

# HAS CONDUCT IN IRAQ CONFIRMED THE MORAL INADEQUACY OF INTERNATIONAL HUMANITARIAN LAW? EXAMINING THE CONFLUENCE BETWEEN CONTRACT THEORY AND THE SCOPE OF CIVILIAN IMMUNITY DURING ARMED CONFLICT

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## INTRODUCTION

It is 11:00 A.M. on June 15, 2003, in Fallujah, Iraq.<sup>1</sup> The stench of bloody corpses reveals the effects of U.S. army rocket fire within the Iraqi town. The rockets nearly demolished an entire building and killed approximately two hundred people, many of whom were women and children. All of the dead are clad in civilian clothes, and there is no evidence of a uniformed soldier among the dead. Media reports capture vivid scenes of relatives crying over corpses and charred children's toys. The images drive home the realization that small children and babies are among the dead. Human rights activists, newspaper editors, and anti-war critics immediately characterize the incident as an example of U.S. noncompliance with

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1. Hypothetical scenario.

International Humanitarian Law (IHL).<sup>2</sup> Few observers, if any, consider that the attack may have been lawful. On the contrary, the civilian casualties, in the opinion of most observers, are a result of illegal conduct on the part of the United States during its occupation of Iraq.

Knowledge of the circumstances preceding the attack, however, might prompt many observers to reach a different conclusion. Three hours before the collapse of the building that killed the men, women, and children, a team of fifteen British soldiers responded to a report that armed insurgents<sup>3</sup> were kidnapping young boys between the ages of nine and fourteen from their homes at gunpoint. The insurgents savagely beat and left for dead any boy or adult who resisted. Consistent with their duties under IHL,<sup>4</sup> the British soldiers proceeded to the scene to restore order and provide medical aid. When the soldiers arrived on the scene, the streets appeared calm. Two Iraqi men selling fruit and a boy, who purportedly had witnessed the incidents, told the soldiers of a badly beaten mother who had tried to protect her son. These informants told the soldiers that the woman was bleeding inside a taxicab. When the soldiers located the cab, the driver waved a white flag and threw his hands into the air. As the team approached, the vehicle exploded, instantly killing three of the soldiers.

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2. In the context of this Article, “International Humanitarian law” is the contemporary expression for that part of international law regulating the conduct of hostilities. It also is commonly referred to as the “law of armed conflict” and “law of war.”

3. The term “insurgent,” as used in this Article, refers to those persons who do not form part of an organized army and are not recognized by any international body. Instead, they constitute a resistance fighting force that conducts clandestine and sporadic offensive operations against occupying armies in occupied territories. As applied in the context of the U.S.-led occupation in Iraq, the term “insurgent” includes the reported twenty thousand resistance fighters, most of whom are Iraqis, currently exacting violence against the peaceful Iraqi civilian populace and coalition forces in Iraq. See Paul Reynolds, *Iraq Two Years On: Endgame or Unending War*, BBC NEWS, Apr. 6, 2005, [http://news.bbc.co.uk/1/hi/world/middle\\_east/4413121.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4413121.stm) (reporting insurgency strength at approximately “20,000”); see also General John Abizaid, Commander, U.S. Central Command, *Meet the Press* (NBC television broadcast Oct. 2, 2005) (transcript available at <http://www.msnbc.msn.com/id/9542948>) (stating during an interview with Tim Russert that “there’s no more than 20,000 insurgents in Iraq” and acknowledging that foreign fighters have “killed well over 5,000” innocent Iraqi civilians in 2005).

4. Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277 [hereinafter HR or Hague Regulations], reprinted in DOCUMENTS ON THE LAWS OF WAR 80-81 (Richard Guelff & Adam Roberts eds., 3d ed., 2000). This Article assumes that at the time of the incident described in the introduction, the U.S.-led coalition forces in Iraq were occupiers. The incident occurred weeks before the legal question regarding occupation status was put to rest in United Nations Security Council Resolution 1546.

Unbeknownst to the soldiers, the cab had been rigged with explosives controlled by a remote detonator. Seconds after the explosion, a civilian vehicle sped toward the soldiers, and its passengers immediately opened fire on them. The soldiers entered a small house for protection. They noticed that they were receiving a barrage of fire from several positions in the building facing them. Six of the soldiers were badly wounded. The team, which was grossly outgunned, estimated that they were fighting roughly a hundred armed insurgents.

The leader recognized the gravity of the situation and advised his commander of the attack via radio, saying that he expected to be overrun in ten to fifteen minutes. Approximately five minutes later, a U.S. army helicopter that had been conducting a separate mission nearby arrived on the scene to assist the British soldiers. The U.S. pilot identified the multiple rocket and machine-gun positions used by the insurgents. Given the insurgents' superior firepower and the likelihood that the British soldiers trapped inside the small building would not survive much longer, the pilot fired rockets into the foundational pillars of the building housing the insurgents, causing the entire front half of the building to collapse. The insurgent fire stopped immediately.

Unknown to the helicopter pilot, but widely known to the insurgents, there were uninvolved men, women, and children inside the building that the insurgents were using as their firing position. After the British team escaped with their wounded and dead, a Middle Eastern news agency publicized the effects of the helicopter attack and reported the incident as another U.S.-led atrocity. The ensuing public outrage manifested in the form of demonstrations and demands that the American pilot be tried for war crimes. The U.S. response was that the destruction of the building was justified by the military necessity of the situation, and that the insurgents bore the blame for the incidental loss of innocent civilian lives. The military's internal investigation of the incident exonerated the pilot of any wrongdoing. Some commentators noted that, even if it had not been necessary to destroy the building, the pilot's conduct was not a war crime because the helicopter attack could be considered a reprisal against "terrorists" (suspected) responsible for the 9/11 attacks or, more immediately, the illegal ambush against the British soldiers.

The aforementioned hypothetical scenario epitomizes the type of situations that occupying armies like those of the United States and the United Kingdom encounter nearly every day, and will continue to

encounter. This Article examines whether the juridical construct governing conduct under conditions encountered in present-day Iraq is adequately positioned to protect the innocent civilian populace. Policy concerns for the safety of civilians and resistance fighters has led to juridical symmetry between hostile and peaceful civilians and created incoherence between the aim of IHL and the juridical models used to achieve the goal of IHL.

This Article posits that, while IHL relative to civilian immunity must be respected, securing its juridical goal of protecting the innocent from violence can only be attained by considering the impact of doctrinal models and abstract theories that inform norms during armed conflict. The reality of the doctrine of military necessity and of the socio-contractarian aspects of hostilities prevent IHL from operating as a coherent framework. IHL should be approached using coherence theory or by incorporating practical legal “reasoning from ends to appropriate means.”<sup>5</sup> That is, in order to achieve juridical coherency, IHL must be applied to produce an outcome that is consistent with its overall aim or purpose of safeguarding the peaceful civilian populace.

This Article argues that a refusal to accept coherence as a necessary value within international humanitarian jurisprudence hinders the restoration of law and order in occupied territories and significantly erodes well-established legal principles of distinction, blurring the line between hostile and peaceful civilians. As a result, present-day armed conflict has begun to regress to an indiscriminate form of warfare, or as referred to by some, total war. These conditions are adverse to the humanitarian principles designed to protect peaceful civilians and prevent excessive violence. As evident by the armed conflict in Iraq, incoherency in current juridical models, such as Protocol I of the Geneva Convention, not only impedes an occupying army’s ability to protect peaceful civilians, but it also removes incentives for occupying forces to properly weigh the humanitarian objectives of IHL against the necessity of military attacks. These circumstances have led to widespread global contempt for the U.S.-led occupying forces in Iraq, despite their attempts to comply with IHL and the insurgency’s continued use of treacherous measures of warfare.

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5. John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 *FORDHAM L. REV.* 869, 908 (2002).

Part I of this Article discusses the law of occupation and how the lawfulness of an occupation impacts the duty that the civilian populace in an occupied territory owes to the occupying power. Part II addresses the scope and limitations of a civilian's duty and rights regarding participation in hostilities and the degree to which incoherent and ambiguous juridical constructs create legal symmetry between insurgents and peaceful civilians and compromise the aims of IHL to minimize hardship and reduce violence to the civilian populace. Part III discusses the application of the military necessity doctrine and how insurgencies and reductions in well established combatant—noncombatant distinction standards affect the proportionality analysis required under juridical constructs and cohere with the aim of IHL. Part IV explores the socio-contractarian aspect of armed conflict and illustrates the normative influences and conditions by which adversaries deem themselves legally excused from certain legal obligations and within their rights to impose obligations upon their adversary to alter behavior. In so doing, Part IV demonstrates the confluence between contract theory and the law and customs of armed conflict. It addresses the legality of reprisals, the degree to which reprisals inform normative values within the civilian populace and how reprisals, despite their utility, may free the peaceful civilian from their duty to refrain from hostilities.

This Article does not contend that the United States is an undeserving scapegoat for inefficiencies in the current models of international jurisprudence or propaganda—nor that it is not. Instead, this Article proposes, among other things, the idea that embedded in the seemingly thoughtless reactionary condemnation of the United States' action in the hypothetical scenario is a presumption of U.S. noncompliance with IHL that is often falsely derived and inevitably hampers international juridical progression. The presumption arises from a lack of understanding of the exigencies of occupations, the strategies and theories of insurgencies, and the way incoherency in the law influences departures from well-established legal principles of armed conflict and traditional notions of morality, all of which this Article seeks to explain.

## I. THE RIGHTS AND DUTIES OF A CIVILIAN IN AN OCCUPIED TERRITORY ARE NOT DETERMINED BY THE LEGALITY OF A HOSTILE NATION'S OCCUPATION

A “territory is considered [legally] occupied when it is . . . placed under the authority of [a] hostile army,”<sup>6</sup> and the occupation exists only in territories where that “authority has been established and can be exercised.”<sup>7</sup> The fact-based transformation shapes the juridical personality of the parties and determines the legal duties each party owes to the other.<sup>8</sup> There is no doubt that military occupations present a unique set of challenges for international jurisprudence.<sup>9</sup> Representative of this challenge is the establishment of a satisfactory standard that regulates the conduct between an occupying force determined to enforce its will and a civilian populace determined to resist.<sup>10</sup> Although both treaty and customary laws of armed conflict make civilians immune from attack so long as they are not actively participating in hostilities,<sup>11</sup> the obligations of the civilian populace to the occupier have been comparatively underdeveloped.

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6. U.S. DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 351, at 75 (1976), available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/588ce7fc87f2b21685256da40050f41d/Body/M2/LOWDocSupp.pdf?OpenElement> [hereinafter FM 27-10] (citing HR, *supra* note 4, art. 42).

7. *Id.*

8. The United States' occupation in Iraq may represent a deviation from long-established laws governing occupation. On June 8, 2004, the United Nations Security Council passed Resolution 1546, which declared an end to Iraq's occupation and recognized the Interim Government of Iraq as the legitimate representative of the Iraqi people and embodiment of Iraqi sovereignty. S.C. Res. 1546, U.N. SCOR, 59<sup>th</sup> Sess., 4987 mtg., at 1, U.N. Doc. S/RES/1546 (2004). Yet, Iraqi citizens in the province of Fallujah remained occupied when the United Nations Security Council passed the resolution that recognized the Iraqi Governing Council as the legitimate representative of all Iraqis, including those in Fallujah. Arguably, the occupying force had not sufficiently occupied Iraq to satisfy the legal standard in the Hague Regulations. The U.N. Security Council's resolution might be construed by some to represent a revolutionary turn toward a more formalistic determination of occupation in lieu of the traditional fact-specific determination promulgated under the Hague Regulations and in national military manuals such as FM 27-10, *supra* note 6, ¶ 355, at 76.

9. See GEOFFREY BEST, WAR AND LAW SINCE 1945 315 (1994) (discussing military occupation in terms of the Israeli occupation).

10. *Id.* at 316 (noting that “there is simply no satisfactory way legally to regulate the relations between an occupying party determined to enforce his will and an occupied party determined to resist him”).

11. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 51, 1125 U.N.T.S. 3, June 8, 1977 [hereinafter Protocol I]. Protocol I is applicable in cases of international armed conflicts, and, by virtue of Articles 1(4) and 96(3), is also applicable between a party to Protocol I and “people fighting against alien occupation.” *Id.*, arts. 1(4), 96(3). Neither the United States nor Iraq is a

The Hague Regulations are “completely silent on the far more important problem of armed resistance in occupied territory.”<sup>12</sup> Neither the subsequent Geneva Conventions of 1949 nor the Additional Protocols of 1977 explicitly ban a civilian in occupied territory from killing or attacking a combatant during occupation.<sup>13</sup> IHL does, however, authorize an occupying force to “subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present convention [and] to maintain the orderly government of the territory.”<sup>14</sup> Once the occupier has properly published and enacted penal rules and other “provisions which are essential,” the civilian populace arguably owes the occupier a duty of peaceful conduct.<sup>15</sup> Military manuals, including those of two of the world’s major military powers, the United States<sup>16</sup> and the United Kingdom,<sup>17</sup> state the

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party to Protocol I. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 493-98 (offering a list of states that have signed Protocol I, which does not include the United States or Iraq). Nonetheless, many of the provisions of Protocol I are considered customary international law, and many of the countries that make up the U.S.-led coalition in Iraq are signatories to Protocol I, including the United Kingdom. See Bradley Graham & Robin Wright, *U.S. Works to Sustain Iraq Coalition; 4 Nations Have Left, 4 More Are Getting Ready to Leave International Force*, WASH. POST, July 15, 2004, available at <http://www.washingtonpost.com/wp-dyn/Articles/A50417-2004Jul14.html> (discussing coalition members that “have promised to significantly add to their contingents” in Iraq). These circumstances, among others, make the provisions of Protocol I germane to the current discussion.

