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Privileging Asymmetric Warfare?: Defender Duties Under International Humanitarian Law

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Privileging Asymmetric Warfare?

Part I: Defender Duties under International Humanitarian Law

Samuel Estreicher*

Abstract

This article is part of a three-part series addressing the question whether the law of armed conflict, also called international humanitarian law (IHL), privileges a form of guerrilla warfare by nonstate actors that is often conducted in violation of these laws and in the process endangers civilians, in pursuit of a strategy of inviting a response from their opponents that helps them enlist additional recruits and international support. The strategy, rational from the standpoint of the guerrilla forces, derogates significantly from the law's overall objective of minimizing harm to civilian populations. The articles in this series approach this question of asymmetry by considering whether IHL in fact need or should be interpreted to privilege the guerrilla strategy.

Most discussions of the laws of war focus on the limitations placed on attackers to avoid risks to civilians. The purpose of this article is to look at the issue from the standpoint of the duties of defenders to avoid such risks. Dangers to civilians during armed conflict are a joint product of both attackers and defenders, and minimization of such harm—presumably the overriding mission of IHL—requires establishing the right incentives for both attackers and defenders.

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Subsequent articles in the series will address the principle of “proportionality”—the duty of attackers to avoid use of excessive force that may imperil civilians, even if they are not being targeted—and consider whether intentional targeting of civilians during armed conflicts by nonstate actors constitutes a war crime under IHL.

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I. THE CHANGING PARADIGM

The law of armed conflict¹ has moved away from a contractual model to embrace a largely regulatory model. At one time the paradigm conflict involved standing armies of warring states clashing in a distinct “battlefield” removed from dense civilian settlements. The “laws of war” established ground-rules in an effort to limit “unnecessary” slaughter—killing and maiming not necessary to achieving the decisive defeat of the adversary—and to limit resort to certain weapons that could have enduring devastating effects beyond cessation of the conflict. The rules were kept in place not by pious invocation of the sanctity of agreement but by the rule of reciprocity: the prospect that non-compliance would incur retaliatory sanctions against the offending state.

The horrific experience of World War II and its immediate aftermath led to a partial shift in emphasis in the 1949 Geneva Conventions (Geneva I–IV) away from the contractual model inching towards a regulatory model. “International humanitarian law” (IHL) was the new name for rules that supplemented the prior laws of war with greater protections for prisoners of war, further limits on

¹ The phrases “laws of war,” “law of armed conflict” and “international humanitarian law” are often used interchangeably; the author’s preference is for “international humanitarian law” (IHL).

the range of permissible targets, and, most especially with regard to Geneva IV, an overarching concern with the protection of civilians under occupation and during armed conflicts. Most importantly, for present purposes, the obligations of “High Contracting Parties” were not backed by a rule of reciprocity. These obligations apply “in all circumstances”—at least as between parties to the Convention and non-parties agreeing to assume those obligations²—and cannot be suspended, or violations excused, because the adversary has flouted the rules of proper warfare.

The model of two warring state armies locked in combat at a battlefield that could readily be distinguished from civilian settlements had been battered during World War II, as cities were treated as targets of legitimate bombing. The model also failed to fit guerrilla warfare—battle by irregulars not necessarily linked with state armies, typified by the “partisan” forces that often provided the only armed resistance to Nazi occupiers. The essential military theory of guerrilla warfare is to strike the enemy and then merge back into the civilian population in the hope either of discouraging a counter-attack or, of even greater value to the cause, inviting a military response laying waste to civilian areas and their inhabitants. The latter is often the preferable outcome for the guerrilla fighters because, in the battle to win over local populations, civilian devastation at the hands of the attacker can be more valuable than directly causing losses to the attacker. The conventional response of the laws of war to guerrilla warfare was that because these irregulars did not adhere to the core principle of “distinction”—they did not adequately distinguish themselves and their operations from civilians—they were unprivileged combatants not entitled to protection as prisoners of war, their military campaign constituted an illegitimate attempt to operate outside the laws of war, and blame for harm to civilians was attributable to their tactics rather than the lack of care of attackers.³

² Common Article 1 of the Geneva Conventions states that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), 6 UST 3516, TIAS No 3365 (1949), reprinted in Gary D. Solis and Fred L. Borch, *Geneva Conventions* 183 (Kaplan 2010). Under Common Article 2, even if the conflict is with a non-party to the Convention, “the Powers that are Parties thereto shall remain bound by it in their mutual relations” and shall “be bound by the Convention in relation to [the non-party], if the latter accepts and applies the provisions thereof.” *Id.* However, even where the conflict is with a non-party that has not assumed the obligations of the Convention, if the conflict is otherwise within the scope of the Convention, obligations would still be owed to persons or property protected by the Convention. In addition, as will be explored below, important aspects of Geneva IV, as well as the 1977 Additional Protocols, are deemed binding on all parties to armed conflict as a matter of customary international law. See notes 11 & 16.

