

Fighting Terrorism: Assessing Israel's Use of Force in Response to Hezbollah

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I. INTRODUCTION

On July 12, 2006, the Lebanese militia group Hezbollah staged an unprovoked attack across the Lebanon-Israel border in which two Israeli soldiers were taken hostage and three soldiers were killed.¹ While such raids have generally provoked limited retaliation from Israel, these raids, large-scale rocket and mortar strikes on Northern Israeli military targets, and the simultaneous abduction of Israeli soldiers triggered a large response.² Israel responded with a full-scale military attack on Lebanon that claimed over one thousand lives.³ While most of the international community expressed support for Israel's right to defend itself against a terrorist attack, humanitarians condemned Israel's response as both disproportionate and indiscriminate with respect to civilian life.⁴ Critics

1. Mohamad Bazzi, *Remorse over Abductions: Leader Says That Hezbollah Would Not Have Kidnapped Troops If They Had Known It Would Lead to War*, NEWSDAY, Aug. 28, 2006, at A23. Arab nations have been unsuccessful in waging conventional wars against Israel. Fred Gedrich & Paul E. Valley, *Despicable Breeders: Hezbollah an Immoral War Machine*, WASH. TIMES, Aug. 22, 2006, at A17. Arab extremists, such as Hezbollah, have increasingly relied on terrorism to advance their ultimate goal of destroying the Jewish state of Israel, which they view as an illegal, Western imposition on their land. *Id.*

2. Thomas L. Friedman, *The Arab Commission*, N.Y. TIMES, May 9, 2007, at A5. The abduction of another Israeli soldier in Gaza a few weeks before Hezbollah's July 12 attack had been met with little retaliation. However, Hezbollah's July attack came on the heels of the induction of Israel's new prime minister, new defense minister, and new Army Chief of Staff; these new office heads felt tested into showing a stronger response to the attacks. *Id.*

3. Bazzi, *supra* note 1, at A23. An Israeli Army spokesman explained the reason for the response stating that "[s]trategically speaking, if the third largest city in Israel is under attack, it's a big thing and a response can be expected." Uri Dan, *Rockets Go Deep into Israel as Leb Reels Under Blitz*, N.Y. POST, July 14, 2006, at 4. Iranian President Mahmoud Ahmadinejad warned Israel against retaliating because it would be considered an assault on the whole Islamic world that would bring a "fierce response." *Id.* The European Union and Russia warned Israel against dangerous escalation. Surprisingly, moderate Arab governments, who are rarely friendly with Israel, showed restraint in criticizing the Jewish state. This is most likely a reflection of popular opinion in Egypt, Jordan, and Saudi Arabia, that Hezbollah was to blame. The strongest reaction to the conflict may have come from the world financial markets: oil prices soared by \$1.75 to \$76.70 a barrel and gold rose by more than \$3 an ounce. *Id.*

4. Kevin Sullivan, *Rights Group Accuses Hezbollah of "Indiscriminate" Killing*, WASH. POST, Sept. 15, 2006, at A15.

claim that Hezbollah's aggravations did not justify a full-scale raid on Lebanon, in which civilian infrastructure was targeted and collateral damage was high.⁵ Despite criticism from human rights groups, Israel has maintained that the decisive use of force was necessary.⁶ Israel claims that Hezbollah is not merely an isolated militia group, but is instead a well-connected terrorist cell acting for Middle East extremists Iran and Syria.⁷ Thus, Israel believed it was justified in using significant force to fight against terror.⁸

The Israel-Lebanon conflict has highlighted difficult questions surrounding military responses to terrorist attacks.⁹ While Israel's response was forceful, this Comment argues that it was legitimate under international law. There are inevitable problems that arise when a nation faces a terrorist militia that hides among civilians and generally operates outside

5. David B. Rivkin Jr. & Lee A. Casev, *Israel Is Within Its Rights: What 'Disproportionate Force'? A Nation is Allowed to Defend Itself from a Mortal Enemy*, PITTSBURGH POST-GAZETTE, July 30, 2006, at H-4.

6. Amnesty International issued a report accusing Israel of using disproportionate bombing and indiscriminate munitions like cluster bombs to destroy Lebanon's civilian infrastructure, and even went so far as to imply that individual commanders could be charged with war crimes. AMNESTY INT'L, ISRAEL/LEBANON: DELIBERATE DESTRUCTION OR "COLLATERAL DAMAGE"? ISRAELI ATTACKS ON CIVILIAN INFRASTRUCTURE 3, 5-6 (2006), available at [http://web.amnesty.org/library/pdf/MDE180072006ENGLISH/\\$File/MDE1800706.pdf](http://web.amnesty.org/library/pdf/MDE180072006ENGLISH/$File/MDE1800706.pdf).

7. Dion Nissenbaum, *Israel's Military Action: A Reasonable Response?*, MIAMI HERALD, Aug. 3, 2006, at A12. Its militia disguise themselves as civilians, and they store weapons and launch attacks from civilian infrastructure such as mosques, schools, and hospitals in violation of the Geneva Conventions. Gedrich & Vallely, *supra* note 1, at A17. Their uses of suicide bombers in civilian markets, restaurants, and buses are clear violations of international norms. *Id.* The United Nations has called for Hezbollah, in U.N. Security Council Resolution 1559, to dismantle and disarm. However, Hezbollah has resisted and refuses to conform to international laws of war. *Id.*

8. Sullivan, *supra* note 4.

9. Terrorism is an inherent combination of violence and theater. Dipak K. Gupta, *The Cost of Fighting Terrorism*, SAN DIEGO UNION-TRIBUNE, July 26, 2006, at B7. The goal is to perpetuate death and destruction regardless of the scale in order to goad the community and the targeted government into reacting. *Id.* Nations have generally responded to these threats with force. The assassination of the Austrian Archduke by a Serbian terrorist threw the world into the First World War. Similarly, the attacks of Sept. 11, 2001, created a global response: the war on terror. Thus, it is not surprising that Israel responded after numerous provocations to the cross-border kidnapping of its soldiers by Hezbollah. *Id.*; see also Editorial, *Lebanon Crisis Has Echoes of 1914*, SCOTSMAN, July 29, 2006, at 23 (arguing that the conflict could soon engulf many countries if Syria and Iran were to rearm Hezbollah, forcing the United States to provide support to Israel, and perhaps even directly attack Iran and Syria).

the confines of international law.¹⁰ The wisdom of maintaining rigid laws of war given changing battlefield norms is a topic that is outside the scope of this Comment.¹¹ Instead, this Comment will closely analyze Israel's controversial actions both under the international customary rules of war and the sometimes aspirational Protocol I of the Geneva Conventions. If found to have been in violation of international law, the individuals carrying out the attacks on behalf of Israel could be held criminally¹² or civilly¹³ liable under customary international law.¹⁴

10. For better or worse, in following the rules of war, Israel was held to a stalemate. Noel Dorr, *Challenges Facing U.N. in Lebanon*, IRISH TIMES, Aug. 28, 2006, at 14. Hezbollah was not anticipating such a forceful response from Israel, and despite showing initial regret at the escalation of hostilities, the terrorist group has instead been bolstered by this conflict. *Id.* Though unable to secure any major offensive gains, their large cache of missiles and questionable battle techniques proved to be sufficient in defending against Israeli attacks. Also surprising, to Israel especially, was that the Lebanese people have blamed Israel and not Hezbollah for the devastation of their country. Thus, Hezbollah has gained in popularity and power, and it has yet to be seen whether they will accept the shaky government authority in their Southern strongholds. While U.N. forces are assisting a fragile Lebanese army, the ceasefire is not expected to last. *Id.*

11. If nations cannot defend themselves against terrorist organizations and terrorists continue targeting civilian populations, then the laws of war have not served their purpose of protecting both combatants and noncombatants. See Jackson Nvamuya Maogoto, *Walking an International Law Tightrope: Use of Military Force to Counter Terrorism—Willing the Ends*, 31 BROOK. J. INT'L L. 405, 405 (2006). See generally Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The "War on Terror,"* 4 SCHOLAR 209, 231–35 (2002) (considering how anticipatory self-defense might work within the framework of the rule of international law). The battles between Israel and Arab extremist groups like Hezbollah and Hamas are likely to continue. Assuming that it can be shown that conducting controlled aerial campaigns against mixed populations are legitimate, Israel will likely increase the number of these campaigns. However, while aerial campaigns may be legitimate, it has yet to be shown whether they will ever prove successful against terrorist militias. New laws of war may be necessary when nations are forced to defend themselves against terrorist groups.

12. See Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 165 (1972). International law has recognized the doctrine of complicity since the Nuremberg Tribunals. *Id.* Thus, individual commanders or soldiers may be held criminally liable for aiding an abetting the primary perpetrator in the commission of an international crime. *Id.* The Ad Hoc International Criminal Tribunal for Rwanda has expressly defined complicity in genocide:

[A]n accused is an accomplice to genocide if he or she knowingly and wilfully aided or abetted or instigated another to commit a crime of genocide, while being aware of his genocidal plan, even where the accused had no specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 726 (Sept. 2, 1998), available at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm>; see also JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 42 (2d ed. 2000).

13. Article 91 of the Protocol, which is almost an exact duplication of Article 3 of the 1907 Hague Convention No. IV, states: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part

Part II of this Comment explores the background and history of the conflict between Israel and Hezbollah. Part III examines the history and development of the rules of war from early Christian theories of just war to the modern codification of the rules of war. Part IV focuses on the doctrine of proportionality, particularly the different methods commonly employed to determine whether a response is proportionate. Part IV also suggests an appropriate definition of proportionality in the context of combating international terrorism. Part V considers the doctrine of military necessity with particular analysis of identifying military targets and interpreting “definite military advantage.” Finally, Part VI addresses the doctrines of humanity and distinction with regard to the method of attack used in strikes and the weapons used to distinguish between military and civilian populations.

II. ISRAEL AND LEBANON ARMED CONFLICT

Hezbollah is both an armed terrorist group and political party.¹⁵ The group, whose name means “party of God,” was established as a resistance group to the Israeli invasion of Lebanon in 1982.¹⁶ The group

of its armed forces.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 91, June 8, 1977, 1125 U.N.T.S. 3 (1977) [hereinafter Protocol I]. While the Article outlines responsibilities for both the victor and the defeated party, it fails to include any details regarding possible compensation. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 547 (1982).

14. Though Israel has not been a signatory to the Protocol, it still could be prosecuted to the extent the treaty embodies normative customary international law. *See* Jordan J. Paust, *The Importance of Customary International Law During Armed Conflict*, 12 *ILSA J. INT’L & COMP. L.* 601, 601–02 (1972). Before World War II, Germany was a nonsignatory to the Hague Conventions, however German nationals were nonetheless prosecuted by the International Military Tribunal at Nuremberg for violations of customary laws reflected in the 1907 Hague Convention No. IV. *Id.*

15. Hezbollah has several thousand members and operates primarily in southern Lebanon, parts of Beirut, and the Bekaa Valley. *Hezbollah: The “Party of God,”* USA TODAY, July 17, 2006, at 2A. The group has claimed responsibility for hundreds of terrorist attacks including the 1983 suicide bombing that killed more than 200 U.S. Marines in their Beirut barracks, the kidnappings of Americans in Lebanon in the 1980s, and the 1985 hijacking of TWA Flight 847. *Id.*

16. Following an attempted assassination of Israel’s ambassador in London, Israel invaded an unstable Lebanon, which had been rife with civil war. *See* PalestineFacts.org, *Why Did Israel Invade Lebanon in 1982?*, http://www.palestinefacts.org/pf_1967to1991_lebanon_198x_backgd.php (last visited Mar. 22, 2008). Israel initially sought to install a buffer between Lebanon and the northern border of Israel. *Id.* However, the fighting escalated into a full-scale war with the Palestinian Liberation

has rejected Israel's right to exist, repeatedly calling for total destruction of the Jewish people.¹⁷ Hezbollah has fought to win popularity among the Lebanese people by funding schools, hospitals, and providing other civilian aid.¹⁸ Following democratic elections that installed a shaky Lebanese government in 2005, Hezbollah won 14 seats in the 128-member parliament.¹⁹ The group receives an estimated \$300 million in weapons and monetary aid from Syria and Iran each year.²⁰ The United Nations (U.N.) Security Council Resolution 1559 called for the disarmament of nonstate militias,²¹ which would make Hezbollah's military activities illegal. Hezbollah continued, however, to gain in strength and arms,²² indicating that there was little effective U.N. enforcement of the resolution.

Organization (PLO) and a smaller scale war with Syria. Following a cease-fire, the PLO was forced out of Lebanon. *Id.*

17. Anti-Defamation League, Amnesty International Report: Ignoring Hezbollah's Reign of Terror (Aug. 23, 2006), http://www.adl.org/main_Israel/amnesty_international_report.htm. The current leader of Hezbollah, Sheikh Hassan Nasrallah, has repeatedly called for the destruction of Israel. In 1992, the group issued a statement declaring an "open war until the elimination of Israel and until the death of the last Jew on earth." *Id.*

18. In addition, the group has funded orphanages, agricultural services, and an extensive social welfare network in order to support Lebanese Shiites, who make up one-third of Lebanon's population and are among the poorest Lebanese. *Hezbollah: The "Party of God," supra* note 15, at 2A.

19. Maggie Farley, *U.N. to Establish Lebanon Tribunal*, L.A. TIMES, May 31, 2007, at A1.

20. Hezbollah maintains strong relationships primarily with Iran's clerical establishment and considers Iran's supreme religious leader, Ayatollah Ali Khamenei, as the group's spiritual reference, or marja. Scott Peterson, *In Mideast, Cease-Fire Is a Start*, CHRISTIAN SCI. MONITOR, Aug. 14, 2006, at 1. The group strongly supports the idea of *velayat e-faqih* (rule by a supreme jurisprudent), as seen in Iran's Islamic regime. Further, the current leader of Hezbollah, Sayyed Hassan Nasrallah, is Ayatollah Khamenei's personal representative to Lebanon. *Id.* Iran has supplied Hezbollah with an estimated 12,000 rockets. Sheldon Kirshner, *Israel Battles Islamic Radicalism on Two Fronts*, CAN. JEWISH NEWS, Aug. 3, 2006, at 13. Iranian shipments of Katyusha-122 and Fajr-3 rockets are flown directly to Damascus and distributed to Hezbollah. Syria has also given Hezbollah long-range rockets. *Id.*

21. *Lebanese Former President, Defence Minister Discuss Pro-Syria Rally*, BBC MONITORING MIDDLE EAST, Nov. 30, 2004.