12. FRITS KALSHOVEN, *THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT* 32 (1973).

13. BEST, *supra* note 9, at 193 (noting that the occupiers’ expectation that occupied people not indulge their inclination to resist is not “spelled out” in any of the relevant instruments). In this context, relevant instruments refer to the Geneva Convention of 1949 and Additional Protocols of 1977; see Protocol I, *supra* note 11; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Geneva Convention Relative To The Treatment of Prisoner of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31.

14. Geneva Convention IV, *supra* note 13, arts. 64, 65.

15. See *id.* (stating that an occupying force may “subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations . . . to maintain the orderly government [and] ensure the security of the Occupying Power”).

16. FM 27-10, *supra* note 6, ¶ 432, at 86 (“Subject to the restrictions imposed by international law, the occupant can demand and enforce from the inhabitants of occupied territory such obedience as may be necessary for the security of its forces, for the maintenance

civilian's legal obligation to the occupier as one of peace and obedience.

Factors that influence a civilian's obedience to an occupier and the global community's expectation of their obedience may be inextricably connected to factors outside of the individual combatant's control. Few would deny there is a growing sentiment that the extent to which an occupied civilian populace owes a duty of cooperation and obedience to an occupying force is dependant upon whether the occupation is legal. The rationale extends from Rousseau's philosophy that an occupying force should not be entitled to claim a right to obedience simply because it is the stronger of the involved military adversaries; there must be a duty to obey the occupier that arises independent of its relative strength.<sup>18</sup> If the occupation is illegal, then the independent duty to obey cannot exist because the sole basis of obedience extends from the superior military might of the occupier in spite of the unlawful character of the occupation.<sup>19</sup>

Adherents of this view therefore ask, in what sense can mere strength or force create a legal duty if that duty does not emanate from an independent legal source? The question is particularly

of law and order, and for the proper administration of the country. It is the duty of the inhabitants to carry on their ordinary peaceful pursuits, to behave in an absolutely peaceful manner, to take no part whatever in the hostilities carried on, to refrain from all injurious acts toward the troops or in respect to their operations, and to render strict obedience to the orders of the occupant.”).

17. BEST, *supra* note 9, at 193 (“It is the duty of the inhabitants to behave in a peaceful manner, to carry on their ordinary pursuits as far as possible, to take no part in hostilities, to refrain from any act injurious to the troops of the Occupant or prejudicial to their operations, and to render obedience to the officials of the Occupant. Any violation of this duty is punishable by the Occupant.”) (quoting THE LAW OF WAR ON LAND, BEING PART 3 OF THE MANUAL OF MILITARY LAW 552 (1958)).

18. See JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 6-7 (G.D.H. Cole trans., 1950).

19. See *generally id.* at 6-7. (“The strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty . . . . Force is a physical power, and I fail to see what moral effect it can have. To yield to force is an act of necessity, not of will—at the most, an act of prudence . . . . Suppose for a moment that this so-called ‘right’ exists. . . the sole result is a mass of inexplicable nonsense. For, if force creates right, the effect changes with the cause: every force that is greater than the first succeeds to its right. As soon as it is possible to disobey with impunity, disobedience is legitimate; and, the strongest being always in the right, the only thing that matters is to act so as to become the strongest. But what kind of right is that which perishes when force fails? If we must obey perforce, there is no need to obey because we ought; and if we are not forced to obey, we are under no obligation to do so. Clearly, the word ‘right’ adds nothing to force: in this connection, it means absolutely nothing . . . . Let us then admit that force does not create right, and that we are obliged to obey only legitimate powers.”).



relevant when considering the current conflict in Iraq, given that some world leaders, including United Nations Secretary General Kofi Annan, have reportedly declared that the “U.S.-led war on Iraq is illegal.”<sup>20</sup> Noted IHL scholar, Hersch Lauterpacht, reasoned decades ago that a civilian’s “legal duty to obey” an occupying force is not conditioned upon international law.<sup>21</sup>

Lauterpacht’s view is consistent with the well established understanding in IHL jurisprudence that *jus ad bellum*, the right to go to war, is distinct from *jus in bello*, conduct during war.<sup>22</sup> Indeed, world powers decided the question regarding the relationship between civilian duty and the legality of an occupation decades ago. This position was adopted by the International Military Tribunal at Nuremberg (IMT), which considered whether IHL imposed upon the occupied civilian populace of Greece and Yugoslavia a legal duty of obedience to the German army where Germany’s invasion was an illegal act of aggression.<sup>23</sup> The IMT held that the provisions of IHL governing civilian conduct during occupation are unaffected by the legality, or lack thereof, of one nation’s attack upon another nation:

At the outset we desire to point out that international law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.<sup>24</sup>

The IMT’s stance illustrates a near global expectation of a civilian’s strict compliance with the law regardless of an inhabitant’s viewpoint regarding an occupation.

Whether one agrees with the IMT and Lauterpacht regarding a civilian’s duty to the occupier or finds relevance in the reported

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20. Julian Borger & Ewan Macaskill, *Iraq War was Illegal and Breached UN Charter, Says Annan*, GUARDIAN, Sept. 16, 2004, <http://www.globalpolicy.org/security/issues/iraq/attack/law/2004/0916illegal.htm>.

21. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 438-39 (H. Lauterpacht ed., 7th ed. 1952) [hereinafter Lauterpacht].

22. Derek Jinks, *The Declining Significance Of POW Status*, 45 HARV. INT’L. L.J. 367, 370 n.10 (2004).

23. William V. O’Brien, *The Meaning of ‘Military Necessity’ in International Law*, 1 WORLD POLITY: A YEARBOOK OF STUDIES IN INTERNATIONAL LAW AND ORGANIZATION 109, 145 n.2 (1957) (quoting NUREMBERG MILITARY TRIBUNALS, *Trials of War Criminals* 1246-47 (1949-1951)).

24. *Id.*

statements of United Nations Secretary General Kofi Annan, it appears reasonably clear that civilians have, at a minimum, a certain duty to comply with IHL regardless of whether they believe an occupation is illegal. Indeed, one of the foremost guiding principles of law is that every “citizen is deemed by the law to know the law,”<sup>25</sup> as ignorance of the law “provides no excuse for unlawful conduct.”<sup>26</sup> The principle is based “upon the equation of common law with common sense.”<sup>27</sup>

The analysis advanced in the next segments of this Article is rooted in the proposition that IHL’s purpose is not to produce the total elimination of particular forms of conduct; but rather IHL’s more realistic purpose is to produce “some amelioration of the circumstances which combatants and non-combatants will confront should war break out.”<sup>28</sup> IHL’s purpose “is to regulate hostilities in order to attenuate hardship.”<sup>29</sup> The next Part of this Article broadly discusses the rights and duties that current juridical models of IHL impose on its subjects, and how the obligations and privileges that flow from IHL advance or inhibit its overall goal of civilian protectionism. The focus in this section is not intended to question the extent to which civilians and combatants will obey or violate the law, but rather to illustrate through practical legal reasoning how incoherency in the law permits civilian and combatants to subvert the aim of IHL despite literal adherence to the conditions imposed by its construction.

## II. CIVILIANS IN OCCUPIED TERRITORIES ARE PRECLUDED FROM PARTICIPATING IN HOSTILITIES

This Part discusses whether IHL precludes civilians from directly participating in hostilities, and how IHL enables or hinders civilian participation in hostilities. In so doing, this Part relies principally upon two theoretical propositions regarding law and its impact on

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25. PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 37-38 (2002).

26. RELIGION, LAW, AND FREEDOM: A GLOBAL PERSPECTIVE, at xvi (Yahya R. Kamalipour & Joel Thierstein eds., 2000).

27. *Id.*

28. Ramesh Thakur, *Security in the new millennium*, in *ENHANCING GLOBAL GOVERNANCE: TOWARDS A NEW DIPLOMACY?* 268, 276 (Andrew F. Cooper et al. eds., 2002).

29. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Convention’s Blind Spot*, 106 *YALE L. J.* 2259, 2289 n.178 (1997) (citing Jean Pictet, *International Humanitarian Law: Definition*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW*, at xix (1988)).

conduct. The first is Professor Ernest Dworkin's formalist theory that any area of law, including IHL, must be coherent in order to be legitimate and justified.<sup>30</sup> Coherence, in this context, is the "unity of the aspects of an area of law by means of a single, internal, integrated justification."<sup>31</sup> Law is coherent only if its doctrinal elements, institutional acts and structures are validated by some justification that integrates and unites those elements.<sup>32</sup> Alternatively, the law may be coherent if "the doctrinal elements are justified by differing intermediate justifications, so long as those intermediate justifications are all justified and united by a single overarching justification, which thereby integrates the doctrinal aspects into a mutually supporting circle."<sup>33</sup> A legal system's basic structural purpose is "implicit in any individual feature."<sup>34</sup> The justification or structural purpose that should be implicit in IHL juridical models is the safeguarding of civilians from excessive and unnecessary violence.<sup>35</sup>

Second, inexplicit obligations and rights can be inferred "from the values underlying the explicit rules only if the explicit rules are coherent."<sup>36</sup> When explicit rules are incoherent, then the "principles and values" underlying them will also be "incoherent, or even contradictory."<sup>37</sup> This "incoherent or contradictory foundation would frustrate citizens' attempts to successfully infer, . . . their inexplicit obligations and rights."<sup>38</sup> Each of the aforementioned theoretical frameworks informs the analysis offered not only in this section, but throughout the remainder of this Article. This Part analyzes Protocol I with an eye towards determining the rights and obligations of civilians in occupied territory and illustrating the lack of coherency in its construct.

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30. Ken Kress, *Coherence and Formalism*, 16 HARV. J.L. & PUB. POL'Y 639, 646 (1993) ("[T]he political system can be legitimate only if its explicit rules are coherent.").

31. *Id.* at 649.

32. *Id.* at 648-49.

33. *Id.* at 649.

34. *Id.* at 659 (quoting Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 511 (1989)).

35. See, e.g., Judge Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature Of The Laws Of War*, 156 MIL. L. REV. 30, 48 (1998) (stating that the majority in the *Erdemoivic* believed the purpose of IHL is the protection of the weak and vulnerable during armed conflict).

36. Kress, *supra* note 30, at 646.

37. *Id.*

38. *Id.*

To determine the practical impact of IHL on a person in an occupied territory, it is first necessary to identify the person as either a combatant or a civilian. These identity classifications are critical in assessing the person's rights and privileges under IHL. Combatants, as noted earlier, can be legally attacked. Due to their status as combatants, they have the right to be granted prisoner-of-war status if captured<sup>39</sup> and are immune from prosecution for killings that do not violate IHL.<sup>40</sup> In contrast, civilians are immune from attack, as IHL forbids the intentional killing or targeting of a civilian if the civilian is not actively engaged in hostile acts.<sup>41</sup>

One commentator observed that the rationale behind the separation of the two classes is that targeting any person other than a combatant would lead to indiscriminate or total war and produce widespread casualties among innocent civilians.<sup>42</sup> A logical extension of this reasoning appears consistent with basic principles of morality and traditional notions of impartiality. Therefore, determining who is properly considered a *civilian* (that is, one who is immune from attack) and who is a *combatant* (one who is privileged to kill and engage in attacks) is of obvious importance to complying with the law and maintaining one's sense of justness and morality. International bodies have looked to the definitional standards in Article 50 of Protocol I for authoritative guidance regarding who is legally entitled to civilian immunity.<sup>43</sup> This Part will do the same.

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39. Geneva Convention III, *supra* note 13, art. 4.A (stating that combatants are entitled to prisoner-of-war status if they: (1) are "commanded by a person responsible for his subordinates"; (2) wear a "distinctive sign recognizable at a distance"; (3) carry their arms openly; and (4) conduct "their operations in accordance with the laws and customs of war"). The requirements are also set forth under HR art. 1. *See also id.* arts. 96, 102.

40. Lauterpacht, *supra* note 21, at 338; Geneva Convention III, *supra* note 13, art. 99.

41. Protocol I, *supra* note 11, art. 51.

42. *See* KALSHOVEN, *supra* note 12, 38-39 (discussing indiscriminate attacks on residential quarters of industrial centers to attack the workers in the war industry (quasi-combatants) as leading to attacks on civilians generally).

43. LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 75, 77, 80 (2002) (*quoting* the ICTR and Inter-American Commission on Human Rights, Third Report on Colombia's reliance on Article 50 of Protocol I when analyzing the definitional standard for the term, *civilian*, and fashioning a proper scope of civilian immunity).

Under Article 50(1) of Protocol I,<sup>44</sup> a *civilian* is understood to be a person who does not qualify for protection under Article 4.A(1), (2), (3), and (6) of Geneva Convention III and Article 43 of Protocol I.<sup>45</sup> The definitional stricture, therefore, grants civilian immunity to a person who is not part of an armed force and who does not qualify for prisoner-of-war status.<sup>46</sup> The civilian immunity provisions of Protocol I do not explicitly require that the civilian refrain from engaging in hostile conduct. The literal text of Protocol I permits a finding that civilian immunity evaporates only “for such time” as the person takes a “direct part in the hostilities,”<sup>47</sup> and, according to at least one international body, immunity reattaches once the person has ceased direct participation in the hostilities.<sup>48</sup>

Before addressing the problem created by Article 50(1), it should be understood that direct participation in *hostilities*, as the term *hostilities* is used in Protocol I, has been interpreted to be far narrower than a person’s general participation in the war effort.<sup>49</sup> The latter encompasses efforts connected with the conduct of the war, whereas the former comprises behavior that can be described as the conduct of war, or, warfare.<sup>50</sup> Hostilities would include, among other things, violent acts of psychological, economic, or military warfare.<sup>51</sup> General or indirect participation in the war effort, by contrast, would include the selling of food to a combatant or failing to prevent an attack by one of the adversaries.<sup>52</sup> The latter category certainly does not strip a person of civilian immunity while the former does. The

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44. The United States has not ratified Protocol I, but considers some of its provisions acceptable practices, though not legally binding. See Nathan A. Canestaro, *Small Wars And The Law: Options For Prosecuting The Insurgents in Iraq*, 43 COLUM. J. TRANSNAT’L. L. 73, 105 n.190 (2004). See also Martin P. Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L & POL’Y 415, 420 (1987) (statements by Department of State Legal Adviser, Mr. Michael J. Matheson, identifying Protocol I provisions that the United States recognizes as customary international law).

