The Rule of Law in Armed Conflict

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Abstract

A fundamental problem in the relationship between war and law has emerged, with two diverging approaches to conceptualizing how law applies to the conduct of hostilities: the operational application for the implementation of legal obligations during combat operations, on the one hand, and the adjudicative application for prosecution and reparation, on the other. Diverging approaches stem from institutional and practical constraints on adjudication, testing the fundamental premise upon which international law operates as a political project to manage international order under the rule of law. This article addresses the doctrinal manifestation of this trend and articulates the parameters in which battlefield conduct can be adjudicated without infringing upon the underlying logic of the law by adhering to its consistent, equal, and objective application.

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I. INTRODUCTION

Russia's invasion of Ukraine has revived the question of whether international law remains viable as a political project to manage international order.[1] Not only is Russia's act of aggression a clear breach of Ukrainian sovereignty and an unlawful use of force under the Charter of the United Nations,[2] but it has also infringed upon fundamental protections accorded under the law of armed conflict.[3] Despite calls for full compliance with their obligations to spare the civilian population and civilian objects,[4] Russian forces and paramilitary groups have disregarded these fundamental protections by indiscriminately targeting civilians,[5] deporting local populations—including children—for "re-education,"[6] and instructing fighters to leave no survivors on the battlefield.[7] These flagrant violations of fundamental norms and rules challenge the normative role of international law as a legal system to manage international relations under the rule of law.

Even in flagrant cases, proving violations of law during an armed conflict is not an easy task. The mere fact of civilian casualties is insufficient to establish that civilians were directly targeted or

1. For a discussion of international law as a political project, see Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L L. J. 1, 11 (2017); Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 1 (2007); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 601, 610, 616 (2d ed. 2005).

2. U.N. Charter art. 2, ¶ 4.

3. For a preliminary assessment, see U.N. Sec'y-Gen., Rep. of the Indep. Int'l Comm. of Inquiry on Ukr., ¶¶ 90–102, U.N. Doc. A/78/540 (Oct. 19, 2023) [hereinafter Ukraine Report II]; Hum. Rts. Council, Rep. of the Indep. Int'l Comm. of Inquiry on Ukr., ¶¶ 23–34, U.N. Doc. A/HRC/52/62 (Mar. 15, 2023) [hereinafter Ukraine Report I]; Wolfgang Benedek et al., Rep. on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine Since 24 February 2022, ODIHR.GAL/26/22/Rev.1 (Apr. 13, 2022).

4. G.A. Res. ES-11/L.1, ¶ 12, U.N. Doc. A/ES-11/L.1 (Mar. 1, 2022).

5. Ukraine Report I, *supra* note 3, ¶¶ 23–34; Benedek et al., *supra* note 3, at 34. On March 5 and June 24, 2024, Pre-Trial Chamber II of the International Criminal Court issued arrest warrants against Russia's senior defense officials for the war crimes of directing attacks against civilian objects and causing excessive incidental harm to civilians, among other grounds.

6. Ukraine Report II, *supra* note 3, ¶¶ 90–102. On March 17, 2023, Pre-Trial Chamber II of the International Criminal Court issued arrest warrants against Vladimir Putin as President of the Russian Federation and Maria Lvova-Belova as Commissioner for Children's Rights for the war crime of unlawful deportation and transfer of children. *Id.*

7. Michael N. Schmitt & John C. Tramazzo, *The Wagner Group's "No Quarter" Order and International Law*, ARTICLES OF WAR (Apr. 26, 2023), https://lieber.westpoint.edu/wagner-groups-no-quarter-order-international-law/.

indiscriminately attacked.[8] Firing rockets that destroy civilian housing does not, in every case, amount to an indiscriminate attack, let alone a war crime.[9] A failure to do everything feasible to avoid or minimize civilian harm is not an inevitable conclusion from the mere proximity of military action or assets to civilian-populated areas.[10] Obligations under the law of armed conflict are contextual, requiring consideration of military objectives, information and resources available at the time, and the entirety of battlefield conditions.

Beyond factual difficulties, a more fundamental problem lies in the relationship between war and law, with the emergence of two diverging approaches to conceptualizing how the law applies to the conduct of hostilities. The first approach is the operational application of international humanitarian law (IHL)—what Michael Schmitt describes as "applied IHL"—deviating from its normative architecture for operational reasons.[11] Another diverging approach, with which this article contends, arises from adjudicative processes where external reviewers apply the law to evaluate combat operations. The application of the law in each dimension follows different logics, leading to two different lines of thought represented in diverging approaches: the operational application, and the adjudicative application.

The operational application follows the underlying logic of the law to implement legal obligations during combat operations. It focuses on training and supervision through responsible command to internalize the principles of distinction, proportionality, and the duty to exercise feasible precautions into military operations.[12] For

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8. *See* Geoffrey S. Corn & Sean Watts, *Ukraine Symposium—Effects-Based Enforcement of Targeting Law*, ARTICLES OF WAR (June 2, 2022), lieber.westpoint.edu/effects-based-enforcement-targeting-law; Charles Garraway, *Fact-Finding in Ukraine: Can Anything Be Learned from Yemen?* ARTICLES OF WAR (Mar. 14, 2022), lieber.westpoint.edu/fact-finding-ukraine-anything-learned-yemen.

9. Chris Jenks, *Ukraine Symposium—The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs—Part 2*, ARTICLES OF WAR (June 24, 2022), lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-2.

10. *See* Michael N. Schmitt, *The Expert Panel's Review of Amnesty International's Allegations of Ukrainian IHL Violations*, ARTICLES OF WAR (May 1, 2023), lieber.westpoint.edu/expert-panels-review-amnesty-internationals-ai-allegations-ukrainian-ihl-violations. *Cf. Report of the Legal Review Panel on the Amnesty International Press Release Concerning Ukrainian Fighting Tactics of 4 August 2022*, N.Y. TIMES, 7 (Feb. 2, 2023), https://int.nyt.com/data/documenttools/revised-final-report-of-legal-review-panel-amnesty-international-ukraine-press-release-02-02-2023/35ae76eaaa90405e/full.pdf.

11. Michel N. Schmitt, *Normative Architecture and Applied International Humanitarian Law*, 104 INT'L REV. RED CROSS 2097, 2097 (2022).

12. *See, e.g.*, Geoffrey S. Corn, *Contemplating the True Nature of the Notion of*

operational purposes, the law is conceived as a set of guidelines to regulate the conduct of armed forces such that reasonable decision-makers perform their missions reflexively within the bounds of the law. The roots of this operational code are diverse, involving the elements of military tradition, political imperatives, ethical considerations, and social practices.[13] But in international law, its rationale rests with the general obligation to ensure respect for the law of armed conflict.[14] This duty is expressed best in the opening clauses of each of the four Geneva Conventions, which require that States Parties "ensure respect . . . [for the law not only by] their armed forces and other persons or groups acting on [their behalf] . . . [but also by] the whole population over which they exercise authority."[15] From this perspective, duties imposed by the law of armed conflict are prospective, mandating internal mechanisms for compliance through legislation, instructions, training, and command and control.

The adjudicative application, on the other hand, relates to post hoc enforcement rather than ex ante internalization. For adjudication purposes, the law functions as a tool to prosecute those responsible for unlawful decision-making and to exact reparations and justice for the victims of war. Its logic is based on the obligation to prevent and suppress violations, by imposing penal and disciplinary responsibility on superiors and making them accountable for failures.[16] The law of armed conflict is applied in this post hoc dimension to validate operational application or deny its legal validity by reviewing the after-effects of military operations. The law does not operate

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"Responsibility" in Responsible Command, 96 INT'L REV. RED CROSS 901, 902 (2014).

13. For example, U.S. WAR DEP'T, GEN. ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD. Known as the "Lieber Code," it was based on a scholarly survey of military practices and regulations. *See, e.g.*, James R. Miles, *Francis Lieber and the Law of War*, 29 MIL. L. & L. WAR REV. 253, 263–74 (1990); James F. Childress, *Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34, 35–41 (1976).

14. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 36 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

15. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶¶ 143–52 (2016).

16. GC I, *supra* note 14, art. 49; GC II, *supra* note 14, art. 50; GC III, *supra* note 14, art. 129; GC IV, *supra* note 14, art. 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 85–87, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

differently in adjudication because of disagreement over the meaning of particular norms, sources, or methods of law among different interpretive communities.[17] Rather, deviation from the normative architecture stems from the institutional and practical constraints on adjudication, even in areas where the applicable rules and their interpretation are settled.

General trends that evoke these two approaches to the application of the law of armed conflict have been detected. The doctrinal overlaps and departures between the law of armed conflict and the adjacent but distinct legal regime of international criminal law have been studied with justified interest and concern.[18] This article strives to go deeper, uncovering the systematic reasons that underpin the diverging approaches described above. Criminal law jurisprudence forms only a part of the law's adjudicative application. A wide range of international bodies contribute to external review by identifying the violation of rules as the basis for State responsibility, reparations for the victims of war, and broader public accountability. As such, the logic of international criminal law does not dictate the deviation. Instead, more systematic justification must be found in the fundamental premise upon which international law operates as a political project to manage international order under the rule of law. The idea that international law constitutes a legal system among States is premised on certain minimum conditions that the law itself must fulfill. This article aims to identify these minimum standards as the basis for shaping the parameters of adjudication on battlefield conduct.

Growing state practice and jurisprudence in this field appear to have drawn these approaches further apart. What military decision-makers consider to be lawful on the battlefield is increasingly dissociated from how external reviewers assess and judge their action. The problem is not merely of theoretical significance. It has practical implications for the legitimacy and effectiveness of military operations. Greater disparity simultaneously undermines military confidence in the law and jeopardizes accountability mechanisms. This article addresses the doctrinal manifestation of that trend and considers possible solutions that could facilitate consistent and objective reviews in compliance with the rule of law. It does so with the focus on the external assessment of targeting in military operations. As such, the findings made in this article do not

17. *See, e.g.*, David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT'L L. 315, 316 (2013).

18. *See, e.g.*, Gabriella Blum, *The Shadow of Success: How International Criminal Law Has Come to Shape the Battlefield*, 100 INT'L L. STUD. 133, 135–36 (2023).

necessarily inform the external review of other issues such as the treatment of detainees, the destruction and seizure of enemy property, or war crimes associated with such conduct. Nor are they prejudicial to the adjudication of other international crimes such as crimes against humanity and genocide.

The article first rewinds to the formative period of the law of armed conflict by reviewing the underlying logic of regulating the conduct of hostilities in the modern law of aerial bombardment. The next section turns to the law's adjudicative application by unveiling how external reviewers have applied the law to their distinct purposes despite methodological difficulties. The third section considers the implications of diverging approaches to the application of this body of law for the efficacy of international law as an instrument to manage international relations under the rule of law. The article concludes by articulating the parameters in which battlefield conduct can be adjudicated without infringing upon the underlying logic of the law and by adhering to its consistent, equal, and objective application, with a few thoughts on how the changing characteristics of war, driven by modern technological advances and their societal impacts, might affect these parameters.

II. HUMANIZING WAR

The 1868 St. Petersburg Declaration occupies a prominent place in early modern efforts to regulate warfare by international agreement, setting forth "limits at which the necessities of war ought to yield to the requirements of humanity."[19] This early effort to humanize war was exceedingly modest as the parties agreed only to forbear the use of lightweight projectiles that were either "explosive, or is charged with fulminating or inflammable substances."[20] Of far greater significance was the Declaration's aspirational preamble, which identified "to weaken the military forces of the enemy" as the only legitimate objective of war and renounced "the employment of arms which uselessly aggravate the sufferings of disabled men, or

19. Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles Under 400 Grammes Weight, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297, *reprinted in* 1 AM. J. INT'L L. SUPP. 95, 95 (entered into force Nov. 29/Dec. 11, 1868) [hereinafter *St. Petersburg Declaration*].