22. The size and strength of Hezbollah's militia has been closely guarded. Jonathan Finer & Edward Cody, *Hezbollah Unleashes Fiery Barrage: 230 Rockets Strike Northern Israel, Shattering Brief Lull*, WASH. POST, Aug. 3, 2006, at A1. A senior U.N. peacekeeping adviser in southern Lebanon has estimated the militia's force at 700 trained fighters and between 8000 to 20,000 farmers who are secretly trained and willing to fight if needed. Israeli officials have estimated the force at 3000 fighters. The size of Hezbollah's arsenal can only be estimated because it has been building up its forces in secret for more than a year. Israeli officials have estimated Hezbollah's total number of rockets at 10,000. If this number is accurate, less than one-third of the group's rockets were destroyed or fired during the conflict. *Id.*

Israel is comprised of 6.4 million residents on land roughly the size of New Jersey that is flanked on three sides by hostile Arab neighbors.²³ Israel has most often come under attack from extremist terrorist groups in both Lebanon and Gaza.²⁴ In 2000, Israel unilaterally withdrew from southern Lebanon and the U.N. outlawed the Hezbollah militia.²⁵ The Lebanese military has been unwilling or unable to control the Hezbollah terrorists, however, and Israel has weathered repeated militia rocket fire along the U.N. recognized border. For years, Israel refrained from responding forcefully to the Hezbollah aggressions.²⁶ Hezbollah's bold decision to fire missiles deep into Israeli territory, penetrating further than any previous Arab attack and striking the third largest city, provoked Israel into a large-scale military reprisal.²⁷

As a member state of the U.N., Israel has a right to self-defense as provided in the U.N. charter.²⁸ However, Israeli officials immediately faced calls from the international community to limit their response to only Hezbollah itself and not to the state that harbored it.²⁹ Lebanon's central government was weak, and the government was either unable or

23. Gedrich & Vallely, *supra* note 1, at A17. Israel is significantly smaller in comparison to the Arab world, which is composed of twenty-one Arab countries and the Palestinian Authority in Gaza and the West Bank. The Arab region spans 5.2 million square miles and has 333 million residents. Further, the U.S. State Department estimates that there are nineteen formal terror organizations in existence in the Arab region. *Id.*

24. Hamas and other Palestinian groups based in Gaza have fired more than 1000 rockets into Israeli territory and have frequently attempted terrorist raids across the border. Michael Oren, *Necessary Steps for Israel: Confronting State Sponsors of Terror is the Only Option*, WASH. POST, July 14, 2006, at A21.

25. Israel withdrew from Lebanon in 2000, retreating behind the defined southern border of Lebanon, which has been deemed the "blue line." Charles Krauthammer, *Why They Fight*, WASH. POST, July 14, 2006, at A21. The U.N. Security Council declared that Israel had fully complied with the resolutions demanding its withdrawal from Lebanon. *Id.*

26. Friedman, *supra* note 2.

27. Israel's Prime Minister, Ehud Olmert, declared "Israel will not be held hostage by terror groups, a terror authority or by any sovereign country." Laura King & Megan K. Stack, *Cease-Fire Efforts Stepped Up*, L.A. TIMES, July 18, 2006, at A1.

28. Article 51 of the U.N. Charter states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51.

29. President George W. Bush remarked that "Israel has the right to defend herself," but he also called for care in attacking the unstable government in Lebanon, noting there is "a group of terrorists who want to stop the advance of peace." Hassan M. Fattah & Steven Erlanger, *Israel Blockades Lebanon; Wide Strikes by Hezbollah*, N.Y. TIMES, July 14, 2006, at A1.

unwilling to disarm militias operating along the Lebanon-Israel border.³⁰ Given that Hezbollah operated outside of international law and deliberately hid amongst civilian populations, Israel faced serious difficulties if it was to keep the campaign limited to the paramilitary terrorist group without affecting the unstable Lebanese government.³¹

Despite the inherent difficulties, Israel responded to Hezbollah with speed and force.³² Israel conducted widespread air strikes on Lebanon, damaging civilian infrastructure that could be useful to Hezbollah, and invaded southern Lebanon by ground.³³ Hezbollah killed 156 Israelis, primarily military members, through missile and rocket attacks.³⁴ Israel's air strikes are believed to have killed as many as 1200 Lebanese people, primarily civilians, and displaced 900,000 Lebanese civilians before the U.N.-brokered ceasefire ended the conflict on August 14, 2006.³⁵ According to the U.N., there are more than one million unexploded bomblets stuck in high trees and in the rubble, which pose serious danger to the 650,000 Lebanese civilians living in the region.³⁶ The U.N. Resolution approved by both the Lebanese and Israeli governments calls for the withdrawal of Israeli troops, the disarmament of Hezbollah,

30. Leon Hadar, *All Is Not Well in the Middle East; The Bush Administration is Hoping That Israeli Military Power Will Succeed in Defeating Hezbollah and Hamas*, BUS. TIMES SING., July 20, 2006.

31. Israeli Foreign Minister Tzipi Livni summarized the difficulty, stating, "The result is it was more difficult to find these terrorists among civilians, compared to attacking a weak Lebanon. . . . We could have done Lebanon in a few days. I think, if we had decided to attack Lebanon as a state." Glenn Kessler, *Lebanon Must Disarm Hezbollah, Israeli Minister Warns*, WASH. POST, Sept. 16, 2006, at A16.

32. Israel immediately called for its soldiers to be returned and that militias cease rocket fire from Gaza in the south and Lebanon in the north. Greg Myre & Steven Erlanger, *Clashes Spread to Lebanon as Hezbollah Raids Israel*, N.Y. TIMES, July 13, 2006, at A1. Hamas and Hezbollah responded by reiterating a desire for an exchange of Palestinian and other Arab prisoners held by Israel. The leader of Hezbollah, Sheik Hassan Nasrallah, stated that "[t]he prisoners will not be returned except through one way—indirect negotiations and a trade." *Id.* In 2004, Hezbollah pressured Israel into freeing more than 400 Palestinian and Lebanese prisoners in exchange for an Israeli businessman and the bodies of three Israeli soldiers. Israel is believed to have 9000 Palestinian prisoners, and a minimal number of Lebanese prisoners in captivity. *Id.*

33. Robin Wright, *As Mideast Smoke Clears, Political Fates May Shift*, WASH. POST, Aug. 13, 2006, at A10. In the process, Lebanon's infrastructure, which was previously rebuilt once after a vicious fifteen-year civil war, was severely damaged, and will require billions of dollars to reconstruct various power plants, roads, bridges, and housing units. *Id.*

34. Jenny Booth & Stephen Farrell, *Ceasefire Holds as Lebanon Awaits Peacekeepers*, TIMES ONLINE (London), Aug. 14, 2006, http://www.timesonline.co.uk/tol/news/world/middle_east/article608776.ece.

35. AMNESTY INT'L, *supra* note 6, at 2.

36. Michael Slackman, *Israeli Bomblets Plague Lebanon*, N.Y. TIMES, Oct. 6, 2006, at A1. Cluster munitions are composed of several small bomblets designed to detonate over a large area. See *infra* Part VI.A.1 for additional discussion on the use of cluster bombs.

and the deployment of Lebanese and U.N. Interim Forces in southern Lebanon.³⁷ While Israel has withdrawn, it is unlikely that Hezbollah will be disarmed.

III. HISTORY AND DEVELOPMENT OF THE RULES OF WAR

Wars have plagued nations since the dawn of civilization. Over the centuries, rules of war have developed in response to this reality. The four main principles of war outlined in Protocol I of the Geneva Conventions—proportionality, necessity, distinction, and humanity³⁸—stem from early thirteenth century Christian philosophy.³⁹ It is important to understand the relevant law and doctrines as established through custom and treaties in order to accurately apply these principles to the Israel-Lebanon conflict. As such, this Part will first explore the Christian theory of war and the codification of that theory.

A. Christian Theory of War

The laws of war have been largely formed by Christian theology, and more particularly, the just war doctrine.⁴⁰ While the Catholic Church was initially pacifist, Church leaders found justification for war from the Bible.⁴¹ Initial limitations on both the reasons for war and the methods of war gave rise to the four basic principles of combat seen in international law today: military necessity, proportionality, distinction, and humanity.⁴²

While nations have resorted to using military force to resolve conflicts

37. Toby Harnden, *UN Fit for Purpose Kofi Annan Castigated Security Council Diplomats for Taking So Long to Reach a Resolution on Lebanon, but the United Nations Itself Is Not Above Criticism*, SUNDAY TELEGRAPH (London), Aug. 13, 2006, at 19.

38. Protocol I to the Geneva Convention expanded the initial aim of the convention, which was to protect civilians and wounded prisoners, to include basic principles of how warfare should be conducted. W. Hays Parks, *The 1977 Protocols to the Geneva Conventions of 1949*, 31 NAVAL WAR C. REV. 17, 19 (1978).

39. See discussion *infra* at Part III.A.

40. See John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 223 (2004).

41. The Church found justification for war in Scripture. In Exodus, Moses parted the Red Sea, drowning the Egyptian soldiers who were trying to enslave the Israelites. *Exodus* 14:21 (King James). In thanks, the Israelites sang, "The Lord is a man of war: the Lord is his name." *Id.* 15:3; see also Alexander C. Linn, *The Just War Doctrine and State Liability for Paramilitary War Crimes*, 34 GA. J. INT'L & COMP. L. 619, 621 (2006).

42. Davis Brown, *A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict*, 47 HARVARD INT'L L.J. 179, 198 (2006).

throughout history, there is evidence that soldiers have historically exercised restraint and used rules of engagement at some level in warfare.⁴³ Simply, some acts have always been considered dishonorable, while others are believed to be honorable and virtuous.⁴⁴ These Christian morals concerning warfare norms, which developed between the Middle Ages and the Renaissance, largely shaped western combat tactics.⁴⁵

The early Christian theory of the just war, *justum bellum*, invoked initially by St. Augustine, was concerned with the reasons and purpose for declaring war, the *jus ad bellum*.⁴⁶ Just war theorists determined that a just war required three components: (1) that the war is declared by a sovereign ruler, since only a ruler has the authority to protect the welfare of his citizens; (2) that the cause of war is just, particularly that the ruler strives to restore something lost, defend against an attack, or avenge a wrong; and (3) that the attackers must intend to promote good and shun evil.⁴⁷ While the conditions under which a war could be declared were restricted, there were no limitations on the method of warfare; in fact, all means were permissible to achieve a just cause.⁴⁸ However, a general disapproval of a “Carthagenic solution”⁴⁹ soon gave rise to limitations

43. Michael C. Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 163–64 (2002). The rules of engagement are directives issued by a military authority that outline the circumstances and limitations under which troops will initiate or continue armed combat with opposing forces. *Id.*

44. Linn, *supra* note 41, at 625–26.

45. Scholars such as St. Augustine, Thomas Aquinas, Francisco Suarez, Alberico Gentili, Francisco de Vitoria, Hugo Grotius, and Emerich de Vattel developed the principles and requirements for a just war. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 5 (2005).

46. Linn, *supra* note 41, at 627.

47. *Id.* St. Augustine analyzed a war as one would analyze an individual defending an attack on another individual. Coverdale, *supra* note 40, at 225. Individuals can come to the defense of others being attacked, just as public entities may defend the common good with violence, no matter how lethal. *Id.*

48. Under this theory, the first Crusade in 1095 would have been justified as an attempt by Pope Urban II to regain the Holy Land from the Turks, which they believed was unrightfully taken from Christian possession. James Muldoon, *Spiritual Freedom—Physical Slavery: The Medieval Church and Slavery*, 3 AVE MARIA L. REV. 69, 79 (2005); see also PAUL RAMSEY, WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY? 15–33 (1961) (arguing St. Augustine believed to be the founder of the Christian theory of just war, promoted no limitations on the methods of warfare).

49. JOHN PREVAS, HANNIBAL CROSSES THE ALPS: THE INVASION OF ITALY AND THE PUNIC WARS 1 (1998). The “Carthaginian solution” refers to the Roman destruction of the Carthaginian civilization with complete disregard for both combatants and civilians. Romans took apart the city stone by stone, killed or enslaved all citizens, and salted the area to prevent civilization from growing again. *Id.*

on the methods of combat.⁵⁰ In addition to focusing on the *jus ad bellum*, theorists began to develop regulations on fair conduct in wars, or *jus in bello*.⁵¹ The doctrines of proportionality, military necessity, distinction, and humanity come from both of these early principles.

The doctrine of proportionality is primarily concerned with the relationship between the moral and political purpose of war, *jus ad bellum*, and the destruction from the methods of war, *jus in bello*.⁵² Fundamental to the doctrine is that the preferred end is proportional to the means used.⁵³ This standard recognizes that there will be collateral damage during war, but directs commanders to balance the military advantage with the probability of civilian destruction.⁵⁴ The conventions of *jus in bello* require that commanders minimize both the costs to their own troops as well as destruction for all parties concerned, while achieving their military goals.⁵⁵

Early Christian norms of warfare are tested in the doctrine of military necessity. Military necessity limits commanders to attacking only legitimate military targets that will help them in gaining a military advantage over their enemy.⁵⁶ Thus, some have argued that *jus in bello* regulations on fair conduct in wars can be ignored entirely under the guise of military necessity, particularly that any attack can be carried out so long as it increases the commander's chances of defeating the enemy.⁵⁷ However, military necessity requirements cannot be imposed

50. FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES 156–57* (1975). The Second Lateran Council of 1139 banned the use of crossbows, bows and arrows, and siege machines, possibly to limit unnecessary suffering. *Id.*

51. See generally Christopher Greenwood, *The Relationship Between Jus Ad Bellum and Jus In Bello*, 9 REV. INT'L STUD. 221 (1983) (examining how *ius ad bellum* and *ius in bello* operate simultaneously during a conflict).

52. Coverdale, *supra* note 40, at 268–69.

53. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 393–94 (1993).

54. *Id.*

55. Coverdale, *supra* note 40, at 269. Minimizing destruction or using the least amount of force necessary to achieve a particular aim is central in the proportionality requirement. *Id.* However, it is unclear under this principle whether commanders must put their troops in greater danger in order to minimize injuries to noncombatants. Jean Bethke Elshtain, *The Third Annual Grotius Lecture: Just War and Humanitarian Intervention*, 17 AM. U. INT'L L. REV. 1, 9 (2001).