45. Protocol I, *supra* note 11, art. 50(1).

46. See *id.* arts. 43, 44, 50, 51 (As Article 44 governs prisoners of war, Article 43 governs members of armed forces, and Articles 50 and 51 govern protection of civilian populations, Protocol I purports to grant civilian immunity to people not in either of those categories.)

47. *Id.* art. 51(3); Protocol II, *supra* note 13, art. 13(3).

48. See ZEGVELD, *supra* note 43, at 75 n.49 (citing Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, 84 ¶ 46, OEA/Ser.L/II.1, Doc. 9, rev. 1 (Feb. 29, 1999)).

49. KALSHOVEN, *supra* note 12, at 49.

50. *Id.*

51. *Id.* at 50.

52. ZEGVELD, *supra* note 43, at 76.

inquiry here is whether, by virtue of the initial grant of civilian immunity, civilians are legally required to refrain from directly participating in hostilities.

Though not explicitly stated in Protocol I, noted commentators Hilaire McCoubrey and Jean Pictet contend that civilians, as people immune from attack, are precluded under IHL from taking direct part in hostilities.<sup>53</sup> Other writers, such as Liesbeth Zegveld, dispute this contention, arguing that “civilians are not prohibited from participation in the hostilities.”<sup>54</sup> Although the definitional strictures of Protocol I are ambiguous on this point, the former position offers more empirical promise, as it is more coherent with the reciprocal nature of armed conflict and the justification for IHL.

It appears reasonably sound to conclude that, if civilians cannot legally be made the object of attack by combatants, then civilians should not be legally permitted to make combatants the object of attack. Any rationalization to the contrary appears inconsistent with one of the most fundamental goals of IHL, which is to maintain two distinct classes. J.M. Spaight, an early twentieth-century scholar, observed, “[t]he separation of armies [combatants] and peaceful inhabitants [civilians] into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable.”<sup>55</sup> Indeed, the purpose of those rules is “to specify for each individual a single identity; [the person] must be either a [combatant] or a civilian.”<sup>56</sup> The British *Manual of Military Law* illustrates this point with stark clarity:

Both these classes [combatant or civilian] have distinct privileges, duties, and disabilities . . . an individual must definitely choose to

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53. HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE* 178 (2d ed. 1998) (“Nor may civilians themselves take a direct part in hostilities.”); JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 72 (1985) (reasoning that noncombatants “do not have the right to participate” in hostilities). Also, the author recognizes the exception that inhabitants in non-occupied territories, who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, are privileged to engage in hostilities provided they carry their arms openly and respect the laws and customs of war. Geneva Convention III, *supra* note 13, art. 4.A(6).

54. ZEGVELD, *supra* note 43, at 76 (contending that “international practice” provides no support for any interpretation of IHL that civilians are obligated to refrain from directly participating in hostilities and that such an “obligation does not fit into the humanitarian law system”).

55. W. Hay Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 493, 514 (2003) (quoting J.M. SPAIGHT, *WAR RIGHTS ON LAND* 37 (1911)).

56. MICHAEL WALZER, *JUST AND UNJUST WARS* 179 (3d ed. 1977).

belong to one class or the other, and shall not be permitted to enjoy the privileges of both; in particular . . . an individual [shall] not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, pretend to be a peaceful citizen.<sup>57</sup>

The excerpt underscores the expectation held by observers that civilians are not to engage in hostile acts.<sup>58</sup> It also embraces at least one practical aim of the law, which is to maintain two distinct classes so as to minimize treacherous conduct in order to preserve traditional notions of justice and respect for life.

Construing IHL, and more specifically, Protocol I, to authorize civilian participation in hostilities not only imbues Protocol I with the color of uselessness, it also precludes the treaty from being construed “as a symmetrical and coherent regulatory scheme, [where] the operative words have a consistent meaning throughout.”<sup>59</sup> Article 50(1) of Protocol I, for instance, requires a combatant to assume that a person is a civilian if there is any doubt as to the person’s true status.<sup>60</sup> An interpretation that allows civilians the right to participate in hostilities would nullify this rule because the rule presumes that civilians may not be attacked. Therefore, an interpretation as such is implausible if the treaty grants civilians the right to participate in hostilities. Moreover, such an interpretation impedes the restoration of law and order and effectively creates three identification classifications: peaceful civilians, hostile civilians, and combatants.

A dual civilian classification scheme would encourage, rather than prevent, increased violence because it would legally permit a person to conduct attacks under the guise of being a peaceful civilian and regain their civilian immunity from attack after they have stowed away their weapons and returned to feigned peaceful conduct.<sup>61</sup> Such situations lead to both civilian and occupying force casualties. Dual

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57. *Id.*

58. W. Hays Parks, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, 28 GEO. WASH. J. INT’L L. & ECON. 207, 217 (1994) (book review); Parks, *supra* note 55, at 514 (relying on Oppenheim for the proposition that “[h]ostile acts by private citizens are not lawful, and are punishable, in order to protect innocent civilians from harm.”).

59. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995).

60. Protocol I, *supra* note 11, art. 50(1) (stating, in part, that when there is doubt about “whether a person is a civilian, that person shall be considered to be a civilian”). Similarly, “[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.” *Id.* art. 52(3).

61. *Id.* art. 51(3) (stating that “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”).

civilian classification also results in public contempt for the occupying force combatants,<sup>62</sup> despite the legality of their conduct, because it enhances a hostile person's ability to operate undercover and conduct ambushes in order to create insecurity within an occupied territory.<sup>63</sup> An additional problem for the international legal community hoping to prevent total or indiscriminate war is that, when civilians decide to engage in hostile acts toward the occupier, it is difficult, if not impossible, to identify them unless these persons distinguish themselves or are identified by peaceful civilians.<sup>64</sup> Without proper distinction and classification standards, total war becomes imminent as these conditions enable insurgencies.

As evidenced by the recent U.S.-led occupation of Iraq, the modern battlefield is replete with insurgents who typically wear civilian clothes rather than uniforms or distinctive insignia.<sup>65</sup> They typically live or seek shelter within the civilian population and often maintain very close contact with the portion of the civilian population that sympathizes with them.<sup>66</sup> Insurgents mobilize only a very small portion of the populace when they first begin their attacks.<sup>67</sup> They organize mainly when they are facing a stronger, heavily armed force and attempt to make up for their inferior military capacity through clandestine operations and terrorism.<sup>68</sup> But insurgents primarily depend on the counterattacks of the larger occupying force to mobilize the rest of the population;<sup>69</sup> hence, they create situations in which the legitimate counterattack kills civilians, so that the ensuing public outcry and condemnation will strengthen the insurgents'

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62. *Iraqi Town Protest at Bomb Blast*, BBC NEWS, Mar. 1, 2005, [http://news.bbc.co.uk/1/hi/world/middle\\_east/4308529.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4308529.stm); *Over 150 Dead in Iraq in One of Deadliest Weekends Since U.S. Invasion*, DEMOCRACY NOW, July 18, 2005, <http://www.democracynow.org/Article.pl?sid=05/07/18/136254> [hereinafter DEMOCRACY NOW].

63. PICTET, *supra* note 53, at 38-39.

64. KALSHOVEN, *supra* note 12, at 38-39.

65. See generally David B. Rivkin, Jr. & Lee A. Casey, *War And The Law*, IN THE NATIONAL INTEREST, Mar. 26, 2003, available at <http://www.inthenationalinterest.com/Articles/Vol2Issue12/vol2issue12rivkincaseypfv.html> (noting press reports highlighted that the Iraqi Republican Guard and Ba'athist Party militia shed their uniforms and fired on Coalition Forces wearing civilian clothes).

66. DAUD L. KHAIRALLAH, *INSURRECTION UNDER INTERNATIONAL LAW* 158 (1973); WALZER, *supra* note 56, at 179, 184.

67. *Id.* at 180.

68. PICTET, *supra* note 53, at 38-39.

69. WALZER, *supra* note 56, at 180.



cause.<sup>70</sup> In sum, insurgents attack not only occupying forces, but also civilians.<sup>71</sup>

A Vietnamese National Liberation Front (NLF) pamphlet indicates that it is the people themselves who act as the driving force in armed conflicts.<sup>72</sup> The NLF's theory was that, if a state waged war against it, the state would be fighting against civilians, not a separate and distinct army, and therefore the state would be branded a killer of men, women, and children.<sup>73</sup> Thus, more people would sympathize with and join the NLF, though it was the NLF that intentionally impeded distinction and increased the risk of harm to civilians.<sup>74</sup> Put succinctly, the insurgent strategy is designed to place the onus of discriminate warfare on the occupying army while simultaneously doing everything within the insurgents' power to make distinction impossible.<sup>75</sup> This tactic endangers peaceful civilians.

To minimize the occurrence of violence against innocent civilians during occupations, it appears imperative, as previously discussed, that international juridical models achieve at least two goals in protecting civilians from violence. First, the law should permit civilian immunity only to those individuals who do not actively engage in hostilities at any time. Second, the law should ensure that "distinction shall be made at all times between belligerents and the civilian population."<sup>76</sup> The latest amendments in IHL, which Protocol I represents, fails in both respects.

The criteria by which insurgents should be required to distinguish themselves from civilians were debated in the drafting of Protocol I.<sup>77</sup> Because of the presumption that there are certain

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70. *Id.* at 179-80.

71. See Abizaid, *supra* note 3 (stating that insurgents have killed over 5000 innocent Iraqi civilians this year alone); *Iraq Car Bombing Causes Carnage*, BBC NEWS, Feb. 28, 2005, [http://news.bbc.co.uk/1/hi/world/middle\\_east/4303629.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4303629.stm); *Fifty Bodies Found in Iraqi River*, BBC NEWS, Apr. 21, 2005, [http://news.bbc.co.uk/1/hi/world/middle\\_east/4465769.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4465769.stm); *Double Car Bombing Rocks Baghdad*, BBC NEWS, Apr. 14, 2005, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/4443409.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4443409.stm).

72. WALZER, *supra* note 56, at 180 (noting that "the entire people . . . are the driving force . . . . Not only the peasants in the rural areas, but the workers and laborers in the city, along with intellectuals, students, and businessmen have gone to fight the enemy.").

73. *Id.*

74. *Id.*

75. *Id.*

76. KALSHOVEN, *supra* note 12, at 28.

77. PICTET, *supra* note 53, at 38-39 (commenting on the concerns voiced at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, Geneva, 1974-1977 (the "Diplomatic Conference")).

situations during armed conflict in which insurgents cannot, without compromising their lives or the success of their operations, distinguish themselves from the civilian population, the decision was made to minimize distinction requirements.<sup>78</sup> Stated differently, the classical view that distinction between civilians and combatants should always be observed was subordinated to the apparent social or political desires of certain nations to protect insurgents.

According to some commentators, the changes were adopted to revise the long standing rule that only states can lawfully establish military forces and that lawful combatants must operate like regular forces in order to maintain lawful combatant status;<sup>79</sup> and to make occupations more akin to domestic police actions rather than armed conflicts so that deadly force is used conservatively.<sup>80</sup> One underlying goal was to promote the lawful status of irregular combatants or insurgents with hopes that they would, in turn, behave humanely and in accordance with IHL.<sup>81</sup> It comes as no surprise that these modifications were adopted during the 1970s amidst global resentment over Israel's hostilities with the Palestinian Liberation Organization (PLO)<sup>82</sup> and United States' involvement in Vietnam.<sup>83</sup>

Under the old requirements, insurgents were granted combatant privileges if they complied with the requirements set forth under Article 4.A(2), Geneva Convention III,<sup>84</sup> which mandated that combatants carry their arms openly.<sup>85</sup> For example, the United States

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78. PICTET, *supra* note 53, at 39.

79. David B. Rivkin & Lee A. Casey, *Leashing the Dogs of War*, THE NAT'L INTEREST 57, 61 (Fall 2003).

80. *Id.* at 63.

81. *Id.* at 62 (“[M]any who have promoted a ‘lawful’ status for irregular combatants have done so in an effort to bring them ‘within the system’, in the hope that, once privileged, guerillas would behave in their own operations.”).

82. See HEATHER WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 119 (1988) (stating that the Diplomatic Conference commenced in 1974, the same year “liberation movements were first extended the privileges of observers in the General Assembly itself. In October of [1974] the General Assembly invited” the PLO, as representatives “of the Palestinian people, to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings”); Rivkin & Casey, *supra* note 79, at 62 (“Protocol I, at least arguably, eliminates the requirement of government sanction for lawful combatant status, and the rules requiring uniforms and open carriage of arms are relaxed.”).