³ See also note 15.

With Yalta's division of Europe between Western and Soviet spheres of influence and the ensuing nuclear stalemate between the US and the Soviet Union, states as such stopped fighting each other.⁴ But all was not the bright future promised by the Kellogg-Briand pact. What had been “irregular” increasingly became commonplace. Insurgencies became the prototypical armed conflict—“wars of national liberation” fought by communist armies; native groups seeking independence from their colonial overlords or the overthrow of the apartheid regimes of South Africa and what had been called Rhodesia; and the Arab-Palestinian militias warring with Israel.

II. 1977 ADDITIONAL PROTOCOLS TO GENEVA CONVENTIONS

The 1977 Additional Protocols to Geneva (AP I and AP II) reflect an attempt to update IHL to address this new prototype of warfare.⁵ Given the absence of a traditional battlefield and the dangers to civilians inherent in the guerrilla-warfare strategy, one might have hoped that this re-articulation of IHL would have focused on how best to protect civilians during these conflicts. Sadly, despite Western sponsorship of the overall effort, what the parties achieved arguably privileged certain aspects of the guerrilla strategy and thus detracted from the overall aim of enhancing the protection of civilians. In response, the US and several of its Western allies, including Israel, refused to ratify AP I, which deals with international armed conflicts. Over time, however, the allies broke ranks. Currently, the sole significant remaining holdouts are the US, India, Israel, and Pakistan. These countries claim to adhere to AP I to the extent it reflects customary international law (CIL). The International Committee of the Red Cross (ICRC), which sees itself as the guardian and advocate of the Geneva process, has over the years documented purported state practices in line with AP I prescriptions in order to lay the case for the essential equivalence between AP I and customary law.⁶

⁴ Notable exceptions include the Israeli-Arab wars of 1956, 1967, and 1973, the Iraq-Iran war, and the Iraqi invasion of Kuwait.

⁵ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“AP I”), 1125 UN Treaty Ser 3 (1977) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 1125 UN Treaty Ser 609 (1978).

⁶ See Jean-Marie Henckaerts and Louise Doswald-Beck, eds, vols. 1 & 2 *Customary International Humanitarian Law* (Cambridge 2005); Jean-Marie Henckaerts, *Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 Intl Rev Red Cross 175 (2005). For initial criticism of the ICRC study, see W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 Am Soc’y Intl L Proc 208 (2005); Letter from John Bellinger III, Legal Adviser, US Dept of State, and William J. Haynes, General Counsel, US Dept of Defense,

What the US opposed, and presumably still opposes, is AP I's legitimization of guerrilla warfare in the definition of covered conflicts and its protection of combatants who do not adhere to the traditional criteria for distinguishing themselves from civilians.⁷ Objection has also been raised to particular rules that, because of their amorphous reach, would hamper the ability of the US and other attackers to achieve military objectives without inviting scrutiny for alleged "war crimes."⁸ The US also questions AP I-inspired restrictions on its use of drones for targeted killings against Al Qaeda in Iraq and Afghanistan.⁹

An additional criticism is that there are aspects of AP I that derogate from the treaty's overarching objective of minimizing harm to civilians—provisions making it easier for defenders to pursue the guerrilla strategy of situating their armed elements within the civilian population in order to invite attacks that kill civilians and thus generate further support for their cause. AP I does so by, *inter alia*, creating an exception from the principle of distinction in certain conflicts,¹⁰

to Dr. Jakob Kellenberger, President, Intl Comm of the Red Cross, Regarding Customary International Law Study, 46 ILM 514 (2007).

⁷ See Ronald Reagan, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal*, 81 Am J Intl L 910, 911 (1987); Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 Am J Intl L 784, 785 (1988). On the categorization issue, compare Curtis A. Bradley, *The United States, Israel & Unlawful Combatants*, 12 The Green Bag 2d 397, 399–400 (2009), and William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J Intl L 319, 322, with David Glazier, *Playing by the Rules: Combating Al Qaeda within the Law of War*, 51 Wm & Mary L Rev 957, 987–96 (2009); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 Am J Intl L 48, 49–51 (2009), and Derek Jinks, *The Declining Significance of POW Status*, 45 Harv Intl L J 367, 372–375 (2004).

