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PROPORTIONALITY IN PERSPECTIVE: HISTORICAL LIGHT ON THE LAW OF ARMED CONFLICT

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I. INTRODUCTION: WHY THE HISTORY MATTERS

What should military commanders be allowed to attack in the midst of armed conflict? Debates on this question usually invoke the most recent and most comprehensive international convention on the law of armed

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conflict, Additional Protocol I to the Geneva Conventions,¹ completed in 1977 (usually designated, “AP–I”). The convention lays down a sweeping “Basic Rule” prohibiting all intentional attacks on “the civilian population and civilian objects.”² It then offers a back-up to this rule to cover “incidental loss of civilian life, injury to civilians, [and] damage to civilian objects.”³ Even an attack not *aimed* at civilians is prohibited when it “may be expected to cause incidental” civilian loss or damage “which would be excessive in relation to the concrete and direct military advantage anticipated.”⁴ Commentators refer to this rule as the “principle of proportionality.”⁵

Recent commentators have described the principle as a “paradox,” for requiring some constant ratio of entirely different speculative assessments (“expected” loss or damage vs. “anticipated” military advantage).⁶ Others have called it “mysterious”⁷ and “extremely subjective.”⁸

For some commentators, however, it is quite simple. To cite the most notable example, the *Commentary on the Additional Protocols* published by the International Committee of the Red Cross⁹ insists that the proportionality rule “does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.”¹⁰

The Red Cross speaks with some authority because it played the leading role in preparing the agenda for the Geneva Conference that drafted AP–I.¹¹ Apart from that, the Red Cross view has obvious appeal for advocates

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. [hereinafter AP–I], *reprinted* in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 711–61 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2014) [hereinafter THE LAWS OF ARMED CONFLICT].

2. *Id.* at art. 48.

3. *Id.* at art. 51, ¶ 5(b).

4. *Id.*

5. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT 272–80 (2010); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT 128–29 (2004).

6. MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 28–29 (2014).

7. Enzo Cannizzaro, *Proportionality and the Law of Armed Conflict*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 332 (Andrew Clapham & Paola Gaeta eds., 2014).

8. Joseph Holland, *Military Objective and Collateral Damage*, 7 YEARBOOK OF INT’L HUMANITARIAN L. 35, 55 (2004).

9. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yvez Sandoz et al. eds., 1987) [hereinafter RED CROSS COMMENTARY].

10. *Id.* at 626, § 1980.

11. *Id.* at 587–89; GEOFFREY BEST, WAR & LAW SINCE 1945, at 341–47 (1994).

of humanitarian protection in conflict zones (as for advocates on the opposing side in a conflict). If the Red Cross view of proportionality is sound, outsiders can quickly and easily pronounce judgments on complex conflict situations.

Disputes about recent conflicts in the Middle East illustrate this view. In each of Israel's extended military campaigns over the past decade—against Hezbollah guerrillas in Lebanon in 2007, against Hamas forces in Gaza in 2009 and 2014—most western governments acknowledged that rocket attacks on Israeli civilians justified some active measures of self-defense.¹² Still, critics in European and UN forums insisted that Israel's actual responses were “disproportionate,” hence in violation of the law of armed conflict.¹³ As critics see it, the first photo evidence of maimed women and children or collapsed houses can preempt any need for

12. See, e.g., Press Release, Joint Statement by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, Jose Manuel Barroso in the name of the European Union on the situation in Gaza (Aug. 3, 2014), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/144223.pdf (“We strongly condemn continued rocket fire over Israel” as “an unacceptable threat to its citizens” but “legitimate defence needs to maintain proportionality.”); Press Release, Secretary Council Debates Escalating Crisis Between Israel, Lebanon; UN Officials Urge Restraint, Diplomacy, Protection of Civilians, SC/8776 (July 14, 2006) (acknowledging Israel's right to strike Hezbollah targets in Lebanon in self-defense) [hereinafter: Press Release on Crisis Debate]; Lizzie Dearden, *Israel-Gaza conflict: William Hague calls for ceasefire but says Israel 'has the right to defend itself,'* THE INDEPENDENT (UK) (July 12, 2014), <http://www.independent.co.uk/news/world/middle-east/israelgaza-conflict-william-hague-calls-for-ceasefire-but-says-israel-has-the-right-to-defend-itself-9602121.html>; Kofi Annan Addresses Middle East Violence, WASH. POST (July 20, 2006, 12:35 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/20/AR2006072000912.html> (acknowledging Israeli right to act in self-defense against rocket attacks from Hezbollah guerrillas in Lebanon).

13. See, e.g., Press Release, Statement by the Spokesperson on rocket fire from Gaza on on-going retaliation operations of the Israeli Defence Forces 140708/02 (July 8, 2014), available at http://eeas.europa.eu/statements/docs/2014/140708_02_en.pdf (“The EU strongly condemns the indiscriminate fire into Israel by militant groups in the Gaza Strip. The EU deplores the growing number of civilian casualties . . . caused by Israeli retaliatory fire”); Press Release, European Union Presidency Statement on Escalation of Violence in Gaza (Mar. 2, 2008), available at <http://unispal.un.org/UNISPAL.NSF/0/25D22CBC70EAD218852574010056004B> (condemning “disproportionate use of force by the Israel Defense Forces (IDF) against Palestinian population in Gaza”); Press Release on Crisis Debate, *supra* note 12 (Denmark, Belgium, Argentina, Spain acknowledge Israel's right to act in self-defense but not when such acts include “excessive” or “disproportionate measures”); J. KITTRICH, THE RIGHT OF INDIVIDUAL SELF-DEFENSE IN PUBLIC INTERNATIONAL LAW 79–83 (2008) (surveying similar responses from debate over Israeli responses to Hezbollah attacks in 2006).

complicated weighing of civilian suffering against “anticipated” security gains. Thus, for critics it was not necessary to await any careful investigation of how loss or damage occurred, let alone weigh such losses against “anticipated military advantage.” Similar denunciations have been hurled against U.S. drone strikes, which have killed civilians and damaged civilian structures along with terrorist leaders in Pakistan, Yemen, and elsewhere.¹⁴

If this is what the proportionality requirement means, however, AP-I would seem to be a sharp break with past military practice. Some critics have indeed depicted AP-I that way.¹⁵ The United States has never ratified AP-I, though it readily endorsed earlier conventions on the law of war.¹⁶ A few regional powers—notably, Israel, Turkey and Indonesia—also refrained from ratifying AP-I, though they had subscribed to earlier Geneva conventions.¹⁷

The Red Cross does not endorse this view, however. The *Commentary* depicts AP-I’s targeting requirements as a mere codification or clarification of long-accepted principles.¹⁸ Viewed as an expression of accepted customary law, AP-I could be regarded as binding even on States that have not ratified it. That is the position urged by the Red Cross in a 2005 treatise on *Customary International Humanitarian Law*.¹⁹

It might seem quite implausible that the “proportionality” rule merely expresses a long-accepted principle. Even the Red Cross *Commentary* acknowledges that military operations in the world wars, even on the Allied side, were often pursued with “indiscriminate” destructiveness.²⁰

14. See, e.g., Resolution on the Use of Armed Drones, EUR. PARL. DOC. PV 2567 (2014), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P7-RC-2014-0201+0+DOC+XML+V0//EN> (characterizing targeted drone strikes as contrary to AP I).

15. See Hays Parks, *Air War and the Law of War*, 32 A. F. L. REV. 1, 149–54 (1990) (does not focus on proportionality). See generally JOHN FONTE, SOVEREIGNTY OR SUBMISSION: WILL AMERICANS RULE THEMSELVES OR BE RULED BY OTHERS? 227–33 (2011) (“Protocol I radically revises the Law of War”).