20. *Id.* at 96. The weight limit was arbitrary, reflecting the dividing line discernible at that time between explosive artillery and rifle munitions, with only the latter deemed dispensable. Frits Kalshoven, *Arms, Armaments and International Law*, 191 RECUEIL DES COURS 185, 207–08. Light explosive or incendiary projectiles weighing less than 400 grams were later developed and have been generally accepted unless they are designed to be anti-personnel. *Id.* at 223.

render their deaths inevitable."[21] These aspirations paved the way for subsequent developments of weapons law, including the general prohibition of weapons calculated to "cause superfluous injury or unnecessary suffering."[22] International agreement has become widely accepted as a means to bar the use of particular weapons such as expanding bullets,[23] asphyxiating, poisonous, or other gases,[24] biological weapons,[25] chemical weapons,[26] blinding laser weapons,[27] anti-personnel landmines,[28] and, most recently, cluster munitions.[29]

Not long after the St. Petersburg Declaration, balloons and other aviation technology drew attention to the prospect of using air power for destructive action. While attempts to ban the use of balloons fell

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21. *See* Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 34 INT'L REV. RED CROSS 98, 99–100 (1994); Fritz Kalshoven, *The Conventional Weapons Convention: Underlying Legal Principles*, 30 INT'L REV. RED CROSS 510, 511 (1990); *St. Petersburg Declaration*, *supra* note 19, at 95.

22. Hague Convention II with Respect to the Laws and Customs of War on Land art. 23(e), July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter 1899 Hague Convention II]; Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land art. 23(e), Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations]; Additional Protocol I, *supra* note 16, art. 35(2); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 237 [hereinafter ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW]; U.S. DEP'T OF DEF., OFF. OF THE GEN. COUNS., LAW OF WAR MANUAL § 6.6 (2023) [hereinafter DOD LAW OF WAR MANUAL].

23. Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 187 Consol. T.S. 459, 26 Martens Nouveau Recueil (ser. 2) 1002. *Cf.* DOD LAW OF WAR MANUAL, *supra* note 22, § 6.5.4.4.

24. Declaration (IV, 2) on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899, 187 Consol. T.S. 453, 26 Martens Nouveau Recueil (ser. 2) 998; Protocol for the Prohibition of the Use in War on Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

25. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, 1015 U.N.T.S. 163.

26. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, T.I.A.S. No. 97-525, 1974 U.N.T.S. 45.

27. Protocol on Blinding Laser Weapons, Oct. 13, 1995, T.I.A.S. No. 09-721.2, 1380 U.N.T.S. 370.

28. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211. For information on the shift of U.S. policy, see generally Michael N. Schmitt, *Déjà Vu: International Landmine Law and the New U.S. Landmine Policy*, ARTICLES OF WAR (June 27, 2022), lieber.westpoint.edu/deja-vu-international-landmine-law-new-us-landmine-policy.

29. Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39.

short of durable success,[30] a movement to regulate air bombardments began to take shape. It emerged from the historic concept of fortification ("walled city,")[31] exempting unfortified, open towns from destruction.[32] During the 1899 and 1907 Hague Peace Conferences, this norm matured into an agreed prohibition on bombardments of undefended towns.[33] Yet, at the same time, States supported an exception to this rule for naval warfare, where such bombardment was incidental to "the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port."[34] A harbinger of modern-day rules of proportionality, this exception was considered necessary owing to the unique character of naval warfare, which demanded the commander of a naval force carry out destruction when they had no landing party at their disposal.[35]

Extensive use of air bombings during the First World War renewed calls to restrict the use of aircraft as a means of warfare.[36] However, it became apparent during the 1921 Washington Conference that any attempt to restrict the use of aircraft by number, size, or character was impractical because commercial aircraft could

30. Declaration (IV, 1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, July 29, 1899, 32 Stat. 1839, T.S. No. 393, 187 Consol. T.S. 453; Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, Oct. 18, 1907, 36 Stat. 2439, 205 Consol. T.S. 403. These instruments imposed a moratorium on the discharge of projectiles and explosives from balloons but did not lead to a permanent prohibition. The 1907 Declaration is still formally in force as the projected Third Peace Conference was never convened.

31. J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 214–15 (3d ed. 1947); M.W. ROYSE, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE 147–64 (1928).

32. International Declaration Concerning the Laws and Customs of War art. 15, Aug. 27, 1874, Brussels, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 22–34 (Dietrich Schindler & Jiri Toman eds, 3d ed. 1988).

33. 1899 Hague Convention II, *supra* note 22, art. 25; Hague Regulations, *supra* note 22, art. 25.

34. This exception was formulated by the *Institut de Droit International* in 1896 and adopted by the U.S. Naval War Code of 1900 art. 4, *reprinted in* 3 INT'L L. STUD. 101, 104 (1903). *See also* Convention No. IX Concerning Bombardment by Naval Forces in Time of War art. 2, Oct. 18, 1907, 36 Stat. 2351, 205 Consol. T.S. 345, 3 Martens Nouveau Recueil (ser. 3) 604.

35. *See* A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES 353–55 (1909); Spaight, *supra* note 31, at 220–21.

36. *See, e.g.*, Thomas Davies, *France and the World Disarmament Conference of 1932-34*, 15 DIPL. & STATECRAFT 767 (2004); Uri Bialer, *The Danger of Bombardment from the Air and the Making of British Air Disarmament Policy 1932-4*, *in* 1 WAR AND SOCIETY: A YEARBOOK OF MILITARY HISTORY 202 (1975); F.P. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS 509–12 (1952).

have easily been converted for military service.[37] Instead, States referred the matter to a Commission of Jurists for deliberation, asking whether existing rules of international law adequately covered new methods of warfare and, if not, what changes in the existing rules ought to be adopted.[38] In 1923, the commission produced the Draft Rules of Aerial Warfare,[39] from which the concept of legitimate military objectives emerged as the linchpin of the distinction principle in the modern law of targeting.[40] The Draft Rules marked a departure from the traditional criterion of "defense" as a test for the legitimacy of bombardment, resorting instead to the notion of military objectives.

Despite these normative efforts, the Second World War proved to be the most destructive conflict in history, causing unparalleled levels of death and devastation due to the widespread practice of target-area bombardment. Efforts to develop more precise rules for the protection of civilian populations from bombardment did not materialize in the immediate aftermath of the war. The problem, at that time, related to technical limits on the ability to confine bombing effects to the intended objects of attack.[41] Technology had simply not kept pace with the ideas of humanity. Rather than regulate the conduct of hostilities, immediate post-war codification efforts were devoted to the treatment of persons who found themselves in the power of the enemy.[42] Progress had to wait until experiences in the Vietnam War and other Cold War proxy conflicts prompted the drafting of new rules as the Additional Protocols to the Geneva Conventions.[43] The comparatively fine-grained rules, particularly

37. Conference on the Limitation of Armament held at Washington, *Report of the Canadian Delegate*, 26 ¶ 55 (1922).

38. RESOLUTIONS ADOPTED BY THE CONFERENCE *reprinted in* 1 FOREIGN RELATIONS OF THE UNITED STATES, 1922, at 288 (Joseph V. Fuller & Tyler Dennett eds., 1938).

39. General Report on the Revision of the Rules of Warfare: Part I—Rules of Aerial Warfare, *reprinted in* 17 AM. J. INT'L L. SUPP. 245 (1923).

40. *See* Christian Wilke & Helyeh Doutaghi, *Legal Technologies: Conceptualizing the Legacy of the 1923 Hague Rules of Aerial Warfare*, 37 LEIDEN J. INT'L L. 88, 89 (2024); Eyal Benvenisti, *The Birth and Life of the Definition of Military Objectives*, 71 INT'L & COMPAR. L. Q. 269, 276 (2022); Heinz Marcus Hanke, *The 1923 Hague Rules of Air Warfare—A Contribution to the Development of International Law Protecting Civilians from Air Attack*, 292 INT'L REV. RED CROSS 12, 24, 29–30 (1993); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 30 (1990).

41. Marco Sassòli, *Targeting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts*, *in* NEW WARS, NEW LAWS? APPLYING LAWS OF WAR IN 21ST CENTURY CONFLICTS 181, 187 (David Wippman & Matthew Evangelista eds., 2005).

42. WILLIAM H. BOOTHBY, THE LAW OF TARGETING 26 (2012).

43. Additional Protocol I, *supra* note 16, pmbl.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-

those of Additional Protocol I, became practicable due to the increased accuracy of projectiles and explosives achieved during the intervening period.[44]

The law relating to bombardment for the protection of civilian populations—generally known as the law of targeting—is thus codified in Part IV of Additional Protocol I to the Geneva Conventions and, for the most part, is considered to reflect customary international law.[45] It prohibits indiscriminate attacks against civilians and requires attacks be directed against military objectives as defined in the Protocol.[46] The rule of proportionality, which the United States had already recognized as regulating bombardment from the air,[47] forms part of the law prohibiting an attack when the incidental damage to civilians is expected to be out of proportion to the concrete and direct military advantage anticipated.[48] These rules are further reinforced by affirmative duties to exercise precautions, to the extent feasible, both in attacks and against the effects of attacks.[49] The International Court of Justice has described this imperative of distinction as a cardinal principle constituting the fabric of humanitarian law.[50]

A detailed account of how the law of targeting is designed to operate in practice is beyond the scope of this article.[51] However, the underlying logic of the law is fairly simple—one must not plan, authorize, or conduct attacks when, based on their good faith assessment of the information available at the time, civilians are

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International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

44. R.R. Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165, 178 (1977).

45. Partial Award: Western Front, Aerial Bombardment and Related Claims—Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, (Eri. v. Eth.), 26 R.I.A.A. 291, 303–304, 327 (Eri.–Eth. Claims Comm'n Dec 19, 2005) [hereinafter Western Front Claims]; Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 524 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000); DOD LAW OF WAR MANUAL, *supra* note 22, § 5.4.

46. Additional Protocol I, *supra* note 16, arts. 51–52.

47. Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy (Sept. 22, 1972), *reprinted in* 67 AM. J. INT'L L. 118, 124–25 (1973).

48. Additional Protocol I, *supra* note 16, arts. 51(5)(b), 57(2)(a)(iii).

49. *See id.* arts. 57, 58.

50. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 257, ¶ 78 (July 8).

51. There is voluminous literature that interested readers may usefully consult on this topic: see, for example, TARGETING: THE CHALLENGES OF MODERN WARFARE (Paul A.L. Ducheine et al. eds., 2016); Michael N. Schmitt & Eric W. Widmar, *"On Target": Precision and Balance in the Contemporary Law of Targeting*, 7 J. NAT'L SEC. L. & POL'Y 379 (2014); Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT'L L.J. 337 (2012); BOOTHBY, *supra* note 42; IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING (Int'l Humanitarian L. Series ed. 2009).

known to be targeted, civilian casualties are reasonably estimated to be excessive to gain the military advantage, or there are other means reasonably available to avoid or minimize civilian casualties. According to this logic, the law's implementation hinges upon the assessments on the part of military planners and decision-makers, taking into account the value of military objectives, information and resources available at the time, and the battlefield condition. Commanders and other military decision-makers must consider the military advantages to be gained, and the extent of casualties expected from targeting operations beforehand.[52] The decisive factor is the assessment of decision-makers based on their interpretation of all information reasonably available to them, which is inevitably subjective and depends on the tactical situation prevailing at the time.[53]

This logic of the law converts into a standard of post hoc assessment derived from the trial of General Lothar Rendulic during the Nuremberg proceedings.[54] Operating under the impression that Russian forces were in pursuit, German General Rendulic carried out the "scorched earth" campaign in the Norwegian province of Finmark.[55] In retrospect, there was no military necessity for this destruction as the Russian forces did not follow up the retreat to the extent anticipated. Nevertheless, the Tribunal found him not guilty on this portion of the charge, by judging the situation as it appeared to him at the time. As the Tribunal observed, external reviewers must evaluate whether the defendant had "acted within the limits of honest judgment on the basis of the conditions prevailing at the time."[56] This standard is pivotal to the external review of military decision-making under the modern law of armed conflict.[57] The law is not designed to regulate the conduct of hostilities based on the objective facts that came to light with the wisdom of hindsight.

As discussed in the next section, the "Rendulic" rule sets an

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52. L. Doswald-Beck, *The Value of the 1977 Geneva Protocols for the Protection of Civilians*, *in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 137, 156 (Michael A. Meyer ed., 1989).

53. BOOTHBY, *supra* note 42, at 171–72.

54. United States v. List ("The Hostage Case"), *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1296–97 (1948).

55. *Id.* at 1297.