56. Jeanne M. Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143, 147 (2001).

57. Coverdale, *supra* note 40, at 273.

apart from the other *jus in bello* restraints on modern warfare.⁵⁸ Protocol I of the Geneva Convention does not hold military necessity above all other rules of war, and thus, attacking civilians or carrying out indiscriminate attacks can never be justified solely because it was necessary to lead to a military victory.⁵⁹

The doctrines of distinction and humanity also arise from these early Christian principles.⁶⁰ Distinction dictates that commanders must wage wars only against military combatants and not against the civilian populations.⁶¹ Humanity urges commanders to minimize unnecessary civilian suffering.⁶² In the Middle Ages, the *jus in bello* restraints urging civilian immunity were embodied in the codes of chivalry.⁶³ While one might assume that there was a moral basis for this belief that civilians are outside of the scope of war, the early reasons for immunity were actually more practical.⁶⁴ At the time, combat arose between knights and their supporting armies, so there was no incentive to attack a civilian who had no connection to the knight's infantries.⁶⁵ Further, attacking a civilian population would be seen as lacking in chivalry.⁶⁶ The practical distinction between armed combatants and noncombatants remained when warfare was restricted to professional armies.⁶⁷ Professional armies were largely removed from society and combat was confined to small designated fields.⁶⁸ Armies had few rational incentives to attack civilians since struggles were limited to battles among princes rather than fights engulfing entire communities.⁶⁹ This clear line between armed combatants and civilians blurred as technological advancements made assaults by and upon entire

58. *Id.*

59. *Id.* at 273–74.

60. Meyer, *supra* note 56, at 146.

61. *Id.*

62. Reynolds, *supra* note 45, at 25.

63. Coverdale, *supra* note 40, at 261.

64. *Id.*

65. *Id.* The code of chivalry directed knights in the Middle Ages to help the weak in addition to promoting reciprocal rights and privileges in combat. See William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 699–701 (2004). See generally RICHARD BARBER, *THE KNIGHT AND CHIVALRY* (1982).

66. Coverdale, *supra* note 40, at 261–62. Chivalry, which bound knights with a code of behavior that promoted honor, virtue, loyalty, and courage, was a central feature of life in the Middle Ages. C. Ounce Hopkins, *Rank Matters But Should Marriage?: Adultery, Fraternalization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177, 257–58 (1999); see also DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE* 16 (4th ed. 1996).

67. James M. Donovan, *Civilian Immunity and the Rebuttable Presumption of Innocence*, 5 J.L. SOC'Y 409, 414–15 (2004).

68. *Id.*

69. Coverdale, *supra* note 40, at 261–62.

municipalities more practical, and consequently more common.⁷⁰ Though the physical distance from combat no longer separated armies from the civilians, the principle of civilian immunity was upheld.⁷¹ International law expressly prohibits indiscriminate attacks or strikes in which combatants use imprecise weapons that kill civilians and combatants alike.⁷² However, as seen in the principles of proportionality and necessity, civilian immunity cannot be absolute given the practicalities of war.⁷³

B. Codification of the Rules of War

Though the rules of war were primarily established under the Christian just war theory, regulations on warfare were not formally codified for centuries.⁷⁴ There are a number of inherent complexities in international law. Unlike domestic law, there are no international bodies with the authority to unilaterally make and enforce international legislation.⁷⁵ Instead, international law arises from countries freely waiving their sovereignty and agreeing to follow international norms.⁷⁶ Today, the rules of warfare are established in treaties and customary international law.⁷⁷ There are now many legally binding international agreements, but many countries choose not to become signatories of such agreements.⁷⁸ Customary laws of armed conflict bind every country in

70. Donovan, *supra* note 67, at 415.

71. *Id.* Christian tradition explicitly protected farmers, laborers, pilgrims, and clergy from attack because they did not traditionally bear arms or participate in unjust aggression. Similarly, children who were unable to bear arms were presumed innocent and therefore shielded from attack. *Id.*

72. Meyer, *supra* note 56, at 147.

73. *Id.*

74. Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 436 (2004). Formal regulations on the laws of war were not drafted until the industrial wars of the late nineteenth and early twentieth centuries. *Id.* The Industrial Revolution and the emerging modern nation-state system brought a marked change from pre-eighteenth-century isolated battlefield conflicts. See W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 6 (1990). The advent of railroads provided the infrastructure for nations to mobilize considerably larger numbers of weapons and troops when taking on enemy forces. This increasingly important technology also became a valuable military target and regulations were needed to formalize laws on the changing battlefield. *Id.*

75. Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 244 (2001).

76. *Id.*

77. *Id.*

78. See *id.*

the world, regardless of what treaties they have signed.⁷⁹ However, the general principles that make up customary law are binding only to the extent that nations feel a legal obligation to follow such norms.⁸⁰ Additionally, there is no established international law that either by treaty or custom requires that unlawful combatants, such as militias or terrorist cells, be provided the same protection given to lawful combatants.⁸¹ However, while terrorists may not receive the protection of international law, nations still strive to adhere to the laws of war in order to adequately protect civilian noncombatants.⁸² The historical acceptance of the norms of armed conflict can be seen by examining the efforts to codify these customs.

The first modern effort to codify international rules of war began with eleven nations signing the first Geneva Red Cross Convention in 1864 in order to provide clear protection for medical personnel on the battlefield.⁸³

79. Further, if a treaty is considered to embody customary international law, its terms would bind and be enforced against nonsignatories. Seth Brugger, *International Law, Terrorism, and Weapons of Mass Destruction: Finding and Filling the Gaps*, 57 RUTGERS L. REV. 803, 812–13 (2005).

80. See Joseph P. “Dutch” Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 43 (2001). The rules of war are based on the anticipation of equal application. A party to a conflict complies with the rules of war because it anticipates its opponent will reciprocate, *non facio ne facias*. *Id.* There are no historical examples of one party binding itself to the law of armed conflict without declaring and expecting reciprocity. The denial of equal application and reciprocity would render all laws of armed conflict meaningless. “As Sir Hersch Lauterpacht [noted], ‘it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them.’” *Id.* (quoting H. Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT’L L. 206, 212 (1953)). While the United Nations has authority to enforce international laws, the U.N. does not operate as a “global police officer.” *Id.* at 42. As one commentator notes, “International law is unenforceable; it lacks a legal system that backs its laws with the trappings of justice, courts, juries, police, prisons, etc.” Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT’L L. 243, 281–82 (1987).

81. Joseph P. “Dutch” Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 1–2 (2004).

82. See Herthel, *supra* note 75, at 248–49.

83. Herthel, *supra* note 75, at 245–46. While the Geneva Red Cross Convention was the first international attempt in codifying the laws of war, the first comprehensive regulation of the laws of war occurred a year earlier in the United States. *Id.* at 245–46 n.111. In 1863, President Lincoln directed Dr. Francis Lieber to draft a code of customary warfare in order to minimize the atrocities occurring in the U.S. Civil War. Meyer, *supra* note 56, at 148. *Union Army General Orders No. 100: Instructions for the Government of Armies of the United States in the Field*, more commonly known as *The Lieber Code*, articulated the principles of necessity and distinction by preventing the targeting of civilians, calling for minimizing civilian damage, and limiting targets to those that provided a military advantage. *Id.* The manual was adopted by Germany,

Four years later, the St. Petersburg Declaration was drafted to regulate the use of weapons; notably, the Declaration was the first of its kind to promote the principle of distinction.⁸⁴ While the Declaration was an important advancement, in reality, it merely presented the conceptual belief that war should be focused on military objectives rather than civilians.⁸⁵ It was the advancement of air power that raised awareness of potential devastation and compelled the international community to expressly regulate the use of weapons.⁸⁶

The existing regulations of armed conflict are primarily found in the Hague Conventions of 1907,⁸⁷ the Geneva Conventions of 1949⁸⁸ and its

France, and Great Britain and later codified at the Brussels Convention of 1874. Reynolds, *supra* note 45, at 8.

84. Herthel, *supra* note 75, at 246. In its Preamble, the St. Petersburg Declaration of 1868 states:

[T]he only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy;
 . . . it is sufficient to disable the greatest possible number of men;
 . . . this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
 . . . the employment of such arms would, therefore, be contrary to the laws of humanity

The Declaration of St. Petersburg, 1868, 1 AM. J. INT'L L. SUPP. 95, 95 (1907).

85. Reynolds, *supra* note 45, at 9.

86. While air power began with simple balloon reconnaissance, aerial bombardment was anticipated as the next potentially destructive progression. *Id.*

87. Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 1 Bevans 619; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681. Collectively, I will refer to these as the Hague Conventions. The Second Hague Peace conference of 1907 was the first to expressly codify civilian immunity. J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 228–29 (3d ed. 1947). The Hague Conferences of 1923 and 1938 attempted to develop a more coherent set of rules following the World War I Italian strategy of attacking civilian populations to defeat enemy morale, but they failed to garner adequate support. *Id.*

88. The 1949 Geneva Conventions are: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85. Collectively, I will refer to these as the 1949 Geneva Conventions. The 1949 Geneva Conventions addressed the actions in World War II, namely the deliberate targeting of civilian populations to reduce morale and the enormous and indiscriminate civilian deaths that arose from the atomic bombs used in Hiroshima and Nagasaki. RONALD SCHAFFER, WINGS OF JUDGMENT: AMERICAN BOMBING IN WORLD WAR II 95–97,

Protocols,⁸⁹ and the Conventional Weapons Treaty of 1980⁹⁰ along with its Protocols.⁹¹ The Hague Conventions and Conventional Weapons Treaty regulate the methods of combat, particularly the weapons used.⁹² The Geneva Conventions were centered on protecting the wounded and sick in war, prisoners of war, and civilians.⁹³

The most recent and comprehensive effort to regulate the conduct of war, and the source of focus for this Comment, is found in Protocol I of the Geneva Convention.⁹⁴ Protocol I expanded the initial aim of the convention, which was to protect civilians and wounded prisoners,⁹⁵ to include the basic principles of proportionality, military necessity, distinction, and humanity. These four principles are fundamental in assessing the legality of armed combat.

The doctrine of proportionality requires that the amount of force used in response to an attack be roughly proportionate to the precipitating events.⁹⁶ Victims are not required to turn the other cheek following a terrorist strike, but there are limits to the amount of force that can be used in response.⁹⁷ While the use of force must be proportionate to the terrorist attack, the definition of proportionality is subject to various interpretations, and the propriety of a nation's military response is

103 (1985). These Conventions specifically provided the basis for neutral zones to house injured combatants and civilians, and gave protection to civilian hospitals which provided care to the injured. Randy W. Stone, *Protecting Civilians During Operation Allied Force: The Enduring Importance of the Proportional Response and NATO's Use of Armed Force in Kosovo*, 50 CATHOLIC U. L. REV. 501, 509 (2001). They also directed occupiers to take care of the occupied civilian population by providing food and medical supplies. *Id.*

89. Protocol I, *supra* note 13.

90. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1524.

91. Herthel, *supra* note 75, at 247–48.

92. *Id.*

93. *Id.*

94. Protocol I, *supra* note 13. Approximately twenty-four member countries of the United Nations, including the United States, Israel, France, Turkey, and the Philippines have failed to ratify Protocol I, but many principles in the Protocol are generally recognized as consistent with customary international law. W. Hays Parks. Book Review. 26 GEO. WASH. J. INT'L L. & ECON. 675, 676 (1993) (reviewing EDWARD K. KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* (1992)). However, the Protocol's application of some major principles to aerial combat are often viewed as aspirational, and not as a codification of international customary norms. *Id.*: see also Hans-Peter Gasser, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987).

95. Reynolds, *supra* note 45, at 9; see also Parks, *supra* note 38, at 17–27.

96. Bonafede, *supra* note 43, at 183.

97. Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309, 316 (1989).

likely to vary considerably depending on the test used to determine proportionality.⁹⁸

The doctrine of military necessity states that forces must not strike military objectives unless those forces will achieve a definite military advantage by doing so.⁹⁹ This principle is centered on how targets are identified and how commanders should measure military advantages before striking.¹⁰⁰ Article 52(2) of Protocol I limits attacks to “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁰¹ Additionally, military planners are limited to strikes in which the anticipated military advantage outweighs the anticipated collateral damage.¹⁰² Commanders must therefore weigh the military advantage against the destruction of civilian lives and property before pursuing any military attack.¹⁰³ This doctrine provides a justification for killing civilians in war, so long as their deaths are not intended but accidental.¹⁰⁴ Article 51(5)(b) of Protocol I states that nations are prohibited from launching strikes that are likely to cause “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁰⁵ Commanders are required, under Article 57(2), to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any

98. Bonafede, *supra* note 43, at 183.

99. Herthel, *supra* note 75, at 248. The U.S. Air Force defines military necessity as “the principle which justifies measures of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy, with the least possible expenditures of economic and human resources.” Canestaro, *supra* note 74, at 454 (quoting U.S. DEPARTMENT OF AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, Air Force Pamphlet 110-31, Nov. 1976, at paras. 1–3(a)1). *The Lieber Code*, first promulgated in 1863, states: “Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war” Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, art. 15, in *THE LAWS OF ARMED CONFLICTS* 3, 6 (Dietrick Schindler & Jiří Toman eds., 3d rev. ed. 1988).

100. Herthel, *supra* note 75, at 248.

101. Protocol I, *supra* note 13, art. 52.

102. Herthel, *supra* note 75, at 248–49.

103. Bernard L. Brown, Note, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification*, 10 CORNELL INT’L L.J. 134, 140 (1976).

104. Herthel, *supra* note 75, at 248.

105. Protocol I, *supra* note 13, art. 51.

event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”¹⁰⁶

Finally, Protocol I emphasizes the principles of distinction and humanity. Distinction requires that military targets are distinguished from civilian objects so that civilian populations are appropriately protected.¹⁰⁷ The doctrine of humanity states that commanders have a duty to protect both combatants and civilians from unnecessary suffering.¹⁰⁸ Article 51(4)(c) prohibits indiscriminate assaults on civilians, specifically “those which employ a method or means of combat the effects of which cannot be limited . . . [and] are of a nature to strike military objectives and civilians or civilian objects without distinction.”¹⁰⁹ In order to protect civilian populations, Article 48 requires commanders to discriminate amongst their targets.¹¹⁰ In other words, the commanders must “distinguish between the civilian population and combatants and between civilian objects and military objectives and . . . direct their operations only against military objectives.”¹¹¹ While the principle of discrimination would theoretically afford complete civilian immunity from combat,¹¹² the practicalities of war promote the need for the principles of necessity and proportionality as well.