16. For list of states subscribing to AP-I, see THE LAWS OF ARMED CONFLICT, *supra* note 1, at 785–91. The 1949 Geneva conventions did not deal with the conduct of military operations, but earlier Hague Conventions (1899, 1907) did and the United States subscribed to all of these conventions. *Id.* at 85–86, 648.

17. All three ratified the four 1949 Geneva conventions. *Id.* at 641, 647. Turkey also ratified the Hague Conventions before the First World War. *Id.* at 84, 86. Israel and Indonesia were not yet independent States at that time.

18. RED CROSS COMMENTARY, *supra* note 9, at 586.

19. 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46, 58 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (customary rules embracing AP-I standards on proportionality).

20. RED CROSS COMMENTARY, *supra* note 9, at 586–87.

Then, there is the problem that no previous convention actually talked about “proportionality.” Indeed, no previous convention contained any statement so sweeping as the “Basic Rule” in AP–I that “attacks” must never be directed at “civilians” or “civilian objects.”²¹ Until the Twentieth Century, Anglo-American authorities expressly rejected the claim that civilians and civilian objects must always be shielded from military efforts.²² The 1956 U.S. Army Field Manual on the Law of Land Warfare correctly summarized the traditional American view when it explained, “a condition of war between two States” means “every national of the one State becomes an enemy of every national of the other.”²³

Concerns about protecting civilians from harm did not arise out of nowhere, however, and then somehow mesmerize delegates to the Geneva Conference in the mid-1970s. As the previously mentioned 1956 U.S. Army Manual explains, “[I]t is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them.”²⁴ The Manual even talks about proportionality: in the conduct of military attacks, “loss of life and damage to property must not be out of proportion to the military advantage to be gained.”²⁵

The U.S. Army did not embrace quite the same view as the Red Cross, however. Among other things, the 1956 Manual insisted that the “use of explosive ‘atomic weapons’ . . . cannot as such be regarded as violative of international law”²⁶ The Red Cross *Commentary* belabors the seemingly obvious suggestion that the standards of AP–I implicitly prohibit resorting to nuclear weapons, since they will inevitably wreak “excessive” loss and damage to civilians.²⁷ Yet when ratifying AP–I, many western States included explicit reservations stipulating that they did not regard it as prohibiting resort to nuclear weapons in all circumstances.²⁸

21. See AP–I, *supra* note 1, art. 48.

22. See Jeremy Rabkin, *Anglo-American Dissent from the European Law of War: A History with Contemporary Echoes*, 16 SAN DIEGO INT'L L.J. 1, 3 (2014).

23. DEPARTMENT OF THE ARMY, FIELD MANUAL 27–10: THE LAW OF LAND WARFARE 16 (1956).

24. *Id.* The qualifying term “exclusively” may signify a considerable restriction in the force of the statement.

25. *Id.* at 19, art. 41.

26. *Id.* at 18, art. 35.

27. RED CROSS COMMENTARY, *supra* note 9, at 589–96.

28. Canada, for example, when ratifying AP–I, stipulated in its understanding that AP–I provisions were “intended to apply exclusively to conventional weapons” and “do not have any effect and do not regulate or prohibit the use of nuclear weapons.” THE LAWS OF ARMED CONFLICT, *supra* note 1, at 797. For similar declarations, see ratifying statements of

The argument of this article is that the proportionality rule in AP-I *does* express a doctrine that has real roots in western military practice, but it was not traditionally understood as the severe constraint on military operations that the Red Cross propounds. The western States at the Geneva drafting conference did not resist the proportionality rule. In fact, they were active sponsors of that formulation.²⁹ They understood that rule to be consistent with past practice, including most Allied tactics in the world wars.³⁰ At the time of the drafting conference, World War II was still within the personal memory of most delegates and even within the professional experience of some delegates. They understood that they were tightening humanitarian constraints in some ways, but did not think they were totally rewriting the law of war.³¹

The history matters for more than insight into the “original understanding” of the treaty text. Past views were based on experience. More precise modern weapons—and greater dependence of civilians on complex support systems—make it reasonable to seek greater constraints on the conduct of war. The challenges of armed conflict are not magically transformed, however, merely because many States ratify a diplomatic instrument. Where earlier conventions were cautious, evasive, or silent, that was often in recognition of genuine difficulties that an overly clear and comprehensive rule would entail.³² Rules that are unrealistic are not likely to achieve humanitarian ends. Therefore, it matters that understandings of the relevant history rest on sounder footings than the fanciful fables spun by the Red Cross.

Section II starts with an analysis of the legal codifications developed to regulate war before World War I. The codifications did gesture toward notions of “military necessity” that might be seen as precursors to

France, *id.* at 800; Germany, *id.* at 802; Italy, *id.* at 807; Netherlands, *id.* at 810; Spain, *id.* at 813; United Kingdom, *id.* at 815; and United States, *id.* at 817.

29. *See infra*, Part V.

30. *Id.*

31. *Id.*

32. The 1907 Hague Convention Respecting the Laws and Customs of War on Land, for example, makes this acknowledgement in the Preamble; “It has not . . . been found possible at present to concert regulations covering all the circumstances which arise in practice Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” None of the sources invoked here—“usages among civilized peoples,” “laws of humanity,” “dictates of public conscience” had very clear or settled meaning. Convention (IV) Respecting the Laws and Customs of War on Land preamble, Oct. 18, 1907, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 60–82 [hereinafter 1907 Version].

“proportionality” requirements, but these were not very constraining. Section III looks at actual military practice by British and American forces in Twentieth Century wars (prior to the 1970s), demonstrating that there was far more continuity, even in the most destructive tactics, than the Red Cross version of “custom” would allow. Section V continues this historical account with a focus on the bombing of cities during and after the Second World War.

Section V traces the development of international legal standards for bombing in the half century before the Geneva conference that drafted AP-I and during the Geneva deliberations in the 1970s. This survey again highlights the conformity of actual AP-I language with a rather permissive approach. Section VI shows that, even in moral terms, applying the same standards to all conflicts against all enemies was not the traditional view and the embrace of such an indiscriminate view in the 1940s severely damaged the reputation of the Red Cross (though it did not affect its subsequent postures). Section VII shows that, even in legal terms, the strict interpretation of the proportionality requirement has proven very difficult to implement. Section VIII offers, in conclusion, a general warning against seeking more legal clarity than the realities of war can sustain.

II. THE NINETEENTH CENTURY RULES: THE MEANING OF PROHIBITIONS ON PILLAGE AND WANTON DESTRUCTION

Prior to the completion of AP-I in 1977, the most general codifications of the law of armed conflict were those found in the Hague Regulations. The Hague Convention on the Law and Custom of War on Land³³ was agreed to at the first Hague Peace Conference in 1899, then reaffirmed (with minor changes) at the Second Hague Conference in 1907.³⁴ The actual rules in both conventions appeared in an appendix, known as the Regulations.

The Preamble in both Hague Conventions explains that the purpose is to provide “general rules of conduct” designed to “diminish the evils of war so far as military necessities permit”.³⁵ At first glance, the Regulations

33. Convention (II) with Respect to the Laws and Customs of War on Land and its Annex, July 29, 1899, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 60–82 [hereinafter 1899 Version].

34. 1907 Version, *supra* note 32.

35. *Id.* at 61.

seem to offer a jumble of disparate restrictions aimed at an unrelated set of “evils.” However, that surface impression conceals an underlying logic.