83. Rivkin & Casey, *supra* note 79, at 61.

84. Geneva Convention III, *supra* note 13, art. 4.A(2).

85. *Id.* (recognizing that militias and other volunteer armed opposition groups are entitled to prisoner-of-war status if they: (1) are “commanded by a person responsible for subordinates”; (2) wear a “distinctive sign recognizable at a distance”; (3) carry their arms openly; and (4)

recognized the Vietcong Main Forces and Local Forces as lawful combatants and granted them prisoner-of-war status upon capture despite being considered irregular “in the way in which they are raised and in the authority on which they depend.”<sup>86</sup> Under the new formula relaxing the requirements for insurgents to acquire lawful combatant status, insurgents can gain such status even when they do not carry their arms openly, except during an attack and the deployment immediately preceding the attack.<sup>87</sup>

As the opening scenario helps illustrate, one problem that arises immediately from this modification involves its practical effect. The modification increases the insurgents’ capability to feign peaceful civilian status and use verbal communications to stage attacks against lawful unsuspecting combatants. Indeed, the fruit vendors’ ability to deceive the British soldiers in the opening hypothetical was enhanced by their ability to pose as peaceful civilians. The argument could be made that the reality of the modification has only a *de minimus* impact on conduct because insurgents do not always have access to arms as do regular military forces. For instance, the fruit vendors could have spontaneously decided to pick up an abandoned weapon and join the attack against the British soldiers after deceiving them. With respect to those insurgents who do own arms, one view may be that the modification’s effect on conduct is insignificant because insurgents, arguably, will not comply with any law that requires them to carry their arms openly.

Neither position dispels the ways in which Protocol I, at the very least, better enables insurgents to wage war. By eliminating the legal requirement to carry arms openly—a measure designed to identify a person as a combatant—the modification impedes the restoration of law and order by legally protecting insurgents from being targeted or attacked except when preparing for an attack or conducting an attack. Protocol I arguably requires insurgents be treated as civilians when returning from an attack or planning an attack.<sup>88</sup> The practical effect

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conduct “their operations in accordance with the laws and customs of war.”). These requirements are also set forth under HR, *supra* note 4, art. 1.

86. KALSHOVEN, *supra* note 12, at 48.

87. PICTET, *supra* note 53, at 39; Protocol I, *supra* note 11, art. 44(3).

88. See Protocol I, *supra* note 11, art. 51(3) (stating that civilians shall enjoy protection unless and for such a time as they directly participate in hostilities); see also Major Lisa Turner & Major Lynn Norton, *Civilians At The Tip Of The Spear*, 51 AIR FORCE L. REV. 1, 28 (2001) (noting that “a controversial provision of Additional Protocol I allows the civilian to regain his protection from attack when he ceases direct participation in hostilities”); Rivkin & Casey, *supra* note 79, at 62 (“Under Protocol I, irregular forces need to produce their arms and

of the weakening of the distinction requirements under Article 4.A(2), Geneva Convention III, represents, at least by implication, approval of the notion that insurgents, like the fruit vendors in the opening scenario, are permitted to hide themselves within the civilian community and directly participate in hostilities while posing as civilians.<sup>89</sup>

Indeed, the danger to peaceful civilians from cruel and wanton violence is not only increased when insurgents fight among peaceful civilians, but also when they fight while disguised as peaceful civilians.<sup>90</sup> Without a proper means to distinguish insurgents from peaceful civilians or a satisfactory juridical model that permits insurgents to be subjected to attack and that requires them to distinguish themselves in the same fashion as occupying forces, circumstances will always arise that compel occupying forces to treat all civilians as potential threats.<sup>91</sup> This condition not only serves the strategic aim of the insurgency, it represents incoherency between the justification of IHL and its construct. The circumstance becomes all the more revealing when one considers the ambush in the opening scenario.

Though some may support the ambush as a legitimate form of war under IHL, the ambush described in the opening scenario is nothing of the kind. IHL makes a sharp distinction between treachery and the legitimate ruse. On one hand, Article 23(b) of the Hague Regulations forbids a person to use treachery to wound or kill during an occupation.<sup>92</sup> While, on the other hand, Article 24 of the Hague Regulations condones the use of ruses of war.<sup>93</sup> Distinguishing between *treachery*, which is illegal, and *ruses of war*, which are legal, is not an easy task under IHL.<sup>94</sup> The divergence helps illustrate why IHL, and more specifically Protocol I, cannot be construed to endorse civilian participation in hostilities.

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identifying badges only immediately before launching an attack, and can only be targeted themselves while preparing for an attack or attacking. At all other times, Protocol I requires irregulars to be treated as civilians, who can be arrested, but not targeted.”).

89. See Protocol I, *supra* note 11, art. 44(3).

90. WALZER, *supra* note 56, at 184.

91. Susan Turley, *Keeping the Peace: Do The Laws of War Apply?* 73 TEX. L. REV. 139, 164-65 (1994) (observing that where circumstances arise where civilian-clad people engage in combat activity against American Forces, the condition compels the American Troops to view “every civilian as a potential threat”).

92. KALSHOVEN, *supra* note 12, at 102.

93. *Id.*

94. *Id.*

Surprise, for example, is an essential feature of both treachery and ruses.<sup>95</sup> The concealment and camouflage involved in staging ambushes “has long been regarded as a legitimate form of combat”;<sup>96</sup> however, not all ambushes are lawful. Surprise attacks that are launched behind the legal cover of noncombatant status, *i.e.*, civilian status, rather than natural cover, are unacceptable. The introductory scenario exemplifies this point. Recall that the insurgents were disguised as unarmed peaceful citizens who, when viewed as such, were legally immune from attack. It was because of their misuse of legal immunity, combined with the effect of the “doubt” requirements under Article 50(1) of Protocol I, that the insurgents achieved their goal elements of surprise ambush.<sup>97</sup> The British soldiers thought they were coming to the aid of needy victims of violence. Instead, they were being trapped.

The insurgents’ conduct, though quite effective for their purposes, was not a legally acceptable form of combat. In fact, it was murder by means of treachery.<sup>98</sup> Conduct is illegal if it betrays the enemy’s confidence that the person dressed as a civilian will not attack after the enemy has treated that person as a civilian.<sup>99</sup> This rule, when read in tandem with the scheme of Protocol I, reinforces the viewpoint that civilians are not to engage in hostilities. The ban against a civilian’s direct participation in hostilities fits squarely within the international humanitarian system. One rationale for the rule is that the wearing of civilian clothes for treacherous purposes

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95. WALZER, *supra* note 56, at 176.

96. *Id.*

97. Protocol I, *supra* note 11, art. 50(1) (stating, in part, that when there is doubt about “whether a person is a civilian, that person shall be considered to be a civilian”). Some might argue that removal of the doubt requirement is necessary to prevent Protocol I from shielding insurgents from the consequences of their treacherous conduct of posing as civilians in order to launch attacks. On one hand, such a revision would appear to lead to an increase in civilian casualties because combatants might relax their rules of engagements and start to injure or kill peaceful civilians they mistakenly presumed were hostile civilians or insurgents. On the other hand, civilian casualties occur because of the continued presence of insurgents within the civilian community. While the removal of the doubt requirement may expose the civilians to increased risk, it might compel peaceful civilians to take a personal stake in ridding their communities of insurgents or take personal steps to distinguish themselves from insurgents. This proactive response may ultimately result in decreased casualties for both civilians and occupying forces.

98. See WALZER, *supra* note 56, at 176-77.

99. KALSHOVEN, *supra* note 12, at 102-04. The long-established rule against using civilian attire for treacherous purposes is also codified in Protocol I, *supra* note 11, art. 37(1)(c).

increases the possibility that an enemy combatant may not “respect the civilian population.”<sup>100</sup>

Although Article 37(1)(c) of Protocol I reiterates the long-established rule against feigning civilian or noncombatant status to attack a combatant, Article 44(3) of Protocol I implicitly makes the well-settled requirement of combatant-noncombatant distinction discretionary,<sup>101</sup> hence, compromising coherency. As written, the latter rule enables insurgent activity by sanctioning the position that “there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself.”<sup>102</sup> Nevertheless, in view of the violence resulting from treacherous conduct,<sup>103</sup> practical legal reasoning, functioning as a subset of coherence theory, demands that IHL require every person to distinguish themselves from the civilian populace as a *prerequisite* to participating in hostilities.

Indeed, one of the foremost challenges for the lawful combatant is enforcing IHL against people who will violate IHL in order to exact violence, whether by misusing internationally recognized protection signs, posing as peaceful civilians, misusing civilian objects as military objects, or conducting military operations within civilian populace. One practical effect that emanates from this circumstance is contempt for the occupier, arising from its perceived failure to protect peaceful civilians from harm. Even in situations where a lawful combatant is responsible for the actual harm or injury to a civilian, contempt for the combatant may be grossly misplaced where it is the adversary's conduct that placed the civilians in harm's way.

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100. KALSHOVEN, *supra* note 12, at 104-05.

101. Protocol I, *supra* note 11, arts. 44(3), 37(1)(c).

102. *Id.* art. 44(3).

103. Treacherous conduct has also included incidents where a civilian-clad suicide bomber killed by exploding his taxicab, see Ben Montgomery, *Local Soldier Dies in Suicide Attack*, TIMES HERALD-RECORD, Mar. 31, 2003, available at <http://64.233.161.104/search?q=cache:dnbAeaNHixYJ:www.recordonline.com/archive/2003/03/31/bmwrap31.htm+taxicab+killed+four+iraq&hl=en&ie=UTF-8>. Civilian-clad insurgents feigned surrender only to ambush U.S. service members as they approached. See Dana Dillon, *Perfidy in Iraq: Their Tactics, Our Response*, THE HERITAGE FOUNDATION, Mar. 26 2003, <http://www.heritage.org/Press/Commentary/ed032603b.cfm>. Insurgents placed peaceful men, women, and children around probable targets to shield the targets from attack (a tactic generally known as using “human shields”). See *U.S. Forces Kill Human “Shield” Child in Iraq*, ABC NEWS ONLINE, May 26, 2005, <http://www.abc.net.au/news/newstems/200505/s1378052.htm>. Non-distinguished persons used white flags to get close enough to U.S. forces to open fire on the soldiers. See W. Hays Parks, *Capitol Hill Hearing, Hearing on Iraq's Violations of the Law of Armed Conflict*, Apr. 4, 2003, available at <http://www.house.gov/hasc/openingstatementsandpressreleases/108thcongress/03-04-04parks.html>.

One of the best-known examples of this condition occurred during a February 13, 1990, attack on the Al-Firdus bunker during the Persian Gulf War.<sup>104</sup> The bunker had been converted from an air raid shelter to a command and control bunker.<sup>105</sup> The bunker was camouflaged, surrounded by barbed wire, and protected by Iraqi armed guards.<sup>106</sup> Unbeknownst to U.S. military planners, Iraqi authorities permitted “several hundred civilians into the facility.”<sup>107</sup> This use of the bunker—which was a legitimate target for attack—resulted in the deaths and serious injury of the civilians in the facility.<sup>108</sup>

The Iraqi government had an obligation under IHL to refrain from “commingling its civilian population with what was an obvious military target.”<sup>109</sup> Despite its obligation, the Iraqi government permitted civilians to dwell inside the compound, an action that led directly to the deaths of the civilians.<sup>110</sup> Uninformed observers nonetheless summarily concluded that the civilian casualties were caused by U.S. noncompliance with IHL, rather than an Iraqi violation of the customarily accepted legal principles embodied in Article 58(a) of Protocol I.<sup>111</sup> Either way, the calamity inspired broad public sympathy for the Iraqis and condemnation of the United States. In short, the contempt for the occupier, which weaker armies and insurgents rely upon to strengthen their ranks was effected by the weaker force’s violations of IHL.

Despite the legality of the attack on the Al-Firdus bunker, tragedies like it and others that stem from violations of IHL bolster the proposition that certain provisions of Protocol I do not comport with practical legal reasoning. For example, Article 52(3) requires a combatant to presume that an object is non-threatening or civilian in

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104. U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 615-617 (Apr. 1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf>. [hereinafter DOD Report] (Reference can be found at 702.)

105. *Id.*

106. *Id.*

107. *Id.* at 141.

108. *Id.*

109. *Id.* at 617

110. *Id.*

111. Protocol I, *supra* note 11, art. 58 (stating that “[t]he Parties to the conflict shall, to the maximum extent feasible: (a) without prejudice to Article 49 of the Fourth Convention, endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.”)

nature if there is any doubt.<sup>112</sup> One practical objection to this requirement is that “[i]t shifts the burden for determining the precise use of an object from the party controlling that object” to the party attacking the object, when in fact the party controlling the object is in a far more informed position to determine its use.<sup>113</sup>

Article 52(3) relaxes the distinction between insurgents and civilians. This innovation encourages total war, undermines the law, and improves the insurgents’ strategic capacity. Consequently, civilians are imperiled because insurgents are better able to disguise threatening behavior as civilian activity.<sup>114</sup>

The by-product of the dreadful effects of this problem compels occupiers to assume less risk in exposing themselves to harm. This result, wherein hostile and peaceful civilians are treated the same, cannot be said to be coherent with protecting innocent civilians from harm. The helicopter pilot in the opening scenario exposed the civilians in the building to grave danger, though unintentionally, in his attempt to minimize the increased risk of harm to the British soldiers. As demonstrated in the following section, though the collapse of the building was a horrible incident, whether to assign liability to the pilot for a war crime requires an examination of the military necessity of the situation at the time of the attack.

### III. A CIVILIAN’S RIGHT TO REMAIN DETACHED FROM HOSTILITIES SHOULD NOT BE VITIATED BY THE DOCTRINE OF MILITARY NECESSITY

This section focuses more generally on the conduct of the occupier, rather than the civilian, in assessing the impact of Protocol I on the civilian’s right to be free from attack. More specifically, it posits that if one of the core aims of IHL is to protect civilians from the unnecessary violence uniquely characteristic of armed conflict, application of the doctrine of military necessity must cohere with this juridical goal. As examined here, the proper application and assessment of military necessity is virtually impossible when there is no viable method for distinguishing hostile civilians or insurgents from innocent civilians. Exacerbating the problem are the overreaching influences of politics, which often lead military

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112. Protocol I, *supra* note 11, art. 52(3).

113. DOD Report, *supra* note 104, at 616.

114. WALZER, *supra* note 56, at 179-80.



commanders to take measures that increase civilian casualties even when there is no identification problem.

