of indiscriminate attacks, this Article suggests that policymakers consider preemptively articulating a more rule-like, objective understanding of kinds of attack that should be off limits—that is, determining *in advance* that certain methods of warfare are sufficiently likely to be unlawful that they should not be employed.

This is not as far-fetched an idea as it might appear. (In fact, as Daniel Bodansky has put it, standards naturally tend to evolve into rules.)²⁴⁶ For instance, the African Union mission in Somalia (AMISOM) issued an indirect-fire policy that limited its use of indirect fire in civilian-populated areas except *in extremis*.²⁴⁷ And the International Security Assistance Force (ISAF) in 2012 decided it would no longer use air-dropped munitions against civilian residences²⁴⁸ (and adopted various other civilian-protective policies before that).²⁴⁹ Likewise, rules of engagement (ROE) may require certain kinds of target identification²⁵⁰ or limit the kinds of munitions that can be used under specific circumstances (as was the case during the first Gulf War, when precision-guided munitions were used against targets in downtown Baghdad²⁵¹).²⁵² The use of “no-strike

244. See Corn, *supra* note 109, at 454 (referencing the deficiencies in current critiques of command decisions).

245. Jakob Kellenberger, International Humanitarian Law at the Beginning of the 21st Century, San Remo Roundtable, <https://www.icrc.org/eng/resources/documents/statement/5e2c8v.htm> (last visited Sept. 21, 2017) [<https://perma.cc/GJR8-8B25>] (archived Sept. 21, 2017).

246. See Daniel Bodansky, *Rules v. Standards in International Environmental Law*, 98 AM. SOC’Y INT’L L. PROC. 275, 278 (2004) (noting the evolution from standards into rules in international law as information develops and consensus emerges).

247. Adebayo Kareem, The Legal Challenges Raised by Conducting Hostilities Against Organized Non-State Armed Groups, San Remo Roundtable, <http://www.iihl.org/wp-content/uploads/2015/11/Kareem.pdf> (last visited Sept. 21, 2017) [<https://perma.cc/9GRY-BWW9>] (archived Sept. 21, 2017); see generally Sahr Muhammedally, *Minimizing Civilian Harm in Populated Areas: Lessons from Examining ISAF and AMISOM Policies*, 98(1) INT’L REV. RED CROSS 225 (2006) (detailing the measures to avoid and limit any attacks that may impact civilian areas).

248. ISAF Statement on Air Dropped Munitions (June 12, 2012), <http://ireport.cnn.com/docs/DOC-802331> (last visited Sept. 21, 2017) [<https://perma.cc/Y8GA-LEHQ>] (archived Sept. 21, 2017).

249. See Muhammedally, *supra* note 247, at 233–38 (noting the progression of changes undertaken to increasingly track damage done to civilian areas and limit future civilian casualties).

250. Cf. SAN REMO MANUAL, *supra* note 88, at 38–39.

251. FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 153 (1992).

252. *Id.* at 55; see, e.g., Joint Publication 3-60, Joint Targeting II-13 (2013) (“Targets may have certain specific restrictions associated with them that should be

lists,” which go beyond objects that would clearly be unlawful to attack, is also increasing. (And, indeed, the US collateral damage estimation doctrine treats different civilian objects differently.²⁵³) And the collateral damage methodology that some states use seeks to make it quantitative, rather than qualitative.²⁵⁴ Finally, scholars have begun to make such arguments, albeit on a case-by-case level,²⁵⁵ and the ICRC has prominently advanced such an argument, predicated upon the *likelihood* of indiscriminate effects—with respect to the use of explosive weapons in civilian-populated areas (although, as discussed *infra*, there are flaws with respect to that particular effort).²⁵⁶

There is also some potential historical grounding to taking such an approach. In its advisory opinion on the *Threat or Use of Nuclear Weapons*, the International Court of Justice had to decide whether the potential use of nuclear weapons should be tested on a case-by-case basis for whether such use was indiscriminate or whether, based on the likely effect on civilians, the use of nuclear weapons should be deemed indiscriminate *per se*,²⁵⁷ even if hypothetical situations existed where they could, from a black letter perspective, be used in a

clearly documented in the ETF (for example, do not strike during daytime, strike only with a certain weapon).”).