The section of the Hague Regulations on the conduct of military operations—“Means of Injuring the Enemy”³⁶—contains only seven articles, but the significance of these provisions is illuminated by longer sections that precede it and follow it. The Regulations begin with a far longer, sixteen articles section elaborating humanitarian treatment of prisoners of war.³⁷ The underlying theme is that captivity aims to remove enemy soldiers from contributing to the fight *in this war*—not in all future wars.³⁸ The Regulations end with a comparably extended set of provisions (fifteen articles) on occupation of enemy territory. The general theme is that occupation aims to withhold territory from the enemy—not to change the status or allegiance of occupied citizens and their property prior to the settlement of future peace terms. Occupying armies are, among other things, prohibited from forcing local civilians to assist in the military efforts of the occupying force.³⁹

The central section on “Hostilities” applies this perspective to the battlefield. It prohibits use of “poison or poisoned weapons,”⁴⁰ then emphasizes the point by separately prohibiting any other weapons “calculated to cause unnecessary suffering.”⁴¹ It prohibits attempts to “kill or wound an enemy who has . . . surrendered.”⁴² It then re-emphasizes this prohibition by forbidding armies “to declare that no quarter will be given”⁴³; that is,

36. Arts. 22–28, *id.* at 72–74.

37. Arts. 4–20, *id.* at 67–72. “The Qualifications of Belligerents” are also of primary relevance to establishing “qualification” to be treated as a “prisoner of war,” while the immediately following provision, Art. 21, “The Sick and Wounded,” affirms protections of most relevance—as an international obligation—to prisoners of war. So one might say 21 of 56 provisions (in the 1907 version) are primarily concerned with combatants in captivity.

38. Arts. 42–56, *id.* at 77–81. Between this final section and the chapter on “Means of Injuring the Enemy,” there are a dozen miscellaneous provisions (29–41) on technical issues surrounding “hostilities”—provisions on “Spies,” “Flags of Truce,” “Capitulations,” and “Armistices.”

39. Art. 44, *id.* at 78: “Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited” (1899, version); “A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent or about its means of defense.” (1907 version). Similarly, taxes imposed on the occupied population or territory can only be used for purposes accepted under the legitimate government or “for the needs of the army or of the administration of the territory in question”—not for general support of the occupying power. *Id.* at art. 49.

40. *Id.* at art. 23(a).

41. *Id.* at art. 23(e).

42. *Id.* at art. 23(c).

43. *Id.* at art. 23(d).

offering no chance to surrender. All these prohibitions reflect the common purpose of directing combat operations at disabling the opposing force, instead of trying to ensure that wounded or captured combatants will never be able to offer resistance to the attacking army, even in a future war.

Other restrictions have a similar logic. The Regulations admonish armies not “to kill or wound treacherously.”⁴⁴ Another provision then reemphasizes the point by prohibiting “improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy”⁴⁵—particular instances of “treachery.” The goal is to preserve trust in humanitarian restraints, so they can save lives in future battles or future wars.

While all these prohibitions are phrased in absolute terms, the main protections for civilians are phrased in more qualified or conditional terms.

Invading armies are admonished not to “destroy or seize the enemy’s property,”⁴⁶ but then authorized to do precisely that, when “such destruction or seizure be imperatively demanded by the necessities of war.”⁴⁷ Again and again, the Regulations offer a similar balancing of prohibitions and authorizations. So, a subsequent provision prohibits “attack or bombardment” of “towns, villages, dwellings or buildings” which are “undefended.”⁴⁸ The immediately following articles then discuss conditions for permissible “bombardment” of *defended* towns or villages.⁴⁹ A later provision then admonishes that “steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes”⁵⁰—on the evident assumption that ordinary “dwellings” or “buildings” may well be targets of “bombardment.”

If these are considered early examples of “proportionality,” they indicate that “military necessity” may often justify harm to civilians and civilian objects. The point seems to be that it is acceptable to use bombardment to force surrender of a particular place that is “defended” (that is, resisting capture). It is not proper to torment an unresisting place

44. *Id.* at art. 23(b).

45. *Id.* at art. 23(f).

46. *Id.* at art. 23(g).

47. *Id.*

48. *Id.* at art. 25.

49. *Id.* at arts. 26, 27.

50. *Id.* at art. 27.

merely to coerce the rest of the enemy, using the captured place (or place that might be readily captured, because undefended) as hostage. The Second Hague Peace Conference struck a similar balance in a convention on naval bombardment.⁵¹ That convention prohibits naval bombardment against undefended “ports, towns, villages, dwellings or buildings”⁵²—but then authorizes naval bombardment of precisely these targets, even when “undefended,” for the limited purpose of enforcing delivery of supplies “necessary for the immediate use of the naval force” involved.⁵³

In the Hague Regulations on land warfare, only three protections for civilians are framed as absolute prohibitions. They may initially seem unrelated to each other or to earlier concerns. First, there is a seemingly quite technical, almost legalistic prohibition on suspending the legal “rights and actions of the nationals of the hostile party.”⁵⁴ Then there is a prohibition against trying “to compel the nationals of the hostile party to take part in the operations of war directed against their own country.”⁵⁵ Finally, there is an unqualified prohibition on the “pillage of a town or place, even when taken by assault.”⁵⁶

On reflection, one can see that all of these prohibitions reflect a common purpose, closely related to the aims of previous restrictions regarding prisoners of war and subsequent restrictions on occupation authority. Ultimate political claims—regarding property and allegiance—are for governments to settle in peace treaties, not for commanders to impose in the midst of wartime battles. Hence, the prohibitions on suspending legal claims and coercing enemy nationals into war service of the invader. “Military necessity,” in the proper sense of the term, extends only to what is needed to compel the opposing government to come to

51. Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1079.

52. *Id.* at art. 1,

53. *Id.* at art. 3. The provision does require “due notice” of intent to bombard, after a “formal summons” to deliver supplies has been “made” and “the local authorities . . . decline to comply.” The absence of a similar provision in the Hague Regulations on land warfare seems to reflect the assumption that land forces would have adequate manpower to enforce requisitions of supplies in an occupied territory, while a naval force might not. So, coercive force is depicted as a last resort in the name of local military necessity.

54. 1907 Version, *supra* note 32, at art. 23(h). Some British commentators at the time protested that this prohibition would unreasonably restrict traditional practices of economic coercion. THOMAS E. HOLLAND, LAW OF WAR ON LAND 44 (1908). Another prominent British commentator defended the provision as addressed only to commanders in the field, leaving governments free to confiscate enemy property and nullify enemy contracts—citing Lincoln’s Emancipation Proclamation as precedent. A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES 253–65 (1909).

55. 1907 Version, *supra* note 32, at art. 23(h). The counterpart provision in the 1899 Version is in art. 44. *See* 1899 Version, *supra* note 33, at art. 44.