Whether the harm to the civilian populace emanates from an inability to distinguish hostile civilians from peaceful ones or a need to satisfy the political objective of minimizing casualties among friendly forces by reducing exposure to risk, the end result is that civilians are harmed, albeit unintentionally. This result is not only inconsistent with the aim of the IHL, but it also undermines the practical reasoning underlying the law proscribing civilian participation in hostilities. Whether intentionally or mistakenly, conditions that give civilians the impression that they are being attacked raise the question as to whether they should continue to refrain from participating in hostilities. To avoid this circumstance, the application of military necessity must comport with the goal of IHL to protect innocent civilians without exception.

Dr. Francis Lieber, a former Columbia University law professor,<sup>115</sup> and the author of the first “codification of the laws of land warfare,”<sup>116</sup> drafted the most widely accepted theory of military necessity. Dr. Lieber defined *military necessity* as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>117</sup> One of the best-known judicially reviewed examples of the broad nature of military necessity comes from the *U.S. v. Wilhelm List et al.* (the Hostage case), which was heard before the IMT.<sup>118</sup> General Lothar Rendulic, commander of the Second Panzer Army in Yugoslavia,<sup>119</sup> was accused of implementing a “scorched-earth policy on an enormous scale, effected when the Germans withdrew from the

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115. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 213-15 (1998). The Lieber definition appears to be analogous to the definition adopted in FM 27-10. See FM 27-10, *supra* note 6, (defining *military necessity* as that “principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible”).

116. LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 19 (2002).

117. U.S. WAR DEPARTMENT, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD*, General Orders 100, art. 14 (Apr. 24, 1863), *reprinted in* Carnahan, *supra* note 115, at 215.

118. O’Brien, *supra* note 23, at 140; *United States v. List* (the Hostage Case), TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG TRIBUNALS UNDER CONTROL COUNCIL NO.10 (Washington, D.C.: U.S. Government Printing Office, 1949), case 7, *reprinted in part in* PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 169-71 (2000).

119. *Id.* at 170.

Finmark region.”<sup>120</sup> He was tried for “wanton destruction of cities, towns, villages or devastation not justified by military necessity.”<sup>121</sup>

The IMT ruled that General Rendulic, who was “far from friendly territory and in grave danger of being cut off and annihilated by the Russian forces,” was justified in ordering the cruel devastation that left 61,000 civilian “men, women and children homeless, starving, and destitute.”<sup>122</sup> The military result was that General Rendulic successfully prevented the Russian Army from overtaking his troops. The Germans were able to escape. Although the facts revealed that the enormity of the devastation was not immediately necessary, the measures were taken to “obstruct the Russian advance and to deprive them of the use of the buildings, private property and human resources of the region.”<sup>123</sup> Because the act appeared necessary to General Rendulic’s accomplishment of his military objective, the tribunal respected his judgment and “ruled that he had acted in accordance with Article 23(g) of the Hague Rules on Land Warfare.”<sup>124</sup>

Although the *Hostage* case illustrates an application of military necessity where civilians were left homeless rather than killed or wounded, the case provides a sound example of its broad and discretionary application. The broad nature of military necessity does not, however, obviate the need for a definite and foreseeable connection between the act committed and the alleged military necessity. Dr. William O’Brien states “[i]t is not sufficient to claim that an act not directly related to a legitimate measure of warfare *might* contribute ultimately to the enemy’s defeat.”<sup>125</sup> Had the Germans’ scorched earth tactics that destroyed huge areas of Russia been motivated by spite rather than military need imposed by the circumstances of their withdrawal, Rendulic’s acts of devastation would likely have constituted war crimes.

Without the requirement that some military objective must exist to justify military necessity, the doctrine would be vulnerable to

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120. O’Brien, *supra* note 23, at 140.

121. *Id.* (quoting Nuremberg Military Tribunal, *Trials of War Criminals* (Washington: Government Printing Office, 1950), at xi, 770).

122. *Id.*

123. *Id.*

124. *Id.*; Article 23(g) forbids the destruction or seizure of “the enemy’s property, unless such destruction and seizure be imperatively demanded by the necessities of war.” HR, *supra* note 4, art. 23(g).

125. O’Brien, *supra* note 23, at 141.

widespread abuse and unworthy of juridical value.<sup>126</sup> Still, the seeming ease with which the doctrine may be invoked as a matter of convenience is a well-known criticism of the doctrine of military necessity.<sup>127</sup> In this vein, questions arise regarding the extent to which a combatant is obligated to balance the necessity of an attack against the protection owed to civilians and civilian objects either when targeting objects such as the Al Firdus Bunker or buildings destroyed by General Rendulic.

The basic rule is any damage to the civilian populace must be proportionate to the military objective. The requirement for proportionality is designed to balance the competing priorities of humanitarian principles and military necessity. Its core purpose is to safeguard civilians from unjustified risks by requiring combatants to weigh military and humanitarian values against one another.<sup>128</sup> It is also designed to preclude combatants from conducting operations that will cause death or injury to civilians and civilian property that is excessive in relation to the military necessity.<sup>129</sup> To satisfy this goal, a combatant is required to: (1) verify that the target is a military objective;<sup>130</sup> (2) “take all feasible precautions to avoid or minimize collateral damage;” and (3) refrain from destroying a target if it is apparent that the destruction may be expected to cause excessive damage.<sup>131</sup>

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126. REPORT OF THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC MONUMENTS IN WAR AREAS 48-49 (1946) (recognizing the risk of military necessity being used for military convenience); see also Sarah Eagen, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action*, 13 PACE INT'L L. REV. 407, 426 (2001) (noting that military necessity is sometimes used for personal convenience and, therefore, there is a potential for abuse when nations involve the concept of military necessity).

127. *Id.* at 426.

128. William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 545 (1997).

129. Frits Kalshoven, as reported by Charles A. Allen, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC'Y INT'L L. PROC. 39, 44 (1992) [hereinafter *Limitations*].

130. Protocol I, *supra* note 11, art. 52(2) defines military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” What constitutes an “effective contribution to military action” and “definite military advantage” has led to much debate and ultimately inspired disputes over whether an object is, legally, a military object. This discussion goes outside the scope of the present Article but will be addressed in a subsequent writing.

131. *Limitations*, *supra* note 129, at 44; Protocol I, *supra* note 11, art. 57.

Examination of the following situation will illustrate the application of the military necessity doctrine. During the Persian Gulf War, the government of Iraq positioned two fighter aircraft adjacent to the ancient temple of Ur, on the theory that the U.S.-led coalition forces' respect for the temple as a historical site would preclude an attack on the aircraft.<sup>132</sup> As military objects, the planes were, of course, subject to attack, and the Iraqis were required by Article 27 of the Hague Regulations<sup>133</sup> to keep the planes away from the temple of Ur and any other cultural artifacts. The United States' position was that the Iraqis should bear responsibility for any damage to the temple as they positioned the aircraft near the protected structure.<sup>134</sup> Despite the military nature of the planes, the legal analysis did not end there. According to U.S. commanders, the principle of proportionality demanded that they refrain from attacking the aircraft because U.S. intelligence indicated that the two planes were scarcely a military threat without servicing equipment and any nearby runway.<sup>135</sup> Those conditions effectively took the two planes out of action, thereby limiting the military value of their destruction when weighed against the risk of damaging the temple.<sup>136</sup> The example shows that, though an object may be military in nature, its destruction, when weighed against humanitarian demands, may not be warranted.

In considering humanitarian values, U.S. commanders weigh the expected collateral harm to civilians against the necessity of an attack either at the time of the attack or in view of the long-term military and political objectives of the entire campaign.<sup>137</sup> Some commentators criticize the United States' view based on the premise that the long-term strategic standpoint of military necessity ignores the fact that "civilian losses may be disproportionate to the

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132. DOD Report, *supra* note 104, at 615.

133. Article 27 reads:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Convention Respecting the Laws and Customs of War on Land, art. 27, Oct. 18, 1907, 36 Stat. 2277.

134. DOD Report, *supra* note 104, at 615.

135. *Id.*

136. *Id.*

137. DOD Report, *supra* note 104, at 615.

immediate military goal to be achieved in any particular tactical attack.”<sup>138</sup> Others commentators criticize the view on the ground that military necessity should apply only to battlefield conditions and should never take political objectives into consideration.<sup>139</sup> Both views appear to take exception to the doctrine’s vulnerability to social policy, which this Article discusses shortly. It is first necessary to understand the fundamental complexities involved in ensuring that the need for an attack is proportionate to the damage it causes.

At first glance, it appears relatively elementary to “state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects.”<sup>140</sup> Clearly, “bombing a refugee camp is obviously prohibited if its only military significance is that women in the camp are knitting socks for soldiers.”<sup>141</sup> Conversely, an air strike on a large ammunition storage facility should not be prohibited because a single farmer is plowing nearby.<sup>142</sup> Of course, during armed conflict, many situations arise that implicate a wide variety of options that could conceivably improve the odds of winning the conflict. Most of these situations are not as clearly determinable as the aforementioned examples. More often than not, balancing the demands of military necessity with humanitarian considerations is very complex and susceptible to subjective morality, bias, and reasoning.<sup>143</sup> Indeed, an experienced human rights lawyer, who is a distant onlooker, is very likely to assess the collateral damage—loss of civilian life or property—in relation to the intended military necessity much differently than would a military commander who is responsible for winning the armed conflict.<sup>144</sup> This reality lends credence to the proposition held by some that the humanitarian portion of the equation is seriously vitiated by subjectivity.<sup>145</sup> This argument is not completely devoid of merit.

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138. Dale Stephens, *Human Rights and Armed Conflict—The Advisory Opinion of the International Court of Justice in Nuclear Weapons Case*, 4 YALE HUM. RTS & DEV. L. J. 1, 20 (2001) (attributing the remarks to Judith Gardem, *Proportionality as a Restraint on the Use of Force*, 20 AUSTL. Y. B. INT’L L. 161, 409 (1999)).

139. Carnahan, *supra* note 115, at 219.

140. Fenrick, *supra* note 128, at 545.

141. *Id.* at 545.

142. *Id.*

143. *Id.* at 546.

144. *Id.*

145. Stephens, *supra* note 138, at 20 (attributing the remarks to Judith Gardem, *Proportionality as a Restraint on the Use of Force*, 20 AUSTL. Y. B. INT’L L. 161, 409 (1999)).

The principle of proportionality, essentially, compels a combatant to assess the value of innocent human lives in relation to military need.<sup>146</sup> The integrity and effectiveness of the analysis is, therefore, vulnerable to the vagaries of human reason: application of the principle is uniquely dependent upon the military commander's concept of who the enemy is and where the enemy is located. A commander cannot accurately consider collateral harm to a civilian if he perceives that person to be the enemy. Therefore, ground conditions that create more difficulty in distinguishing innocent civilians from hostile civilians or insurgents logically increases the psychological value the commander will give to military need when assessing whether an attack on an objective is proportionate. If a commander mistakes an innocent civilian for an insurgent, despite his best attempts to comply with the proportionality requirement, the operation will increase casualties among the innocent civilian populace.

The dilemma is further exacerbated by the language of Article 51, which permits insurgents to abuse the presumption of innocence or peacefulness. Indeed, when approaching the rule as strict textualists rather than from a coherent approach, the rule could reasonably be construed as authorizing civilians to engage in acts that negate their immunity, and then permit them to regain that immunity once they cease the wrongful conduct, provided they are not caught.<sup>147</sup> This condition so distorts the term *civilian* that the presumption of civilian innocence disappears in the face of hostility. In the eyes of the combatant, Article 51 does nothing more than turn the civilian into a sniper by day and a legally immune citizen by night. This consequence not only undermines the legitimacy of the law, it ultimately leads to total war, as self preservation compels combatants to expand the list of targets to be attacked in response to threats and internal casualties.<sup>148</sup>

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146. Fenrick, *supra* note 128, at 546.

147. Protocol I, *supra* note 11, art. 51(3) (stating that “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”).

148. Indeed, former Special Assistant for Law of War Matters to the U.S. Army Judge Advocate General W. Hays Parks urges that the Protocol I legal constraints governing the conduct of armed conflict are too restraining because they do not take into account a combatant's need to destroy the war-sustaining capability of an enemy. *See* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 140-46 (1990). To that end, U.S. policy holds that bridges, railroads, seaports, highways, communication sites, and utility sites, though typically civilian in nature, may also be attacked if used for military purposes. *See* DOD Report, *supra* note 104, at 613-16. The reported U.S. attack on an Iraqi television station in order to stop the

The extent to which military commanders should expose their forces to danger in order to limit civilian casualties is difficult to determine, particularly in light of military commanders' duty to limit casualties within their own forces—the most basic military necessity.<sup>149</sup> The Herculean challenge lies in the tension between a U.S. military commander's duty under international law to minimize collateral damage and a commander's duty under domestic law to protect U.S. troops against the risk of capture and harm. Reducing the risk of harm to troops, though a widely accepted military practice, may increase the risk to civilians, albeit unintentionally. Making the analysis exponentially more challenging are influences of political objectives on the proportionality equation.