253. Cf. Chairman of the Joint Chiefs of Staff, Instruction, No-Strike and the Collateral Damage Estimation Methodology, CJCSI 3160.01, Enclosure B (2009) (dividing collateral objects into different categories, such as religious structures and refugee camps in Category I and civilian civic centers and recreational facilities in Category II).

254. See SOLIS, *supra* note 10, at 533 (“[a]ttempting to quantify military necessity and proportionality . . .”).

255. See e.g., *The Principle of Discrimination in Twenty First Century Warfare*, in ESSAYS ON LAW AND WAR AT THE FAULT LINES at 131, 137 (Michael N. Schmitt ed., 2012); Christopher J. Markham & Michael N. Schmitt, *Precision Air Warfare and the Law of Armed Conflict*, 89 INT’L L. STUD. 669, 681 (2013) (arguing that it would be an indiscriminate attack to use a “weapon . . . in an environment that causes it to be highly inaccurate (e.g., at a very high altitude or in weather that disrupts guidance system functionality).”); cf. NATO REPORT, *supra* note 91, ¶ 29 (“Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. *If precautionary measures have worked adequately in a very high percentage of cases* then the fact that they have not worked in a small number of cases does not necessarily mean they are inadequate.”) (emphasis added); Laurent Gisel, *The Use of Explosive Weapons in Densely Populated Areas and the Prohibition of Indiscriminate Attacks*, in CONDUCT OF HOSTILITIES, *supra* note 33, at 100, 111 (“At this juncture, an informed discussion seems necessary and should contribute to States forming a more elaborate policy position as a response to the humanitarian concerns.”); ICRC Q&A, *supra* note 183, at 103 (“The interpretation of the prohibition of indiscriminate attacks may become more demanding with the development of new means and methods of warfare, notably with advances in precision weaponry.”).

256. See generally ICRC Q&A, *supra* note 183, at 100 (“[E]xplosive weapons with a wide impact area should not be used in densely populated areas due to the significant likelihood of indiscriminate effects.”).

257. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 262 (July 8) [hereinafter *Nuclear Weapons Case*].

discriminating fashion.²⁵⁸ The black letter answer to this question was clearly that if circumstances existed where nuclear weapons could be directed at a military objective and would not cause disproportionate civilian harm, they could not be deemed *per se* indiscriminate. As the United States argued at the time, the legality of use of nuclear weapons depended on a range of facts “that can only be guessed at” in advance.²⁵⁹ The court, however, by the deciding vote of its president, sought to thread a different needle. It held only that it could not “conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”²⁶⁰ In so doing, it appeared to be seeking to offer something of a test to states—indicating limited circumstances in which the use of nuclear weapons might be permissible,²⁶¹ presumably on the basis that only in such circumstances would there be sufficient necessity to allow for even the possibility of lawful targeting.

Likewise, during the negotiation of Additional Protocol I, a number of states wanted a committee to decide the means and methods of warfare that should be prohibited by Article 36.²⁶² Other states, however, wanted to leave such determinations to each individual state party, and they ultimately prevailed. Nevertheless, the ICRC Commentary explains that the phrase “some or all circumstances” in Article 36 was intended to encompass “foreseeable” uses of a weapon.²⁶³ Thus, the Protocol did anticipate a form of probabilistic legal review, at least in terms of the ways in which a weapon would be likely to be used. So, rather than only looking to whether a weapon could be used legally with respect to its probable use, why not also look to whether it *would more likely than not* be used illegally under particular circumstances?

Finally, focusing on objective norms for what should be considered indiscriminate attacks (or at least the policy-based

258. Cf. *id.* at 261; *id.* at 320 (Schwebel, J., dissenting) (discussing the use of nuclear weapons against a nuclear-weapon-armed submarine at sea when that submarine was about to, or had, fired nuclear weapons).

259. See Written Statement of the Government of the United States of America, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Written Proceedings 7 (June 20, 1995) (arguing against a *per se* prohibition of nuclear weapons).