56. 1907 Version, *supra* note 32, at art. 28.

terms. That seems to explain the prohibition on “pillage” as opposed to mere seizure or occupation. Legitimate war measures aim to deprive the enemy of resources during the current conflict—not for all future time, when denial can be achieved without destruction.⁵⁷

Given the other restrictions, the prohibition on “pillage”—unrestrained destruction of a captured town or city—might have seemed to go without saying. In fact, the Hague drafters took the trouble to say it twice; after prohibiting “pillage” in the section on hostilities, the Hague Regulations repeat the prohibition without any further elaboration in the section on authority in occupied territory.⁵⁸

This emphatic, repeated prohibition on pillage was not an idiosyncratic gesture of the Hague drafters. One can see the central, symbolic resonance of this prohibition by tracing the lineage of the Hague provisions. The preambles to both Hague Conventions acknowledge the “wise and generous foresight” of the Brussels Conference of 1874.⁵⁹ That conference produced a “Declaration,”⁶⁰ which was not adopted at the time as a formal treaty, but clearly provided the working draft for what became the Hague Regulations. The Brussels Declaration also prohibited pillage in two different places.⁶¹

The Brussels Declaration drew, in turn, on the code issued to the Union Army during the American Civil War, known as the “Lieber Code,”⁶² after its principal drafter, the German émigré scholar, Francis Lieber.⁶³ The Lieber Code, designed for the first mass army in American history, offered much more detail and explanation than the international codes, which encapsulated its main provisions.

In the Lieber Code, the prohibition is more elaborate:

57. Why not regard “pillage” of a captured place as a means to coerce others, when they see the consequences of resisting? The unstated reason seems to be that such tactics would descend into an unlimited campaign to “terrorize” enemy civilians.

58. 1907 Version, *supra* note 32, at art. 47.

59. *Id.* at preamble, ¶ 4.

60. THE LAWS OF ARMED CONFLICT, *supra* note 1, at 21–28.

61. See Project of an International Declaration Concerning the Laws and Customs of War art. 18, Aug. 27, 1874, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 21–28 “[A] town taken by assault out not to be given over to pillage.” *Id.* at art. 38. “[P]illage is formally forbidden.” *Id.* at art. 39.

62. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863) [hereinafter LIEBER CODE], *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 3–20.

63. See JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012) for background on the thought and career of Francis Lieber and the origins of the Code.

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death or such other severe punishment as may seem adequate for the gravity of the offense.⁶⁴

The Lieber Code formulates a broader set of prohibitions in explaining the limits on “military necessity”:

Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district.

Yet another provision tries to capture the underlying logic:

The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful.”⁶⁵

The Code is not overly squeamish. It specifically authorizes “all destruction of property and obstruction of the ways and channels of traffic, travel or communication and of all withholding of sustenance or means of life from the enemy.”⁶⁶ It does not shrink from spelling out the implication: “it is lawful to starve the hostile belligerent, armed and unarmed, so that it leads to the speedier subjection of the enemy.”⁶⁷ It sanctions seizure of private property for the “benefit of the army or of the United States.”⁶⁸ Such provisions prompted the Confederate Secretary of War to denounce the Code as justifying reversion to “the warfare of the barbarous hordes who overran the Roman Empire.”⁶⁹

Prepared for a country with limited military experience, the Lieber Code devotes considerable attention to explaining the rules it sets out. It does not say that civilians must be spared. In fact, it does not even even

64. LIEBER CODE, *supra* note 62, at art. 44.

65. *Id.* at art. 16.

66. *Id.* at art. 15.

67. *Id.* at art. 17.

68. *Id.* at art. 38.

69. Letter of James Seldon, Secretary of War, Confederate States of America, to Robert Ould, (June 24, 1863), *reprinted in* RICHARD S. HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR 120–21 (1983). Seldon was particularly indignant that the Code justified instigating slave revolts and “servile war” and that it justified devastation of agriculture and destruction of private property. He took note of the fact that the Code “was proposed by a German professor” and seemed “the handicraft of one much more familiar with the decrees of the imperial despotisms of the continent of Europe than with the Magna Carta . . . the Declaration of Independence and the Constitution of the United States.” *Id.* at 128.

use the term civilian. However, it does insist that limits on war measures flow from the limited character of modern wars, reflecting the limited claims of modern governments:

As civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself . . . The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will admit.⁷⁰

The Code then offers eight separate provisions explaining and elaborating the point. In “remote times” and still among “barbarous armies” and “uncivilized peoples,” the “private individual of the hostile country” had to “suffer every privation of liberty and protection and every disruption of family ties.”⁷¹ By contrast, “modern regular wars of the Europeans and their descendants” follow a different rule because, “[m]odern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.”⁷² So the “ultimate object of all modern war is a renewed state of peace.”⁷³ It follows that “war has come to be acknowledged not to be its own end, but the means to obtain great aims of state or to consist in defense against wrong” and “the law of war imposes many limitations and restrictions on principles of justice, faith and honor.”⁷⁴

These explanations may sound somewhat complacent about the moral superiority of “civilized Europeans” compared with “the internecine wars of savages.”⁷⁵ The central distinction, however, turns not on ancestry, but epoch. It is, in effect, a set of norms reflecting the difference in outlook between “modern Europeans” and prior cultures – very much including prior cultures in Europe.

By the standards of the Lieber Code, the Greek hoplites and Roman legions were “barbarous”—following the rule of “barbarous” armies that permitted murder, rape, and enslavement of defeated peoples.

The Enlightenment congratulated itself on having reached a higher stage of civilization, while denouncing isolated survivals of (or relapses into) earlier modes. The American Declaration of Independence accordingly

70. LIEBER CODE, *supra* note 62, at art 22.

71. *Id.* at art 24.

72. *Id.* at art 29.

73. *Id.*

74. *Id.* at art 30.

75. *Id.* at art 29.

denounced the “savage” and “indiscriminate” warfare of Indians and the “barbarous” practices of the British, as inciting the Indians to attack the American colonists. Thomas Jefferson himself confessed that the Spartan practices described in Thucydides and Xenophon reminded him of Indian warriors on the American frontier.⁷⁶ In antiquity, the Greeks and Romans practiced what might modernly be called “indiscriminate slaughter,” a term discussed below.

To take a few famous examples, Alexander of Macedon completely destroyed the city of Thebes to punish its citizens for resisting his authority.⁷⁷ Those who survived the military assault were sold into slavery. Such conduct did not prevent later generations from calling him “Alexander the Great,” nor did it prevent Plutarch from telling of this episode in the book known to later generations as “Lives of the Noble Greeks and Romans.”⁷⁸ Julius Caesar, ranked with Alexander in Plutarch’s work, massacred a million people in the conquest of Gaul and sold another million into slavery (at least, according to Plutarch).⁷⁹ A recent book by a classical historian uses a modern word for such extreme tactics: “terror.”⁸⁰

The most famous ancient commanders aspired to conquest, not merely to military victory in a political conflict among nation-States. The conqueror aspired to make opponents submit to him, totally and irrevocably. His aim was to banish the idea of successful resistance, even in the future, while terrifying other peoples by example. The point was not simply to coerce, but to conquer; not merely to subdue, but to subjugate. Conquerors

76. See HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* liv–lv (William Beach Lawrence ed., 6th ed. 1855) (reprinting Jefferson letter to Wheaton, commenting on ancient warfare).

77. For the most famous account, see Alexander in PLUTARCH, *THE LIVES OF THE NOBLE GRECIANS & ROMANS* 808–09 (Clough ed., Modern Library Classics 1992).

78. Plutarch’s work did not have that exact title in antiquity, but the adoption of that title by English translators in the 17th Century captures the spirit of Plutarch’s intent to offer up accounts of exemplary figures for moral instruction. *Id.* at xviii–xix.

79. *Id.* at 863.