In Kosovo, for instance, an air commander required pilots on combat missions to fly above 15,000 feet so as to avoid Serbian air defense systems.<sup>150</sup> The limitation reduced the risk of U.S. casualties and a costly aircraft shoot-down or prisoner-of-war incident that could have been politically damaging and might have jeopardized national interests.<sup>151</sup> The mandate, however, increased the number of civilian casualties because the higher altitude made it more difficult for pilots to positively identify conditions on the ground before firing.<sup>152</sup> Similarly, in February 2002, in Afghanistan, Central Intelligence Agency officers and U.S. Army officers attached to the U.S. Central Command watched as a Predator plane, flying thousands of feet above ground, captured images of a very tall man being treated very respectfully by his colleagues.<sup>153</sup> The officers “agreed that the tall man could be Osama Bin Laden.”<sup>154</sup> Minutes later, permission was granted, they fired.<sup>155</sup> The attack devastated the area,

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Iraqi disinformation campaign illustrates the degree to which traditional civilian objects may become targets for attack in response to the realities of armed conflict. See Amnesty Int'l, *Iraq: Fear of War Crimes by both Sides*, Mar. 26, 2003, available at <http://web.amnesty.org/library/index/engmde140442003> (criticizing U.S. attack on Iraqi TV station); Patrick Martin, *Media bosses admit pro-war bias in coverage of Iraq*, WORLD SOCIALIST, May 2, 2003, <http://www.wsws.org/Articles/2003/may2003/med-m02.shtml> (commenting that BBC and CNN officials admitted that American broadcast media stations distorted the news and functioned as information distributors for the Pentagon and Bush Administration during the war in Iraq).

149. Fenrick, *supra* note 128, at 549.

150. Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 477 (2004) [hereinafter *Legal and Policy Constraints*].

151. *Id.*

152. *Id.*

153. SEYMOUR M. HERSH, CHAIN OF COMMAND 269 (2004)

154. *Id.*

155. *Id.* at 269-70.

but the media later reported that the victims were merely local men scavenging the woods for scrap metal, not Osama Bin Laden.<sup>156</sup>

The incident involving the killing of the three local men, and others like it, have been criticized as constituting summary executions in contravention of international law and for encouraging other nations to execute anyone they consider a terrorist.<sup>157</sup> Despite the international criticism, incidents like the abovementioned military operations have been applauded by many Americans as “progress in the war against terrorism.”<sup>158</sup> This circumstance symbolizes a growing divergence between humanitarian objectives and national policy that suggests political pressures have the tendency to manipulate the application of IHL as well as increase or decrease violence depending on the desired political outcome.

Turning to the flight commander’s decision in Kosovo, the example provides a careful reminder of how political influences, in addition to regard for individual safety, affect the proportionality analysis.<sup>159</sup> The commander was thinking not only of the impact of losing a pilot, but also of the long-term and political effects of having a plane shot down. For instance, a captured pilot could give enemy forces international media notoriety and be used as a tool for advancing their demands. Though his actions may have been within the letter of the proportionality rule, the outcome flowing from his actions hardly comports with the aim of IHL, which is to protect innocent civilians from the tragic effects of armed conflict. Civilian safety, undoubtedly, was subordinated by political concerns, much the

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156. *Id.* at 270. It is noted that not all incidents involving the Predator have resulted in death. During the U.S. conflict in Afghanistan, an American, unmanned aircraft known as the “Predator” “identified a group of cars and trucks fleeing the capital.” One of the cars was suspected of carrying Taliban leader Mullah Omar. The Predator followed the cars to a building where Omar and others were seeking refuge. Despite requests from fighter bombers, General Tommy Franks denied authority to fire because of the concerns expressed by his Judge Advocate General. See Seymour M. Hersh, *Annals of National Security: King’s Ransom*, THE NEW YORKER, Oct. 22, 2001, available at <http://www.hvk.org/Articles/1001/193.html>. The refusal led some officers to complain that they were being refused the right to strike targets because “of political pressure to avoid a bloody collateral damage incident that would publicly damage the campaign.” See *Legal and Policy Constraints*, *supra* note 150, at 478-79.

157. HERSH, *supra* note 153, at 268.

158. *Id.* at 268.

159. One of the best and most critical influences of political concerns upon battlefield operations reportedly occurred in Iraq, when military commanders halted major attacks designed to retake insurgent stronghold cities such as Fallujah and Ramadi until after the U.S. presidential election. See Mark Mazzetti, *Major assaults on hold until after U.S. Election*, L.A. TIMES, Oct. 11, 2004, available at <http://www.southcoasttoday.com/daily/10-04/10-11-04/a02wn655.htm>.



same way the ratifiers of Protocol I subordinated the traditional value of the combatant-noncombatant distinction when granting insurgents increased rights to operate during armed conflicts.

In both instances, the means used to achieve the goals of the law did not produce a result that is coherent with the overall aim of the law. Succinctly put, “[t]he reality of politics leaves the law untidy.”<sup>160</sup> Coherence theory, however, “minimize[s] the effect of politics.”<sup>161</sup> It achieves this by functioning as a theory of practical reasoning from ends to means.<sup>162</sup> That is to say, through analyzing IHL in a coherent, outcome-driven manner, obstacles to proper applications, such as literalism or politics are minimized. Indeed, if one keeps focused on the aim of IHL, which is to protect civilians, a different outcome can be reasonably attained.

This discussion should not be taken to imply, however, that commanders are legally free to make decisions based on their personal conceptions of fairness and individual biases. Instead, the contention here is that the law, as written, permits too much vulnerability to flawed application. Turning to the opening scenario, the pilot fired the rockets into the building because the insurgents were using the building to support multiple fighting positions. In judging whether the helicopter pilot acted reasonably, a person must look at the situation through the lens of the pilot.<sup>163</sup> The extent to which the pilot gathered available information and relied on the information acquired, as well as the accuracy of the information, are key factors in determining the reasonableness of his attack decision.<sup>164</sup> Other factors, such as time, available troops, and combat conditions, are also taken into account when assessing the reasonableness of decision to attack.<sup>165</sup>

As previously stated, the helicopter pilot’s decision could have been guided by concern that if the British soldiers were captured, they might become hostages or be murdered on public television. Both results have tremendous political ramifications. Given the broad

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160. JOSEPH RAZ, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN* 261, 298 (1994).

161. Gerald J. Postema, *Integrity: Justice in Workclothes*, 82 *IOWA L. REV.* 821, 831 (1997).

162. Murray, *supra* note 5, at 908.

163. MAJOR KEITH E. PULS, *LAW OF WAR HANDBOOK 2005: INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT* 167 (2005) (citing A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 66 (1996)).

164. *Id.*

165. *Id.*

nature of military necessity and the subjectivity of any proportionality assessment, though, other factors make the pilot's action legally sound. The pilot's decision to fire into the foundation of the building to prevent the team of soldiers from being killed appears reasonable, as there was a military need to immediately suppress the insurgents' fire upon the soldiers. The pilot did not know that civilian men, women, and children were in the building when he fired at it, nor was there sufficient time for the helicopter team to ascertain the existence and number of peaceful civilians who may have been in the building being used by the insurgents to ambush the soldiers. In sum, the pilot's application of force, despite resulting in the unfortunate deaths of innocent civilians, did not constitute the outrageous conduct proscribed by the IMT. The pilot did not destroy the building for revenge or out of spite. On the contrary, the pilot made a reasonable decision in light of the immediate need to stop the attack on the British soldiers. Had the pilot not acted as he did, the ground team would probably have been killed.

Despite the media fixation on the results of the pilot's rocket fire, the civilian deaths were the result of insurgent misuse of civilian objects and civilian attire. The result is made possible by the previously discussed provisions of Protocol I.<sup>166</sup> The insurgents evaded criticism, although it was their conduct that brought about the civilian deaths. This result is incoherent with Protocol I's underlying justification. Application of the law and the means by which conduct complies with the law should produce an outcome that prevents treacherous conduct by insurgents rather than restrains the lawful military options available to occupiers seeking to restore order when threatened by treachery. The quintessential task, therefore, is determining what an occupier can do to prevent insurgents from employing treacherous means of warfare that place innocent civilians in danger, so that there is coherency between the justification and outcome produced by implementation of IHL. Some states have concluded that reprisals are the "only means" to compel a recalcitrant enemy to cease treacherous conduct during armed conflicts.<sup>167</sup>

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166. See relevant Protocol provisions discussed *supra* notes 11, 13.

167. PICTET, *supra* note 53, at 67.

#### IV. THE USE OF REPRISALS TO DETER TREACHERY MAY OBVIATE A CIVILIAN'S DUTY TO REFRAIN FROM PARTICIPATING IN HOSTILITIES

This Part discusses the law and practice of conducting reprisals against civilians and explores the legality of using reprisals to stop treacherous conduct by insurgents. Also discussed is the way social contractarian theory informs norms relative to reprisals and how this circumstance has the tendency to hinder rather than restore law and order within an occupied territory.

A violation of IHL by insurgents or hostile civilians does not legally justify the commission of violations by occupiers.<sup>168</sup> Nevertheless, reprisals are considered an exception to that rule: they are self-help measures that would otherwise be unlawful but for their strict use to compel an adversary to cease illegitimate conduct.<sup>169</sup> Reprisals are employed to deter acts of illegitimate warfare, whether the acts are international violations or otherwise.<sup>170</sup> Though at times reprisals may be an adequate means for making the enemy comply with IHL, they typically prompt counter-reprisals and their employment is often abused.<sup>171</sup>

The qualifying standards for what objects are subject to reprisal attacks remains so narrow that the term *reprisal* has been erroneously used to describe conduct that does not qualify as a lawful reprisal.<sup>172</sup> The legal standards are very specific. Reprisals may be employed only after all other means have been exhausted.<sup>173</sup> They must be authorized by the commander-in-chief;<sup>174</sup> proportional to the wrong committed by the enemy; committed by an actor against an addressee who are both "states or other entities enjoying a degree of

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168. *Id.* at 90-91.

169. Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 *MIL. L. REV.* 155, 156 (2001) (quoting *The Naulilaa Case*, 8 *Trib. Arb. Mixtes* 422-25).

170. Lauterpacht, *supra* note 21, § 248, at 562-63.

171. *Id.* § 247, at 562; *Iraq: Reprisal Killing of Civilian is War Crime*, HUMAN RIGHTS WATCH, May 13, 2004, <http://hrw.org/english/docs/2004/05/13/iraq8582.htm>; Paul McGeough, *Fallujah Braces for U.S. Reprisal*, THE AGE, Apr. 3, 2004, available at <http://www.theage.com.au/Articles/2004/04/02/1080544690212.html?from=storyrhs>; Michael Gillespie, *Reprisal in Fallujah*, Apr. 15, 2004, <http://world.mediamonitors.net/content/view/full/6240>.

172. W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 *MIL. L. REV.* 73, 82-83 (1995) (offering a list of items and individuals that nations have agreed are protected from reprisal).

173. *Id.* at 84.

174. Lauterpacht, *supra* note 21, § 250, at 564.

international personality;”<sup>175</sup> and they must constitute acts, which amount to a violation of either the identical or another form of international law, but undertaken for the purpose of coercing the addressee to bring its conduct into compliance with IHL.<sup>176</sup>

#### A. Legality of Reprisals against Civilians

Unlike the state of jurisprudence that existed during the American Civil War, it is almost universally agreed that reprisals may not be exacted by taking hostages<sup>177</sup> or killing prisoners of wars.<sup>178</sup> The legality of conducting reprisals against civilians, however, is not without dispute. Admittedly, moral principle prompts questions regarding how just it is to punish civilians for acts they did not commit. The prohibition contained in Article 50<sup>179</sup> against levying punishment upon populations of civilians for the individual acts of others for which they cannot be held collectively responsible has not been interpreted to ban reprisals against civilians.<sup>180</sup> It remains fairly undisputed that the Geneva Conventions do not ban “reprisals against enemy civil population.”<sup>181</sup> Protocol I, however, attempts to ban reprisals against *all* civilians.<sup>182</sup> The ban contained in Protocol I, though appearing to legally proscribe reprisals against civilians, does nothing of the sort in a practical sense.

Major military powers such as Italy, Germany, Egypt, and the United Kingdom, despite ratifying Protocol I, have all reserved the right to resort to reprisals in the face of serious violations of IHL against their respective civilian populations.<sup>183</sup> The United States is not a signatory to Protocol I and persistently objects to the portion of

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175. FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 33 (1971) [hereinafter *BELLIGERENT REPRISALS*].

176. *Id.*

177. Geneva Convention IV, *supra* note 13, arts. 27, 33, & 34.

178. Geneva Convention III, *supra* note 13, art. 13.

179. The Hague Regulations provide: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.” HR, *supra* note 4, art. 50.

180. Lauterpacht, *supra* note 21, § 250, at 565; *see also id.* § 170, at 443.

181. *BELLIGERENT REPRISALS*, *supra* note 175, at 357; *see also* PICTET, *supra* note 53, at 67 (endorsing the view that the Geneva Conventions prohibit reprisals only against protected persons, but permits them “in the conduct of hostilities”).

182. Protocol I, *supra* note 11, arts. 51(6), 52.

183. Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 226-227 (2003); DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 493-512.

Article 51 and subsequent Articles of Protocol I that ban reprisals.<sup>184</sup> According to U.S. policy, a viable means of combating treachery available for U.S. soldiers serving in U.S.-occupied territories is the use of reprisals<sup>185</sup> against unprotected civilians.<sup>186</sup>

At least one noted scholar, Fenrick, contends that certain reprisals are banned under international customary law,<sup>187</sup> which binds the United States and other nations though they are not parties to Protocol I.<sup>188</sup> I do not concur. International customary law binds nations by functioning as a collection of widespread international practices that states over time come to accept as *opinio juris*, i.e., legally binding.<sup>189</sup> States, by their acceptance and subsequent conduct, create international customary rules.<sup>190</sup> Fenrick's reliance on U.N. General Assembly and the International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.) sources regarding the state of international customary law, without discussion of a state's official reservations or objections in shaping customary norms, ignore the notion that a state's acceptance is a necessary condition for the progression of customary international law.<sup>191</sup> Fenrick posits that

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184. LAW OF WAR HANDBOOK, *supra* note 163, at 157; see Martin P. Dupuis *et al.*, *supra* note 44, at 426.

185. United States military regulations make clear that reprisals may be taken against "enemy civilians" or "unprotected civilians," which can logically be deduced to include the same category of civilians. See OFFICE OF THE JUDGE ADVOCATE, U.S. NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON NAVAL OPERATIONS, Ch. 6, § 6.2.3, at 6-16, available at <http://www.nwc.navy.mil/ILD/chapter6.pdf>; see also FM 27-10, *supra* note 6, ¶ 497(c), at 95-96 (allowing reprisals against unprotected civilians).