260. *Nuclear Weapons Case*, *supra* note 257, at 266.

261. Others understood that aspect of the Court’s decision as specifying circumstances where even otherwise apparently unlawful (under IHL) uses of nuclear weapons might nevertheless not necessarily be unlawful. *Nuclear Weapons Case*, *supra* note 257, at 590 (Higgins, J., dissenting).

262. ICRC COMMENTARY, *supra* note 34, ¶¶ 1463–1465.

263. *Id.* ¶¶ 1468–71. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that, while legal as such, this munition “should, however, only be used in concentrations of civilians if the military necessity for such use is great, and the expected collateral civilian casualties would not be excessive in relation to the expected military advantage.”

equivalent) would in fact *remove* some of the results-based scrutiny that has been the subject of so much debate. An indiscriminate attack is indiscriminate, regardless of whether there are many civilians killed or none.²⁶⁴

This is not an argument for progress on efforts to articulate standards for the use of explosive weapons with wide-area effects.²⁶⁵ That effort suffers from a dangerous lack of precision and would sweep in too much conduct to be likely to appeal to states engaged in armed conflict (or who believe they might be in the future). Nor is the argument that stand-off weapons should be disfavored because remote technology necessarily “de-humanizes” warfare by allowing the commander distance from those who might suffer due to his or her decisions credible. (To the extent the argument is that advanced militaries have set minimum altitudes for aircraft conducting attacks that shield them from risk but make target identification difficult, this would appear to be a precautions question.)

But why should it be impossible to agree that based on their likely effects, it would be unacceptable—the equivalent of an indiscriminate attack—to drop certain kinds of unguided munition²⁶⁶ from above a certain altitude into a certain kind of civilian-populated area?²⁶⁷ (Indeed, the United States already has a reticulated set of rules that compare likely blast patterns to target areas in assessing

264. Alexandra Boivin, *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare*, University Center for International Humanitarian Law 34 (2006), http://www.geneva-academy.ch/docs/publications/collection-research-projects/CTR_objectif_militaire.pdf [<https://perma.cc/5MHY-76D2>] (archived Oct. 12, 2017) (“It does not follow that a breach of the principle of proportionality can be equated with an indiscriminate attack nor does it follow that an attack which respects the principle of proportionality is necessary discriminate.”).

265. In a 2012 report, the UN Secretary-General recommended that parties to conflict refrain from using explosive weapons with wide-area effects in populated areas. U.N. Secretary-General, *Report on the Protection of Civilians in Armed Conflict*, UN Doc. S/2012/376, ¶ 75 (2012). This issue has since gained a fair amount of traction.

266. I recognize that it may be too simple to posit that lower-altitude attacks are likely to be more precise, given, for instance, that a longer time between weapon deployment and effect may allow adjustment to precision-guided munitions.

267. I am here suggesting an approach that would not have covered NATO’s actions in Kosovo, but rather something more akin to what the Syrian regime has done with its barrel bombs. Markham & Schmitt, *supra* note 255, at 682 (“International law’s application and understanding of the rules prohibiting indiscriminate attacks will evolve with advances in precision weaponry. For example, while bombs dropped from a B-17 during World War II had a circular error probable exceeding three thousand feet, today such accuracy (or lack thereof) would be considered indiscriminate. In the future, it is plausible that unguided air-delivered weapons as such may begin to be characterized as violating the prohibition.”). One interesting 1986 proposal is cited in Maya Brehm, *International Humanitarian Law and the Protection of Civilians from the Effects of Explosive Weapons*, at 23, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373680 (last visited Sept. 22, 2017) [<https://perma.cc/L2LX-WFXS>] (archived Sept. 21, 2017).

whether to strike.²⁶⁸) Why should there not be some limits on beyond-visual-range engagements using *unsophisticated* weapons? Why can it not be said that a siege of a populated area is simply inappropriate under certain circumstances (regardless of whether foodstuffs are targeted and regardless of whether the ostensible objective of the siege is to force the surrender of belligerents co-located with civilians)? And why can it not be said that states should not engage in cyber-attack against certain kinds of internet infrastructure (without the need for a complex proportionality calculation of the effects on civilian use)?