80. BARRY STRAUSS, *MASTERS OF COMMAND: ALEXANDER, HANNIBAL AND CAESAR AND THE GENIUS OF LEADERSHIP* 12 (2012). Subsection on “Terror”: “the great commanders” engaged in “massacring entire cities” . . . “They were willing to kill innocents and everyone knew it. *Id.* at 12. That too was the secret of their success.” After Alexander defeated Greek mercenaries fighting for the Persians, he “executed most” of them: “He wanted to make a political more than a military point in order to discourage other Greeks from fighting for the Persians.” *Id.* at 43. Caesar’s account of his conquest of Gaul (*The Gallic War*) “drove home the power of “Caesar’s military. It was quick, efficient, ruthless, and utterly ready to commit acts of terror.” *Id.* at 45.

would impose complete control, even if that meant, as the Roman historian Tacitus reported, having to “make a desert and call it peace.”⁸¹

Medieval crusades had something of this quality—indiscriminate slaughter, intended to shatter any hope of future resistance or recovery among defeated foes.⁸² Even in less apocalyptic struggles in Europe, as during the Hundred Years War in the 14th and 15th Centuries, it was common practice for successful sieges to culminate in “sacking” conquered towns in orgies of violence and destruction as a punishment for defying the besieging army and as an ominous lesson to the next place that might think of resisting the same army.⁸³

The Lieber Code implicitly links coercive force to victory—in the current war, on the assumption that “peace” is “the normal condition” of nations in “modern times,” while “war is the exception.”⁸⁴ The Code does not draw the conclusion that modern wars must never injure civilians; instead, the Code accommodates a variety of harsh measures against civilians. The Code does not even demand that accepted rules of restraint never be violated. The Code expressly acknowledges that violations of the law of war—“acts of barbarous outrage” by a “reckless enemy”—can be punished by retaliation in kind.⁸⁵ It cautions, however, that such retaliation must “never be resorted to as a measure of mere revenge,” lest “unjust and inconsiderate retaliation removes belligerents farther and farther from the mitigating rules of regular war” and so “nearer to the internecine wars of savages.”⁸⁶ So, generally, “military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge.” And “in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.”⁸⁷

81. GERMANIA AND AGRICOLA OF TACITUS 88 (Oxford trans., 1922) (“To ravage, to slaughter, to usurp under false titles, they call empire; and where they make a desert, they call it peace”—attributed to a Scottish chieftain denouncing the Roman practice).

82. Robert Stacey, *The Age of Chivalry*, in *THE LAWS OF WAR* 33 (Michael Howard, et al. eds., 1994) (Wars against non-Christians “fought by the rules which in antiquity had applied in the wars of the Romans,” allowed “the conquered [to] be slain or enslaved” with “no distinctions between combatants and noncombatants”).

83. See *id.* at 38 (on sieges); see also Theodor Meron, *Shakespeare’s Henry the Fifth and The Law of War*, 86 AM. J. INT’L L. 1, 26–30 (1982) (noting that Henry’s threats against Harfleur—including pillage, rape and murder—were characteristic of siege warfare).

84. LIEBER CODE, *supra* note 62, at art. 29.

85. *Id.* at art. 27.

86. *Id.* at art. 28.

87. *Id.* at art. 16.

Lieber did not invent any of these doctrines. The same general doctrine was embraced in the first extended treatise on international law by an American writer—the first anywhere to use the new term, “international law.”⁸⁸ Henry Wheaton’s *Elements of International Law*⁸⁹ first appeared in 1836 and depicted the modern law of war as an application of fundamental principles. Respect for private property and the rights of non-combatants was, by mutual consent of nations, the modern practice in war.⁹⁰ Nevertheless, it was always subject to exceptions:

The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of the same original principle of natural law, which authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the object of hostilities [i.e., *current* hostilities]. The same general rule, which determines how far it is lawful to destroy the persons of enemies, will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary, in order to accomplish the just ends of war, it may be lawfully done, but not otherwise.⁹¹

The Swiss diplomat Emer de Vattel made the same point in the mid-18th century in his highly influential treatise *The Law of Nations*.⁹² Vattel was the principal authority on international law for Wheaton and Lieber and, decades earlier, for the American Founders.⁹³ His treatise puts the point this way:

A lawful end confers a right only to those means which are necessary to attain that end. Whatever is done in excess of such measures is contrary to the natural law and must be condemned as evil before the tribunal of conscience. Hence it

88. Before the Nineteenth Century, the term in general use was “law of nations” (or counterpart phrases in other languages, adapted from the original Latin term, *jus gentium*). The Framers of the U.S. Constitution still referred to “the law of nations” in Art. I, sec. 8, cl. 10 (authorizing Congress to “define and punish offenses against the law of nations”). The new expression, “international law,” was coined by English legal reformer Jeremy Bentham in the late Eighteenth Century to emphasize that it was a law governing the relations between sovereign States, not a set of universal understandings about justice between individuals.

89. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE* (1836). The 8th edition of this work, edited by R.H. Dana was originally published in 1866, then reprinted by Oxford Univeristy Press in 1936. All subsequent references are to this edition.

90. *Id.* at 364, § 347.

91. *Id.*

92. EMER DE VATTEL, *THE LAW OF NATIONS OR, PRINCIPLES OF THE NATURAL LAW, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* (Charles G. Fenwick trans., The Carnegie Institution of Washington 1916) (1758).

93. Wheaton presented the first edition of his work as an updating of Vattel: “Advertisement to the First Edition,” reprinted in the Oxford University Press edition, *supra* note 89, at xix. On Lieber’s engagement with Vattel, see WITT, *supra* note 63, at 183–86. Lieber understood himself as embracing a more permissive approach to war tactics than Vattel, whom he called “Father Namby-Pamby.” *Id.* at 182, 235.

follows that certain acts of hostility may be justifiable or not, according to the circumstances. What is perfectly innocent and just in one war, owing to peculiar conditions, is not always so on other occasions; right keeps pace with necessity, with the demands of the situation; it never goes beyond those limits.⁹⁴

Wheaton thus devoted half a dozen pages in his treatise to a demonstration that the British army violated international law when it burned public buildings in Washington, D.C. toward the end of the War of 1812.⁹⁵ If Wheaton had viewed the destruction of civilian objects as wrong in all circumstances, the indictment against the British action could have been concluded in one sentence.

The logic is easy to understand if applied to pillage. The Lieber Code seemed to think it applied to “assassination”⁹⁶ and “torture,”⁹⁷ as well—practices so shocking they would appear to the other side as a regression to “barbarism,” and therefore an obstacle to peace or to durable peace. This might seem a reflection of Victorian squeamishness or sentimentality. Yet, similar distinctions have been confidently asserted in recent debates about contemporary military tactics. Critics denounced the Bush administration for practicing “torture” (or forms of “enhanced interrogation” equivalent to “torture”).⁹⁸ A number of such critics then acquiesced to the Obama administration’s policy of escalating drone strikes, designed to kill terror suspects outright (and often killing their families or local bystanders,

94. VATTEL, *supra* note 92, at 279. He seems to have been thinking of the “devastation” of farms and villages directed by the Duke of Marlborough in Bavaria, one of the most extensive “modern” episodes of the practice, some fifty years before Vattel composed his treatise. The same 1704 episode was described, with similar cautious approval by Winston Churchill, on the eve of the Second World War. WINSTON CHURCHILL, *IV MARLBOROUGH: HIS LIFE AND TIMES* 58–60 (1935). “It was not senseless spite or brutality, but a war measure deemed vital to success and even safety. . . . It was, of course, incomparably less efficient than the destruction wrought by the Germans in their withdrawals from France and Belgium in our own times [i.e., in 1918]. But we must make allowances.” *Id.* at 60.

95. WHEATON, *supra* note 89, at 371–75, §§ 348–52.

96. LIEBER CODE, *supra* note 62, at art 148.

97. *Id.* at art. 16.