186. Geneva Convention IV identifies protected civilians as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Geneva Convention IV, *supra* note 13, art. 4. U.S. military manuals explain that protected civilians fall into two categories. Using the U.S. occupation of Iraq as an illustration, the first category includes civilian enemy nationals within the national territory of each of the parties to the conflict, (e.g., U.S. oil workers in Iraq or Iraqi students in the U.S. after the start of the invasion on March 1, 2003). The second category consists of the population of occupied territories, excluding nationals of the occupying power or a co-belligerent. See LAW OF WAR HANDBOOK, *supra* note 163, at 147-48.

187. Fenrick, *supra* note 128, at 557-559.

188. See *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also Martin P. Dupuis *et al.*, *supra* note 44, at 420.

189. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116 (1999).

190. Darcy, *supra* note 183, at 220.

191. Fenrick, *supra* note 128, at 557-58 (noting that "in view of the Appeals Chamber in the Tadic Jurisdiction motion, attack on civilian objects are prohibited as a matter of customary law in all conflicts and [that] this prohibition is reflected in U.N. Resolution 2675"); see also *id.* at

reprisals against civilian objects are prohibited as a matter of customary international law in all conflicts<sup>192</sup> because U.N. Resolution 2675<sup>193</sup> suggests that reprisals against civilians in all circumstances are forbidden.<sup>194</sup>

To support his position, Fenrick asserts that the legality of reprisal actions against civilians was considered and rejected by the I.C.T.Y in the matter of *Prosecutor v. Martić*,<sup>195</sup> where the trial chamber agreed that the prohibitions against reprisals are an integral part of customary international law and are to be respected by all states during all armed conflicts.<sup>196</sup> Fenrick's propositions rest upon the notion that when international organs such as the U.N. General Assembly and the I.C.T.Y. concur that a norm is customary, the norm rises to the status of a customary rule of international law.<sup>197</sup> To the extent Fenrick posits that the *Martić* decision is establishing international customary law, he departs from the majority view in several ways.

First, the fact that the legality of reprisals was not an issue before the trial chambers in *Martić* makes that entity's view *obiter dicta*,<sup>198</sup> and nonbinding on that basis alone.<sup>199</sup> Second, the *Martić* decision does not bind objecting states. Although the judgment of an international court construing customary international law binds the parties to the dispute, the court's opinion does not have the effect of establishing precedent,<sup>200</sup> particularly with respect to a state that has

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559 (stating "direct attacks on civilian objects would also constitute a violation of customary law in all conflicts.").

192. *Id.* at 558-59 (citing Decision of Trial Chamber I, *Prosecutor v. Milan Martić*, Case No. IT-95-11-I (1996)).

193. Basic principles for the protection of civilian populations in armed conflicts, G.A. Res. 2675, U.N. GAOR, 25th Sess., Vol. 13, U.N. Doc. A/8178 (Dec. 9, 1970).

194. Fenrick, *supra* note 128, at 558.

195. *Prosecutor v. Martić*, Case No. IT-95-11-R61, Decision of Trial Chamber I, (Mar. 8, 1996) (Jorda, J., presiding).

196. Fenrick, *supra* note 128, at 558-59.

197. *Id.* at 557-59.

198. *Obiter dicta* is defined as an "incidental statement in a judgment; legal proposition which the judge does not consider necessary for reaching his decision and which therefore does not form part of the *ratio decidendi*." A. G. TOTH THE OXFORD ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW 393 (1990).

199. See Darcy, *supra* note 183, at 241.

200. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1527 (2004) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103, cmt. b (1987)) (recalling "the traditional view that there is no *stare decisis* in international law"); see also Jean-Marie Henckaerts, *Study on Customary International*

persistently objected to a rule and does not regard it as binding.<sup>201</sup> Because of the positivist characteristics of international law, states that “do not consent to being bound by treaty norms or to the development of customary rules . . . [are] not responsible to the international community for non-observance of [the norm].”<sup>202</sup> Therefore, a state that possesses certain weapon systems or employs specific measures of waging war that the rest of the world wishes to ban can prevent the development of a prohibition of those weapons and measures with respect to itself.<sup>203</sup>

The same is true for U.N. General Assembly resolutions. Although U.N. General Assembly Resolution 2675 may represent persuasive authority,<sup>204</sup> resolutions are generally not binding on states, and the value afforded it in assessing the formation of customary international law depends on a state’s acceptance thereof, its content, and its practice relative to the law.<sup>205</sup> A state’s position regarding a certain treaty provision, as expressed through reservations, statements of interpretation, or implementation made upon ratification, is relevant in determining state practice and whether a particular rule can be considered an international customary law.<sup>206</sup> The reservations to Protocol I made by the United Kingdom,<sup>207</sup>

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*Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 179 (2005).

201. Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79, 106 (2005) (noting that “customary international law is universal in the sense that its obligations bind all nations except those that ‘persistently object’ during the development of the customary international law norm” (quoting Goldsmith & Posner, *supra* note 189, at 1118-19)).

202. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT’L REV. RED CROSS 125, 131 (1997).

203. *Id.* (relying on IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 10 (4th ed. 1990)).

204. Shimon Shetreet, *Negotiations and Agreements Are Better Than Legal Resolutions: A Response To Professor John Quigley*, 32 CASE W. RES. J. INT’L L. 259, 265 (2000) (noting that United Nation General Assembly Resolutions may be persuasive of what international law should be).

205. Henckaerts, *supra* note 200, at 179.

206. *See id.* at 182-83.

207. *See* Protocol I, United Kingdom Reservation, reservation m, available at <http://www.icrc.ch/IHL.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (“The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party

Italy,<sup>208</sup> Germany,<sup>209</sup> and Egypt,<sup>210</sup> and the objections of the United States can, therefore, be said to be an exercise of their right not to be bound by any attempt to ban reprisals. This fact militates against any argument that reprisals against civilians are banned under international customary law, particularly with respect to these objecting states.<sup>211</sup>

It should be noted that some commentators assert that international customary law binds all other states that did not “‘persistently object’ during the development of the . . . norm.”<sup>212</sup> Additionally, there are universally accepted crimes of aggression that can be described as peremptory norms that bind all states.<sup>213</sup> Reprisals, however, have never been so characterized by the international community,<sup>214</sup> which explains why even the historic guardian of international humanitarian efforts, the International

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to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government.”).

208. See Protocol I, Italy Declaration, available at <http://www.icrc.ch/IHL.nsf/NORM/E2F248CE54CF09B5C1256402003FB443?OpenDocument> (“Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation.”).

209. See Protocol I, Germany Reservation, para. 6, available at <http://www.icrc.ch/ihl.nsf/NORM/259D4F9EF25B0E95C1256402003FB8C0?OpenDocument> (“The Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation.”).

210. See Protocol I, Egypt Declaration, available at <http://www.icrc.ch/ihl.nsf/NORM/47930B6388C46B08C1256402003FB884?OpenDocument> (“The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.”).

211. Questions remain as to whether a finding that reprisals are legally banned under international customary law would actually prevent U.S. forces from employing them. The U.S. Army military manual on land warfare makes clear that while customary law is strictly observed by United States forces, it is subject to “such exceptions as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy.” FM 27-10, *supra* note 6, ¶¶ 7a, 7c, at 10-11.

212. Goldsmith & Posner, *supra* note 189, at 1118-19.

213. Benjamin Ferencz, *Can Aggression Be Deterred by Law?*, 11 PACE INT’L L. REV. 344, 349 (1999).

214. Frank Emmert, *Labor, Environment, Standards and World Trade Law*, 10 U.C. DAVIS J. INT’L L. & POL’Y, 75, 90, n.39 (2003) (recognizing that reprisals may be lawful so long as they do not violate “peremptory rules of international law (jus cogens)”).



Coalition of the Red Cross, recognizes that reprisals, albeit limited, are not prohibited under international customary law.<sup>215</sup>

## B. The Empirical Effect of Using Reprisals

One of the most difficult tasks for a field commander facing an enemy that violates the most fundamental laws of war is fashioning a humane, but effective, way to stop the proscribed conduct, while preserving humanitarian value systems.<sup>216</sup> Sometimes the need to obtain this balance requires a departure from accepted means of conduct.<sup>217</sup> Therefore, reprisals seem especially useful for a commander faced with enforcing the laws and customs of armed conflict. A French military general once stated that reprisals will “never disappear, because the laws of war are the laws of necessity, and it will always be necessary to repress acts of treachery, of bad faith and of vengeance.”<sup>218</sup> Indeed, this was the conclusion reached during the American Civil War by General Robert E. Lee, commander of the Army of Northern Virginia, after being informed by one of his subordinate commanders that six of his men had been captured and hanged in violation of the law and customs of war.<sup>219</sup>

Lieutenant Colonel John Mosby advised General Lee of his intent to conduct reprisals in response to illegal conduct perpetrated against his men.<sup>220</sup> General Lee’s response could not have been more

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215. Henckaerts, *supra* note 200, at 210 (recognizing, via Rule 145 of the 2005 customary law study, that belligerent reprisals are not legally prohibited but are subject to stringent conditions); *see also* ZEGVELD, *supra* note 43, at 92 (recognizing that international humanitarian law does not expressly prohibit nor permit reprisals).

216. WALZER, *supra* note 56, at 304 (recognizing that judgments relative to “proportionality” and the “usefulness” are “very difficult for soldiers in the field”).

217. *Id.* at 208-09 (recognizing that French partisans forces killed 80 German prisoners as a means to stop the German army from executing captured partisans).

218. KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE, AND THE LAW 31 (Oxford Univ. Press 1999) (quoting GENERAL « T » (BRIALMONT), ANGLETERRE ET LES PETITS ÉTATS 65 (Brussels: C. Muquardt, Librairie Militaire 1875)).

219. John S. Mosby, *Retaliation. The Execution of Seven Prisoners: A Self Protective Necessity*, RICHMOND, VA TIMES, Sept. 3, 1899, *reprinted in* 27 SOUTHERN HISTORICAL SOCIETY PAPERS 314, 316-317 (1899).

220. Lieutenant Colonel John Mosby wrote: “General, I desire to bring, through you, to the notice of the government the brutal conduct of the enemy manifested towards citizens of this district since their occupation of Manassas road . . . . [W]e smashed up one of their trains, killing and wounding a large number. In retaliation, they arrested a large number of citizens living along the line and have been in the habit of sending an installment of them on each train. As my command has done nothing contrary to the usage of war, it seems to me that some attempt at least ought to be made to prevent a repetition of such barbarities. During my

demonstrative of the reciprocal nature of armed conflict and a combatants' willingness to use reprisals when they believe an adversary has breached a duty owed to them: "[r]espectfully referred to the Honorable Secretary of War for his information. I do not know how we can prevent the cruel conduct of the enemy towards our citizen[ry]. I have directed Colonel Mosby . . . to hang an equal number of Custer's men in retaliation for those executed by him."<sup>221</sup> Mosby explained afterward that the reprisal was not an act of revenge but a judicial sentence<sup>222</sup> intended to save lives, not only those of his men but also those of his enemy. Because of his actions, no more of his men were hanged, but Mosby was remorseful for having to resort to reprisals: "I regret that fate thrust such a duty upon me."<sup>223</sup>

The Mosby experience illustrates that combatants may, despite their desire for the humane conduct of a war, overlook certain rules of armed conflict or undertake reprisals when they believe the other party's breach of legal obligations has freed them from their own legal obligations. While some commentators warn that the application of IHL should never be subject to conditions or operate as if the duty under IHL is contractarian in nature, they acknowledge that combatants often condition their obligations during hostilities upon their adversary's compliance with certain military or political conditions.<sup>224</sup> Although not immediately discernible by some observers, contract theory has influenced normative values during armed conflict since the beginning of the United States' participation in war.<sup>225</sup>

For instance, when the British army captured American revolutionaries in 1776, General Washington was informed that as deserters from the British army, his men could not be considered prisoners of war.<sup>226</sup> "It was only the fear of reprisal against British prisoners captured by the American revolutionaries" that caused the British army to spare the lives of General Washington's men.<sup>227</sup> The

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absence . . . the enemy captured six of my men. They were immediately hanged . . . . It is my purpose to hang an equal number of Custer's men whenever I capture them." *See id.*

221. *Id.*

222. The form of reprisal Mosby exacted is now illegal. *See* Geneva Convention III, *supra* note 13, art. 13 (stating "[m]easures of reprisal against prisoners of war are prohibited").

223. Mosby, *supra* note 219, at 316-17.

224. PICTET, *supra* note 53, at 91.

225. KHAIRALLAH, *supra* note 66, at 175.

226. *Id.* at 197.

227. *Id.*

existential aspects of contract theory have continued to remain characteristic of armed conflict even in modern times.

During the 1970s and 1980s, Israel launched a series of attacks against the Palestinian Liberation Organization (PLO) reportedly based in Lebanon.<sup>228</sup> Although Israeli attacks failed to achieve full deterrence, “[t]he rate of PLO attacks against Israel from Lebanon was far below the organization’s capability.”<sup>229</sup> The PLO’s decision to refrain from conducting attacks commensurate with their capabilities reflected their unwillingness to invoke a certain magnitude of Israeli response.<sup>230</sup> Though the PLO was willing to suffer losses during its armed struggle as the cost of pursuing what it believed to be important political values, “it did not want to lose its territory in Lebanon, which was very important for its political and organizational independence.”<sup>231</sup> The social condition amounted to an agreement, albeit conceptual, “through which the level of the PLO’s terrorist activity was maintained below the threshold that would, by the [PLO’s] assessment, trigger a massive Israeli response.”<sup>232</sup> Israel, though capable, did not launch any massive response until the fragile balance was broken.<sup>233</sup> Indeed, the Israeli government has always classified the PLO members as “terrorists” on the grounds that “they neither belong to a party to the conflict, nor conduct their operations in accordance” with IHL, and thus, “are not entitled to privileged treatment in accordance with the Third Geneva Convention.”<sup>234</sup> Despite this position, the Israeli government has generally treated Palestinians as prisoners-of-war.<sup>235</sup> Put differently, each party performs or refrains from conduct of which it is capable in exchange for the other party’s like consideration so long as they perceive that an optimal balance is being attained.