56. *Id.*

57. *See* Sean Watts, *The Genesis and Significance of the Law of War "Rendulic Rule"*, *in* HONEST ERRORS? COMBAT DECISION-MAKING 75 YEARS AFTER THE HOSTAGE CASE 155 (Nobuo Hayashi & Carola Lingaas eds., 2024); Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgement, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); Hays Parks, *supra* note 40, at 3, 172.

inherent limit on humanitarian efforts to regulate the conduct of warfare under the rule of law. Even though human rights law has encroached on the law of armed conflict over the last few decades,[58] targeting law decisions have been insulated from its impact.[59] The idea of objectively assessing the reasonableness of military decisions finds little support in an environment where decision-makers do not enjoy a high degree of control over the circumstances confronting them.[60] Rather, the application of human rights standards during an armed conflict has been limited to the controlled environment, such as detention and shooting incidents under military occupation.[61] The European Court of Human Rights has indeed precluded the application of human rights law during the active phase of hostilities from its jurisdiction,[62] except for a procedural obligation to conduct independent investigations after lethal events.[63] The degree of

58. *See generally* THEODOR MERON, *The Humanization of the Law of War*, *in* THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: THE VIEW FROM THE BENCH 42 (2011); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

59. The International Court of Justice has held that human rights law does not cease to apply during an armed conflict. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9). However, the United States maintains the position that the law of armed conflict is the controlling body of law in armed conflict with respect to the conduct of hostilities and the protection of war victims. Fifth Periodic Report submitted by the United States of America under Article 40 of the Covenant pursuant to the Optional Reporting Procedure, ¶ 8, U.N. Doc. CCPR/C/USA/5 (Nov. 11, 2021); Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUDS. 20, 53–61 (2014).

60. By contrast, the police use of force in domestic law enforcement is subject to a varying degree of objective reasonableness test. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396–99 (1988); McCann v. United Kingdom, 21 Eur. Ct. H.R. 97, ¶¶ 195–200 (1995).

61. *See, e.g.*, Güzelyurtlu v. Cyprus, App. No. 36925/07, Eur. Ct. H.R. ¶ 179 (Jan. 29, 2019), https://hudoc.echr.coe.int/spa?i=001-189781, and previous cases cited therein; Hassan v. United Kingdom, App. No. 29750/09, Eur. Ct. H.R. ¶¶ 76, 96–111 (Sept. 16, 2014), https://hudoc.echr.coe.int/eng?i=002-10082; Al-Jedda v. The United Kingdom, App. No. 27021/08, Eur. Ct. H.R. ¶¶ 85, 107–10 (2011), https://hudoc.echr.coe.int/eng?i=002-426.

62. Georgia v. Russia (II), App. No. 38263/08, Eur. Ct. H.R. ¶¶ 133–44 (Jan. 21, 2021), https://hudoc.echr.coe.int/fre?i=001-207757; Banković v. Belgium, App. No. 52207/99, Eur. Ct. H.R. ¶ 75 (Dec. 12, 2001), https://hudoc.echr.coe.int/eng?i=001-22099. However, the European Court's approach based on the reach of its jurisdiction is arguably flawed. *See* Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos*, EJIL: TALK! (Jan. 25, 2021), https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/; Helen Duffy, *Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights*, JUST SEC. (Feb. 2, 2021), https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/.

63. Hanan v. Germany, App. No. 4871/16, Eur. Ct. H.R. ¶¶ 135–37 (Feb. 16, 2021),

subjectivity accorded under the "Rendulic" rule makes the application of human rights standards ill-suited to the review of targeting decisions.

Human rights discourse has nonetheless inspired humanitarian adventurism in evaluating military operations. In its General Comment No. 36, the Human Rights Committee has asserted that the right to life applies to the conduct of hostilities during an armed conflict while acknowledging that the use of lethal force consistent with international humanitarian law does not, in general, amount to an arbitrary deprivation of life.[64] This indicates that external reviewers are liable to surmise the illegality of military action according to stricter standards of review and by drawing inferences from the consequences of warfighting. As will be discussed in the next section, an adjudicative application constructed on that basis risks defying the underlying logic of the law that dictates how States implement their obligations to regulate the conduct of hostilities.

III. JUDICIALIZING WAR

The modern law of armed conflict serves as the basis for establishing the responsibility of a belligerent State for loss, damage, and injury caused by violations of the law and prosecuting individuals involved in those violations for war crimes.[65] Despite a self-regulatory nature driven by the underlying logic of the law, this body of international law is equally susceptible to external scrutiny through a mechanism such as an international tribunal or a fact-finding mission. This external dimension of the law surfaces when humanitarian crises on battlefields inspire political and civic action referring to or establishing an international accountability mechanism, such as the one called for to hold Russia accountable for its acts of aggression and

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https://hudoc.echr.coe.int/fre?i=001-208279; Georgia v. Russia (II), App. No. 38263/08, Eur. Ct. H.R. ¶ 331.

64. U.N. Hum. Rts. Comm., General Comment No. 36 Article 6: Right to Life, ¶ 64, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019). For U.S. objections, see U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2017, at 188–89 (CarrieLyn D. Guymon ed., 2017); *see also* Mitt Regan, *International Law and the Humanization of Warfare*, 37 ETHICS & INT'L AFFS. 375, 378 (2023).

65. *See, e.g.*, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in The Territory of the Former Yugoslavia Since 1991 art. 3, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (noting that Article 3 of the Statute is a general clause covering all violations of humanitarian law).

war crimes committed by its forces.[66]

The law's adjudicative application thus permeates international efforts to hold belligerent parties accountable. Still, it must not run counter to the underlying logic of the law that prescribes legal requirements for conducting or directing military operations. The reason for this is simple—no one should be reprimanded, or worse, convicted, for operating within the bounds of the law. However, the underlying logic of the law is not readily translatable for external review. Its application in a specific situation is difficult to evaluate without having the benefit of military experiences and access to the same information that was reasonably available to the decision-maker. These difficulties manifest when external reviewers set the standard of proof as the basis for finding breaches, consider the element of intent to commit a violation, and determine whether battlefield mistakes are reasonable.

A. STANDARD OF PROOF

Prosecuting violations of the laws of war has always been fraught with methodological difficulties. At the Nuremberg trials, aerial bombardments against civilians to induce surrender were generally considered legitimate under the broad rubric of military necessity.[67] A Nuremberg Military Tribunal justified this deference to military necessity in the *Einsatzgruppen Case* by stating as follows:

> [T]here . . . is no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory . . . [A]s grave a military action as is an air bombardment, whether with the usual bombs or by atomic bomb, the one and only purpose of the bombing is to effect the surrender of the bombed nation.[68]

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66. *See, e.g.*, Joint Motion for a Resolution on the Establishment of a Tribunal on the Crime of Aggression against Ukraine, RC-B9-0063/2023 (Jan. 18, 2023), https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063_EN.html.

67. Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT'L L.J. 1, 19–28 (2002); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 91–94 (1994).

68. United States. v. Ohlendorf ("The Einsatzgruppen Case"), *in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 467 (1948).

This judgment is not a statement of military necessity to justify violations of law—the claim that the same Tribunal rejected elsewhere.[69] It is instead an indication of judicial deference to executive and legislative authorities on military affairs as an exercise of judicial restraint prevailing at the time.[70] Despite normative developments witnessed prior to the Second World War, the Nuremberg Tribunals found themselves constrained from assessing the legality of aerial bombardment.

Under the modern law of armed conflict, claims of military necessity do not enjoy the same degree of deference.[71] The practice of morale bombings directed against the civilian population has lost its place in the legitimate conduct of warfare.[72] Nevertheless, there are other, more technical reasons why external reviewers are inclined to be deferential by setting a high standard of proof as the basis for their findings. In *Eritrea v. Ethiopia*, for example, the Claims Commission required clear and convincing evidence to establish the State's responsibility for war reparations in light of the gravity of the claims advanced for adjudication.[73] For trials at the Yugoslav Tribunal, the Prosecutor sought credible evidence tending to show that crimes within the jurisdiction of the Tribunal may have been committed in Kosovo.[74] As with any criminal trial, the guilt of the accused must be proven beyond a reasonable doubt based on evidence, whether direct or circumstantial, sufficient to establish the facts on which the

69. United States v. von Leeb ("The High Command Case"), *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 541 (1948); United States v. List ("The Hostage Case"), *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1255–56 (1948).

70. Affaire des Biens Britanniques au Maroc Espagnol (Spain v. U.K.), 2 R.I.A.A. 615, 645 (Perm Ct. Arb. 1925); Korematsu v. United States, 323 U.S. 214, 223 (1944); The Zamora [1916] 2 AC 77 (PC), 107 (U.K.).

71. *See, e.g.*, NOBUO HAYASHI, MILITARY NECESSITY: THE ART, MORALITY AND LAW OF WAR 316–72 (2020); SIGRID REDSE JOHANSEN, THE MILITARY COMMANDER'S NECESSITY: THE LAW OF ARMED CONFLICTS AND ITS LIMITS 64–89 (2019); SHANE DARCY, JUDGES, LAW AND WAR: THE JUDICIAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 145–50 (2014).

72. DOD LAW OF WAR MANUAL, *supra* note 22, § 5.6.7.3. Note that it is legitimate to intend to diminish the morale of the civilian population as an incidental, secondary aim of the military advantage anticipated to be gained. *See, e.g.*, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 76 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 13, 2000) [hereinafter Prosecutor's Report].

73. Partial Award: Prisoners of War—Eritrea's Claim 17 (Eri. v. Eth.) 26 R.I.A.A. 23, ¶ 46 (Eri.–Eth. Claims Comm'n July 1, 2003); Partial Award: Prisoners of War—Ethiopia's Claim 4 (Eri. v. Eth.) 26 R.I.A.A. 73, ¶ 37 (Eri.–Eth. Claims Comm'n July 1, 2003).

74. Prosecutor's Report, *supra* note 72, ¶ 5.

conviction relies.[75] The European Court of Human Rights has likewise adopted the "beyond reasonable doubt" standard to prove allegations of unlawful killing, which requires "sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."[76]

Strict evidentiary standards constrain the external reviewer's ability to establish violations committed during hostilities. The mere fact that the air strike hit a civilian building is insufficient to establish a violation. The civilian building might not have been the intended target or could have transformed into a military objective because of its use by the adversary. It could have been incidental harm expected from the strike and not considered out of proportion to the military advantage anticipated.[77] A breach cannot be established to any degree of objectivity without the benefit of knowledge regarding the military decision-maker's subjective intent and the battlefield condition on which the decision was made.[78] Such a contextual assessment of each attack becomes practically untenable when hundreds of sorties are coordinated, managed, and launched every day of fighting in a large-scale armed conflict.

Intelligence-driven targeting practices in modern military operations impose further practical impediments to the collection of information sources for external review. Many States prohibit military intelligence sharing without authorization,[79] which prevents access to targeting information and the commander's interpretation of it.[80]

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75. *See* Prosecutor v. Martić, Case No. IT-95-11-A, Appeals Judgment, ¶¶ 55–61 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008); Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Judgment, ¶ 219 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); *see, e.g.*, 22 THE TRIAL OF GERMAN MAJOR WAR CRIMES BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945–1 OCTOBER 1946, at 555–56 (acquitting Schacht), 573–74 (acquitting von Papen) (1948).

76. *See, e.g.*, Issa v. Turkey, App. No. 31821/96, Eur. Ct. H.R. ¶ 76 (Nov. 16, 2004), https://hudoc.echr.coe.int/eng?i=001-67460 and previous cases cited therein.

77. *See, e.g.*, Office of the Prosecutor, *Letter Concerning Communications on the Situation in Iraq*, INT'L CRIM. CT. 6–7 (Feb. 9, 2006), https://www.icc-cpi.int/news/otp-response-communications-received-concerning-iraq (noting a lack of information to find a reasonable basis for believing that civilian casualties were clearly excessive).

78. *See* Hanan v. Germany, App. No. 4871/16, Eur. Ct. H.R. Judgment ¶¶ 213–18 (Feb. 16, 2021); Carolin Wuerzner, *Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects Before International Criminal Tribunals*, 90 INT'L REV. RED CROSS 907, 917 (2008).

79. *See generally* Hitoshi Nasu, *State Secrets Law and National Security*, 64 INT'L & COMPAR. L.Q. 365 (2015).

80. *See generally* Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 YALE J. INT'L L. 477 (2006); Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, *in* SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW

Forensic evidence of a particular site being used for military purposes is usually destroyed in the attack or, if time allows, removed by the adversary who exploited the site in the first place.[81] The Yugoslav Tribunal found that States were obliged to comply with its requests for information without any exception because the trial was essentially an enforcement measure under Chapter VII of the Charter of the United Nations.[82] However, other international courts lack comparable powers and can only expect good faith cooperation when they call upon States to produce such evidence they may consider necessary.[83] Therefore, external reviewers have little choice but to rely on circumstantial evidence without such cooperation.