The driving source behind the Protocols must also be considered when analyzing the legitimacy of attacks, particularly since the Protocols often use language that is inconsistent with prior state practice.¹¹³ The drafting of the Protocols began in the 1950s when the International Committee of the Red Cross (ICRC),¹¹⁴ the Institute of International

106. *Id.* art. 57.

107. Herthel, *supra* note 75, at 248. The principle of distinction is deemed to be generally accepted as a rule of law, though at that time it was not considered necessary to incorporate it into The Hague or Geneva Conventions. Stuart Walters Belt, *Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 146 (2000). The ICRC commentary concludes: “The rule is included in this Protocol to verify the distinction required and the limitation of attacks on military objectives.” INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 598 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

108. Herthel, *supra* note 75, at 249.

109. Protocol I, *supra* note 13, art. 51.

110. *Id.* art. 48.

111. *Id.*

112. Meyer, *supra* note 56, at 146.

113. *Id.* at 161–62.

114. The ICRC was established in 1863 in Geneva, Switzerland as an “impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance.” ICRC.org, The ICRC’s Mission Statement, http://www.icrc.org/Web/Eng/site_eng0.nsf/htmlall/section_mandate?OpenDocument (last visited Mar. 23, 2008). Now the organization exists in about eighty countries in the world. *Id.*

Law, and the United Nations all put forth numerous proposals to limit, if not prohibit, aerial warfare entirely.¹¹⁵ Though these proposals were presented to the international community, support was weak and the proposals were criticized as unrealistic.¹¹⁶ In 1974, in the wake of the Vietnam War, the ICRC took up this cause again in a three-year conference called The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which resulted in Protocol I and Protocol II to the Geneva Convention.¹¹⁷ The origins of the Protocol raise questions about whether the language truly reflects customary international law or rather efforts to limit the use of aerial warfare.

It is understood that civilian casualties are unavoidable, but Protocol I attempts to minimize civilian injury by relying on principles of proportionality, necessity, distinction, and humanity. These principles will be examined fully in Parts IV, V, and VI, and applied to the Israeli action in Lebanon to determine if the strikes against Hezbollah were consistent with Protocol I and customary international law.

IV. DOCTRINE OF PROPORTIONALITY

The doctrine of proportionality states that the amount of force used in response to an attack must be roughly proportionate to the precipitating

115. Parks, *supra* note 74, at 64. The position of the ICRC calling for disarmament was a marked change from their original role as a protector of civilians. *Id.* at 66. Support from the major powers was tepid at best, so members of the ICRC instead sought their main support from Third World nations. *Id.* Developing nations comprised more than 60% of the delegations present and frequently used the threat of walking out as leverage throughout the four sessions of the Diplomatic Conference. *Id.* at 79 n.264 (citing B. NOSSITER, *THE GLOBAL STRUGGLE FOR MORE: THIRD WORLD CONFLICTS WITH RICH NATIONS* (1987)). Developed Western nations were stymied by their inability to present a unified front, and were worried about being seen as antihumanitarian if they opposed such restrictions. The U.S. delegation was chiefly aware of its image, particularly since it sought to uphold the Carter administration's emphasis on human rights. *Id.*

116. The General Counsel of the Department of Defense specifically warned against such unrealistic prohibition of aerial attacks, citing the failed 1923 Hague Rules that attempted to impose similar restrictions. Mever, *supra* note 56, at 161. Also, the ICRC was made up entirely of Swiss citizens. Parks, *supra* note 74, at 67. Switzerland, a neutral nation, had not sent citizens into combat since 1798. *Id.* There was strong resistance to permit individuals with little military training and no combat experience to shape the complex regulations of armed conflict. *Id.*

117. Parks, *supra* note 74, at 75–82.

events.¹¹⁸ This Part examines the different methods commonly employed to determine if a response is proportionate. Additionally, this Part suggests an appropriate definition of proportionality in the context of combating international terrorism.

A. *Interpreting Proportionate*

International law does not allow terrorists to attack targets with impunity. While victims are not required to turn the other cheek following a terrorist strike, there are limits to the amount of force that can be used in response.¹¹⁹ In order for the response to comply with international law, the force used must be proportionate to the precipitating event.¹²⁰

While the use of force must be proportionate to the terrorist attack, the definition of proportionality is subject to various interpretations.¹²¹ The propriety of a nation's military response is likely to vary considerably depending on the test used to determine proportionality. In deciding whether an attack is proportionate to the preceding incident, scholars have typically applied one of three approaches: (1) the "tit-for-tat" or quantitative test; (2) the cumulative test; or (3) the deterrent proportionality test.¹²²

1. *Tit-for-Tat Test*

Under the tit-for-tat quantitative approach, the proportionality of the response is judged in comparison to the immediate preceding terrorist strike.¹²³ The response must be roughly equivalent to the number of deaths and amount of destruction caused by the precipitating incident.¹²⁴ Using this approach, it is inappropriate to consider prior patterns of aggression beyond the last act or any potential deterrent value of the response.¹²⁵ If the response to the preceding act exceeds the amount of force that is strictly necessary to counter that attack, the response is illegally disproportionate under the tit-for-tat approach.¹²⁶ This test

118. Bonafede, *supra* note 43, at 183.

119. Schachter, *supra* note 97, at 316.

120. Bonafede, *supra* note 43, at 183.

121. *Id.*

122. *Id.*; *see also* Roberts, *supra* note 80, at 281–82 (discussing the tests for assessing proportionality).

123. *See, e.g.*, Schachter, *supra* note 97, at 315. "The U.N. Security Council in several cases, most involving Israel, has judged proportionality by comparing the response on a quantitative basis to the single attack which preceded it." *Id.*

124. Roberts, *supra* note 80, at 281.

125. *See* Schachter, *supra* note 97, at 315.

126. Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 206 (1987); *see also* Alberto R. Coll, *The*

adopts the most restrictive definition for proportionality of the three commonly applied approaches.

Applying the tit-for-tat approach to the current Israel-Lebanon conflict requires balancing all Israeli actions in Lebanon against Hezbollah's initial July 12, 2006 provocations¹²⁷ and asking whether Israel did more than necessary to counteract the threats it faced.¹²⁸ The tit-for-tat approach is more likely than the other two possible approaches to indicate a disproportionate response because it advocates the most narrow interpretation of proportionality.

2. Cumulative Test

The cumulative test allows one to consider not only the immediate act of aggression, but also a continuing pattern of attacks when assessing the proportionality of the military response.¹²⁹ This approach can be significantly more expansive when there have been a number of previous incidents that have led up to the current response.¹³⁰ The cumulative test still does not allow one to take into consideration the utilitarian concepts of general or specific deterrence when determining the proportionality of the response.¹³¹

Under this approach, the “[r]ough equivalence in the number of deaths and extent of property damage remains the *sine qua non* of proportionality.”¹³² However, this does not mean that if terrorists attack a day care center housing children, nations can respond by attacking the children of the terrorists.¹³³ The rough equivalence in terms of deaths and damage does

Legal and Moral Adequacy of Military Responses to Terrorism, 81 AM. SOC'Y INT'L L. PROC. 297, 299 (1987) (noting that deterrence, which is inconsistent with the tit-for-tat approach, was one of the key objectives of the military response against Libya because the United States hoped to “persuade Libya and any other similarly inclined actors in the international community that the support of terrorist activities against the United States is bound to trigger an American response prohibitively costly to such actors”).

127. See generally The Secretary-General, *Report of the Secretary-General on the United Nations Interim Force in Lebanon, delivered to the Security Council*, U.N. DOC. S/2006/560 (July 21, 2006) (describing the beginning of the Israel-Lebanon conflict).

128. Bonafede, *supra* note 43, at 184 (applying the tit-for-tat approach to U.S. actions in Afghanistan following the September 11 attacks).

129. Schachter, *supra* note 97, at 315.

130. See Bonafede, *supra* note 43, at 184.

131. See Schachter, *supra* note 97, at 315.

132. Roberts, *supra* note 80, at 281.

133. *Id.* at 281–82 (noting that the status of certain classes of persons—for example, children—protects them from retaliation).

not suggest that reprisals against protected groups and objects are allowed merely because the terrorists chose to violate the laws of war.¹³⁴

In order for previous attacks to qualify, they must be part of an “overall plan of attack that relies on numerous small raids.”¹³⁵ Advocates of this approach argue that it makes little sense to require nations to respond to each and every minor attack with a roughly equivalent response.¹³⁶ As long as the previous attacks by terrorists are based on the same overall plan, a large retaliatory strike, proportionate to the sum of their smaller attacks, would be justified.

Applying the cumulative test to the current Israel-Lebanon conflict allows Israel to include a host of prior terrorist attacks, rather than simply the last attack, in evaluating the proportionality of the response. Israel could include the previous cross-border attacks and troop kidnappings that took place prior to July 2006 in addition to other terrorist acts that could be seen as part of a continuing pattern of attacks. These previous terrorist strikes would be included with the immediately preceding strike in assessing the proportionality of the response.

What remains unclear is how far back in time Israel can go in including previous Hezbollah acts of terror, or whether prior attacks that have already solicited a military response can be included in the equation.¹³⁷ As cross-border attacks from southern Lebanon into Israel have occurred as far back as 1968, a considerable number of incidents could conceivably factor into the calculation.¹³⁸ The more events that are included as being part of a continuing pattern of attacks, the less likely it is that the response was disproportionate.

134. *Id.*

135. *Id.* at 282.

136. *Id.*

137. Bonafede, *supra* note 43, at 184. In applying the cumulative proportionality theory to the U.S. response to September 11, questions have been raised as to whether the 1993 strike on the World Trade Center, the 1998 African embassy bombings, and the attack on the U.S.S. *Cole* could be considered part of the same continuing pattern of attacks. *Id.* Additionally it is unclear whether the U.S. cruise missile strikes against Afghanistan and Sudan in response to these previous attacks made the events inappropriate for inclusion. *Id.* See also Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 589 (2002) for a detailed discussion of the legality of America's use of force in response to the September 11 attacks, which argues that “[w]hile some [have criticized] America's previous uses of force against terrorist supporting states, the case for America's forcible response to the September 11 attacks as being fully consistent with the inherent right of self-defense under customary international law and Article 51 of the U.N. Charter is very strong.”

138. For a summary of the development of the conflict with Lebanon, see Julie M. Peteet, *Lebanon: Palestinian Refugees in the Post-War Period*, LE MONDE DIPLOMATIQUE, Dec. 1997, available at <http://mondediplo.com/focus/mideast/region-lebanon-refugee>.

3. *Deterrent Proportionality Test*

The deterrent proportionality test considers the response in terms of the goal of deterring future terrorist attacks.¹³⁹ One scholar has remarked that this approach allows force that would “be sufficient to cause the terrorist to change his expectations about costs and benefits [such] that he would cease terrorist activity.”¹⁴⁰ Because proportionality is judged not in relation to the harm caused by previous terrorist attacks, but in terms of the overall goal of ending terrorist strikes, the amount of force used in response to an attack could potentially exceed the force exhibited in the initial terrorist strike.

The deterrent proportionality test is not without its share of critics.¹⁴¹ Some argue that determining proportionality based on a speculative assessment of how the terrorists will behave in the future is too lax of a standard.¹⁴² In their view, a concrete basis for comparison is necessary in order to calculate the proportionality of the response.¹⁴³ Without a concrete starting point, such as the harm caused by previous attacks following the same overall plan or the harm caused by the last attack, there is no basis for comparison.¹⁴⁴ An unsubstantiated belief that a huge terrorist attack could occur in the future might justify a frighteningly large response under this approach. As the future wrong is yet to occur, the critics feel that justifying a preventative retaliatory response is inappropriate.¹⁴⁵

Applying the deterrent proportionality test to the Israel-Lebanon conflict allows Israel to include any potential deterrent value of the response in assessing proportionality. The question becomes whether Israel’s retaliatory response was proportional to the end it sought—the cessation of attacks.¹⁴⁶ This approach favors Israel’s response more than any of the previously discussed methods.

139. Schachter, *supra* note 97, at 315.

140. *Id.*

141. Roberts, *supra* note 80, at 282.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Schachter, *supra* note 97, at 315.

4. *Combination of Tests*

Scholars have also suggested combining the previously articulated tests.¹⁴⁷ Under a combined approach of both the cumulative and deterrent tests, military retaliation is weighed against the immediately preceding attacks as well as the probability and magnitude of future attacks.¹⁴⁸ The cumulative-deterrent approach would result in an even more flexible standard than either the cumulative or deterrent test standing alone.

B. The Most Appropriate Definition

The appropriate standard for assessing the proportionality of Israel's response to a continuing pattern of terrorist attacks is the cumulative-deterrent approach.¹⁴⁹ The tit-for-tat and cumulative approaches alone are unworkable in combating terrorism. It is illogical to force Israel to wait for terrorists to attack so that they can have a concrete basis to determine proportionality and then limit their response to the amount of damage caused by the terrorists.

International terrorist organizations are fundamentally different from nation-states.¹⁵⁰ While negotiations, sanctions, embargoes, and other diplomatic methods are available to discourage hostile nation-states, these alternatives are not possible against modern terrorist regimes that cross international boundaries.¹⁵¹ With the normal arsenal of diplomatic measures unavailable to persuade terrorist organizations, the only alternative is proactive engagement.¹⁵²

Both the tit-for-tat and cumulative approaches mandate a reactionary response that is unrealistic for combating modern terrorist regimes. It is inappropriate to view the proportionality doctrine as requiring nations to either wait until they are attacked or have evidence that an attack is virtually certain to occur before allowing them to respond when reasonable

147. Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 47 (1987); see also Bonafede, *supra* note 43, at 185.

148. Baker, *supra* note 147, at 47.

149. *Id.* (advocating the cumulative deterrent approach in assessing the U.S. military response against a continuing pattern of attacks by Libya).