98. For recent arguments about the unique evil of torture, see David Sussman, *What’s Wrong with Torture*, PHIL. PUB. AFF. 1–33 (Winter 2005); Gunter Frankenberg, *Torture and Taboo: Comparing Paradigms of Organized Cruelty*, AM. J. COMP. L. 403–22 (Spring 2008); David Luban, *Liberalism, Torture and the Ticking Bomb*, VA. L. REV. 1425–61 (Oct. 2005); Louis Michael Seidman, *Torture’s Truth*, 72 U. CHI. L. REV. 881–918 (Summer, 2005).

as well).⁹⁹ Whatever the mix of motives in contemporary political debates, the distinction has a long history. The Framers of the U.S. Bill of Rights thought it important to prohibit “cruel and unusual punishment,” while still sanctioning capital punishment.¹⁰⁰ The Lieber Code, while specifically prohibiting torture, also expressly endorsed capital punishment for certain offenses.¹⁰¹

It might seem that the rejection of torture would also condemn threats of dire consequences—as a sort of mental torture. The Lieber Code does not prohibit such threats as cutting off food to a besieged city or encampment. In a similar way, contemporary critics of torture do not feel obligated to condemn plea-bargaining in the criminal justice system, even though the essence of plea bargaining, on the prosecutor’s side, is the threat to seek more severe penalties (or charges carrying more severe penalties) if the accused does not agree to a guilty plea. Terror attacks or pillage are meant to inspire paralyzing fear rather than a reflective assessment of dangers. The point of terror is to reduce the intended targets beneath the level of human reflection, so terrorism is not a mere synonym for threatening severe consequences.¹⁰²

If “proportionality” meant more than “not justified by military necessity,” it meant not justified by the military necessity of a modern war, which aims to secure victory in *this* war, without blocking a return to peace. A modern war, however, presumed a modern enemy, prepared to negotiate peace when defeat of its organized armies made further resistance seem hopeless. Enemies that fought differently were treated differently. The Lieber Code was not followed by the U.S. Army in subsequent wars with Indian tribes on the western frontier, where burning of villages was a

99. See, e.g., Conor Friedersdorf, *Harold Koh’s Slippery, Inadequate Criticism of the Drone War*, THE ATLANTIC, May 9, 2013, available at <http://www.theatlantic.com/politics/archive/2013/05/harold-kohs-slippery-inadequate-criticism-of-the-drone-war/275692/>.

100. Compare U.S. CONST., amend. VIII (prohibiting “cruel and unusual punishment”) with amend. V (prohibiting taking of “life . . . without due process” and requiring indictment by “grand jury” for “capital crime”—implying capital punishment can be lawful if imposed according to procedural requirements).

101. On “torture,” see LIEBER CODE, *supra* note 62, at art. 16. On the death penalty, see *id.* at art. 44.

102. Seidman, *supra* note 98, at 907. “The problem with torture is . . . that the victim’s will is commandeered by the dehumanizing realization that all we associate with being human is an illusion [as regards mental freedom]. It is not the pain itself that is the essence of torture’s evil. It is rather what the pain produces—the terrible betrayal of our self-understanding of human life.” *Id.*

common tactic.¹⁰³ Similar tactics were pursued by British forces on the frontiers of the Empire, both before and after the Hague Conventions.¹⁰⁴

The Hague Conventions provided for the challenge of different enemies by presenting the Regulations as a “contract” among the parties, binding only in wars in which all sides were committed to the Regulations. The catch-all provision in the Preamble left situations not covered by the rules “under the protection and the rule of the principles of the law of nations . . . the laws of humanity and the dictates of the public conscience”¹⁰⁵ without defining any of these terms. Since they were outside the “contract” among the Hague parties, they were left for each State to determine for itself.

What if a State ratified the Regulations, but then allowed troops to violate the prohibitions? The Hague Conventions were silent on the point, but the silence was taken as endorsement for the traditional remedy—“reprisals” in kind.¹⁰⁶ The Lieber Code was more explicit: “The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch.” When facing “a reckless enemy,” the opposing side may “often” have “no other means of securing [itself] against the repetition of barbarous outrage.”¹⁰⁷

Here is where a different root of “proportionality” may be found. The Lieber Code cautions: “Unjust and inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war and by rapid steps leads them nearer to the internecine wars of savages.” Consequently, the Code admonishes that “retaliation shall only be

103. See, e.g., ROBERT M. UTLEY, *FRONTIER REGULARS: THE U.S. ARMY AND THE INDIAN* 51 (1973) (noting that punitive raids were “aimed at finding and destroying Indian villages,” though in the “majority of actions, the army shot noncombatants incidentally and accidentally, not purposefully”).

104. See C.E. CALLWELL, *SMALL WARS: THEIR PRINCIPLE AND PRACTICE* 40–42 (1990, reprinting 1896 edition) (recommending “raids on livestock” to quell native rebellions outside Europe, or else “their villages must be demolished and their crops and granaries destroyed” and remembering that “the overawing and not the exasperation of the enemy is the end to keep in view.”).

105. 1899 Version, *supra* note 33, at preamble. Compared to the 1907 convention; the 1899 Preamble speaks, a shade less imperatively, of the “requirements [rather than ‘dictates’] of the public conscience” and both precede this with a reference to “usages established *between* civilized nations” [emphasis added]—which might exclude wars with “uncivilized nations.”

106. LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 305–06 (2d ed. 1912); see also *id.* at 308 (noting that “the Hague Regulations do not mention reprisals at all” because Russian proposals for limits on reprisals were rejected at an earlier international conference).

107. LIEBER CODE, *supra* note 62, at art 27.

resorted to after careful enquiry into the real occurrence and the character of the misdeeds that may demand retribution.”¹⁰⁸ It does not quite say that “retaliation” must be “proportionate” to the provocation. European commentators (and proposals from European governments in the late Nineteenth Century) sought to clarify exactly that point.¹⁰⁹ Down to the eve of the Geneva conference in the 1970s, articles on “proportionality” typically focused on the requirement that a “reprisal” should be roughly proportionate to the offense that triggered it—lest the rule be lost altogether.¹¹⁰

“Proportionality” made sense to military lawyers in the context of reprisals. Reprisals were understood as actions otherwise unlawful, except when necessary to force the enemy to stop the same practice.¹¹¹ Reprisals were supposed to uphold the rule by forcing the enemy to face the consequences of violating it. That did often work, as when execution of enemy prisoners prompted respect for prisoners held by the enemy.¹¹² But without some caution, “reprisal” could generate counter-reprisals and end with both sides disregarding the rules.

It made sense when there were relatively clear rules. It made less sense when the rules were already vague—as with permissible targets in an ongoing military campaign.

III. HARSH MEASURES OF WAR: CONTINUITY IN ANGLO-AMERICAN WAR TACTICS IN THE TWENTIETH CENTURY

If “proportionality” had long been an established part of the law of war—and understood as a major constraint—one would expect to find that earlier wars were far less destructive. That is indeed how the Red Cross *Commentary* tells the history of war. “Up to the First World War, there was little need for [treaty provisions to clarify] the practical implementation of this customary rule [exempting civilians and civilian objects] as the

108. *Id.* at art. 28.

109. See OPPENHEIM, *supra* note 106, at 308–09 (summarizing limits endorsed by Institute of International Law, including “reprisals . . . must never exceed the degree of the violation committed by the enemy” and “must in every case respect the laws of humanity and of morality”). However, Oppenheim himself concedes “reprisals” are bound to be “terrible means, because they are in most cases directed against innocent enemy individuals, who must suffer for real or alleged offences for which they are not responsible. *Id.* at 305.