The law's adjudicative application breaks away from its underlying logic when the breach is inferred from the results of attacks without appreciating these legal complexities of military decision-making in combat operations. Such fractures surfaced when the Goldstone Report assessed the legality of Operation Cast Lead conducted by Israel in the Gaza Strip in 2009.[84] The Report identified numerous violations by collecting evidence on the aftereffects of warfighting. For example, the Report observed the air strikes against governmental buildings as deliberate attacks on civilian objects in the absence of indications or evidence that would have characterized them as military objectives and the attacks on police stations as disproportionate based on the number of civilian casualties.[85]

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391 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000). Note, however, the US administration's efforts to cooperate with the International Criminal Court on the investigation of war crimes committed in the Russia-Ukraine conflict. *See* TODD F. BUCHWALD ET AL., U.S. COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT ON INVESTIGATION AND PROSECUTION OF ATROCITIES IN UKRAINE: POSSIBILITIES AND CHALLENGES (2023).

81. Hum. Rts. Council on Its Twenty-Ninth Session, Rep. of the Detailed Findings of the Indep. Comm'n of Inquiry Established Pursuant to Hum. Rts. Council Resol. S-21/1, ¶ 215, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015) (detailing the argument submitted by the Israel Defense Force to the Commission of Inquiry) [hereinafter 2014 Gaza Conflict Report].

82. Prosecutor v. Blaškić, Case No. IT-95-14-AR108 *bis*, Judgment on the Request for the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶¶ 62–65 (Oct. 29, 1997). The ruling was subsequently incorporated into the Tribunal's Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.17, r. 54 *bis* (Dec. 7, 1999).

83. *See, e.g.*, Statute of the International Court of Justice art. 49, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; Rome Statute of the International Criminal Court arts. 72, 87(7), 93(4), July 17, 1998, 2187 U.N.T.S. 3.

84. Hum. Rts. Council on Its Twelfth Session, Hum. Rts. in Palestine and Other Occupied Arab Territories: Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter Goldstone Report].

85. *Id.* ¶¶ 388–89, 435–37. For a critical review of the Report in these respects, see Laurie Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*,

Likewise, the Commission of Inquiry found civilian casualties during Israel's 2006 incursion into southern Lebanon to be disproportionate without considering the military objectives against which attacks might have been launched.[86] The same tendency continues to taint the Commission's assessment of Israeli action during the 2023 Gaza conflict by presuming the civilian status of victims and disproportionate civilian casualties in the absence of credible evidence that establishes otherwise.[87]

The Hague civil court in the Netherlands took a similar approach to the claims for tortious damages in relation to the bombing of the Afghan *quala* (a walled residential complex) conducted during the battle of Chora in June 2007. The bombing was considered indiscriminate due to insufficient data that would have caused a reasonable commander to classify the *quala* as a military objective.[88] By drawing inferences from extrinsic evidence, these decisions have driven evidentiary standards into the realm of probability, skewing military considerations in favor of humanitarian protection. The

12 Y.B. OF INT'L HUMANITARIAN. L. 347, 358–60, 368–77 (2009).

86. Hum. Rts. Council on Its Third Session, Rep. of the Comm'n of Inquiry on Lebanon pursuant to Hum. Rts. Council Resol. S-2/1, U.N. Doc. A/HRC/3/2, ¶¶ 111–12, 128, 135 (Nov. 23, 2006). For critical reviews, see Andreas Zimmermann, *The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality*, 11 MAX PLANCK Y.B. U.N. L. 99, 138–40 (2007); James G. Stewart, *The UN Commission of Inquiry on Lebanon*, 5 J. INT'L CRIM. JUST. 1039, 1045 (2007).

87. Hum. Rts. Council on Its Fifty-Sixth Session, Detailed Findings on the Military Operations and Attacks Carried Out in the Occupied Palestinian Territory from 7 October to 31 December 2023, ¶¶ 178, 181, 186, 422, U.N. Doc. A/HRC/56/CRP.4 (June 10, 2024); *see also* Hum. Rts. Council on Its Fifty-Second Session, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, ¶¶ 31–34, 42–44, U.N. Doc. A/HRC/52/69 (Feb. 7, 2023); Hum. Rts. Council on Its Fifty-First Session, Rep. of the Int'l Comm'n of Hum. Rts. Experts on Eth., ¶¶ 91-94, U.N. Doc. A/HRC/51/46 (Sept. 19, 2022).

88. C/09/581972 HA ZA 10-1099 and C/09/604819 HA ZA 20/1244, ¶¶ 5.23–5.32 (Nov. 23, 2022). For critical commentaries, see Marieke de Hoon, *Dutch Court, Applying IHL, Delivers Civil Judgment for Victims of 2007 Afghanistan Attack*, JUST SEC. (Feb. 27, 2023), https://www.justsecurity.org/85223/dutch-court-applying-ihl-delivers-civil-judgment-for-victims-of-2007-afghanistan-attack/;

Marten Zwanenburg, *Dutch Judgment on IHL Compliance in Chora District, Afghanistan*, ARTICLES OF WAR (Dec. 19, 2022), https://lieber.westpoint.edu/dutch-judgment-ihl-compliance-chora-district-afghanistan/. A joint investigation conducted by the Afghanistan Independent Human Rights Commission and the U.N. Assistance Mission in Afghanistan found no violation for it was possible to conclude that the use of force in the specific Chora incident "was not disproportionate in relation to achieving the necessary and expected military advantage." U.N. Assistance Mission in Afg. & Afg. Indep. Hum. Rts. Comm'n, AIHRC & UNAMA Joint Investigation into the Civilian Deaths Caused by the ISAF Operation in response to a Taliban Attack in Chora District, Urugzan on 16th June 2007, at 13, https://open.overheid.nl/documenten/ronl-83089f0b-de8e-4057-b0fe-2b9be9ce3fca/pdf.

lowered threshold has shifted the burden of proof to the government conducting military operations by demanding military authorities furnish operational information to support their legal assessment.

A more cautious approach can mitigate this problem by focusing on the pattern of misconduct attributable to the belligerent forces. Acknowledging regrettable targeting errors and the adversary's failure to keep civilians and military objectives further apart, the Eritrea-Ethiopia Claims Commission opined that these casualties alone were insufficient to establish a wrongful act under the law of armed conflict.[89] Instead, the Commission sought to identify a pattern of frequent or pervasive misconduct, such as the direct shooting of civilians, while disregarding isolated incidents for lack of proof.[90] Likewise, the Group of Experts established by the U.N. Human Rights Council to investigate violations of international law in the Yemen conflict sought, at least in an initial stage, to identify patterns of misconduct based on circumstantial evidence relating to operational incidents.[91] While acknowledging that errors and accidents were unavoidable, the Group of Experts found reasonable grounds to believe that the Saudi-led coalition forces might have failed to comply with their legal obligations in conducting airstrikes and raised concerns about the coalition's targeting processes.[92]

By focusing on the pattern of misconduct, external reviewers can adopt a more systematic approach to circumstantial evidence aligned with operational reality in the implementation of the law. The

89. Western Front Claims, *supra* note 45, ¶¶ 96–97.

90. *Id*. ¶¶ 28, 35, 45, 56, 61, 65.

91. Hum. Rts. Council on Its Forty-Second Session, Rep. of the Detailed Findings of the Group of Eminent Int'l and Reg'l Experts on Yemen, ¶ 30, U.N. Doc. A/HRC/42/CRP.1 (Sept. 3, 2019); Hum. Rts. Council on Its Forty-Second Session, Rep. of the Group of Eminent Int'l and Reg'l Experts as Submitted to the U.N. High Comm'r for Hum. Rts., ¶ 3, U.N. Doc. A/HRC/42/17 (Aug. 9, 2019) [hereinafter Yemen Report II]; Hum. Rts. Council on Its Thirty-Ninth Session, Rep. of the U.N. High Comm'r for Hum. Rts. Containing the Findings of the Group of Eminent Int'l and Reg'l Experts and a Summary of Tech. Assistance Provided by the Office of the High Comm'r to the Nat'l Comm'n of Inquiry, ¶ 4, U.N. Doc. A/HRC/39/43 (Aug. 17, 2018) [hereinafter Yemen Report I]. The subsequent reports are increasingly turned speculative and built on assumptions, as is pointed out by the Response of the Coalition Forces Supporting Legitimacy in Yemen to the Report of the Group of International and Regional Experts on Yemen for the Year 2020 (Unofficial Translation) ¶ 8 (Oct. 7, 2020), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/GEE-Yemen/NV-Saudi-Coalition-unofficial-translation07102020.pdf; *see also* Rep. of the Group of Eminent Int'l and Reg'l Experts on Yemen, ¶¶ 26–30, U.N. Doc. A/HRC/48/20 (Sept. 13, 2021) (drawing conclusions based on incomplete investigations); Hum. Rts. Council on Its Forty-Fifth Session, Rep. of the Group of Eminent Int'l and Reg. Experts on Yemen, ¶¶ 27–31, U.N. Doc. A/HRC/45/6 (Sept. 28, 2020) (drawing conclusions based on the lack of information for verification).

92. Yemen Report II, *supra* note 91, ¶ 30; Yemen Report I, *supra* note 91, ¶ 38.

evidentiary value of effects from military operations increases as patterns emerge, indicating that precautions are not exercised to mitigate risk to civilians.[93] Exercising precautions is a procedural obligation that must be implemented with the due process of targeting.[94] The failure to verify military targets or minimize incidental harm to civilians is not necessarily conclusive evidence of a breach because precautions must be exercised only to the extent feasible under the attendant circumstances.[95] Nevertheless, repeated patterns of reckless behavior drawn from the assemblage of objective facts, such as the lack of reconnaissance activities, communication failures, weapon choice, and methods and timing of the attack, can be probative of the failure to exercise constant care to minimize the risk to civilians. Strict evidential standards thus constructed align better with the underlying logic of the law that hinges upon the feasibility of precautions.

B. THE ISSUE OF INTENT

The commander's intent is central to the law of targeting. The law prohibits intentionally directing an attack against civilians or launching an attack when the civilian casualties expected as incidental harm are out of proportion to the military advantage the commander intends to gain. For criminal prosecution, intent is relevant to the mental element of an offense to establish the presence in the person executing the act of a culpable condition of mind (*mens rea*).[96] As the Yugoslav Tribunal stated in *Prosecutor v. Blaškić*, an unlawful attack against civilians "must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity."[97] Mere negligence is insufficient to establish a breach or individual liability for a war crime.

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93. Geoffrey S. Corn & Sean Watts, *Ukraine Symposium—Effects-based Enforcement of Targeting Law*, ARTICLES OF WAR (June 2, 2022), https://lieber.westpoint.edu/effects-based-enforcement-targeting-law/.

94. Sean Watts, *Law-of-War Precautions: A Cautionary Note*, *in* THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 99, 112 (Eric Talbot Jensen & Ronald T.P. Alcala eds., 2019) (describing the "due process of targeting.").

95. Additional Protocol I, *supra* note 16, art. 57(2). For a discussion on reasons to exercise cautions in assessing feasibility, see Watts, *supra* note 94, at 134–42.

96. Additional Protocol I, *supra* note 16, art. 85(3); Rome Statute, *supra* note 83, arts. 8(2)(b)(i)–(iv), 8(2)(e)(i)–(iv), 30.

97. Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); *see also* Prosecutor v. Kordić, Case No. IT-95-14/2-T, Trial Judgment, ¶ 328 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

The element of intent is the golden thread that ties operational and adjudicative applications together. However, discrepancies could emerge when this element is applied in practice. Consider, for example, indirect fire with wide-area effects against enemy fighters operating from an urban area, resulting in several civilian casualties. Could it be said that there was an intent to make the civilians an object of the attack? Could such intent be established when the commander was aware that civilian casualties would result or that civilians would be exposed to harm?