150. Bonafede, *supra* note 43, at 196–97.

151. *Id.*

152. Bonafede, *supra* note 43, at 197; see also President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (“I will not wait on events, while dangers gather. I will not stand by as peril draws closer and closer.”).

preemptive measures can prevent the attack from occurring.¹⁵³ Common sense dictates that it is irrational to allow terrorist groups to “fester and grow” after they have expressly indicated that their sole purpose is a state’s destruction.¹⁵⁴ As it is not always possible to obtain concrete evidence that an attack is imminent, in certain cases the mere existence of terrorists camps may need to be a sufficient justification for military action.

Requiring the rough equivalence in terms of force and damage is also ineffective in combating terrorism. If a terrorist group places a bomb on a bus and kills ten civilians, it would be ineffective to limit the response to the same amount of casualties when the organization has thousands of members training for the next terrorist strike. It is futile to limit a military response to the exact same amount of casualties and financial damage caused by a terrorist strike, and the potential deterrent value from an attack should be included in assessing proportionality.

As Hezbollah had amassed over four thousand rockets which were fired at Israel, it is apparent that Lebanon was either unable or unwilling to control the group within its borders.¹⁵⁵ This tacit support for the organization means that Israel’s only option to prevent future attacks was by engaging Hezbollah directly. Given the unthinkable loss of life that could potentially occur when a terrorist group is this well armed, Israel’s response appears proportional to the threat it faced coupled with the deterrent effect that it achieved.¹⁵⁶

Interpreting the proportionality requirement as allowing the cumulative-deterrent approach with respect to international terrorist organizations does not mean that the proportionality requirement is

153. Former U.S. Secretary of State George Schultz commented: “A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks The U.N. Charter is not a suicide pact. The law is a weapon on our side, and it is up to us to use it to its maximum extent.” *Low-Intensity Warfare: The Challenge of Ambiguity*, 86 DEP’T STATE BULL. 15, 17 (1986).

154. Bonafede, *supra* note 43, at 200.

155. Uzi Rubin, *Hizballah’s Rocket Campaign Against Northern Israel: A Preliminary Report*, JERUSALEM ISSUE BRIEF, Aug. 31, 2006, <http://www.jcpa.org/brief/brief006-10.htm> (“From July 13 to August 13, the Israeli Police reported 4,228 rocket impacts inside Israel from rockets fired by Hizballah. No geographical area in the world has sustained such a large quantity of rocket strikes since the Iran-Iraq war in the early 1980s.”).

156. Israel’s response appeared to alter Hezbollah’s expectations about the costs of terrorist activity. Bazzi, *supra* note 1. Hezbollah leader Sayyid Hassan Nasrallah said in an interview on Lebanese TV in August 2006 that he would not have ordered the troops’ capture if he had known it would lead to a full-scale war with Israel. *Id.*

entirely meaningless.¹⁵⁷ While calculating the amount of deterrence necessary to alter the terrorists' behavior cannot be done with mathematical certainty using this approach, any response not clearly disproportionate to the provocation should satisfy the requirement.¹⁵⁸

V. DOCTRINE OF MILITARY NECESSITY

The doctrine of military necessity states that forces must not strike military objectives unless they will achieve a definite military advantage by doing so.¹⁵⁹ In order to apply this principle to the Israel-Lebanon conflict, it is important to determine how targets are identified, particularly how dual use targets¹⁶⁰ should be handled, and how commanders should measure military advantages before striking.¹⁶¹

A. Identifying Targets

Before a commander can attack a perceived threat, the nature of the target must be examined to predict the potential military advantage and the potential civilian casualties.¹⁶² The targeting of a military establishment in the middle of a populous city could be permissible if the target is legitimate.¹⁶³ Identifying targets becomes critical because of the potential collateral effects a strike could have on a civilian population. In identifying possible targets, commanders must take into account the proximity to

157. “[T]he destruction of a city because of a single terrorist incident . . . would create revulsion and horror, even when the target state is seen as an enemy.” Schachter, *supra* note 97, at 315.

158. FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 342 (1971).

159. Herthel, *supra* note 75, at 248. *The Lieber Code* states, “Military necessity admits of all direct destruction of life or limb of *armed* enemies and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war” Lieber, *supra* note 99, art. 15.

160. Dual use targets are those which are used simultaneously for civilian and military purposes. Canestaro, *supra* note 74, at 455–56.

161. CHARLES G. FENWICK, *INTERNATIONAL LAW* 654–55 (4th ed., Meredith Publ’g Co. 1965) (1924). Mere necessity is not enough to avoid conforming to the rules of war. *Id.* at 655. Otherwise, this principle of need would

reduce[] the entire body of the laws of war to a code of military convenience, having no further sanction than the sense of honor of the individual military commander or chief of staff and no practical effect where the contending forces were sufficiently equal to render the issue doubtful.

Id.; see also Hays Parks, *Protection of Cultural Property From the Effects of War*, in *THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE: PROTECTION, TRANSFER AND ACCESS* 3-1, 3-12 (Mary Phelan et al. eds., 1998) (quoting General Dwight Eisenhower who famously noted: “[T]he phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference.”).

162. See Brown, *supra* note 103, at 145–46.

163. *Id.* at 146–47.

civilian life, the potential to cause substantial civilian damage, the military importance of the target, and the vulnerability of the object to the military attack.¹⁶⁴

Clarifying the meaning of the terms *military objective* or *military target* can be difficult given that nations often choose to define these terms according to their own interests; some nations, like the United States, have generally relied on Protocol I to clarify these terms.¹⁶⁵ Article 52(2) of Protocol I outlines two important factors to consider when determining whether an object should be subject to attack.¹⁶⁶ Attacks are (1) “limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and [(2)] whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁶⁷ Under this two-part definition, it is not sufficient that an object simply be useful from a military perspective. The object’s destruction must also “offer a definite military advantage.”¹⁶⁸

Many objects, depending on the situation, have the potential to “make an effective contribution to military action.”¹⁶⁹ Street lights, trees, railroads, or any other commonplace civilian structure could potentially be advantageous to the enemy combatants.¹⁷⁰ While commanders must

164. *Id.* at 146. The commander will be judged on the reasonability of his actions both to acquire adequate information and in light of the gathered information. Matthew D. Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 170 (2005).

165. Canestaro, *supra* note 74, at 455.

166. Protocol I, *supra* note 13, art. 52.

167. *Id.*

168. Françoise J. Hampson, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC’Y INT’L PROC. 39, 49 (1992). For example, “[a] civilian’s hot-air balloon is of potential military usefulness, but whether it can be attacked depends on the circumstances.” *Id.* Whether a target offers a “definite military advantage” is subject to interpretation. *Id.* The implications of interpreting this term narrowly to include only specific tactical benefits or using the term broadly to include strategic and political advantages is discussed in depth in the following subsections.

169. Protocol I, *supra* note 13, art. 52.

170. The U.S. Operational Law Handbooks include targets which by their nature, location, purpose, or use could be used for military purposes. Canestaro, *supra* note 74, at 455–56. As the front lines of combat have changed, there have been dramatic alterations in both the quantity of targets available and the nature of the targets, as reflected by the NATO attack on Milošević’s private bank accounts. Eric Talbot Jensen, *Unexpected Consequences From Knock-On Effects: A Different Standard for Computer Network Operations?*, 18 AM. U. INT’L L. REV. 1145, 1148 (2003).

look at how critical the object is to the military campaign and whether they are likely to effectively destroy the target by striking it, there is no weighted calculation to determine what object may be hit or spared.¹⁷¹ There would be great uncertainty in deciding which objects were immune from attack using these parameters, because a case could be made to attack virtually any object. For example, striking a hot air balloon could make an effective contribution to military action, and it is unlikely to cause a large number of civilian casualties, thus under this analysis, it could be attacked.¹⁷²

The Protocol dictates that if there is doubt regarding an object that is normally dedicated to civilian activities, such as “a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”¹⁷³ This aspirational presumption not only differs from customary international law, but it actually encourages combatants to intentionally camouflage military objectives to look like civilian objects.¹⁷⁴ Though the ICRC intended this provision to protect civilians, the language results in a civilian population at greater risk when attackers look for disguised civilian objects.¹⁷⁵ Further, shifting the burden entirely on the attacker to identify civilian objects represents a historical departure from the rules of war as implemented during World War II, where both the attacker and defender shared this obligation.¹⁷⁶

171. There is no proportionality balancing test required when identifying an object: either it is of military use, or it will not provide any military advantage and thus, it must not be targeted. Hampson, *supra* note 168, at 49. In the midst of the stresses of battle, different commanders are likely to reach different conclusions about these matters. See Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 149 (1999).

172. Hampson, *supra* note 168, at 49.

173. Protocol I, *supra* note 13, art. 52. Further, if there is doubt as to a person’s status, he will be considered a civilian. Canestaro, *supra* note 74, at 459. This presumption of noncombatant status is not surprising considering that the protection of civilians is among the oldest tenants of war, and that civilian safety was the chief concern of the ICRC. *Id.* at 449.

174. Parks, *supra* note 74, at 136.

175. *Id.*

176. This puts an unprecedented duty on the attacker to protect civilian property which is controlled by the defender. *Id.* at 137. Such an obligation seems impractical in the realities of war and illogical given that civilian lives are not afforded such deference. This is shown in the following hypothetical example: A plane is seriously damaged en route to a target and in order to stay operational, must jettison its bombs. *Id.* at 148. The pilot may either drop the bombs immediately on a playground full of children, or drop the artillery on a farmer’s barn. Given the choice, there is no question civilian lives would be spared over the protection over any form of civilian property. Protecting the life of even one child in the playground would take precedence over the property as it has throughout the history of war. Thus, the choice to afford civilian property greater or even equal protection with civilian lives drastically departs from the customary rules of war. *Id.*

Many problems arise when military objectives fall within the category of dual use targets. Dual use targets are those which are used both for civilian and military purposes.¹⁷⁷ These include airports, electricity generators, roads, and bridges. In the case of a road, civilians might simultaneously use a specific road to distribute goods while the military also uses the road to move weapons and machinery. Protocol I does not expressly use the term *dual use* or specifically refer to simultaneously used objects. However, it seems that even with a narrow interpretation of Article 52(2), almost every dual use target can be read as a legitimate military objective.¹⁷⁸ An object that is used by the military would seem, by virtue of its “nature, location, purpose or use[, to] make an effective contribution to military action.”¹⁷⁹ Fortunately, these factors alone are not determinative in calculating which objects can be attacked. Whether or not a commander can attack a target depends on the second part of this test.¹⁸⁰ A broad interpretation might support attacking targets such as bridges and roads not only to limit an enemy’s ability to function, but also to affect the morale of the civilian population.¹⁸¹ A narrow interpretation would limit strikes to only those targets which have a real-time tactical advantage.¹⁸²

B. Interpreting Definite Military Advantage

The second step in determining whether a target is legitimate requires commanders to refrain from strikes that cause civilian casualties in excess of the definite military advantage anticipated. Little guidance has been given, however, on how commanders should interpret a “definite military advantage.”¹⁸³ The interpretation of this phrase is of the utmost

177. Canestaro, *supra* note 74, at 455–56.

178. The U.S. Operational Law Handbooks include objectives which, by their use, could be used for military advantage. *Id.* Thus, dual use civilian objects could lawfully be targeted. *Id.* at 456.

179. Protocol I, *supra* note 13, art. 52.

180. That is, the definite military advantage anticipated from striking the object. Hampson, *supra* note 168, at 49.

181. See Meyer, *supra* note 56, at 165–66.

182. *Id.* at 166.

183. Protocol I, *supra* note 13, arts. 51, 57. In fact, further complicating this subjective element, some lawful targets may wax and wane in importance over the duration of the conflict. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 228–29 (1998) (noting how the military necessity for attacking irrigation dams during the Korean

importance, as it will ultimately determine whether an attack passes the proportionality test.¹⁸⁴ The two approaches commonly used are the cumulative approach and the case-by-case basis.¹⁸⁵

1. Cumulative Approach

If “definite military advantage” is interpreted broadly, or on a cumulative basis, strikes are not limited to those only providing an immediate tactical advantage but can include attacks which are expected to bring a general strategic advantage.¹⁸⁶ More generally, in deciding whether to strike a particular object under the cumulative approach, one would weigh the overall anticipated civilian losses from a strike against the anticipated overall gains to the military operation as a whole.¹⁸⁷ Many governments have been quick to clarify that they interpret “definite military advantage” to be measured cumulatively under Article 52.¹⁸⁸

The British first articulated the broad cumulative interpretation of “definite military advantage” when signing the Protocol.¹⁸⁹ This declaration stated that “in relation to paragraph 5(b) of Article 51 and paragraph (2)(a)(iii) of Article 57, . . . the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.”¹⁹⁰ Canada similarly declared that “references in

War became more important towards the end of conflict and how targets in Vietnam were bombed following failed peace negotiations in 1972).

184. Brown, *supra* note 103, at 141.

185. *Id.*

186. *Id.*

187. Commander Fenrick uses the February 1945 Allied attack on Dresden to illustrate the importance of strategic goals over simple calculated strikes. William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 127 (1982). On a tactical level, the attack offered negligible military advantage and cost 25,000 civilian lives. Parks, *supra* note 74, at 176–77. However, on the strategic level, the attack was enormously advantageous to disrupt German communication in the face of Soviet advances. *Id.* at 177. The Soviet winter offensive pushed the Russians close to Frankfurt, but left them vulnerable to flank attacks from the German Army that still occupied outer areas of the country. Rebecca Grant, *The Dresden Legend*, A.F. MAG., Oct. 2004, at 64, available at <http://www.afa.org/magazine/oct2004/1004dresden.pdf>. Dresden had both rail and road lines of communication which, if attacked, would choke off transport and reinforcements from a possible German counterattack. Parks, *supra* note 74, at 176–77. The attack on Dresden produced a high amount of collateral damage, but also hastened the end of the war, thereby saving hundreds of thousands of lives. *Id.* at 177. The strategic advantage of bringing about the end of the war is arguably of greater significance than any tactical assessment. *Id.*

188. Fenrick, *supra* note 187, at 107.

189. William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT’L L. 539, 543 (1997).

190. *Id.* at 548.