⁸ Despite the refusal to ratify AP I, the United States claims to adhere to Article 57 as a matter of customary law. See William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 Milit L Rev 91, 103–104 (1982); Taft, 28 Yale J Intl L at 319, 322 (2003) (cited in note 7) (suggesting US adherence to AP Articles 48–52 and 57 as a matter of CIL). NO -- [May we delete this? It does not seem crucial and is a bit confusing]

⁹ Compare Philip Alston, *United Nations Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on targeted killings*, A/HRC/14/25/Add.6 (May 28, 2010), with Remarks of Harold Hongju Koh, Legal Adviser, US Dept. of State, *The Obama Administration and International Law* (Am Society of Intl Law 2010), online at www.state.gov/s/1/releases/remarks/139119.htm (visited Nov 20, 2010).

¹⁰ AP I's Article 44(3) allows insurgents to fail to distinguish themselves from the civilian population in certain circumstances when resisting "alien occupation" and in conflicts within Article 1(4). See Waldemar A. Solf, *A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol*, 20 Akron L Rev 261, 276–77 (1986) (explaining views of state delegations that "the situations described in the second sentence of Article 44(3) are very exceptional and can exist only in occupied territory and in conflicts described in Article I(4)"). With the resolution of the anti-Apartheid struggle, this means that to the extent Hamas and other organizations are fighting Israeli occupation (itself unclear after the Israeli withdrawal from Gaza), they may be permitted by AP I to violate this aspect of the principle of distinction and still retain prisoner-of-war protections.

outlawing any resort to reprisals targeting civilians¹¹ to punish violations of the rules of war,¹² and making it difficult to launch attacks against irregulars hiding among civilians without encountering accusations of war crimes.¹³

This is all well understood and perhaps explains the continued refusal of the US and Israel to ratify AP I. Nonetheless, AP I is likely to set the prevailing legal framework for the law of armed conflict for many decades to come. Given the vast number of nations that have acceded to the treaty, the opportunity to open up AP I to significant revision is a ship that has left port and is not likely soon to return. Amendments to multilateral treaties are extremely difficult.¹⁴ The political economy of such an effort likely spells failure because the US and Israel are, for all practical purposes, the only encumbered parties.¹⁵ Most of the developed nations do not themselves engage in, or (like the UK and other reluctant NATO allies) seek to disengage from, armed conflict as attackers; they also derive some benefit from moral criticism of the US and Israel as encumbered parties. Moreover, most developing nations have little to fear from IHL because their repression of internal conflicts is not likely to meet Geneva IV or AP I thresholds for coverage; and the provisions of Common Article 3

¹¹ “Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take precautionary measures provided for in Article 57.” Geneva IV, AP I Art 51 at 277 (cited in note 5).

¹² See Sofaer, *Am J Intl L* at 785 (cited in note 7) (AP I “eliminates significant remedies in cases where an enemy violates the Protocol. The total elimination of the right of reprisal, for example, would hamper the ability of the United States to respond to an enemy’s intentional disregard of the limitations established in the Geneva Conventions of 1949 or Protocol I, for the purpose of deterring such disregard.”); Guy B. Roberts, *The New Rules for Waging Wars: The Case Against Ratification of Additional Protocol I*, 26 *Va J Intl L* 109, 142 (1985) (“Indeed, the new restrictions imposed by Protocol I would virtually eliminate reprisals as a lawful method of enforcing the laws of war, leaving enemy combatant troops and military property as the only lawful objectives against which reprisals could be taken.”).

¹³ This is the subject of my forthcoming article, *Privileging Asymmetric Warfare? Part II: The “Proportionality” Principle under International Humanitarian Law*, *Chicago Journal of International Law* (Summer 2011).

¹⁴ Even if the United States were to ratify AP I with significant reservations, those reservations would not likely influence proclamations of the customary law confirmed by AP I’s text.