The Eritrea-Ethiopia Claims Commission answered negatively when it assessed the shelling of artillery fire at a distance from the front lines into civilian towns and camps for displaced persons, which resulted in many Ethiopian civilians suffering. According to the Commission, "the evidence is inadequate for the Commission to hold that . . . the shelling . . . was unlawful on the grounds that they targeted civilians or were indiscriminate."[98] Similarly, the Yugoslav Tribunal's Appeals Chamber found that the Croatian Army's attack against the town of Vitez in April 1993 could not have been considered as targeting civilians in light of the number of military objectives present in the area, the resistance offered by Muslim forces, and the absence of evidence suggesting civilian status among the victims.[99] The unclear circumstances of the combat operations in this attack, including the unascertainable context in which civilians and civilian structures were harmed, led the Appeals Chamber to conclude that "no reasonable trier of fact could have concluded that civilian objects were unlawfully targeted."[100] These findings are consistent with the law's underlying logic, which leaves room for errors and foreseeable civilian casualties to the extent justifiable to achieve military objectives.

On the other hand, the Yugoslav Tribunal broadened the definition of intent when its Trial Chamber reviewed the shelling and sniping campaigns in Sarajevo under the command of General Galić. The Trial Chamber held that willfully making the civilian population or individual civilians the object of attack encompassed recklessness,[101] drawing on the International Committee of the Red

98. Partial Award: Central Front—Ethiopia's Claim 2 (Eri. v. Eth.), 26 R.I.A.A. 115, ¶¶ 47, 58 (Eth.–Eri. Claims Comm'n 2004) [hereinafter Central Front Claim].

99. Prosecutor v. Kordić, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 450 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶¶ 463–64 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

100. Prosecutor v. Kordić, Case No. IT-95-14/2-A, Appeals Judgment, ¶¶ 456, 452–57 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

101. Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgement, ¶ 54 (Int'l Crim.

Cross Commentary to Article 85 of Additional Protocol I.[102] On that basis, the Trial Chamber found that the shelling and sniping were willfully directed against civilians, deliberately or recklessly.[103] Recklessness may satisfy the culpable condition of mind for committing willful killing. It may also be sufficient to establish the mode of liability, such as ordering, aiding and abetting, as the basis for conviction.[104] However, had this standard been applicable to targeting operations, the commander's intent to accept the risk of harm to civilians within the bounds of the law could well be misconstrued as having no regard for the danger posed to civilians.[105] Because of this problem, the drafters of the Rome Statute specifically removed recklessness from the mental element that satisfies the International Criminal Court to establish criminal liability.[106] By applying a lower threshold, the *Galić* Tribunal arguably turned the act of launching a military operation knowing and accepting the risk of harm to civilians into a criminal offense when it would otherwise be considered lawful.

The broadening of intent stems further from the idea that

Trib. for the Former Yugoslavia Dec. 5, 2003).

102. Claude Pilloud et al., *Protocol 1—Article 85*, *in* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 994 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC AP I COMMENTARY] (defining what constitutes a willful act, encompassing the concept of recklessness).

103. Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgement ¶ 596 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); *see also* Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Judgment, ¶¶ 139–40 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (upholding the decision on appeal without serious challenge).

104. Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, ¶ 152 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

105. *See* Brian L. Cox, *Recklessness, Intent, and War Crimes: Refining the Legal Standard and Clarifying the Role of International Criminal Tribunals As a Source of Customary International Law*, 52 GEO. J. INT'L L. 1, 17–29 (2020) (criticizing the analysis of the *Galić* Trial Chamber); *see also* Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 85–97 (2013) (examining issues with recklessness being used to meet the *mens rea* standard for attacks on civilians). *Cf*. Corn & Corn, *supra* note 51, at 365–66 (analogizing the rule of proportionality to the common law concept of implicit malice in relation to the crime of murder; however, noting that this equation is not totally apposite to targeting decisions).

106. Rome Statute, *supra* note 83, art. 30; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-A-5, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against His Conviction, ¶¶ 441–49 (Int'l Crim. Ct. Appeals Cham. Dec. 1, 2014); Prosecutor v. Gombo, Case No. ICC-01/05-01/08-424, Decision on the Confirmation of Charges, ¶¶ 356–69 (Int'l Crim. Ct. Pre-Trial Cham. June 15, 2009). *See also* Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE BY ARTICLE COMMENTARY 1340 (Kai Ambos ed., 4th ed. 2022); Roger S. Clark, *Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings*, 19 CRIM. L.F. 519, 529–30 (2008).

employing particular means of combat, such as unguided munitions with wide-area effects, qualifies as direct attacks against civilians because of the indiscriminate characteristics that render them incapable of hitting specific targets. In *Prosecutor v. Blaškić*, as noted above, the Appeals Judgment rejected this idea,[107] reversing the Trial Chamber's finding that inferred an intent to direct attacks against civilians from the use of home-made mortars due to their irregular trajectories and likelihood of hitting non-military targets.[108] In *Prosecutor v. Martić*, by contrast, the Yugoslav Tribunal determined that the M-87 Orkan non-guided projectile fired from the extreme of its range against Zagreb in May 1995 was an indiscriminate weapon "by virtue of its characteristics and the firing range in the specific instance."[109] The Group of Experts on Yemen also criticized "the use of such [wide-area] weapons in an urban setting" as indiscriminate,[110] as did the Goldstone Report in relation to the use of mortars in a location filled with civilians.[111]

The law of armed conflict leaves little room to assume the intent to attack civilians based on the weapon's characteristics alone. As the Yugoslav Tribunal's Appeals Chamber clarified in *Prosecutor v. Prlić*, the finding of an indiscriminate weapon must be "based on evidence that the weapon employed in the attack, when used in its normal or designed circumstances, will inevitably be indiscriminate, in the sense that it is incapable of being directed at a specific military objective or its effects are incapable of being limited as required by law."[112] In

107. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶ 466 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

108. Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, ¶ 512 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

109. Prosecutor v. Martić, Case No. IT-95-11-T, Trial Judgment, ¶ 463 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007); Prosecutor v. Martić, Case No. IT-95-11-A, Appeals Judgment, ¶¶ 247–52 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008) (upholding the finding on appeal).

110. Yemen Report I, *supra* note 91, ¶ 45.

111. Goldstone Report, *supra* note 84, ¶¶ 699–702; *see also* 2014 Gaza Conflict Report, *supra* note 81, ¶¶ 102, 226 (discussing that the use of mortar attacks and bombs with wide area effects are "likely to constitute a violation of the prohibition of indiscriminate attacks"); 2 Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, at 340–43 (2009), https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf (concluding that the uses of cluster weapons by Georgia and Russia both led to indiscriminate attacks).

112. Prosecutor v. Prlić, Case No. IT-04-74-A, Appeals Judgment, ¶ 434 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017); *see also* STUART CASEY-MASLEN & STEVEN HAINES, HAGUE LAW INTERPRETED: THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT 115–16 (2018) (discussing the reasoning provided in Prosecutor v. Prlić); WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 66–69 (2d ed. 2016) (discussing and providing examples of indiscriminate attacks and weapons law).

other words, indiscriminate weapons must be incapable of discriminating among targets under any of the normal or designed circumstances. However, instead, the requisite intent is more likely to be discerned from the "indiscriminate *use* of weapons, regardless of their innate ability to discriminate."[113] Such an intent is satisfied when the attack is not or cannot be directed at a specific military objective or when its effect cannot be limited as required by the law of armed conflict.[114] As such, external reviewers cannot establish an indiscriminate intent without contextual evaluation of the manner and circumstances in which a particular weapon or weapon system was employed.

The Yugoslav Tribunal has indeed acknowledged the need for contextual evaluation to determine whether civilians were targeted on a case-by-case basis. Relevant factors include:

> [T]he means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack.[115]

Similarly, the Inter-American Court of Human Rights took note of

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113. Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148 (1999); *see, e.g.,* U.S. DEP'T OF DEF., REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR—APPENDIX ON THE ROLE OF THE LAW OF WAR (1992), *reprinted in* 31 I.L.M. 612, 633–35 (1992) (providing the oft-cited example of the U.S. Department of Defense assessing the launch of "Scud" missiles by Iraq against Israeli and Saudi cities as indiscriminate). *But cf*. U.K. MINISTRY OF DEF., JSP 383: THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 6.4.1 (2004) [hereinafter U.K. MANUAL], (prohibiting weapons so inaccurate that they cannot be directed at a military target).

114. Additional Protocol I, *supra* note 16, art. 51(4); DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS NWP 1–14M § 5.3.4 (2022); *see also* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 467–69 (Michael N. Schmitt ed., 2017) (providing that cyber-attacks are prohibited in the circumstances where they cannot be directed at a specific lawful target or their effects cannot be limited as required by the law of armed conflict).

115. Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Judgment, ¶ 271 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008); *accord.,* Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgment, ¶ 807 (Int'l Crim. Ct. Trial Cham. II Mar. 7, 2014); Prosecutor v. Milošević, Case No. IT-98-29/1-A, Appeals Judgment, ¶ 66 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009); Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Judgment, ¶ 132 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment, ¶ 91 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

imprecise launch instructions, internal regulation in force at the time, and repeated errors preceding the launch of an AN-M1A2 cluster munition, a weapon with limited precision, before concluding that its use was unlawful.[116] The accuracy of a weapon has only an evidential relationship to indiscriminate attack, with the case for indiscriminate intent strengthening as the precision capabilities of an attacker become greater.[117]

The Yugoslav Tribunal pushed the envelope too far in *Prosecutor v. Gotovina*, where the Trial Chamber formulated and relied on the 200-meter margin of error as a dispositive rule to determine whether the shelling of Knin by using BM-21 Multi Barrel Rocket Launchers at distances of eighteen to twenty kilometers from the town was intended to be indiscriminate.[118] This accuracy-based standard made the presumption that any projectile landing over 200 meters from an identified military target was the product of indiscriminate attacks or attacks directed against the civilian population.[119] As the Appeals Chamber noted, not only was it methodologically flawed, but the 200-meter standard failed to consider the possible presence of mobile targets of opportunities such as military trucks and tanks.[120]

These fluctuations in the Yugoslav Tribunal's jurisprudence indicate the tension between the imperative of contextual evaluation demanded by the underlying logic of the law and humanitarian adventurism that stretches the notion of intent. Resulting misalignment creates the risk for commanders that their subjective intent may be misconstrued or even surrendered to the putative construct of their intent based on circumstantial evidence.

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116. Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 12.416, ¶¶ 216–29 (Nov. 30, 2012).

117. *See* Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445, 455 (2005).

118. Prosecutor v. Gotovina, Case No. IT-06-90-T, Trial Judgment, ¶ 1898 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011), *rev'd by* Case No. IT-06-90-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

119. *Id.* ¶ 1911 (holding that because "the shelling impacted all over Knin," it constituted an indiscriminate attack).

120. Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Judgment, ¶¶ 64–67 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012); *see also* Walter B. Huffman, *Margin of Error: Potential Pitfalls of the Ruling in* The Prosecutor v. Ante Gotovina, 211 MIL. L.R. 1 (2012) (discussing issues with the 200-meter rule and imploring the Appeals Chamber to reverse the Trial Court's ruling); *cf.* Darren Vallentgoed, *The Last Round? A Post-Gotovina Reassessment of the Legality of Using Artillery Against Built-up Areas*, 18 J. CONFLICT & SEC. L. 25 (2013) (demonstrating that "using conventional artillery against urban areas is inadvisably reckless," but if it is being used in urban environments offensively, calculations should be performed to correct for known factors).

Admittedly, the potential for post-hoc legal action is an integral part of the commander's risk assessment to a certain degree when they accept civilian casualties expected from the attack.[121] However, legal risks created by deviation from the underlying logic of the law are unjustifiable. Such deviation runs counter to the "Rendulic" rule by allowing external reviewers to reconstruct the commander's intent based on circumstantial evidence with the wisdom of hindsight. An adjudication could result in a miscarriage of justice when indiscriminate intent is construed from circumstantial evidence alone without considering military intelligence available at the time of attack or factors outside the commander's control that may account for civilian casualties.

C. THE ISSUE OF CERTAINTY

Certainty is a luxury in warfighting.[122] No matter how sophisticated military technologies have become and despite multi-layered sensor arrays feeding real-time battlefield information, uncertainty persists in the enemy's behavior, capabilities, strategies, and tactics. Uncertainty also derives from the risk of error that military decision-makers are liable to make when, for example, assessing the military value of a target or estimating the definite military advantage to be gained by the planned course of action.[123] In addition to these "known unknowns," battlefield uncertainties are further compounded by "unknown unknowns"—information outside of the perceived situational picture or the event that is unexpected to arise.