Articles 46 [now 51] and 50 [now 57] to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of that attack.”¹⁹¹

The United States has not ratified the Protocol and thus has not made any formal declarations.¹⁹² However, U.S. commanders have justified attacks using the cumulative approach.¹⁹³ Under the cumulative approach, the use of atomic bombs in Hiroshima and Nagasaki in 1945 would be considered legitimate. The civilian casualties from the bombing did not exceed the definite military advantage gained because the strike led to a prompt Japanese surrender and prevented a full-scale invasion.¹⁹⁴ While the bombing did cause heavy civilian casualties and high collateral damage to objects without a tactical advantage, the strike was greatly advantageous from a strategic standpoint.¹⁹⁵ The bombing is thus justified not by measuring the anticipated gain in relation to specific tactical advances from destruction of individual targets, but by measuring the advantage relative to the overall operation.¹⁹⁶ A strike that ended the war and saved enormous casualties from a ground invasion would likely pass the cumulative interpretation of definite military advantage.

Although most national governments have made it clear that “definite military advantage” should be interpreted broadly, there can be practical problems with using the cumulative approach.¹⁹⁷ Calculations that are too broad and too abstract may be difficult to estimate in day-to-day real-time operations.¹⁹⁸ A commander cannot accurately predict the entire strategic and psychological advantages of a particular strike in the

191. Fenrick, *supra* note 187, at 107.

192. Canestaro, *supra* note 74, at 456. For additional discussion see generally Gasser, *supra* note 94 (urging the United States to ratify Protocol I).

193. The United States regards Article 52 as binding international customary law; however, it has generally rejected interpretations of the Protocol which limit strikes only to military gains that can be directly quantified. Canestaro, *supra* note 74, at 456.

194. The United States estimated that sending in Allied troops for a full-scale ground invasion would cause Allied casualties exceeding 500,000. Burrus M. Carnahan, *The Law of Air Bombardment in Its Historical Context*, 17 A.F. L. REV. 39, 56–57 (1975).

195. *Id.*

196. Meyer, *supra* note 56, at 170–71.

197. Fenrick, *supra* note 187, at 107.

198. *Id.*

context of the entire military campaign without the benefit of hindsight.¹⁹⁹ Further, it seems unlikely that military commanders could make such sweeping assessments before each combat strike.²⁰⁰ Applications that are too broad and attack calculations that can only be applied in hindsight are tools that cease to be useful in combat situations.²⁰¹ While the cumulative approach becomes less helpful if applied too broadly, the case-by-case approach seems even less appropriate in determining whether there is military necessity for a given strike.

2. Case-by-Case Approach

The case-by-case approach requires that the anticipated gain of each strike be measured by the specific military benefit gained in each attack.²⁰² Under this approach, aerial campaigns are limited to individual targets that provide an immediate tactical advantage.²⁰³ Every road or bridge that is targeted must be one that is used or is very useful to the military combatants.²⁰⁴ Strategic or psychological advantages are not considered in making this calculation.²⁰⁵ Further, the ICRC Official Commentary notes that attacks must offer a real time advantage, but strikes that offer only a possible future advantage should not be considered.²⁰⁶

199. *Id.* For example, it would be difficult to calculate the anticipated advantage from all Allied bombing raids in Germany in comparison to all estimated civilian casualties because the approach is too expansive. *Id.*

200. The United States has adopted what is known as the Rendulic Rule, which evaluates a commander's decision based on the reasonableness given the information available at the time. Canestaro, *supra* note 74, at 457. A commander must analyze the personnel and combat conditions and the information available to determine whether the target is a military objective and whether collateral damage would be appropriate in the situation. *Id.*

201. Fenrick, *supra* note 187, at 107.

202. Brown, *supra* note 103, at 141.

203. *Id.* The Protocol clarifies that the rules relating to the general protection of the civilian population "apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land." Protocol I, *supra* note 13, art. 49(3). The rules "further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air." *Id.*

204. Brown, *supra* note 103, at 141.

205. By striking terrorist targets in Libya in 1986, President Ronald Reagan sent the psychological message that the United States would no longer ignore state-sponsored terrorism. Parks, *supra* note 74, at 143. While the strikes had military effect, these actions were primarily psychological, and did not necessarily result in a direct tactical advantage. *Id.*

206. The ICRC Official Commentary states that "it is not legitimate to launch an attack which only offers potential or indeterminate advantages . . ." Parks, *supra* note 74, at 141 (quoting COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 107, at 636). The Commentary also notes that *definite* "is a word of limitation denoting in this

Under this approach, the 1944 Allied aerial attacks on bridges and railroads in Pas de Calais would have been prohibited because they did not provide an immediate tactical advantage.²⁰⁷ In targeting Pas de Calais, the Allies sought to deceive the German troops by creating diversionary bombings.²⁰⁸ Deceiving the Germans into thinking that the Allied invasion would occur in Calais instead of Normandy provided great strategic advantages.²⁰⁹ However, because there was no immediate tactical advantage to targeting that infrastructure other than to divert the German military efforts from Normandy, this operation would likely be regarded as an illegitimate and disproportionate target selection under the case-by-case approach.²¹⁰

In limiting targets to only those that provide a case-by-case tactical military advantage, relief agencies disregard the reality that a nation's war effort is founded on goals that go beyond calculated military components.²¹¹ If one limits targets to only those in which the gains are tactically advantageous, then much of the purpose of warfare is being ignored.²¹² The purpose of armed conflict is not limited to merely

context a concrete and perceptible military advantage rather than a hypothetical and speculative one." *Id.* at 637.

207. W. Hays Parks, *Conventional Aerial Bombing and the Law of War*, U.S. NAVAL INST. PROC., May 1982, at 98, 114. The deception operation Fortitude was carried out by representatives of various Allied intelligence agencies. Ramon J. Farolan, *Reveille: "Bloody Omaha,"* PHIL. DAILY INQUIRER, July 9, 2006, at 11. These agents, known as the Double Cross Committee, fed the Germans with misinformation, making them believe that the real invasion would be carried out in the Pas de Calais, a logical area for attack since it was situated just across the English Channel. *Id.* Under Operation Fortitude, a Spanish double agent was able to gain the confidence of the Germans by giving them military information that was accurate but of little military importance. Just before the Normandy invasion, the double agent sent word of the imminent attack at Normandy but also warned of a larger strike at Pas de Calais. As a result, the German High Command held their forces in Calais instead of countering the Normandy landings. A senior German officer described the error as the decision that lost the war for Germany. *Id.*

208. Parks, *supra* note 74, at 176.

209. *Id.* Normandy was the site of the largest seaborne invasion in history. See Stephen E. Ambrose, *The Battlescape of Normandy*, N.Y. TIMES, Apr. 17, 1994, §5, at 15. On June 6, 1944, the D-Day invasion began with overnight parachute and glider landings, air and naval bombardment, and morning amphibious landings. The invasion was costly in terms of casualties but the attack dealt the Germans one of the largest defeats of the war. Strategically, the successful invasion secured a major front and forced the German troops out of most of France. *Id.*

210. Parks, *supra* note 207, at 98, 114.

211. Reynolds, *supra* note 45, at 83–86.

212. *Id.* at 86.

defeating the enemy combatants; rather, nations seek to attain advantages that are not considered purely military in nature.²¹³ “We don’t go to war merely to have a nice fight; rather, we go to war to attain something of political value to our organization.”²¹⁴ War is often the means to a political end. As Carl von Clausewitz, a Prussian commander and one of Western civilization’s most famous military theorists, commented, “War is thus an act of force to compel our enemy to do our will.”²¹⁵ Military operations that generate moral, diplomatic, or political gains have long been considered legitimate under the customary rules of war, despite lacking capture of territory.²¹⁶

Nongovernmental relief agencies have long questioned the legitimacy of the NATO strikes in Operation Allied Force in Kosovo because they did not all provide an immediate tactical advantage.²¹⁷ Amnesty International adopted a limited interpretation of “military objective” and “military advantage” in criticizing a NATO strike on the Serb Radio and Television headquarters in Belgrade. Amnesty called the strike “an attack on a civilian facility . . . constitut[ing] a war crime.”²¹⁸

213. Military historian Sir Michael Howard has stated, “Wars are not simply acts of violence. They are acts of persuasion or of dissuasion; and although the threat of destruction is normally a necessary part of the persuading process, such destruction is only exceptionally regarded as an end in itself.” Parks, *supra* note 74, at 141 (quoting Michael Howard, *Strategy and Policy in Twentieth-Century Warfare*, in THE HARMON MEMORIAL LECTURES IN MILITARY HISTORY, 1959–1987, at 354 (1988)).

214. Meyer, *supra* note 56, at 167 (quoting John A. Warden III, *The Enemy as a System*, AIRPOWER J., Spring 1995, at 40, 43).

215. Linn, *supra* note 41, at 636 (quoting CARL VON CLAUSEWITZ, ON WAR 83 (Michael Howard & Peter Paret eds. & trans., Everyman’s Library 1993) (1976)). Von Clausewitz also noted that “[t]he destruction of the military forces of the enemy is not now and never has been the objective of war: it has been merely a means to an end—merely the removal of an obstacle which lay in the path of overcoming the will to resist.” HAYWOOD S. HANSELL, JR., THE AIR PLAN THAT DEFEATED HITLER 33 (Arno Press Inc. 1980) (1972).

216. Parks, *supra* note 74, at 141. For example, the 1972 bombing missions of Linebacker II against targets in Hanoi commenced after the North Vietnamese delegation walked away from negotiations to end the war. *Id.* at 142–43. The targeting was not tactically advantageous, but was designed to pressure the North Vietnamese back to negotiations. *Id.* at 143. Eleven days after the raids, the North Vietnamese Government returned to the negotiating table and reached an agreement to end the war within three weeks. *Id.*

217. Human Rights Watch (HRW) raised doubt on the legitimacy of several strikes of bridges conducted by NATO, proposing that targeted bridges “that are not central to transportation arteries or have a purely psychological importance” do not fall within Protocol I. Meyer, *supra* note 56, at 165.

218. *Id.* at 166. At a press conference after the bombing, NATO explained:

[We needed to] directly strike at the very central nerve system of [Milošević]’s regime. These of course are those assets which are used to plan and direct and to create the political environment of tolerance in Yugoslavia in which these brutalities can not only be accepted but even condoned. . . . Strikes against TV transmitters and broadcast facilities are part of our

Amnesty's aspirational promotions of civilian safety may be within a strict reading of Article 52 of the Protocol, but they may also demonstrate a departure from the customary definitions of military targets and what constitutes a contribution to military action.²¹⁹ The state-controlled Serb Radio and Television headquarters was considered a high-impact strategic military target because it was being used by Serbia's leader, Slobodan Milošević, to disseminate propaganda for his ethnic cleansing campaign.²²⁰ The goal of NATO forces was to attain strategic and psychological goals, particularly to influence the Serb population and make Milošević more amenable to the coalition.²²¹ Cumulatively, these strikes were instrumental in ending the war. Following the repeated attacks, "[t]he Serbian population forced [Milošević] to call the war off when the life of the Serbian population was made very uncomfortable."²²² Thus, strategic and psychological targets that have a high political value can prove to be very useful in military operations, but if one uses the case-by-case approach and limits strikes to tactical advantages alone, effective and customary warfare tactics will be unnecessarily and incorrectly prohibited.²²³

3. Analysis

While Israel and Lebanon both incurred civilian losses and infrastructure damage from rocket, missile, and artillery attacks, this analysis will mainly focus on the legitimacy of Israel's target selection. Hezbollah's actions of targeting civilians and using human shields raise fewer questions of interpretation as they are clear violations of international laws.

Israel conducted operations to cut off roads, bridges, airports, and

campaign to dismantle the FRY propaganda machinery which is a vital part of President [Milošević]'s control mechanism.

International Criminal Tribunal for the Former Yugoslavia (ICTY), *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 39 I.L.M. 1257, 1277 (June 13, 2000) [hereinafter *ICTY Report*], available at <http://www.un.org/icty/pressreal/nato061300.htm>.

219. Meyer, *supra* note 56, at 165–67.

220. Meyer, *supra* note 56, at 165–66. The attacks on the Serbian radio and television headquarters killed 16 people. AMNESTY INT'L, *supra* note 6.

221. Meyer, *supra* note 56, at 174–75.

222. James A. Kitfield, *Another Look at the Air War That Was*, A.F. MAG., Oct. 1999, at 39, 42.

223. Canestaro, *supra* note 74, at 474.

seaports to prevent Hezbollah from receiving aid that would arrive from Syria or Iran, Hezbollah's main suppliers of weapons, money, and military training.²²⁴ By bombing Lebanese highways and bridges, Israel also made it harder for Hezbollah to move its mobile rocket launchers and to fire on Israeli cities.²²⁵ Whether these strikes on dual use targets are interpreted as legitimate military objectives depends on how broadly or narrowly the terms are defined.

The Israeli Minister of Foreign Affairs explained that roads and bridges were targeted because "the roads in Lebanon are used to transport terrorists and weapons to the terror organizations operating from Lebanese territory against civilians in Israel."²²⁶ The Lebanese government has estimated that 100 roads equaling roughly 200,000 square meters of road were destroyed.²²⁷ Amnesty International claimed that Israel closed the final road linking the country to Syria and denied a convoy carrying 150 tons of aid into the region on August 4, 2006.²²⁸ Israel also destroyed bridges along Lebanon's coastal roads to prevent Syria from rearming Hezbollah.²²⁹ Lebanese estimates are that between 80 and 120 bridges were bombed.²³⁰

Even using the narrowest possible interpretation of "military objective," the destruction of roads and bridges would be justified.²³¹ Given that the roads and bridges were being used to supply arms and launch rockets into Israel, the destruction of this property would produce an "effective contribution to military action."²³² The roads and bridges are legitimate targets, and their destruction meets the definition of "military objective" under this first part of the paragraph. The second paragraph limits those attacks to only strikes which offer a real-time

224. AMNESTY INT'L, *supra* note 6, at 11–13. Because of the nature of the terrorist group, Israel had to primarily rely on destroying dual use infrastructure to hamper Hezbollah. *Id.* at 11.

225. *Id.* at 11.

226. *Id.*

227. *Id.*

228. However, Israel took many necessary precautions. *Id.* at 12. Israel distributed leaflets to civilians on August 7, 2006, stating that "any vehicle of any kind travelling south of the Litani River will be bombarded, on suspicion of transporting rockets, military equipment and terrorists." *Id.* at 18. The Israeli military warned that all moving objects would be attacked except for UNIFIL and Red Cross vehicles. *Id.* at 12.

229. *Id.* at 12.