¹⁵ This is true even if there is reason to give considerable weight to the state practice of nations actually involved in armed conflicts. See *North Sea Continental Shelf Cases, (Ger v Den, Ger v Neth)*, 1969 ICJ 3, 32–33 (Feb 20, 1969) (“State practice during that period, including that of States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved.”). See generally Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 *Am J Intl L* 238 (1996).

and AP II, which do apply to certain non-international armed conflicts, have yet to present significant restrictions on parties to such conflicts.¹⁶

III. DUTIES OF DEFENDERS IN IHL

My purpose here is not to enter into a debate on whether or how AP I may be said to place improper limits on attackers. Rather, my purpose is to open a discussion of the extent to which AP I and other sources of IHL articulate the duties of defenders.¹⁷ Dangers to civilians during armed conflict are a joint product of both attackers and defenders, and minimization of such harm—presumably the overriding mission of IHL—requires establishing the right incentives for *both* attackers and defenders.¹⁸

Politics is the art of the possible. I would suggest that our work as academics and publicists is within the same domain. What needs to be addressed is whether, under current law, defenders are under real obligations to minimize risks to civilians; and, if so, what can be done within the realm of the politically possible to change the discourse of the international law community so that defender violations are taken seriously and sanctioned.¹⁹

¹⁶ But see *Prosecutor v Tadic*, Case No IT-94-1-AR72, Appeal on Jurisdiction (Dec 2, 1995), 35 ILM 32 (1996) (finding that parties to arguably non-international conflict within Bosnia and Herzegovina entered into an agreement based on the Common Article 3 of Geneva; moreover, the UN Security Council in the Statute of the International Tribunal in 1993 referred to “the laws and customs of war” so as to capture both international and non-international aspects of the conflict). See generally Meron, 90 Am J Intl L 238 (cited in note 15).

¹⁷ Under Article 49(1) of AP I, “[a]ttacks’ means acts of violence against the adversary, whether in offence or in defence.” Attackers engage in such acts of violence. Although there is no definition of defenders as such, Article 48 states the “Basic rule” of Part IV of the Protocol dealing with the “Civilian Population” as requiring that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives....” In addition to the principle of distinction which applies to all parties to the conflict and is not in terms limited to attackers, Article 51(1) states that the “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.” The phrase “dangers arising from such military operations” suggests a broader protective ambit that is not limited to attacks. Geneva IV, AP I Articles 48, 49, and 51 at 276–77 (cited in note 5).

¹⁸ This paper assumes for the purpose of discussion that AP I, including the protocol’s overarching commitment to minimize dangers to civilians in armed conflict, generally reflects CIL.

¹⁹ The applicability of international norms to nonstate actors requires some discussion. Let us take, for example, the Palestinians. In June 1989, the Palestine Liberation Organization (PLO), on behalf of the Government of the State of Palestine, acceded to Geneva and AP I and II and became bound by their terms. However, “[o]n September 13, 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the PLO’s letter constituted an instrument of accession, due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine”. International Committee of the Red Cross (ICRC), *Palestine*, International Humanitarian Law – Treaties & Documents, online at www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS (visited Nov 11, 2010). On the other hand, because Israel has not ratified AP I, the provisions of AP I, to the extent they exceed Geneva and do not

A. Sources of Duties

Although AP I reverses the prior customary law that placed on defenders virtually the entire obligation to avoid civilian losses,²⁰ the Protocol leaves in place a substantial core of defender obligations.²¹ The sources of defender duties would seem to include:

1. The prohibition of civilian shields
 - Geneva IV, Art 28: “The presence of a protected person may not be used to render certain points or areas immune from military operations.”²²
 - AP I, Art 51(7): “The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in

reflect CIL, would not be binding on the Palestinian Authority in any armed conflict with Israel. In addition, Hamas has acceded neither to Geneva nor AP I, which raises the interesting question whether the PLO or PA binds all Palestinian armed forces by its accession, or whether Hamas is bound by Geneva and AP I and II only to the extent these instruments reflect CIL. See generally Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge 2002); Michael Bothe, *War Crimes in Non-International Armed Conflicts*, in Yoram Dinstein and Mala Tabory, eds, *War Crimes in International Law* 293, 302–03 (Martinus Nijhoff 1996); Yoram Dinstein, *The International Law of Civil Wars and Human Rights*, 6 Israel YB Hum Rts 62 (1976).

²⁰ As W. Hays Parks observes in his classic article:

In customary international law the primary responsibility for preventing collateral civilian casualties rests with the defender and the individual civilian, with little or no responsibility imposed upon an attacker. The reason for the existing rule is simple. Under most circumstances, the attacker has no idea where civilians are located and, except for a warning, has no way of controlling the location or movement of individual civilians or the civilian population; the civilian population is in the exclusive control of the defender.