In the fog of war, these uncertainties cast doubt about whether the target individual or object is a military objective as defined under the law of armed conflict. This doubt is not a reason for mercy. Still, the decision to attack must reflect the level of certainty that can reasonably be achieved on the basis of information available at the time.[124] Additional Protocol I to the Geneva Conventions introduced the presumption of civilian status in case of doubt into the law of

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121. The author is grateful to Associate Professor Robert Lawless for raising this point.

122. CARL VON CLAUSEWITZ, ON WAR 101 (Michael Howard & Peter Paret eds. & trans., 1976) ("War is the realm of uncertainty . . . .").

123. Michael N. Schmitt & Michael Schauss, *Uncertainty in the Law of Targeting: Towards a Cognitive Framework*, 10 HARV. NAT'L SEC. J. 148, 155 (2019).

124. INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 76 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].

targeting.[125] This codification was designed "to preclude unscrupulous belligerents from denying the protection of the Protocol to civilians."[126] It generated concerns that the presumption would shift the onus to protect civilians onto a force engaged in offensive operations, encouraging a defending party to camouflage military objectives as civilian objects and placing the civilian population at a greater risk.[127] However, the "Rendulic" rule still controls its application in the context in which military decisions were made and executed on the basis of the subjective assessment of information available at the time.[128] As William Boothby observes, "the mere fact that an object's status appears dubious may not be sufficient to justify an attack on it, but the context is critical. Against surprise attacks, an object's dubious character may well be sufficient to justify its attack."[129]

Indeed, the presumption of civilian status has little impact on adjudicative application. The Yugoslav Tribunal's approach to the direct participation of civilians in hostilities illustrates its frivolity. In *Prosecutor v. Strugar*, the Tribunal's Appeals Chamber acknowledged practical difficulties when an individual's participation in hostilities was intermittent and discontinuous.[130] Accordingly, no one can be

125. Additional Protocol I, *supra* note 16, arts. 50(1), 52(3).

126. Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–1977: Part II*, 9 NETH. Y.B. INT'L L. 107, 111 (1978).

127. Hays Park, *supra* note 40, at 136–37.

128. See the interpretive declarations lodged by various European nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 432 (U.K.); 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, 2020 U.N.T.S. 3, 76–77 (U.K.); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1435 U.N.T.S. 181, 370 (Belgium); 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, 1425 U.N.T.S. 305, 439 (Italy); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8 1977, 1477 U.N.T.S. 165, 300 (the Netherlands). *See also* MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 336 (2d ed. 2013).

129. BOOTHBY, *supra* note 42, at 71. *See also* DOD LAW OF WAR MANUAL, *supra* note 22, § 5.4.3.2; DANISH MINISTRY OF DEF., MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 320–22 (2016); NORWEGIAN DEFENSE UNIVERSITY COLLEGE, MANUAL OF THE LAW OF ARMED CONFLICT 33–34 (1st ed. 2018) [hereinafter NORWEGIAN MANUAL]; Schmitt & Schauss, *supra* note 123, at 155–66.

130. Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Judgment, ¶¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008).

convicted for an offense of killing civilians as long as a reasonable doubt exists in the nexus between the victim's activities at the time of the alleged offense and any acts of war which by their nature or purpose are intended to cause harm to the adversary.[131] In other words, victims of war are not necessarily presumed to be civilians unless there is evidence to suggest that they were not taking direct part in hostilities.

Circumstantial evidence must be carefully assessed to establish the civilian immunity of victims because a determination should be based on "a variety of factors," including their conduct, rather than merely on the status informed by their appearance.[132] Individuals may reasonably be seen as directly participating in hostilities not only by bearing arms or performing combat functions but also due to other forms of hostile activities, such as reporting the location of enemy forces.[133] The logic of the law breaks down when reviewers rely on a limited range of circumstantial evidence, such as a victim's clothes, the absence of arms or other indications of combat function.[134] In *Prosecutor v. Dordević*, Judge Tuzmukhamedov's dissent criticized the majority judgment reached without any evidence regarding the conduct of the victims and the circumstances of their deaths.[135] Evidence must be sufficient to establish that the victims could not have been involved in the conduct of hostilities, for example, due to indications of captivity or execution in close range.

The rule on doubt is integral to the law of targeting and its underlying logic in implementing the principle of distinction but operates differently for external reviews. Even though absolute certainty can hardly be guaranteed in the target identification process,

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131. *Id.*

132. *Id.* ¶ 271.

133. ICRC AP I COMMENTARY, *supra* note 102, ¶ 1943 ("It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon."). On direct participation in hostilities by civilians using smart phones during the Ukraine conflict, see Michael N. Schmitt & William Casey Biggerstaff, *Ukraine Symposium—Are Civilians Reporting with Cell Phones Directly Participating in Hostilities?* ARTICLES OF WAR (Nov. 2, 2022), https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/.

134. *See, e.g.*, Prosecutor v. Dordević, Case No. IT-05-87/1-T, Trial Judgment, ¶¶ 473, 522 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011); Prosecutor v. Boškoski, Case No. IT-04-82-T, Trial Judgment, ¶¶ 310–11 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008); Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgment, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

135. Prosecutor v. Dordević, Case No. IT-05-87/1-A, Dissenting Opinion of Judge Tuzmukhamedov, ¶¶ 39, 42, 46, 49 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014).

military decision-makers must act with due diligence and in good faith for reasons of military necessity.[136] In addition, they must do everything feasible to reduce uncertainty in target identification.[137] Although the requisite level of certainty for targeting decisions may differ in State practice,[138] military commanders generally look for operationally relevant information such as the pattern of enemy behavior, military advantages of the target location, intelligence estimates of enemy dispositions, and risks of harm to civilians and friendly forces.[139]

By contrast, doubt operates as a defense against the alleged targeting of civilians in adjudicative processes. In the case of doubt, external reviewers must establish that "a reasonable person could not have believed that the individuals attacked were combatants."[140] In other words, this "reasonable person" standard is satisfied when circumstantial evidence shows that targeted individuals or objects could not have been a valid military objective.[141] As previously discussed, external reviewers must seek situationally relevant information such as the forensic analysis of ballistic trauma, the physical condition of the victims, and their distance from areas of

136. DOD LAW OF WAR MANUAL, *supra* note 22, § 5.3; *see also* Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT'L L. 517, 522–30 (2007); Michael Bothe, *Legal Restraints on Targeting: Protection of Civilian Population and the Changing Faces of Modern Conflicts*, 31 ISR. Y.B. ON HUM. RTS. 35, 45 (2001).

137. Additional Protocol I, *supra* note 16, art. 57(2)(a)(i).

138. *Compare e.g.*, U.K. MANUAL, *supra* note 113, ¶ 5.3.4 (showing the status of the individual should be given the benefit of the doubt "only in cases of substantial doubt."), *with* NORWEGIAN MANUAL, *supra* note 129, ¶ 2.5 ("[T]he degree of doubt will have to be weighed up against the consequences of not attacking.").

139. *See* John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VA. J. INT'L L. 83, 122, 143 (2016); Corn & Corn, *supra* note 51, at 366–67.

140. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Trial Judgment, ¶ 457 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016); Prosecutor v. Milošević, Case No. IT-98-29/1-A, Appeals Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009); Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgment, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003). *Cf.* Geoffrey S. Corn, *Targeting, Command Judgement, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOK. L. REV. 437, 442 (2012) (arguing that the shifting quantum of information framework from Fourth Amendment jurisprudence should be adopted to determine if one can legitimately reasonably believe that a military objective exists).

141. *Cf.* ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR 119–20 (2017) (explaining that a solider should have a stronger reason to believe that a person is a combatant than a civilian before attacking); Adil Amhad Haque, *Killing in the Fog of War*, 86 S. CAL. L. REV. 63, 91 (2012) (advocating for evidence-based reasonable belief that the individual is a lawful target).

active hostilities.[142] The presumption of civilian status does not operate as a rule of evidence that external reviewers can rely upon to establish the civilian immunity of victims in the absence of circumstantial evidence that indicates their military function.[143]

The room for doubt in adjudicative application pertains equally to errors. Despite all good faith efforts, civilian casualties may result unintentionally, contrary to the purpose or knowledge of the attacking force at the time they acted.[144] The individuals or objects initially assessed as valid military objectives may turn out to be civilians or civilian objects; these unintended outcomes may derive from human errors made in the process of decision-making, mechanical errors in the means of warfare, or due to the course of events that were unforeseeable at the time the decision was made or executed.[145] Illustrative is the bombing of the Chinese Embassy in Belgrade due to human errors in the target location process.[146] Additionally, the legal opinion offered to the Yugoslav Tribunal's Prosecutor considered it was "inappropriate to attempt to assign criminal responsibility for the incident to senior leaders because they were provided with wrong information by officials of another agency."[147] Similarly, the airstrike that targeted a trauma center operated by Médecins Sans Frontières when it was mistaken for a Taliban compound was found to have resulted from a combination of human errors and equipment failures short of a war crime.[148] Nevertheless, if errors are repeated, concerns about civilian casualties continuing to mount can be directed toward the adequacy of the

142. *See supra* text accompanying note 115.

143. DOD LAW OF WAR MANUAL, *supra* note 22, § 5.4.3.2 fn. 92; Robert Lawless, *2023 DoD Manual Revision—The Civilian Presumption's Durability*, ARTICLES OF WAR (Sep. 8, 2023), https://lieber.westpoint.edu/civilian-presumptions-durability/.

144. Geoffrey Corn, *Targeting, Distinction, and the Long War: Guarding Against Conflation of Cause and Responsibility*, 46 ISR. Y.B. HUM. RTS. 135, 159–60 (2016).

145. *Id.*

146. Thomas Pickering, Under Sec'y of State, Oral Presentation to the Chinese Government Regarding the Accidental Bombing of the P.R.C. Embassy in Belgrade (June 17, 1999).

147. Prosecutor's Report, *supra* note 72, ¶ 84.

148. Summary from U.S. Cent. Command of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015: Investigation and Follow-on Actions (Apr. 28, 2016), https://info.publicintelligence.net/CENTCOM-KunduzHospitalAttack.pdf; *see also* Françoise Bouchet-Saulnier & Jonathan Whittall, *An Environment Conducive to Mistakes? Lessons Learnt from the Attack on the Médecins Sans Frontières Hospital in Kunduz, Afghanistan*, 100 INT'L REV. RED CROSS 337, 343 (2018) (taking a critical review of the investigation); Michael W. Meier & James T. Hill, *Targeting, the Law of War, and the Uniform Code of Military Justice*, 51 VAND. J. TRANSNAT'L L. 787 (2018) (explaining the subsequent action taken within the U.S. Department of the Army).

targeting practice.[149]

The Group of Experts in Yemen has cautioned that if errors in the targeting process effectively removed the protections provided for under the law of armed conflict, these would amount to violations.[150] Indeed, the Eritrea-Ethiopia Claims Commission took notice of the failure of two out of four sorties aimed at the Mekele airfield, with cluster munitions dropped instead on the civilian neighborhood.[151] While refusing to conclude it amounted to a deliberate targeting of civilians, the Commission found that the repeated failures indicated "a lack of essential care" in the military operations, which was "compounded by Eritrea's failure to take appropriate actions afterwards to prevent future recurrence."[152] The Commission made this finding despite being unable to determine the actual cause of the failures, recognizing the possibilities of error in computer programming and inaccurate targeting data.[153] As with the pattern of misconduct discussed previously, repeated errors and the failure to rectify them can be probative of the failure to exercise feasible precautions to minimize civilian harm.

IV. IMPLICATIONS FOR THE RULE OF LAW

The law of targeting has taken shape in response to the changing characteristics of warfare owing to the development of modern technology. Its practical utility has increased due to the emergence of aircraft as a means of warfare, an increased range of firepower, and sophistication with mechanical accuracy. Warfighting concepts and doctrines have moved away from the practice of carpet bombardment, which treated a number of clearly separated and distinct military objectives as a single one. With the enhanced precision of weapons, this body of law has developed to strengthen international obligations to discriminate among targets.[154] These

149. Robert Cryer, *The Fine Art of Friendship*: *Jus in Bello in Afghanistan*, 7 J. CONFLICT SEC. L. 37, 51–52 (2002).

150. Yemen Report I, *supra* note 91, ¶ 39.

151. Central Front Claim, *supra* note 98, ¶ 108.

152. *Id.* ¶ 110.