This Article therefore urges taking a more objective approach to the analysis of whether an attack should be considered indiscriminate—something akin to the concept of “objective recklessness,” assessed *by category* on an *ex ante* basis. More precisely, this would entail two elements—(1) an entirely objective assessment of whether an attack is reckless as to targeting, and (2) the making of such an assessment as to categories of attack (i.e., in a rule-like way), rather than *post hoc* as applied to a specific attack. So, if based on the type of weapon and circumstances there is a high risk that the attack could not be conducted in compliance with the principle of distinction, the attack should be deemed indiscriminate, regardless of whether or not the attacker knew (subjectively) of those risks, and this analysis should be applied to *types* of attack.

The first element of the approach offered here is somewhat similar to the now-mostly-abandoned doctrine of *Caldwell* recklessness. In *R v. Caldwell*, the UK House of Lords stated that recklessness, with respect to the Criminal Damage Act, meant a person “does an act which in fact creates *an obvious risk* that property will be destroyed or damaged and . . . when he does the act he either had *not given any thought* to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.”²⁶⁹ *Caldwell* recklessness is a form of recklessness that does not turn on the actor’s appreciation of the risk—i.e., it does not require the same scrutiny of what the actor knew or thought, because it permits an actor to be deemed reckless who has given no thought to the possibility of there being such a risk.²⁷⁰

This goes beyond the “recklessness” that the ICTY has applied in its criminal analysis. The ICTY has used recklessness in the sense of *dolus eventualis*, which is “advertent” recklessness—i.e., it requires

268. See CJCSI 3160.01, *supra* note 253, Enclosure D, Appendix B (showing the detailed process for estimating collateral damage).

269. [1982] A.C. 341 at 354 (emphasis added).

270. Cf. MODEL PENAL CODE § 2.02(2)(c) (“A person acts recklessly with respect to a material element of an offense when he *consciously* disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”) (emphasis added).

that an individual have *subjective* awareness of the risk.²⁷¹ To give a ripped-from-the-headlines example, *dolus eventualis* was recently the subject of discussion in the Oscar Pistorius case, where the appeals court in South Africa made clear that:

[t]he rhetorical question “How could the accused reasonably have foreseen that the shots he fired would kill the deceased or whoever was behind the door?” wrongly applies an objective rather than a subjective approach to the question of *dolus*. The issue was not what was reasonably foreseeable when the accused fired at the toilet door but whether he actually foresaw that death might occur when he did so.²⁷²

This Article does not argue for the negotiation of a new IHL instrument—for which there may be little appetite—and since this Article does not propose a criminal law standard, it is not something that could readily emerge in jurisprudence. Rather, perhaps the most that could be hoped for would be that states would coalesce around an approach such as the one this Article articulates—likely in a non-binding way. For instance, in the context of the Convention on Certain Conventional Weapons (CCW), states have made political commitments regarding the use of anti-vehicle mines. Perhaps a similar set of political commitments might be made with regard to how to understand the concept of an indiscriminate attack going forward. But while this Article’s recommendation remains a tentative one, the current circumstances warrant considering articulating a set of norms governing *kinds* of attacks. Otherwise, the gap between war fighting and the public debate risks yawning further.

To be clear, this Article does not necessarily suggest that a recklessness standard be used in determining whether an individual has committed a war crime. Indeed, it takes no view on whether there should be a new approach to the war crime of indiscriminate attacks. For one thing, the criminal law status of the prohibition of indiscriminate attack is still uncertain.²⁷³ Moreover, separate from its

271. See ICRC COMMENTARY, *supra* note 34, ¶ 3474 (“the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening”); see also John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VA. J. INT’L L. 83, 106 (2016) (referring to a “nonchalant” state of mind). *But cf.* Brian Finucane, *Partners and Legal Pitfalls*, 92 INT’L L. STUD. 407, 413 (2016) (suggesting an objective approach, although perhaps only as to the assessment of the risk as opposed to the question of the appreciation of the risk); Merriam, *supra*, at 115–16 (suggesting that recklessness as applied by the ICTY is lower than *dolus eventualis* insofar as it doesn’t have a subjective element).