110. See e.g., Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT’L L. 586 (1972).

111. See OPPENHEIM, *supra* note 106, at 83–84.

112. See *id.* at 306–08 (citing examples in which abuse of prisoners by an enemy was halted by threat to reciprocate).

population barely suffered from the use of weapons unless it was actually in the combat zone itself.”¹¹³

The Red Cross account leaves out quite a bit of relevant history, even if one looks at conflicts among western states in the Victorian era. Civilians in Paris were starved and subjected to relentless artillery bombardment by Prussian invaders in 1870.¹¹⁴ In the American Civil War, the Union army shelled the besieged river port of Vicksburg so relentlessly that civilians relocated (often with household furniture) to primitive bomb shelters.¹¹⁵ Across the Confederacy, civilians suffered from shortages of food and vital resources (including salt for curing meat) imposed by the Union’s naval blockade of southern ports¹¹⁶ and by the deliberate depredations of agricultural regions by General William T. Sherman and other Union commanders. The Confederate President, Jefferson Davis, denounced General Sherman as “the Attila of the American Continent.”¹¹⁷

Even the Red Cross *Commentary* does not pretend that the world wars were fought under strict rules of constraint to ensure protection of civilians. The *Commentary* depicts the world wars as a sort of mindless descent to savagery, fueled by a spiral of retaliatory excesses on all sides.¹¹⁸ The *Commentary* sees the Second World War as “a dramatic turning point” in the constraining effect of humanitarian law, at the climax of which “the belligerents went so far as to wage war almost indiscriminately,

113. RED CROSS COMMENTARY, *supra* note 9, at 598.

114. On bombardment of Paris by Prussian army in 1870, see Robert Tombs, *The Wars Against Paris*, in ON THE ROAD TO TOTAL WAR 546–48 (Stig Forster and Jorg Nagler eds., 1997) (“Civilians were not being caught up in siege operations owing to the carelessness of the soldiers: They were the ultimate target of those operations, which had no other aim but to intimidate them into political surrender.”).

115. WINSTON GROOM, VICKSBURG 1863, at 390 (2009). For over six weeks, between 500 and 5,000 artillery shells landed in Vicksburg. *Id.* Firing from naval gunboats on the Mississippi, west of Vicksburg “was deliberately aimed at the civilians” in the city, because military fortifications were out of range. *Id.* at 363. “[M]ost shells” from Grant’s army, entrenched to the east of city, also landed on civilian houses, so civilians moved into cave dwellings, taking furniture, rugs and household valuables because “so many homes were smashed up by Federal bombardment that these furnishings most likely would have been ruined anyway.” *Id.* at 364. Food was so scarce that civilians were reported to buy rats for meat. *Id.* at 403.

116. JAMES M. MCPHERSON, WAR ON THE WATERS: THE UNION AND CONFEDERATE NAVIES, 1861–1865, at 183 (2012).

117. JEFFERSON DAVIS, II RISE AND FALL OF THE CONFEDERATE GOVERNMENT 279 (1881).

118. RED CROSS COMMENTARY, *supra* note 9, at 598. “By the repeated use of reprisals the point was reached where systematically directed at towns and their inhabitants.” *Id.*

which resulted in heavy losses among the civilian population and culminated in the dropping of the nuclear weapons on Hiroshima and Nagasaki.”¹¹⁹

It would be generous to describe the Red Cross’s narrative as oversimplified. It is a politically convenient fable—the world wars as seen from the safe perspective of Swiss lawyers. Even harsher characterizations might be applied to the moral evasions in the Red Cross account. Before reaching the moral disputes, however, it is worthwhile to look first at the actual historical record. Long before the “dramatic turning point” of the Second World War, western military strategists assumed that military necessity authorized them to deploy tactics that imposed considerable loss on civilian populations. Air attacks on cities were not the first time civilians were made to share in the costs of war.

An instructive example occurred at the very outset of the Twentieth Century. In 1899, the Dutch-speaking Boer republics in South Africa invaded the neighboring British colonies. Within a year, the British army had repelled these incursions and taken possession of both Boer capitals. Then, a guerrilla campaign broke out in the open plains outside the Cape Colony. British forces commanded by General Herbert Kitchener responded by devastating farms over a large region, then gathering women and children in bases which were called “concentration camps.”¹²⁰ The term was pointedly embraced by German authorities in later times. Thousands died—some twenty per cent of those “concentrated”—mostly from epidemic disease, attributed to poor sanitary conditions and inadequate provisions.¹²¹

When word of these camps reached London, the Liberal Party (then in opposition) denounced the government’s *handling* of the policy—though not the underlying policy itself.¹²² The Conservative government removed the camps from military to civilian control, greatly alleviating conditions, but did not disavow the policy. It was a severe and costly policy, but not motivated by vengeful passion or mere desire to terrorize.¹²³ It did, in

119. *Id.* at 586.

120. For a detailed account of the war’s origins, see THOMAS PAKENHAM, *THE BOER WAR* 100–80 (1979).

121. *Id.* at 549.

122. See *id.* at 533–49. Churchill wrote a book published in 1958, but completed some twenty years earlier, which also uses the term “concentration camp” and offers a sympathetic account of criticism from Liberal leaders at the time, regarding conditions in the camps, where thousands died from inadequate food and disease. WINSTON S. CHURCHILL, *HISTORY OF THE ENGLISH-SPEAKING PEOPLES*, VOL. IV: *THE GREAT DEMOCRACIES* 383 (1958).

123. Pakenham reports that even some Boer leaders recognized the logic of the British policy. “One is only too thankful nowadays to know that our wives are under English protection,” wrote General Louis Botha near the end of the war. See PAKENHAM, *supra* note 120, at 603.

fact, secure the submission of the guerrillas. It did not even prevent former Boer fighters from accepting the post-war settlement. Leading Boer commanders in the war were subsequently elected to high offices in South Africa, with Boer support, on a program of cooperation with the British Empire.¹²⁴ Jan Smuts, a Boer commander in 1900, served in British war councils in both world wars.¹²⁵

What is most telling about this episode is that it was endorsed by leading scholars of international law at the time. Lassa Oppenheim's treatise, *International Law*, first appeared in 1906 and became the leading English language treatise for most the twentieth century.¹²⁶ Oppenheim interpreted the devastation of farms as a response to "military necessity" and the "concentrating" of women and children as a "humanitarian" compensation.¹²⁷ Percy Bordwell, an American law professor, published a short treatise on the law of war in 1908.¹²⁸ Bordwell also endorsed the devastation and "concentration camps" as reasonable acts of war. American forces deployed similar tactics to defeat guerrillas in the Philippines at almost the same time.¹²⁹

124. Louis Botha represented the Boers at the peace conference following the Boer War. After the Union of South Africa was reorganized as a Dominion of the British Empire, he served as Prime Minister from 1910 to 1919, in which capacity he assisted British war efforts in the First World War and signed the Versailles Treaty in 1919.