153. *Id*. ¶ 111; Adverse inferences were also drawn from Eritrea's refusal to provide relevant information according to Article 14(4) of the Commission's Rules of Procedure. *See* SEAN D. MURPHY ET AL., LITIGATING WAR: ARBITRATION OF CIVIL INJURY BY THE ERITREA-ETHIOPIA CLAIMS COMMISSION 255 (2013). *See also* Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R. No. 12.416, ¶¶ 216–29 (Nov. 30, 2012).

154. Schmitt & Widmar, *supra* note 51; MATTHEW C. WAXMAN, INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS 11–15 (2000).

obligations are procedural in nature by integrating humanitarian considerations into military decision-making without requiring it to yield specific outcomes.

Built in parallel is the burgeoning practice of external reviews by international tribunals and other fact-finding bodies. The lack of access to battlefield information and its evaluation within the inner circle of targeting cells has caused them to develop a different method of application by necessity. Dialectics of the law that permeate this adjudicative application are not necessarily in accord with the law's logic for operational implementation. As examined above, the law's underlying logic collapses when, for example, conclusions are drawn from extrinsic evidence alone, the meaning of intent is arbitrarily broadened, or the presumption of civilian status is misapplied as a rule of evidence. This schizophrenic development of the law for the regulation of warfare casts doubt on its efficacy as an instrument to manage international relations under the rule of law, especially during an armed conflict.

The rule of law, at its core, is an appraisal concept that purports to restrict arbitrariness in the exercise of sovereign powers.[155] The concept has been conceived in various ways to evaluate the state of affairs within a political regime, with the Diceyan formalist vision of the rule of law as a virtue of the legal system at one end of the spectrum.[156] More expansive visions occupy the other end in the form of moral and political ideals, embracing the protection of human rights within its scope.[157] However, the rule of law's relevance to international law has been contested because of structural and institutional differences between national and international legal systems.[158] No matter which vision one may adopt, the rule of law is a

155. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 114–26 (2004); *see also* Martin Krygier, *What's the Point of the Rule of Law*, 67 BUFFALO L. REV. 743, 760–62 (2019).

156. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 201–03 (10th ed. 1959). For different elements of the formalistic conception of the rule of law, *see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270–73 (2d ed. 2011); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 219–20 (2d ed. 2009); LON L. FULLER, THE MORALITY OF LAW 38–39 (rev. ed. 1969).

157. *See, e.g.*, TOM BINGHAM, THE RULE OF LAW 67 (2010); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUB. L. 467, 68–69 (1997).

158. Paul Burgees, *Deriving the International Rule of Law: An Unnecessary, Impractical and Unhelpful Exercise*, 10 TRANSNAT'L LEG. THEORY 65 (2019); Ian Hurd, *The International Rule of Law and the Domestic Analogy*, 4 GLOB. CONST. 365, 390–92 (2015); Ian Hurd, *The International Rule of Law: Law and the Limit of Politics*, 28 ETHICS & INT'L AFFS. 39 (2014); R. Collins, *The Rule of Law and the Quest for Constitutional Substitutes*, 83 NORDIC. J. INT'L L. 87, 89 (2014).

product of domestic legal experiences and practices generated within each country's constitutional framework and processes.[159] As such, the national rule of law cannot be analogized to or equated with the international rule of law.

The law of armed conflict, particularly the law governing the conduct of hostilities, is a distinct area of international law. It is premised upon the lawfulness of killing and destruction for reasons of military necessity, overriding the operation of competing rules such as the right to life and liberty in cases where a normative conflict arises.[160] As such, the rule of law in situations of armed conflict does not reside in the idea that "law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals."[161] Instead, the rule of law must find its place in what may be characterized as an emergency law, where belligerent parties enjoy broader discretion for the deprivation of life and liberty than in peacetime.

These considerations have led many authors to the hypothesis that the formalist approach is best suited if the rule of law is to obtain in international relations.[162] Common to these views are the following three elements comprising the rule of law: (a) certainty and predictability; (b) equality before the law; and (c) effective application of the law. Methods of application developed by external reviewers to enforce the law against the conduct of hostilities must not fall short of these minimum standards to sustain the rule of law, even in situations of open violence.

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159. Arthur Watts, *The International Rule of Law*, 36 GERM. Y.B. INT'L L. 15, 16–21 (1993).

160. *See* Int'l L. Comm'n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at 183–85, 187–88 (2011) (Ch. 6 of the ILC Report, Draft Articles on the Effects of Armed Conflicts on Treaties arts. 3, 6 and commentary); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2014 I.C.J. 192, ¶ 136 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 257, ¶ 25 (July 8); N. Atl. Coast Fisheries Case (Gr. Brit. v. U.S.), 11 R.I.A.A. 167, 181 (Perm. Ct. Abr. 1910); Hassan v. U.K., App. No. 29750/09, Eur. Ct. H.R. ¶¶ 96–105 (Sept. 16, 2014), https://hudoc.echr.coe.int/fre?i=001-146501; *see also* Richard Rank, *Modern War and the Validity of Treaties*, 38 CORNELL L.Q. 321, 343–44, 436 (1953) (citing the advice from the U.S. State Department Legal Advisor, Ernest A. Gross, and from the U.K. Foreign Office, respectively).

161. William W. Bishop, *The International Rule of Law*, 59 MICH. L. REV. 553, 553 (1961).

162. *See, e.g.*, Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity?* 65 INT'L & COMP. L.Q. 277, 291–96 (2016); Stéphane Beaulac, *The Rule of Law in International Law Today*, *in* RELOCATING THE RULE OF LAW 197, 202–04 (2009); Simon Chesterman, *An International Rule of Law*, 56 AM. J. COMP. L. 101, 130–31 (2008).

A. CERTAINTY AND PREDICTABILITY

As Friedrich Hayek put it, the rule of law means that "government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[163] A number of formalist views regarding the rule of law indeed subscribe to the idea that the law must be applied with certainty and predictability.[164] The importance of certainty and predictability in the application of international law, as opposed to selectivity and double-standard, is widely shared among States.[165] The International Court of Justice has also described the desire for consistency and predictability as the essence of judicial reasoning.[166]

Ambiguities in the formulation of a rule are not necessarily an impediment to the regulation of warfare as long as its meaning can be clarified through interpretation and application. Military manuals, the work of experts, and scholarly analysis of discrete legal issues all help clarify what the law demands, or more precisely, how the State organ or the author of the work understands what the law requires as applied to specific battlefield conduct. The publication of government views is not only an aid to armed forces in consistently applying the law but also enables external audiences to predict how the forces will or ought to apply the law. Indeed, the practice of human shield and the act of perfidy are paradigmatic examples of military tactics prohibited under the law of armed conflict as malicious reliance on this legal predictability.

Furthermore, disagreement over the contours and contents of a particular rule or its interpretation is not a bar to consistency and predictability in the application of the law. Israel and the United States, for example, advocate for contextual evaluation to determine

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163. F.A. HAYEK, THE ROAD TO SERFDOM 80 (1944).

164. *See* Thomas W. Merrill, *The Essential Meaning of the Rule of Law*, 17 J.L. ECON. & POL'Y 673, 677–81 (2022); Beaulac, *supra* note 162, at 202–03; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

165. For a survey of State practice, see Noora Arajärvi, *The Core Requirement of the International Rule of Law in the Practice of States*, 13 HAGUE J. ON THE RULE OF LAW 173, 185–87 (2021).

166. Legality of Use of Force (Serb. and Montenegro v. U.K.), Preliminary Objections, 2004 I.C.J. 1307, 1353, ¶ 3 (Dec. 15) (joint declaration by Vice President Ranjeva and Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, JJ); *see also* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, 2010 I.C.J. 639, ¶ 66 (Nov. 30); Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 13, ¶ 45 (June 3).

whether a civilian is liable to attack due to direct participation in hostilities.[167] Their view differs from the stricter approach proposed by the International Committee of the Red Cross, which sets high thresholds for the loss of civilian immunity.[168] Likewise, the United States has long maintained that an object can qualify as a military objective for effectively contributing to the adversary's war-sustaining capabilities (such as financing).[169] This legal position may well be contested,[170] but it does not negate the predictability in the application of the law by the United States as long as U.S. forces conduct their military operations in a manner consistent with it. Disagreement simply means that either legal position can be found invalid if the belligerent parties have submitted themselves to a court of law for adjudication.

Risks of inconsistent and unpredictable application reside in the rules that leave room for subjective evaluation. The object rule is one such example. Under the law of armed conflict, an object may qualify as a military objective when the object, by its nature, location, purpose, or use, makes an effective contribution to the enemy's military action, and attacking, capturing, or neutralizing the object offers a definite military advantage in the circumstances ruling at the time.[171] According to its logic, the purpose-limb of the object rule allows belligerent parties to identify a military objective based on their prospective assessment of the adversary's intended future use of the object.[172] Experts caution that there must be clear indications,

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167. DOD LAW OF WAR MANUAL, *supra* note 22, § 5.8; Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT'L L. 53, 110–15 (2015).

168. ICRC INTERPRETIVE GUIDANCE, *supra* note 124, at 46–68. For criticisms, see Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 712–36 (2010); Bill Boothby, *"And for Such Time As": Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741, 746–61 (2010).

169. DOD LAW OF WAR MANUAL, *supra* note 22, § 5.6.6.2; *see also* Ryan Goodman, *The Obama Administration and Targeting "War-Sustaining" Objects in Noninternational Armed Conflict*, 110 AM. J. INT'L L. 663, 664 (2016).

170. *See* Terry Gill et al., *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT'L L. STUD. 322, 340–41 (2017) [hereinafter ILA Study]; Emily Chertoff & Zachary Manfredi, *Deadly Ambiguity: IHL's Prohibition on Targeting Civilian Objects and the Risks of Decentered Interpretation*, 53 TEX. INT'L L.J. 239, 259–67 (2018).

171. Additional Protocol I, *supra* note 16, art. 52

172. DEP'T OF DEFENCE, AUSTRALIAN DEFENCE DOCTRINE PUBLICATION 06.4: LAW OF ARMED CONFLICT ¶ 5.29 (2006); U.K. MANUAL, *supra* note 113, ¶ 5.4.4; INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2022 (Claude Pilloud et al. eds., 1987); DOD LAW OF WAR MANUAL, *supra* note 22, § 5.6.6.1 ("'Purpose' means the intended or *possible* use in the future.") (emphasis added).

based on objective information rather than estimation or speculation, that the enemy will use the object for military action.[173] However, such indications are not readily available when external reviewers must determine the lawfulness of destroying or damaging what would otherwise appear to be a civilian object unless there is documented evidence that suggests the belligerent's intent to use the object for military purposes.[174]

External reviewers could instead circumvent evidentiary issues by construing absence of intent as a lack of indication of possible military use. In *Ethiopia v. Eritrea*, the Claims Commission accepted Ethiopia's submission that "electric power stations are generally recognized to be of sufficient importance to a State's capacity to meet its wartime needs of communication, transport and industry so as usually to qualify as military objectives during armed conflicts."[175] The Commission's attention was directed to the absence of indications that power stations were known, or should have been known, to be segregated from a general power grid for uses that could have had no effect on the State's ability to wage war.[176] A ruling thus constructed alleviates the need to evaluate the commander's assessment of the information available when attacking the object. Such an approach is more conducive to a consistent and predictable application of the object rule by external reviewers. There is a risk, however, that a broader range of attacks on civilian objects could escape external review, especially as the military increasingly relies on inter-connected dual-use infrastructure such as the internet and communication satellites, which cannot easily be segregated.

B. EQUALITY BEFORE THE LAW

For the rule of law to exist, all subjects of the law must receive equal treatment. This element of the rule of law is integral to international law as the principle of sovereign equality among all States.[177] In situations of armed conflict, the rule of law extends even to all belligerent parties, whether they are recognized as States, de

173. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 133 (4th ed. 2022); ILA Study, *supra* note 170, at 332–33.

174. *See, e.g.*, Prosecutor v. Gotovina, Case No. IT-06-90-T, Trial Judgment, ¶¶ 622, 626, 963 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

175. Western Front Claims, *supra* note 45, ¶ 117.

176. *Id.* ¶¶ 117–119.