272. Gauteng v. Pistorius, 2015 (96) SA 1 at 16–17, para. 28.

273. During the negotiation of the Rome Statute, there appears to have been little attention paid to the issue of indiscriminate attacks, whether because it is not among the grave breaches of Additional Protocol I, *cf.* Additional Protocol I art. 85, or for other reasons. With respect to international armed conflict, the war crimes of attacks on civilians and disproportionate attacks are covered. See Rome Statute Articles 8(2)(b)(i), (ii), (iv). Both of these are grave breaches of Additional Protocol I. So

lower profile under international criminal law, it may be appropriate to require a greater *mens rea* showing in the context of individual criminal liability. For instance, the grave breaches provision of Additional Protocol I requires that unlawful targeting be done “willfully.”²⁷⁴ Likewise, there may be additional ways in which criminal recklessness might be evidenced with respect to individual conduct, such as whether the attacking state has shown the ability lawfully to target under similar circumstances in the past. But such an analysis would be inapt for a general, *ex ante* rule.

The next subpart defends this Article’s “objective recklessness” approach against criticism. It then concludes and extrapolates from the specific analysis of the prohibition of indiscriminate attacks.

B. Addressing Counter-Arguments

There are a handful of countervailing considerations. Perhaps the two most significant questions are: (1) “Would an objective recklessness approach significantly hinder commanders from addressing unforeseen circumstances?” and (2) “Would this incentivize parties to contrive to render military objectives off limits by making their placement meet certain criteria?”

In general, the criticism of rules is that they tend to be both under- and over-inclusive.²⁷⁵ With respect to potential under-inclusion, this Article’s proposal would not mean that other IHL provisions would not also still apply. With respect to the possibility of over-inclusion, Yoram Dinstein, who has challenged the notion that a defined list of military objectives would be unhelpful, makes a persuasive point in arguing that “[p]aradoxically, the United States has lost . . . concrete targets today only because of the curious belief that the availability of a binding list might restrict its freedom of

too are uses of weapons and methods of combat that are inherently indiscriminate, see Rome Statute art. 8(2)(b)(xx), although these are not grave breaches of the Protocol. But there is no apparent coverage of attacks that are simply untargeted, nor does it appear that much thought was given to exactly what *methods* of combat should be considered inherently indiscriminate (as opposed to what weapons should be deemed to fall in that category). Marie-Claude Roberge, *The New International Criminal Court: A Preliminary Assessment*, 325 INT’L REV. OF THE RED CROSS 671, 673 (1998) (“there are no provisions on . . . the launching of indiscriminate attacks affecting the civilian population or civilian objects”). Dormann, in his treatise on the elements of crime under the Rome Statute, does not treat the inclusion of “methods” in his discussion of Article 8(2)(b)(xx). Further, interestingly, during the run-up to the Rome Conference there was even discussion of not including the prohibition on inherently indiscriminate weapons. Cf. A/CONF.183/2/Add.1 (options 2 and 3 for article on war crimes (B)(o)). All this said, I do take the view it is a war crime.

274. Additional Protocol I, *supra* note 8, art. 85(3); cf. Finucane, *supra* note 271, at 412.

275. Bodansky, *supra* note 246, at 278 & n.8 (discussing IHL and asserting that “[b]ecause knowledge is limited, we cannot anticipate every eventuality. If we specify a rule, it is likely to be over- or -under-inclusive; it is likely to be too strict or lax in contexts that were beyond our ability to anticipate.”).

action tomorrow, should it wish to strike at unspecified theoretical targets that are over the horizon of time.”²⁷⁶ Moreover, as early as the Hague Peace Conference of 1899, the United States said of efforts to limit balloon-dropped projectiles: “We are without experience in the use of arms whose employment we proposed to prohibit forever.”²⁷⁷ But the result is one that should be more willingly tested—that is, a time-limited approach.²⁷⁸

The second argument is that such an approach would allow defenders to avoid attacks. But this argument is something of a canard.²⁷⁹ It has also been surfaced, for instance, with respect to defenders’ decisions to co-locate military objectives next to significant civilian objects, with the result that an attack may prove impossible. Simply put, the history of involuntary human shields²⁸⁰ makes clear that defenders have long been able to seek to mitigate the risk of attack by themselves violating their distinction obligations, and new approaches speaking to the specific methods of attack seem unlikely to significantly change this dynamic.