The practice of *all* nations that carried out aerial bombardment operations during World Wars I and II establishes clearly that *no* nation concerned itself with the risk of injury to the civilian population of an enemy nation incidental to the conduct of military operations. Protocol I constitutes an improvement in the law of war in recognizing that an attacker should, in most cases, give consideration to minimization of collateral civilian casualties. The issue is the degree to which an attacker should assume this responsibility. If the new rules of Protocol I are to have any credibility, the predominant responsibility must remain with the defender, who has control over the civilian population.

W. Hays Parks, *Air War and the Law of War*, 32 AF L Rev 1, 153–54 (1990) (emphasis in original).

²¹ Defender duties are rarely discussed in the literature. In addition to Parks, 32 AF L Rev (cited in note 20), see Matthew C. Waxman, *International Law and the Politics of Urban Air Operations* 15–18 (Rand 2000); Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 Va J Intl L 353 (1999); Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 Colum J Transnatl L 292, 301–22 (2009).

²² Geneva IV, Art 28 at 197 (cited in note 2). “The prohibition is expressed in an absolute form and applies to the belligerents’ own territory as well as to occupied territory, to small sites as well as to wide areas.” ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 209 (Martinus Nijhoff 1987) (Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds) (*ICRC Commentary*).

attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.”²³

2. The prohibition of perfidy

- AP I, Art 37(1): “It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: ... (c) the feigning of civilian, non-combatant status”²⁴

3. The duty to protect the civilian population against dangers from military operations²⁵

- AP I, Art 48: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”²⁶
- AP I, Art 51(1): “The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”²⁷

²³ Geneva IV, AP I Art 51(7) at 277 (cited in note 5). Similarly, Article 8(2)(b)(xxii) of the Rome Statute of the International Criminal Court includes within its listing of war crimes “utilizing the presence of a civilian or other protected person to render certain points, area or military forces immune from military operations.” Rome Statute of the International Criminal Court (“Rome Statute”), Art 8(2)(b)(xxiii), UN Doc A/CONF.183/9 (July 17, 1988), reprinted in Christian Rosbaud and Otto Triffterer, eds, *Rome Statute of the International Criminal Court* 13 (Nomos Verlagsgesellschaft 2000).

²⁴ Geneva IV, AP I, Art 37(1) at 273 (cited in note 5).

²⁵ Since this paper focuses on defender duties, provisions dealing with the duty to minimize harm to civilians during “attacks” are omitted.

²⁶ Geneva IV, AP I, Art 48 at 276 (cited in note 5). This is captioned the “Basic rule” of Part IV of the Protocol dealing with the “Civilian Population”: “The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law.” ICRC, *Commentary* at 209, 598 (cited in note 22).

²⁷ Geneva IV, AP I, Art 51(1) at 277 (cited in note 5). What follows is a list of specific rules “[t]o give effect to this protection,” but without suggestion that list exhausts the content of the duty to provide “general protection against dangers arising from military operations.”

- AP I, Art 57(1): “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”²⁸
 - AP I, Art 57(4): “In the conduct of military operations at sea or in the air, each Party to the conflict shall in conformity with its rights and duties under the rules of international law applicable to armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”²⁹
4. The duty to remove civilians from and not locate them in the vicinity of military objectives
 - AP I, Art. 58: “The parties to the conflict shall, to the maximum extent feasible: (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual citizens and civilian objects under their control against the dangers resulting from military operations.”³⁰
 5. The duty to avoid methods or means of warfare that cause unnecessary injury or suffering
 - AP I, Art. 35:

²⁸ Geneva IV, AP I, Art 57(1) at 279 (cited in note 5). Paragraphs 2–3 and 5 apply to “attacks” but the first and fourth paragraphs speak more generally of “the conduct of military operations,” which should include actions and omissions of defenders. When the ICRC comments that the word “operations” “refers to military operations during which violence is used” and to “all movements and acts related to hostilities that are undertaken by armed forces,” this cannot reasonably be read to exempt defender actions or operations which are also operations “during which violence is used” or “acts related to hostilities that are undertaken by armed forces.” Rather, the distinction is between such combat operations and “ideological, political or religious campaigns.” ICRC, *Commentary* at 600 (cited in note 22).

²⁹ Geneva IV, AP I Art 57(4) at 280 (cited in note 5).