230. Amnesty International claims that Israel bombed the original and subsequent temporary bridge built between Tyre, Sidon, and Beirut which cut off Lebanon's fourth largest city from aid. *Id.* The group has also charged Israel with denying passage to a Médecins sans Frontières (MSF) convoy which used a tree trunk as a bridge and a human chain to pass along humanitarian supplies. *Id.*

231. Brown, *supra* note 103, at 141.

232. AMNESTY INT'L, *supra* note 6, at 4; *see also* Protocol I, *supra* note 13, art. 52.

“definite military advantage.”²³³ It could be argued that if no combat was likely to occur in the area to which the bridge led or the road was not in a location which suppliers could use to rearm Hezbollah, then these roads and bridges were improperly destroyed. Destruction that may only be hypothetically advantageous does not qualify as a military objective under Protocol I, because the destruction might not afford an actual military advantage.²³⁴ In reality however, it appears Israel bombed sources of transportation that were directly connected to overcoming the enemy forces, and their destruction thus offered an immediate and definite military advantage. Israel’s targeting of roads and bridges was therefore legitimate under Article 52 of the Protocol.²³⁵

Amnesty International also argued that airports and seaports are illegitimate military objectives under the narrow interpretation.²³⁶ Israel has been heavily criticized for initiating an air and sea blockade of Lebanon for eight weeks in its attempt to cut off Hezbollah from military support from its suppliers in Iran and Syria.²³⁷ Lebanon’s main airport²³⁸ and other smaller airports were attacked in bombing raids, sometimes multiple times.²³⁹ The Beirut airport was an early target; aerial attacks destroyed fuel tanks and major runways, and while the main facilities and control tower were spared, the airport was inoperable.²⁴⁰ Israel explained that it had targeted airports and the fuel tanks because they were the “central hub for the transfer of weapons and supplies” to the terrorists.²⁴¹ Additionally, Israel struck three main seaports in

233. See Protocol I, *supra* note 13, art. 52.

234. Otherwise, Israel would have been within its right to destroy all bridges and roads in Lebanon because it might have eventually provided a military advantage. AMNESTY INT’L, *supra* note 6, at 5.

235. Even if a target is considered a legitimate military objective within the definition of Article 52, the Protocol provides an exception that prohibits the destruction of objects that are indispensable to civilians. Protocol I, *supra* note 13, art. 54. However, the Protocol only limits attackers from destroying food and water sources; bridges and roads are not considered under the Protocol as indispensable to civilian survival. *Id.*

236. AMNESTY INT’L, *supra* note 6, at 5.

237. *Id.* at 18–19. Lebanon’s economy is based on its role in the Middle East as a shipping hub and tourist destination for its oil-rich neighbors. Scott Wilson & Edward Cody, *Israel to End Blockade of Lebanon*, WASH. POST, Sept. 7, 2006, at A21. The blockade, therefore, both inhibited terrorist movements and dampened the civilian economy.

238. Lebanon’s main airport is Beirut International Airport.

239. Lebanon has estimated the damage to the airports at \$55 million. AMNESTY INT’L, *supra* note 6, at 13.

240. *Id.* at 13.

241. *Id.* Amnesty International has accused Israel of having an ulterior motive in

Beirut, Tripoli, and Sidon and instituted a blockade at sea to prevent the shipment of arms.²⁴²

Like the legitimate targeting of roads and bridges, the targeting of airports and seaports was appropriate under the customary rules of war because the objectives were military in nature and were directly connected to defeating enemy combatants.²⁴³ The airports and seaports are major sources of transportation that are vital to enemy forces. The targets would be considered legitimate “military objectives” under Article 52(2) because their destruction hampers the rearmament of the enemy and thus provides a definite military advantage. Though Amnesty International has criticized such classifications of dual use targets as “[o]verbroad . . . to justify attacks aimed at harming the economy of a state or demoralizing the civilian population” and “undermin[ing] civilian immunity,”²⁴⁴ such criticism ignores the customary laws of war. The Israeli targeting of roads, bridges, airports, and seaports falls within customary rules of war and the overwhelming majority of interpretations nations take when applying the Protocol.

VI. DOCTRINES OF HUMANITY AND DISTINCTION

The final main principles of war are the doctrines of humanity and distinction, which require nations to distinguish between combatants and civilians, and direct operations only against combatants.²⁴⁵ Distinction requires commanders to use weapons that are capable of discriminating between combatants and noncombatants.²⁴⁶ The doctrine of humanity states that commanders have a duty to protect both combatants and civilians from unnecessary suffering.²⁴⁷ While humanity and distinction

bombing the airports, mainly that it was aiming to force the Lebanese government to pay for harboring Hezbollah. As proof of the ulterior motive to harm the Lebanese government, Amnesty cites the IDF statement issued on July 14, 2006, which stated: “The Lebanese government is blatantly violating the resolution of the U.N. Security Council which calls, among other things, for the removal of the Hizbullah terrorist organization from the Lebanese border, and is therefore fully responsible for the current situation.” *Id.*

242. Israel struck the port of Beirut, which included fuel tanks that exploded and resulted in the deaths of two workers. *Id.* The port of Tripoli was attacked, and the Israeli air force also launched strikes on Beirut’s modern lighthouse and a maritime antenna in Tripoli. *Id.*

243. Canestaro, *supra* note 74, at 456.

244. AMNESTY INT’L, *supra* note 6, at 5.

245. Canestaro, *supra* note 74, at 457. The doctrine of distinction is closely tied to the principles of proportionality and military necessity. The doctrine of distinction prohibits calculated damage of civilian objects that are not directly connected to military advantage. *Id.* at 457 n.174.

246. *Id.* at 458.

247. The St. Petersburg Declaration of 1868 defined humanity as prohibiting

are separate doctrines, their substantial overlap allows them to be analyzed together. This Part will analyze whether Israel complied with the doctrines of humanity and distinction in its method of attack.

A. Method of Attack

Nations must discriminate between combatants who may be attacked and noncombatants who cannot be intentionally attacked.²⁴⁸ The practicalities of warfare provide that locations that are populated with civilians are often still considered legitimate military objectives.²⁴⁹ As Article 51 of the Fourth Geneva Convention states, “The presence . . . of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations”²⁵⁰ Simply, civilians do not enjoy absolute immunity. The nature of war makes it nearly impossible to strike military targets without injuring noncombatants. Because collateral damage that is disproportionate to the military advantage gained is prohibited, nations must rely on the principles of distinction and discrimination to limit civilian casualties.²⁵¹ Commanders must use care in choosing the method of destruction and pay particular attention to the controllability of weapons in conducting aerial strikes.²⁵²

Indiscriminate attacks include those not aimed at a specific military target, those using weapons that cannot be aimed solely at the military target, and those using weapons the effects of which cannot be confined to the military target. Indiscriminate attacks are prohibited by Paragraph 4 of Article 51 of the Protocol,²⁵³ thus, commanders may not target a legitimate military object when the means of the attack will affect both

methods of combat that “uselessly aggravate the sufferings of disabled men, or render their death inevitable.” St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 1 AM. J. INT’L. L. SUPP. 95 (1907). Article 23 of the Fourth Hague Convention prohibits “employ[ing] arms, projectiles, or material calculated to cause unnecessary suffering.” Convention Respecting the Laws and Customs of War on Land. *supra* note 87, art. 23(e).

248. Canestaro. *supra* note 74, at 457–58. Thus, nations must distinguish legitimate military targets from nonmilitary targets. *Id.*

249. See Reynolds. *supra* note 45, at 81–82.

250. Protocol I, *supra* note 13, art. 51.

251. *Id.*

252. Thus, the *jus in bello* requires that planners of an attack choose a method of attack which minimizes destruction to civilians by paying particular attention to the controllability of their weapons, particularly in aerial strikes. Brown, *supra* note 103, at 142–43.

253. Protocol I, *supra* note 13, art. 51.

combatants and civilians without distinction.²⁵⁴ In addition, Article 57 imposes a duty on attackers to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”²⁵⁵ The means and method of a combat strike are as important as the possibility of collateral damage from the execution of the attack.²⁵⁶ A weapon’s controllability is dictated by its ability to confine damage to a particular military object and avoid civilian damage.²⁵⁷ The immediate physical damage to the military objects as well as the long-term environmental impact must be examined when analyzing this factor.²⁵⁸ It is important to consider that no weapon is capable of total accuracy; factors including target intelligence, planning time, weather changes, crew experience, pilot error, and weapons malfunction rates must be considered when determining a weapon’s accuracy.²⁵⁹

Additionally, commanders must use weapons and perform strikes that are not likely to cause unnecessary suffering.²⁶⁰ There is debate, however, as to whether nations must use weapons with the greatest accuracy rate or the least risk of causing collateral damage.²⁶¹ Some scholars believe the doctrine of humanity requires that only precision-guided missiles be used when given a choice.²⁶² As only a few nations, namely Israel,²⁶³ Britain, Russia, and the United States, have such

254. If an armed attack can be undertaken within these limitations, it is legitimate; otherwise the strike is prohibited. Canestaro, *supra* note 74, at 458. The availability of precision-guided munitions does not by any means restrict alternative methods of attack. Yoram Dinstein, *Collateral Damage and the Principle of Proportionality*, in *NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN TWENTY-FIRST CENTURY CONFLICTS* 221 (David Wippman & Matthew Evangelista eds., 2005). It must also be considered that, should forces actually employ precision-guided munitions, they will be susceptible to stricter scrutiny when additional options in targeting inevitably arise. *Id.* at 221–22.

255. Protocol I, *supra* note 13, art. 57.

256. Discrimination is linked to the intentions of the attacker, and the “distinction is not determined by the amount of the devastation or the number of deaths, but by the direction of the action itself, i.e., by what is deliberately intended and directly done.” Parks, *supra* note 74, at 5.

257. Brown, *supra* note 103, at 142.

258. *Id.* at 143. For example, military planners must assess the later environmental damage caused by crop destruction or defoliation before pursuing a military strike. *Id.*

259. Hampson, *supra* note 168, at 48.

260. Herthel, *supra* note 75, at 249. Typically, this concerns the ability to aim and control the weapon in question. *Id.* For example, a long-range missile with little guidance abilities may be objectionable if used in a populated city because it is too indiscriminate. Schmitt, *supra* note 171, at 147. Biological weapons that spread contagious diseases would more clearly fall under this category, because these weapons cannot limit the effect to only combatants and they are quite difficult to control. *Id.*

261. Canestaro, *supra* note 74, at 465.

262. *Id.*

263. Moshe Yaalon, *The Rules of War*, WASH. POST, Aug. 3, 2006, at A27.

capabilities, it seems illogical that they should be held to a higher standard of law.²⁶⁴

1. Cluster Bombs

Whether cluster bombs are a controllable means of attack has been a frequent question for international law.²⁶⁵ There are currently no express prohibitions against cluster bombs; in fact, cluster bombs have been used in at least fourteen armed conflicts to date.²⁶⁶ Cluster munitions are designed as “area” weapons for destroying light armor and personnel over a given area.²⁶⁷ The munitions are grouped into several clusters of smaller bomblets that are designed to explode at or near impact.²⁶⁸ When a number of cluster bombs are deployed at once, they are capable of covering an area equivalent to nineteen football fields.²⁶⁹ Humanitarian groups have widely condemned the use of these munitions on two bases, namely, that cluster bombs are indiscriminate because they (1) cannot be selectively and accurately deployed; and (2) the bomblets which do not detonate create minefields that cannot distinguish between combatants and noncombatants.²⁷⁰

The first criticism of humanitarian groups is that cluster bombs are indiscriminate by nature because the weapons cover a large area and the dispersion of bomblets is unsystematic.²⁷¹ The Commentaries for the Protocol have outlined specific examples of indiscriminate means, or

264. *Id.*

265. See generally Michael Krepon, *Weapons Potentially Inhumane: The Case of Cluster Bombs*, 52 FOREIGN AFF. 595, 595–605 (1974) (noting the devastating effects of cluster bombs in the Vietnam War).

266. Herthel, *supra* note 75, at 238. A spokesman for the Israel Defense Forces correctly stated, “All the weapons and munitions used by the IDF are legal under international law and their use conforms with international standards.” Anthony Shadid, *In Lebanon, a War’s Lethal Harvest*, WASH. POST, Sept. 26, 2006, at A1. However, the Reagan administration ceased providing these weapons to Israel after a congressional investigation found that Israel had used the cluster bombs inappropriately in the 1982 campaign in Lebanon. *Id.*

267. Thomas Michael McDonnell, *Cluster Bombs Over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 96 (2002).

268. Herthel, *supra* note 75, at 234–35.

269. McDonnell, *supra* note 267, at 96.

270. Herthel, *supra* note 75, at 249. A Committee of the ICTY explained that the use of cluster bombs was not prohibited by any specific treaty provision and that the tribunal must only examine whether the cluster bombs were employed in accordance with general principles regulating weapons. *ICTY Report*, *supra* note 218, at 1264.

271. Herthel, *supra* note 75, at 262–63.

“methods which by their very nature have an indiscriminate character, such as poisoning wells.”²⁷² In fact, even landmines, which are intentionally programmed to remain dormant until blindly activated, are not currently considered indiscriminate by nature.²⁷³ Further, the mere fact that a weapon can be used to cover a large battlefield area is not alone a determinative factor in considering if the weapon is indiscriminate.²⁷⁴ Assuming planners considered alternatives, such as limiting the area of detonation by dropping the munitions at various altitudes and with various spin rates, this method of attack should withstand the first criticism of being indiscriminate by nature.²⁷⁵

Second, cluster bombs have been criticized because they do not always ignite as designed and thus produce minefields which are unable to distinguish between civilians and combatants.²⁷⁶ Ordnance that fails to explode and weapons malfunctions are a reality in modern warfare. It is estimated that five to seven percent of cluster bombs are duds.²⁷⁷ However, this unexploded ordnance is not designed to function like a mine; that is, it is not constructed to explode from movement in its proximity, such as when someone walks by.²⁷⁸ Instead, the dud munitions are akin to any other unexploded bomb, they just differ in size.²⁷⁹ If landmines, which are specifically designed to lie in wait before detonating, are not considered indiscriminate, then cluster bombs should not be considered so simply because they have the potential to malfunction.