177. *See* Watts, *supra* note 159, at 31–32; Arajärvi, *supra* note 165, at 183–84; Beaulac, *supra* note 162, at 209–12.

facto authorities, or nonstate armed groups.[178] According to the equality of belligerents principle, the law of armed conflict applies equally to all belligerents involved in the conflict, irrespective of legal or moral justifications for resorting to military action. [179] It is the premise upon which this body of law emerged, converged into a uniform set of rules, and has enjoyed widespread support even to date, notwithstanding the prohibition on the use of force in international relations.[180]

Equality before the law does not mean that all belligerents are subject to the same law. As the consent-based system of law, international law allows States to decide the legal obligations binding on them by agreement and opt out from the formation of customary international law as a persistent objector.[181] For example, the States Parties to the Ottawa Convention are prohibited from using anti-personnel landmines,[182] whereas other States are not.[183] Equal application of the law means that all the parties bound by the same rule must be treated equally in the application of that rule without any discrimination between them in their subjection to it.

Nor does equality mean that all rules must apply in the same way to all the parties. The way in which the law applies to the belligerent party may vary depending on enemy threats, the battlefield condition, and the resources available to them, among other factors.[184] Concepts such as direct military advantage, expectations, and feasibility lend themselves to contextual evaluation in the application of the law.[185] For one facing significant disadvantages against a more technologically advanced adversary, any of the enemy's capabilities

178. For further discussion about the equality of belligerents in the context of non-international armed conflict, see Marco Sassòli & Yuval Shany, *Should the Obligations of States and Armed Groups Under International Humanitarian Law Really Be Equal?*, 93 INT'L REV. RED CROSS 425 (2011).

179. *See* Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. RED CROSS 931, 932 (2008).

180. *Id.* at 935–42.

181. On the role and controversy of the persistent objector rule, see Moisés Montiel Mogollón, *The Consent-Based Problems Surrounding the Persistent Objector Doctrine*, 43 MICH. J. INT'L L. 301 (2022) and literature cited therein.

182. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, *supra* note 28.

183. *See, e.g.*, *Landmines: New Use Despite Global Ban*, HUM. RTS. WATCH (Nov. 14, 2023), https://www.hrw.org/news/2023/11/14/landmines-new-use-despite-global-ban (describing recent usage of anti-personnel landmines by Russia, Myanmar, and Ukraine).

184. *See, e.g.*, Schmitt & Widmar, *supra* note 51, at 400–03; Schmitt, *supra* note 113, at 155–58.

185. *See supra* notes 51–53 and accompanying text.

may well be calculated to score a significant military advantage that justifies targeting despite extensive civilian casualties, whereas the destruction of the same target may yield little value relative to the likelihood of civilian loss for one certain of victory.[186] For one wielding advanced technological capabilities to strike long-range targets accurately, the legality of deploying wide-area weapons in urban settings shifts the focus of inquiry from the ability to discriminate toward risk calculation based on the estimation of incidental harm.

Adjudicators would fail to treat belligerent parties equally when, for example, the use of unguided munitions in urban settings is categorically rejected as indiscriminate by virtue of their characteristics and firing range. As previously discussed, such a ruling would be inconsistent with the underlying logic of the law and, in effect, would favor technologically advanced forces with the capability and resources to produce and deploy precision-guided munitions. Even for them, the ability to accurately strike military objectives hinges on technological feasibility and situation-specific practicality. It is one thing to advocate for, or even voluntarily implement, more elaborate decision-making processes and practices to mitigate civilian harm when explosive weapons are used in populated areas;[187] it is a different matter to set them as the standards against which battlefield conduct will be universally reviewed. Doing so without having regard to contextual variables risks unequal application of the law contrary to its underlying logic.

C. EFFECTIVE APPLICATION

The third aspect of the rule of law fundamental to its formalistic conceptions is the law's ability to settle questions of legal rights and obligations.[188] This element must not be confused with law enforcement through judicial processes. Many States are still reluctant to embrace the idea of compulsory settlement, especially when disputes arise from or during armed conflict, and the fact-finding mission established under Article 90 of Additional Protocol I remains dormant.[189] Instead, the key to this element is the availability

186. Schmitt, *supra* note 113, at 157.

187. *See, e.g.*, Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the Use of Explosive Weapons in Populated Areas (Nov. 18, 2022), https://ewipa.org/the-political-declaration; U.S. DEP'T OF DEF., INSTRUCTION 3000.17: CIVILIAN HARM MITIGATION AND RESPONSE (2023).

188. Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 72 (2007).

189. Kenneth J. Keith, *The International Rule of Law*, 28 LEIDEN J. INT'L L. 403, 413–14 (2015).

of judicial or other adjudicative procedures before an independent body to settle international disputes.[190] And should the dispute be submitted to an independent body, the law must be capable of objective determination to resolve legal questions within the purview of international law.

The subjective language used in the law of armed conflict as part of its underlying logic complicates the role of external reviewers in the application of the law. As previously discussed, external reviewers must perform contextual evaluation in assessing the legality of targeting decisions. This contextual evaluation may demand military decision-makers be granted a margin of appreciation and reviewers defer to their professional judgement. For example, external reviewers are not well equipped to assess the military values of the target, an acceptable level of risk to civilians, or practical steps that could have been taken to verify the military objective and to avoid or minimize civilian harm.[191] A deferential approach is particularly warranted when external reviewers lack expertise in military operations or access to sufficient information that enables them to make objective findings.[192] It is also consistent with the "Rendulic" rule, pivotal to the external review of military decision-making, as discussed previously.

For this reason, external reviewers must construe each rule carefully to enable them to draw conclusions from objectively verifiable facts. While one may be inclined to interpret targeting rules restrictively to yield better humanitarian outcomes, such an approach is ill-suited if it is incapable of objective application. Illustrative is the "one causal step" test proposed by the International Committee of the Red Cross to assess whether civilians are directly participating in hostilities and forgoing their immunity from attack.[193] This strict test could—one may hope—work as a policy for good practice designed to reduce errors in target identification. Still, its application by external reviewers is impractical as a means of verifying the civilian immunity

190. McCorquodale, *supra* note 162, at 298. *Cf*. Rosa Brooks, *Drones and the International Rule of Law*, 28 J. ETHICS & INT'L AFFS. 83, 86 (2014) (broadly accepting State compliance through other means such as diplomacy and retaliation as satisfying this element of the rule of law).

191. HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel, Isr. L.R. 459 para. 56–60 (2006) (Isr.).

192. *See* HITOSHI NASU, THE CONCEPT OF SECURITY IN INTERNATIONAL LAW 91–97 (2023); JOHANNES HENDRIK FAHNER, JUDICIAL DEFERENCE IN INTERNATIONAL ADJUDICATION: A COMPARATIVE ANALYSIS 151–54 (2020).

193. ICRC INTERPRETIVE GUIDANCE, *supra* note 124, at 51–58. For criticisms, see Schmitt, *supra* note 168, at 727–29; Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 657–59 (2010).

of victims. Because this assessment is based on their conduct, causal proximity or a lack thereof can hardly be established without appreciating the battlefield context in which the conduct took place.

An effective application is more likely to be viable when circumstantial evidence is sought to establish that the target could not have been a military objective or that civilian casualties could not have been justifiable. As previously discussed, circumstantial evidence must be relied upon with care so that external reviewers do not trespass the "Rendulic" rule by reconstructing the commander's intent with the wisdom of hindsight. Instead, a more systematic approach must be taken to circumstantial evidence by identifying patterns of misconduct and repeated errors in the targeting process resulting from the failure to rectify them. Circumstantial evidence thus constructed helps ensure that external reviewers apply the law to yield objective outcomes.

V. CONCLUSION

The modern codification of the law of armed conflict for the regulation of warfare is a product of the normative efforts to humanize war by leveraging technological advances that have increased the accuracy of projectiles and explosives. The body of law thus developed is designed to provide a legal framework for the lawful conduct of warfare and to punish those trespassing as war crimes. The law's potential for enforcement has constituted an external dimension of the law with the corresponding methods of application. Without it, the law of war would have been nothing more than a code of conduct to guide battlefield behavior.

At the same time, codification efforts have invited suspicions as "a handy aid to vilification" rather than a meaningful restraint on the conduct of hostilities.[194] The "Rendulic" rule is designed to play a pivotal role as the safeguard against such pejorative use of the law. However, with the growth of international bodies reviewing the implementation of the law, adjudicative application started defying the law's underlying logic by relaxing evidentiary standards to draw inferences from extrinsic evidence, broadening the meaning of intent, and converting the presumption of civilian status into a rule of evidence. This schizophrenic development of the law has risked undermining the efficacy of this legal regime as a means of regulating the conduct of hostilities.

The rule of law, at the very minimum, demands that external

194. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 47 (1997).

reviewers ensure certainty and predictability, apply the law equally to all belligerent parties with due regard to contextual variables, and construe each rule carefully with a view to objective determinations based on accessible evidence. In order to sustain the rule of law in armed conflict, these minimum standards must be upheld when the legality of a combat operation is adjudicated. Adherence to these minimum standards sets the parameters that define how battlefield conduct can be adjudicated without deviating from the underlying logic of the law governing the conduct of hostilities during an armed conflict.

First, external reviewers must be deferential to a professional judgement made by military decision-makers where they lack expertise in military operations or access to sufficient information necessary to make objective findings. They must not lower evidentiary standards or shift the burden of proof to the government conducting military operations by demanding military authorities furnish operational information to support their legal assessment. Instead, adjudication must focus on establishing that the target could not have been a military objective or civilian casualties could not have been justifiable, based on verifiable evidence.

Second, the intent to attack civilians and the civilian population must be expressed negatively as the absence of intent to target military objectives by establishing the lack of indication of possible military use or value. Consistency and predictability in the application of the law will increase if external reviewers trace patterns of misconduct and repeated errors in the targeting process resulting from the failure to rectify them. This systematic approach alleviates the need to evaluate the commander's assessment of the information available when attacking the object.

Third, external reviewers must consider contextual variables, including factors outside the commander's control that might account for civilian casualties. A strict interpretation of the law or a one-size-fits-all approach to the principle of distinction risks a biased application of the law, failing to appreciate differences in technological capabilities and resource constraints. The law's adjudicative application must circle along the outer layers of forbidden characteristics rather than intruding into grey areas where the commander's decision is reasonably contestable.

An adjudication of battlefield conduct adhering to these parameters will not interfere with the underlying logic of the law according to which troops in each country are trained and expected to engage in the conduct of hostilities. However, external reviewers must be mindful of the inherent limits of their role in ensuring

accountability for the conduct of hostilities as modern technological advances and their societal impacts continue to change the characteristics of war. For example, the military's increased reliance on inter-connected dual-use infrastructure such as information technology and communication satellites may render a greater range of attacks on civilian objects immune from external review to the extent that such objects cannot easily be segregated from military use. The belligerent use of advanced technology, such as artificial intelligence and image recognition sensors, leaves the risk of technical errors outside the scope of adjudication.

On the other hand, the greater availability of recording capabilities and the ease of data sharing in modern society have contributed to exponential growth in the volume of information accessible for the external review of targeting operations. The widespread use of the internet and the rise of social media have made such data publicly accessible. These changes, driven by modern information technology, have created a hyperconnected information environment in which real-time battlefield information and images feed into the political discourse of war and even shape the course of a conflict.[195] Democratic countries are increasingly susceptible to political pressures generated in such an information environment, which in turn converge into strategic interests that affect the law's operational application. The recent development of civilian harm mitigation policy in the United States illustrates this trend. Such realignment of operational norms could bring them into line with more relaxed standards for adjudication by reducing the room for a deferential approach or increasing the outer layers of forbidden characteristics in future warfighting.

Disparity will nonetheless remain between the law's operational implementation and its review through adjudicative processes. This disparity represents an inherent limit of international law as a normative instrument to regulate the conduct of hostilities, arising from institutional and practical constraints associated with external review. The parameters for adjudication articulated in this article only help ensure that the methods of application for external review are consistent with the underlying logic of the law, according to which troops are trained and expected to implement their legal obligations. The remaining disparity is not a reason for reducing the extent of legal obligations under the law of armed conflict to externally verifiable elements. States still owe an obligation to ensure respect for all

195. Dan E. Stigall, *Future Conflicts, Civilian Harm, and the CHMR-AP—Part I*, ARTICLES OF WAR (May 3, 2023), https://lieber.westpoint.edu/future-conflicts-civilian-harm-chmr-ap-part-i/; DAVID KENNEDY, OF WAR AND LAW 111–41 (2006).

applicable rules during armed conflict. The law of armed conflict is essentially a self-regulatory body and its effectiveness hinges heavily on the belligerent parties' readiness to implement it in good faith.