³⁰ Geneva IV, AP I Art 58 at 280 (cited in note 5). It has been suggested that the wording of the provisions contained in Article 58 indicates they are merely hortatory, not obligatory. See Parks, 32 *AF L Rev* at 159 (cited in note 20). The ICRC commentary does not take this position but does acknowledge that “a Party to the conflict cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary....” ICRC, *Commentary*, at 693(cited in note 22). Professor Michael Schmitt observes that “the norm applies only in territory under the effective control of a force” and that “valid military or humanitarian reasons may exist for failing to move civilians away from military objectives or situating military forces near them; for instance, evacuation of the civilian population during urban combat can place that population at greater risk or may be militarily imprudent.” Schmitt, 47 *Colum J Transnatl L* at 304 (cited in note 21). No authority is offered for the latter suggestion that collocation of military operations and civilian populations can be justified on grounds of military advantage or prudence.

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ ... methods of warfare of a nature to cause superfluous injury or unnecessary suffering.³¹

B. Implications

Any inquiry into whether the parties to an armed conflict have complied with the laws of war requires a two-stage inquiry: asking not only (1) whether attackers have transgressed the limits IHL places on attacks, but also (2) whether defenders have observed the limits IHL places on what fighters can do to defend themselves. Both steps of the inquiry are essential.

1. Relevance of compliance with defender duties to attacker duties

It is clear that attackers cannot, because of defender violations, claim excuse for their non-compliance with, say, their duty to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects” under AP I, Article 57(2)(a)(i)³². But the feasibility inquiry under Article 57(2)(a)(i), or the proportionality inquiry under Article 57(2)(a)(iii), necessarily requires that account be taken of whether defenders have disguised military operations as civilian operations or have deliberately embedded their military assets in close proximity to civilian areas, all in violation of defender obligations under IHL. Similarly, the duty to provide “effective warning ... of attacks which may affect the civilian population, unless circumstances do not permit” under Article 57(2)(c) must take account of defender actions. The effectiveness of a warning is a joint product both of the message and its mode of delivery and what defenders do, including what they tell civilians, upon receipt of the warning.³³

³¹ Geneva IV, AP I, Art 35 at 277 (cited in note 5). “Methods or means of warfare” should include the defender strategy of shooting missiles from batteries located in dense civilian populations and other decisions to locate military objects in close proximity to civilians. *Id.*

³² Geneva IV, AP I, Art 57(2)(c)(i) at 279 (cited in note 5).

³³ See Parks, 32 AF L Rev at 158 and n 469 (cited in note 20). Similar considerations may have informed the Obama administration’s view of the legality of the use of drone attacks against high-level Al Qaeda leaders: “As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations.” Koh, *The Obama Administration and International Law* (cited in note 9). They also help explain the conclusions reached in the *Final Report of the ICC Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 39 ILM 1257, 1271 (2000).

2. Urging investigation of defender actions as a necessary concomitant of any investigation of attacker actions

Scholarship and advocacy need to bring defender duties to the forefront of any discussion and investigation of armed conflicts. The necessarily joint contribution of both attackers and defenders to civilian harm must be recognized. Any investigation of an armed conflict must focus on the duties of both sides to the conflict and evaluate the feasibility of attacker compliance with some of the more open-ended obligations of IHL. For example, the duty to avoid excessive or disproportionate force, as stated in AP I Article 57(2), requires attackers to “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated....”³⁴ While attackers are not excused of their obligation because of defender violations, their ability to identify beforehand who are civilians and what are civilian objects may be significantly hampered when defenders use civilians as shields or civilian objects as bases for their military operations.³⁵

3. Urging linkage of attacker and defender duties in further elaboration of IHL

There are open areas in IHL. States that have acceded to AP I are not necessarily bound by all ICRC interpretations and they and states that have declined to ratify AP I can play an active role in formulating and urging others to adopt rules of practice that strike the right balance between attacker and defender duties.

Even if, for example, there is widespread international recognition that, at some abstract level, the duty of proportionality is grounded in customary law, the content of that duty is not necessarily identical to the wording contained in AP Article 57 or the gloss provided by ICRC commentary. The effectiveness of such a duty, including the ability of military commanders to implement it in the air and on the ground, may well depend on serious consideration, elaboration, and implementation of defender duties, for defenders are often in the superior position to minimize civilian exposure to the dangers of military operations.³⁶

³⁴ Geneva IV, AP I, Art 57(2) at 279 (cited in note 5).

³⁵ For further elaboration, see Estreicher, *The ‘Proportionality’ Principle* (cited in note *).

³⁶ Although revision of AP I is highly unlikely, perhaps agreement could be reached on the drafting of a new protocol, or even a joint declaration by major military powers, addressing in a more comprehensive fashion defender duties under IHL.

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