2. *Human Shields*

The choice of which weapon or technique to use may be most important when enemy combatants choose to use civilians as human shields. Article 51(7) of Protocol expressly forbids the use of civilians as human shields, but it does not absolve an attacking commander of

272. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 107, at 623.

273. Herthel, *supra* note 75, at 265.

274. *Id.* at 264.

275. *Id.* at 268. The important distinction between cluster bombs and indiscriminate weapons is the ability to aim and successfully discriminate between civilian and military objectives. McDonnell, *supra* note 267, at 79. Indiscriminate weapons that are truly “blind” include the free-flying balloons that carried incendiary bombs that the Japanese used in World War II. *Id.*

276. Herthel, *supra* note 75, at 249.

277. *Id.* at 266.

278. Major General Chuck Wald, Department of Defense News Briefing (May 13, 1999), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=541>.

279. *Id.* As with other unexploded ordnance, it is not clear what will cause dud cluster munitions to detonate; any vibration could cause it to explode. McDonnell, *supra* note 267, at 42.

liability if a defender uses humans as shields.²⁸⁰ If intelligence reveals that combatants are attempting to shield legitimate targets with human shields, commanders are still responsible for exercising care.²⁸¹ The attacking commander must still take the enumerated precautionary measures outlined in the Protocol to avoid unnecessary civilian casualties.²⁸² Article 57 states that the military commander must still “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”²⁸³ Additionally, Article 57 requires attackers to verify the objectives to be attacked, take all feasible precautions to minimize civilian damage, and refrain from indiscriminate attacks and from a strike entirely if it would result in excessive collateral damage.²⁸⁴ These provisions calling for the attacker but not the defender to assume additional safety measures to limit civilian casualties have been heavily criticized.²⁸⁵

International customary law requires the attacker and defender to share the responsibility of protecting civilians.²⁸⁶ Attackers are under the customary duty to protect civilians from harm by exercising ordinary

280. Protocol I, *supra* note 13.

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to shield military objectives from attacks or to shield military operations.

Id. art. 51; see also Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT’L L. REV. 445, 455 (2002).

281. Hampson, *supra* note 168, at 48.

282. Herthel, *supra* note 75, at 261–62.

283. Protocol I, *supra* note 13, art. 57.

284. *Id.*

285. Canestaro, *supra* note 74, at 459–60. The United States and Israel have taken the position that both the attacker launching attacks on military targets and the opponent subject to the attack have an equal responsibility to protect civilians from indiscriminate attacks. The legal standard applied in Protocol I which confers main responsibility upon the attacker as understood in *jus in bello*, whether in attack, defense, or even in violation of the *jus ad bellum* prohibitions on the use of force, does not reflect customary international law. See 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?*, *supra* note 254, at 181, 207.

286. Parks, *supra* note 74, at 201–02.

care in undertaking strikes.²⁸⁷ Defenders are under the customary duty to separate military objectives and control the civilian population to minimize injury.²⁸⁸ The defender has complete access to the civilian population, thus when defenders place military targets within the civilian population they are consciously putting a civilian population at risk.²⁸⁹ It is illogical to conclude that the defender's deliberate efforts that cause a military strike to be less discriminate should increase the duty of care on the attacker.²⁹⁰ As Parks has argued, these provisions "clearly were intended to raise the standard of care for the attacker while lowering it for the defender, thereby shifting the burden for minimization of collateral civilian casualties to the party to the conflict with the least control over the civilian population."²⁹¹ Thus, when civilian losses result from a defender's attempts to use civilians to shield military objectives, ultimate responsibility should lie with those putting civilians at risk.²⁹² As Israel's Ambassador to the United Nations, Dan Gillerman, told an emergency session of the Security Council: "These women and children killed . . . may have been killed by Israeli fire, but they are the victims of Hezbollah, they are the victims of terrorism."²⁹³ This is not to say that the attacker should be absolved from responsibility to avoid or at least minimize injury to civilians, but Israel should not be required to assume additional duties as a result of "an intervening cause for which the attacker is not responsible."²⁹⁴ When analyzing Israel's actions in light of Hezbollah's use of human shields, it is important to assess the strikes both under international customary law and the Protocol's aspirational provisions which increased the burden of care on the attacker.

287. Canestaro, *supra* note 74, at 460.

288. *Id.*

289. *Id.*

290. Parks, *supra* note 74, at 52.

291. *Id.* at 201–02. There is an inherent uncertainty in war, and even the best attempts to use aerial strikes to hit precise targets can be easily thwarted. *Id.* at 201. Attackers have mistakenly hit their own targets and even properly marked civilian targets in "friendly fire" incidents. Likewise, defenders have thwarted strikes on their own military targets by entangling civilians with military objectives. Given the confusion of war, the customary rules of war place the burden on both attacker and defender to distinguish populations and minimize collateral damage. *Id.* at 201–02.

292. *Id.* at 201–02.

293. Israel has laid the blame on Hezbollah because it has continually fired rockets from Lebanese towns and repeatedly used civilians as shields, both of which are clear violations of international law. Liz Sly & Joel Greenberg, *Israel Suspends Air Raids*, CHI. TRIB., July 31, 2006, at A1. Israel released a video of Hezbollah firing rockets from the apartment building in Qana, which was later hit by an Israeli strike. The attack killed fifty refugees sheltered in the basement. *Id.*

294. Parks, *supra* note 74, at 29.

B. Analysis

Israel has repeatedly been criticized for attacks considered to be uncontrollable. In an August 2006 report, Amnesty International accused Israel's aerial strikes of being indiscriminate and causing civilian deaths in violation of international law.²⁹⁵

U.N. officials have estimated that 590 Lebanese sites were blanketed with cluster munitions, mainly fired in the days leading up to the ceasefire.²⁹⁶ Israel presumably chose to drop cluster munitions because they were an effective means to destroy the varied Hezbollah rocket positions, which were sending an average of 100 rockets a day into Israel.²⁹⁷ There is no weapon, no matter how technologically advanced, that can instantly identify and distinguish five terrorists or even disguised rocket launchers within a crowded village. Though Israel had the means to use precision-guided missiles²⁹⁸ or other high-tech countermeasures, they were under no affirmative duty to do so.²⁹⁹ Further, the use of high-tech weapons is often defended by effectively using low-tech countermeasures such as guerilla warfare or disguising combatants and military objects as purely civilian.³⁰⁰ While higher collateral damage may result from the use of cluster munitions, it is hardly the fault of the attacker that the combatants chose to hide in cities for cover. In fact, it is the defender that is in violation for causing unnecessary suffering by commingling combatant and noncombatant

295. Sullivan, *supra* note 4. Amnesty International's report claimed that Israel had purposely targeted "civilians and destroy[ed] Lebanese infrastructure as part of a deliberate military strategy that violated international law." *Id.* Amnesty's Secretary General, Irene Khan, stated, "Civilians must not be made to pay the price for unlawful conduct on either side." *Id.* The group has pleaded that "[j]ustice is urgently needed if respect for the rules of war is ever to be taken seriously." *Id.*

296. Shadid, *supra* note 266.

297. *Id.*

298. Yaalon, *supra* note 263.

299. Canestaro, *supra* note 74, at 465.

300. *Id.* at 480. Guerrilla warfare is an unconventional technique of warfare in which one side uses hit-and-run tactics without regard for the accepted rules of war. *See* IAN O. LESSER ET AL., COUNTERING THE NEW TERRORISM 94-96 (1999). Though the method is often credited to Mao Zedong, the practice can be traced to biblical times. Phillip Michael Romero, *An Immunological Approach to Counter-Terrorism and Infrastructure Defense Law in Electronic Domains*, 14 INT'L J.L. & INFO. TECH. 101, 110 (2006). The name was derived from a famous Spaniard, Gonzalo Guerrero, who defected and fought with the Mayans against the conquistadors. *Id.*

facilities.³⁰¹ Therefore, Hezbollah seems to be guilty of abuses of both discrimination and humanity.

The last main argument often levied at Israel is that it should have suspended attacks on these legitimate objects when it became apparent that the attack would “be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”³⁰² This argument has been cited in connection with an Israeli strike on a two-story complex which housed the Hamas militant leader and bombmaker Mohammed Deif.³⁰³ Deif and other leaders of Hamas believed to be responsible for the abduction of an Israeli soldier were hiding in a residential home in a crowded Gaza City neighborhood.³⁰⁴ Upon receiving intelligence, Israel sent an F-16 warplane to drop a 550-pound bomb on the house at 2:30 a.m. local time, despite the fact that the terrorist leaders were hiding among civilians.³⁰⁵ The bomb killed nine members of the resident family, though the target Deif was only injured.³⁰⁶ Hospital officials said thirty-seven people were wounded from the bombardment.³⁰⁷ An official in the office of Israeli Prime Minister explained that “Israel is compelled to take action against those planning to unleash lethal terror attacks against Israeli citizens, [even if] Palestinian terrorist leaders continue to take refuge among and hide behind their own civilians.”³⁰⁸

Under the principle of distinction, a commander is required to employ the method or means of attack likely to cause the least civilian injury relative to the military advantage gained.³⁰⁹ A terrorist leader is an appropriate military target, and under Protocol I, large-scale collateral

301. Protocol I, *supra* note 13, art. 58.

302. *Id.* art. 57. AMNESTY INT’L, *supra* note 6, at 5.

303. See News Release, Amnesty Int’l, Israel/Occupied Territories: Civilian Population at Risk in Gaza (July 14, 2006), http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=3599&c=Resource+Centre+News. Deif had appeared at the top of Israel’s most wanted list since 1992, and was the leader of the Izzedin al-Qassam Brigades, Hamas’s military wing. Thomas Wagner & Sarah El Deeb, *Top Hamas Leader Hurt in Israeli Bombing*, BREITBART.COM, July 12, 2006, http://www.breitbart.com/article.php?id=D8IQNIJ01&show_article1.

304. Wagner & El Deeb, *supra* note 303. Israel claimed that the targeted home was a key Hamas hideout, however a spokesman for Hamas’s military wing disputed the claim. *Id.*

305. *Gaza Neighbours “Felt Earthquake,”* BBC NEWS, July 12, 2006, http://news.bbc.co.uk/2/hi/middle_east/5173410.stm.

306. *Deaths Mount in Attacks on Gaza,* BBC NEWS, July 12, 2006, http://news.bbc.co.uk/1/hi/world/middle_east/5171148.stm.

307. *Id.*

308. Wagner & El Deeb, *supra* note 303.

309. Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT’L LAW. 733, 733–34 (2005).

damage may be acceptable when a proper military objective is targeted.³¹⁰ Civilian casualties are a likely consequence from an attack by aircraft carrying unguided bombs, but as long as the expected damage is outweighed by the military advantage gained, Israel has acted within the guidelines of the Protocol.³¹¹ The unguided bomb used in the Deif strike seems to have hit a legitimate military target without excessive collateral damage in relation to military goals. As mentioned previously, Israel is under no duty to use guided munitions,³¹² but given this target it seems that the method of bombing, guided or dumb, made little difference. In fact, using a guided missile would have likely had the same result of hitting the house that collapsed while causing some collateral damage. Though precision-guided munitions have an estimated accuracy rate of ninety percent while dumb bombs only have one of thirty percent, the strike employed by Israel was effective and the means do not seem extreme relative to the anticipated military gain.³¹³ Israel's dumb bomb fulfilled the requirement of planners to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."³¹⁴

While Israel has been criticized for using bombs that damaged an estimated 15,000 homes,³¹⁵ according to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), it took great safety measures to minimize loss of civilian life. The Israeli army dropped

310. *Id.* at 747.

311. The Israeli military is in the unique position of being one of the few modern militaries to commit to large-scale urban warfare. Christopher B. Puckett, Comment, *In This Era of "Smart Weapons," Is a State Under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?*, 18 EMORY INT'L L. REV. 645, 718 (2004). In fact, in conducting campaigns through the narrow streets and dense apartment complexes, the military has found that modern precision bombing from F-15s and F-16s using 500- to 1000-pound bombs has been unsuccessful in preventing collateral damage. *Id.*

312. See Canestaro, *supra* note 74, at 465 (noting that it is illogical for states which possess precision weaponry to be held to a higher standard than states who do not).

313. Belt, *supra* note 107, at 131.

314. See Protocol I, *supra* note 13, art. 57.

315. AMNESTY INT'L, *supra* note 6, at 7. OCHA was created in December 1991 under Resolution 46/182, in order to "strengthen the United Nation's response to both complex emergencies and natural disasters . . . [and] improv[e] the overall effectiveness of the UN's humanitarian operations in the field." OCHAonline.un.org, *A Brief History of OCHA*, <http://ochaonline.un.org/AboutOCHA/tabid/1076/Default.aspx> (last visited Mar. 27, 2008).

leaflets to warn of impending military strikes and urged the civilian population of southern Lebanon to flee the area and to avoid contact with Hezbollah.³¹⁶ While Israel used unguided bombs and cluster bombs to destroy infrastructure, the means and method of attack appear reasonable given the precautionary measures to minimize collateral damage. These munitions fit within the definition of distinction, and Israel's efforts also show an attempt to promote humanity.

VII. CONCLUSION

Israel's aerial campaigns in response to Hezbollah were conducted under the international customary laws of war. Despite the aspirational view of international law promoted by Amnesty International and even the ICRC, accepted international practice does not prohibit Israel's actions. No military operation is perfect, and it is regrettable that civilians will die as a result of aerial bombing. However, Israel has conducted this campaign properly, without unnecessary suffering or indiscriminate attacks. Further, it seems that Israel's targeting of military objects was lawful and exercised in good faith. Finally, the attacks on Hezbollah, though widespread, were proportionate to the goals of Israel's military operation, preventing future Hezbollah attacks against Israel.

Striking a balance between responding to terrorists and respecting international custom and humanitarian law is difficult considering the ambiguities and uncertain applications in this unconventional method of combat. Israel's struggle against terrorism has highlighted some important gaps in the existing legal framework, particularly the doctrines of proportionality, necessity, distinction, and humanity. Although these concepts as defined in Protocol I may not be precise, their historical and customary applications provide the more preferable definitions. It is customary international law that is likely to be accepted by most nations when confronting terrorists in the future.

316. Amnesty Int'l, *supra* note 6, at 18 (citing Israel Ministry of Foreign Affairs, IDF Warns Lebanese Civilians to Leave Danger Zones, July 25, 2006, <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/IDF+warns+Lebanese+civilians+to+leave+danger+zones+3-Aug-2006.htm>).