The British army’s capitulation and subsequent disregard of its own policy of considering the American revolutionaries deserters, Mosby’s reprisal, and the Israeli-PLO conflict all exemplify the socio-contractarian aspect of the relationship between adversaries during

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228. Ariel Merari, *Deterring Fear: Government Responses to Terrorists Attack*, 23 HARV. INT’L REV. 26, 28 (2002).

229. *Id.* at 28.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Wilson, *supra* note 82, at 158.

235. *Id.* at 160.

armed conflict. That is to say, there exists a social agreement between adversaries that supplies the normative blueprint for an ideal set of conditions that shapes individual behavior within the conflict. The socio-contractarian commitment largely emanates from the dictates of rationality and self interest. The examples discussed above not only confirm the useful effects of reprisals, they validate the practical dimensions of social contractarian theory. Though socio-contractarian thought processes have remained characteristic of armed conflict for some time, the use of reprisals, despite their attractiveness and apparent utility, impedes coherency between the principle justification of IHL and the outcome produced by its application, particularly when dealing with insurgencies or opposition movements.

The German army's attempt to quell the insurgency in Independent Croatia between 1941 and 1944 helps illustrate the detrimental effects of reprisals.<sup>236</sup> During the 1940s, a German occupying force was charged with eliminating partisan opposition to the Axis Powers.<sup>237</sup> The German commander's resort to repeated reprisals against the civilian population only generated support for the Partisans.<sup>238</sup> The Partisans became so strong that the German army was unable to subdue the Partisans, who, in turn, ultimately gained control of half of Independent Croatia.<sup>239</sup> Similarly, Israel has also widely employed reprisals with very little deterrent effects. Indeed, for over half a century, Israel has adhered to a policy of reprisal, largely to no avail.<sup>240</sup> Its Arab neighbors have continued to sponsor or permit terrorist activity, while Israel has struck at military and civilian targets in the sponsoring country with no material reduction in the rate of terrorist attacks despite the loss of civilian lives.<sup>241</sup>

Turning to the opening scenario, it does not appear that the hypothetical helicopter pilot's conduct in destroying the building could have qualified as a lawful reprisal, for at least two reasons. As

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236. Jonathan Gumz, *German Counterinsurgency Policy in Independent Croatia, 1941-1944*, THE HISTORIAN 33, 46 (1998) (stating that Germany's use of "reprisal measures" against civilians was "counterproductive").

237. *Id.* at 33.

238. *Id.* at 46 (noting that the German's use of reprisals against civilians drove "people toward, not away, from the Partisans.").

239. *Id.* at 49.

240. Merari, *supra* note 228, at 28.

241. *Id.*

noted, reprisals are exacted against other nations or international actors. The insurgents in the scenario do not represent a state and are not recognized international belligerents. Instead, they are persons engaged in hostilities committed by unlawful means. Second, reprisals are actions that would otherwise be unlawful but for the enemy's breach of international law.<sup>242</sup> As previously stated, the pilot's destruction of the building to end the attack upon the trapped soldiers was justified by the military necessity of the circumstances. It was, therefore, a legal response and would not qualify as a reprisal. Based on these two conditions alone, it is doubtful that the helicopter pilot's attack on the building in the opening scenario could legally qualify as a reprisal. Therefore, if the destruction of the building had not been required by military necessity, the pilot's action would likely have amounted to a war crime.

Though the destruction of the building was a purely defensive maneuver aimed at saving the lives of the British team, it was not construed in that fashion. One problem faced by occupying powers is that too often their lawful responses to attacks are viewed as reprisals or retaliations, and, thus, produce outcomes that are incoherent with the justification for IHL. As the German army experienced in Croatia, public outrage and condemnation may create support for the insurgency.<sup>243</sup> The circumstance evolves primarily from the civilian populace's perception that they are either the object of attack or the occupier is powerless to protect them from attack.<sup>244</sup>

This condition undermines the logic supporting the proscription against civilian direct participation in hostilities and weakens the social contract between civilians and the occupier. The legal right of the civilian to be free from attack is the legal duty of the occupier, and, vice versa.<sup>245</sup> If peaceful civilians have the right to be free from attack, then they do not have the right to conduct attacks. Few would deny that there is also a human right that arises from our nature as human beings that entitles an individual to certain conduct from all others.<sup>246</sup> It is comparable to a "contractual right" imposed upon

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242. WALZER, *supra* note 56, at 207.

243. Gumz, *supra* note 236, at 46.

244. See generally DEMOCRACY NOW, *supra* note 62, (reporting that an attack upon the Iraqi civilian populace prompted denunciation of the Iraqi Parliament and a call for a local militia to take up arms).

245. See Robert Grant, *The Social Contract and Human Rights*, *The Humanist*. Vol. 60, p. 18, 20 (January/February 2000).

246. See *id.*

others to refrain from acting in a certain way.<sup>247</sup> Hence, the agreement not to kill, albeit implicit, is the condition precedent to peaceful conduct.<sup>248</sup>

Applying this reasoning, when civilians perceive themselves to be attacked or harmed, they may view such conduct as a breach of the occupier's duty to refrain from targeting or harming civilians. As a result, the civilians may deem themselves freed from their duty to refrain from participating in hostilities and may begin to engage in hostilities.<sup>249</sup> That is to say, even if there is a duty of obedience or an obligation to comply with IHL, the moral preeminence of the socio-contractarian influences on conduct may cause the civilian to deem themselves excused from their obligation to obey the law or refrain from hostilities. The circumstance can be said to be akin to a condition in which a promisor deems himself excused from performing if a promisee breaches his duty to perform under the contractual theories related to justification for nonperformance or impracticability. Succinctly stated, despite the mandates of IHL, the socio-contractarian aspect of armed conflict tends to supersede a person's value for the law during occupation and armed conflict. Practical reasoning, therefore, suggests that it is beneficial for the occupier and international lawyers to recognize the influence of socio-contractarian theory upon conduct during armed conflict so as to avoid juridical gaps in the law that create incoherency and enable conditions that hinder IHL's justification and impede the restoration of law and order in occupied territories.

Despite an occupier's recognition of the socio-contractarian nature of armed conflict, the challenge for the occupier is that the perception of the civilian populace is typically not gleaned from close examination of the facts or obligations of IHL. Rather, the perceptions of civilians and other observers are informed by media coverage and propaganda. This condition suggests that it is vital that the occupier manage the public's perception of its conduct just as carefully and critically as it manages its actual conduct during the occupation. Educating the civilian populace on the customs and laws

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247. *See id.* at 20-21.

248. *See id.* at 20.

249. *See id.* at 20 (“[W]here human rights are abridged or the benefits of social cooperation are denied, the willingness to observe the basic duties of society is diminished. Denial or abridgement of the human rights breaches the social contract, which impels those who perceive themselves as underprivileged to rebel and commit crimes against those they perceived as the privileged.”).

of armed conflict may also be helpful. The task of managing perception requires more attention today than it did during the Vietnam War, because of the advances in media technology and the media's ability to broadcast to large numbers of people in short periods of time. Perhaps the need for perception management explains why the U.S. news media have been reportedly biased in their coverage of the U.S.-led occupation of Iraq.<sup>250</sup>

Though there are some indications that coverage was indeed biased, there is also evidence that the United States is doing what it can to comply with IHL. Despite these efforts, the amount of casualties resulting from the U.S.-led occupation of Iraq—an arena rife with insurgent activity—strongly suggests the advent of total war and demonstrates incoherency between the application of IHL and its justification—of minimizing the impact of war upon the innocent civilian populace. The impact of the U.S.-led occupation of Iraq upon the civilian populace could not be more justifying of a proper juridical model.

Research by scientists, including scholars from Johns Hopkins Bloomberg School of Public Health<sup>251</sup> and Columbia University,<sup>252</sup> indicates that since the United States' invasion of Iraq in March 2003, approximately 100,000 people have been killed<sup>253</sup> and that more than half of the dead were women and children.<sup>254</sup> Granted, many people doubt the legitimacy of the number of reported civilian deaths. The credibility of the study appears strong given that most independent studies, including research conducted by the U.S. Census Bureau estimate that the number of Iraqi civilian deaths in the comparatively much shorter Gulf War in Iraq also exceeded 100,000.<sup>255</sup> Notwithstanding criticism, the study not only challenges the credibility of the usefulness of IHL, but also raises the question of

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250. See Martin, *supra* note 119.

251. Les Roberts, Ph.D., and Gilbert Burnham, M.D.

252. Professor Richard Garfield Ph.D, School of Nursing.

253. Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, available at <http://www.countthecasualties.org.uk/docs/robertsetal.pdf>. See also General John Abizaid Interview, *supra* note 3, (stating that reports regarding the number of American servicemen and women casualties in Iraq as of October 2, 2005 were 1,935 killed and 14,755 wounded.).

254. Diane Marie Amann, *Foreword*, 11 U.C. DAVIS J. INT'L L. & POL'Y J. 1 n.3 (2004) (noting that "nearly 100,000 civilians, mostly women and children, died in post-invasion period.").

255. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L. J. 49, 50 n.4. (1994).

whether we have now approached the level of “total” war witnessed in the 1940s, which led to the deaths of nearly 1 million civilians, including 600,000 in Germany and 360,000 in Japan.<sup>256</sup>

The current deaths did not occur because of ignorance of the law or a blanket refusal to obey its conditions. Rather, the harm to the civilian populace emanates from the incoherent and contradictory construct of Protocol I, which exists principally due to a concerted inability among some nations to appreciate the socio-contractarian aspects of armed conflict and the need for absolute coherency between Protocol I’s justification and the means to achieve it.

### CONCLUSION

This Article has asserted that, due to incoherence between IHL’s underlying justification and its construct, Protocol I is ill-suited to achieve its goal of protecting innocent civilians during armed conflict. Despite the obvious obstacles that insurgencies pose to the restoration of law and order within an occupied territory and the resulting harm to the civilian populace that is largely attributed to identification problems during hostilities, there has been a regression in juridical requirements historically designed to distinguish combatants from civilians. The weakening of distinction requirements in favor of insurgents and the lack of juridical precision regarding the definitional standard for civilian status are contradictory to IHL justification and has a deadly effect on peaceful civilians and occupying forces alike. The overly broad definition of the term *civilian*, under Protocol I, compromises the conceptual purity of civilian identity, because it arguably can be read to grant immunity to those persons who are not part of an armed conflict while authorizing them to engage in hostilities and later rejoin the civilian populace. This condition compels occupiers to presume that all civilians are hostile until they act otherwise, and undermining the authority and credibility of IHL.

This Article has explained how the doctrine of military necessity and socio-contractarian aspects of armed conflict may impede the restoration of law and order during occupations by compelling occupiers to apply the law based predominantly on considerations of self-preservation and military necessity, rather than humanitarian imperatives. Indeed, it defies moral reason to expect an occupier to weigh heavily the harm to innocent civilians under a system of law

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256. PICTET, *supra* note 53, at 52.



that encourages insufficient distinction standards between a hostile person and an innocent civilian, while requiring an occupier to acquire absolute certainty of a person's true status before defending against a threat. Indeed, it is doubtful that any legal argument could persuade an occupying commander to weigh, proportionately and appropriately, the welfare of civilians against the demands of military necessity when that commander has been deprived of humanitarian protections under law, while the noncompliant insurgent enjoys increased juridical protection.

The mandates of coherency demand that Protocol I be interpreted to prevent conduct that leads to the type of tragedy described in the opening scenario. Once a territory is occupied, within the context of IHL, a civilian's duty to refrain from participating in hostilities must be absolute. There must be a clear prohibition under IHL against any conduct that impedes or compromises an occupying force's ability to distinguish insurgents from peaceful civilians so as to preserve innocent lives. Civilian immunity should permanently evaporate when civilians engage in hostilities, or aid and abet anyone who engages in hostilities, against the occupier. Violations of these requirements should make the violator subject to penal laws, rather than reprisals, which tend to lead towards indiscriminate or total war rather than inspire humane conduct. Such modifications would make the fruit vendors that sent the British soldiers to the taxicab loaded with explosives liable for war crimes, which, one must hope, would deter such conduct.

These recommendations are not intended to suggest that civilians should swear an oath of allegiance to the occupier. Rather, they arise from an overarching need for coherency between the law and the practical means to achieve its justification—a measure crucial to avoiding a total form of war in occupied territories. That said, the influences of contract theory upon behavior during armed conflict cannot be ignored. Occupiers must be ever mindful of the way their conduct informs norms within the civilian community as they weigh the military value of an attack against the collateral harm to the civilian populace so that they do not undermine the justification of IHL, or offend the socio-contractarian balance. Perceived reprisals against innocent civilians or disproportionate military attacks constitute, at least by implication, a breach of the occupiers duty to protect civilians that, in turn, may justify a civilian deeming himself free from the legal obligation to refrain from participating in hostilities.

Simply put, IHL, as a result of Protocol I, leaves itself too vulnerable to socio-political influences. IHL must be read and applied so that the application and interpretation of its mandate is coherent with the outcome achieved by its application. Interpretations or applications that lead to increased civilians casualties are inconsistent with the juridical aim of IHL. Without the implementation of coherency from end to appropriate means, total or indiscriminate war is inevitable.