Finally, there are a handful of other potential arguments that would need to be considered: If there is a move toward a more objective test with respect to attacks that should be deemed impermissible, would there be a risk that certain attacks would be presumed to be *lawful*? So for instance, as Ian Henderson notes, the structure of IHL is that means or methods of warfare that are not prohibited can be understood to be permitted.²⁸¹ But, one might ask, would ruling out certain kinds of attacks under certain circumstances give greater legitimacy to other attacks that may, in the view of some, sit in a “grey area”? While such a risk exists, it exists to at least the same extent today. Likewise, is there a risk that a more rule-bound approach could be repurposed to *require* a certain approach to targeting (e.g., the use of precision-guided munitions under particular

276. Yoram Dinstein, *The Thirteen Waldemar A. Solf Lecture in International Law*, 166 MIL. L. REV., 93, 107 (2000). With respect to military objectives, I do appreciate, however, the view of the experts at the 2005 Geneva Academy meeting who opined “lists could lead to the undesirable impression that everything on the list must be a military objective at all times, or conversely, that if an object was not on the list, it must be protected.” *Geneva Expert Report*, *supra* note 180, at 8; *see also* HENDERSON, *supra* note 43, at 47–48.

277. Parks, *supra* note 42, at 11.

278. *Id.*

279. *See, e.g.,* HENDERSON, *supra* note 43, at 214 (“I can find no legal support for the argument that the [attacker’s] obligations are reduced [by a defender’s failure to comply].”); Boivin, *supra* note 264, at 19–20 (“[S]uch a violation [by defenders] does not change the attacking Party’s obligation”) 54); *cf.* Marty Lederman, *Troubling Proportionality and Rule-of-Distinction Provisions in the Law of War Manual*, JUST SECURITY (June 27, 2016), <https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality> [<https://perma.cc/Z2C6-UF9X>] (archived Oct. 12, 2017).

280. *See also* ROGERS, *supra* note 91, at 77–79.

281. HENDERSON, *supra* note 43, at 39.

circumstances)? Such a result could be problematic insofar as it would fail to account for all the vagaries of combat (such as technological failure or weather conditions that would make a less sophisticated munition more likely to reach a target)²⁸² and would be subject to criticism by developing states on the ground that they are not able to pay for such weapons. As there already may be such a trend, such an effect, if it materialized, might not be significant. Finally, does such an approach do damage to the long-standing principle that individuals must be judged based on the specific facts and circumstances prevailing at the time?²⁸³ The short response is that it is not argued here that this standard should be applied in the context of individual criminal liability.

V. CONCLUSION

There is a growing divergence between outside entities' scrutiny of particular attacks and the black letter rules that states apply. There is a real risk of the development of two, parallel tracks of IHL. As William Fenrick has put it, such a "two-track approach [could] result in distortions on each track. The military participants may develop a version that is too pro-military and does not benefit from informed external criticism, while the external reviewers may develop a version that is simply unrealistic."²⁸⁴ While how to address it with respect to the full gamut of international humanitarian law norms is well beyond the scope of this Article, states would be well-advised to consider this themselves. In particular, if the key goal is to avoid what Laurie Blank has characterized as "a steady erosion towards a retrospective analysis driven by media coverage of civilian casualties,"²⁸⁵ a limited number of more objective, *ex ante* rules seems a reasonable price to pay.

282. Cf. John F. Murphy, *Some Legal (and a Few Ethical) Dimensions of the Collateral Damage Resulting from NATO's Kosovo Campaign*, 78 INT'L L. STUD. 229, 240 (2002).

283. Compare, for instance, the UK statement upon ratification of Additional Protocol I, that "[m]ilitary commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time." Declaration c of the Declarations and Reservations made by the UK.

284. Fenrick, *supra* note 15, at 114.

285. Blank, *supra* note 99, at 711.