125. See KENNETH INGHAM, JAN CHRISTIAN SUMTS 94–115, 208–33 (1986). As South African Minister of Defense in the First World War, Smuts took an active role in campaigns against German colonies in Africa and then served in the Imperial War Cabinet in London in the last years of the war and subsequently represented South Africa at post-war peace conferences. See *id.* at 94–115. As Minister of Defense and Prime Minister in the Second World War, Smuts again played an active role in British strategy councils and in plans for the postwar United Nations. See *id.* at 208–33. In 1941, Smuts was given the rank of British Field Marshall. See *id.*

126. OPPENHEIM, *supra* note 106, at 190–91.

127. "The practice resorted to, during the South African war, to house the victims of devastation in concentration camps, must be approved. The purpose of war may even oblige a belligerent to confine a population forcibly in concentration camps." *Id.*

128. PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 153 (1908). "The Boers thought they were fighting for the sacred cause of liberty. If they were willing to suffer martyrdom in that cause, all honor was due them, but when in order to continue the struggle they found it necessary to resort to guerrilla fighting, thus involving the whole people, they had no right to complain when the British authorities made prisoners of those who had ceased to be non-combatants." *Id.* Anyway, "[t]he sufferings of those who were not brought into the camps were worse than those who were brought in." *Id.* (citing a 1902 letter from Boer General Louis Botha). Bordwell was professor of constitutional law at the University of Missouri.

129. Bordwell made the comparison explicitly. See *id.* at 155.

Delegates to the Second Hague Peace Conference, held in 1907, did not seem to think these recent episodes demanded a new convention to regulate or restrain such severe war measures.¹³⁰ Even after the Second World War, subsequent editions of Oppenheim's treatise retained the passage on "concentration camps," letting the terminology of a more innocent era speak for itself.¹³¹ The editors of post-war editions instead contrasted Britain's policy in South Africa in 1901 with depredations of the German army in France in 1916, in Norway in 1940, and in Russia in 1943 as exercises in vengeance or fury, unrelated to immediate tactical exigencies.¹³² Among other things, the Charter of the Nuremberg Tribunal conferred jurisdiction (as Oppenheim's post-war editors recorded) for the crime of "wanton destruction of cities, towns or villages or devastation *not justified by military necessity*."¹³³

To Oppenheim and his later editors—as to his forerunners like Lieber and Vattel—it seemed quite reasonable to distinguish even deliberate "devastation" from mere "wanton destruction." In the Boer War, Britain had faced a military challenge and dealt with it, making some effort to limit the worst consequences to civilians. Neither at the time, nor in later decades, did commentators try to justify harsh measures by depicting the Boers as beyond the claims of humanity.¹³⁴

In the world wars, Britain and its allies unleashed tactics that caused civilian suffering on a far wider scale. In the First World War, British blockade measures provoked great bitterness in Germany, where the "starvation blockade" was seen as an attempt to terrorize civilians.¹³⁵ Whatever else one may say of this policy, it was not prompted by war

130. See BARBARA TUCHMAN, *THE PROUD TOWER* 324–38 (1966) (describing political currents leading up to the Second Hague Peace Conference and preoccupying delegates; concern about tactics in colonial wars was not on the agenda).

131. See LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 415–16 (H. Lauterpacht, ed., 7th ed. 1952).

132. *Id.*

133. *Id.* (quoting International Military Tribunal Charter art. 6, Aug. 8, 1945) (emphasis added). Writing in the 1970s, a British historian concurred that "British anti-guerrilla operations (including much devastation) in the second phase of the Boer war" had preserved "a proper distinction . . . between property and persons" as targets of attack. GEOFFREY BEST, *HUMANITY IN WARFARE* 354 (1980).

134. The young Winston Churchill's first speech in the House of Commons, as a new Conservative member in 1901, expressed sympathy for the Boers: "we cannot help admiring their determination and endurance" and "if I were a Boer, I hope I should be fighting in the field." Still, he did not question the justice or wisdom of the war. RANDOLPH S. CHURCHILL, *WINSTON S. CHURCHILL VOL. II: YOUNG STATESMAN* 7–9 (1967).

135. See C. PAUL VINCENT, *THE POLITICS OF HUNGER: THE ALLIED BLOCKADE OF GERMANY 1915–1919*, at 45–60, 124–51 (1985).

fever, let alone by technological compulsion.¹³⁶ Four years before the outbreak of the world war, the Liberal government of the day had agreed to the Declaration of London, which proposed to limit seizures of enemy cargo on the high seas to war-related contraband and to limit blockades solely to ports receiving such supplies.¹³⁷

In the House of Lords, critics warned that enemies might treat food shipments as contraband and try to blockade all British ports. It would be a natural recourse for an enemy, they argued, since an enemy was likely to think that food shortages would undermine the British public's support for the war: "the pinch on our population would be terrible. Therefore it is no wonder that a foreign power should make its plans almost exclusively at the beginning of a naval war with a view to creating a shortage in our food supply."¹³⁸ On the strength of such arguments, the Lords rejected the Declaration of London and it was not adopted.¹³⁹

In the ensuing war, it was Britain which blocked Germany's food supplies. The massive post-war study sponsored by the British government, *History of the Blockade of Germany*, was completed in 1937, but not made public for more than a quarter century.¹⁴⁰ The study acknowledges that, from the evidence of German sources, the blockade did not prevent

136. An alternate explanation offered in RED CROSS COMMENTARY, *supra* note 9, at 586 ("During the Second World War . . . the enormous development of the means of warfare jeopardized this principle [of civilian immunity] in practice").

137. Declaration Concerning Laws of Naval War, Feb. 26, 1909, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1113–22. For background on diplomatic origins and subsequent political fate of the treaty, see CALVIN DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE 303–26 (1975).

138. EARL OF SELBORNE, DEBATES IN BRITISH PARLIAMENT 1911–1912 ON DECLARATION OF LONDON AND NAVAL PRIZE BILL 631 (1919). He began by saying: "I think foreigners are largely inclined to overestimate the effect which such a pinch would have upon our population. I believe our people, if the war was one in which their heart was engaged, would not hamper their Government by riot or panic at a time of such emergency." *Id.*

139. See DAVIS, *supra* note 137.

140. ARCHIBALD C. BELL, A HISTORY OF THE BLOCKADE OF GERMANY, 1914–1918, at iv (1961). As the preface (written in 1937) explains, the term "blockade" in the title is "conveniently employed as a general description of measures taken by this country to deal with enemy commerce during the Great War, but is technically inaccurate, as a legal blockade of the Central Powers, in the technical sense given to the word in international law, was never declared and the powers taken by Orders in Council to deal with trade of the Central Powers generally . . . were justified as reprisals for their infractions of international law." *Id.* Blockade "in the technical" sense—at least in the Nineteenth Century—required close-in naval forces blocking access to specific ports, which was not how Britain organized its efforts to close off German access to sea-borne commercial traffic.

Germany from continuing to provide adequate munitions and equipment to its troops in the field. Still, the author, Professor A.C. Bell, concluded that “the great consequence” of the blockade “and the great achievement of those who waged it” was the “infusing” of “a blind and contagious anger at authority” in “one of the bravest and most obedient peoples in Europe.”¹⁴¹

As the official history saw it, food shortages caused by the blockade undermined civilian morale and contributed to the mutiny in the fleet and the uprising in Berlin in November of 1918, which forced the Kaiser to abdicate and the German army to insist on an immediate armistice. The official history offers no criticism of the blockade, even while accepting German claims that it led to hundreds of thousands of deaths (from the effects of epidemic disease on civilian populations weakened by food shortages and dietary deficiencies).¹⁴²

Decades later, Hersch Lauterpacht, successor to Oppenheim’s chair at Cambridge, defended the blockade as a logical extension of “economic warfare.” The traditional law of contraband rested on “the notion of a legally relevant distinction between military and civilian needs.”¹⁴³ The wartime blockades presumed “no such sacrosanctity attaches to the civilian population at large as to make illegal the effort to starve it alongside the military forces of the enemy as a means of inducing him to surrender. According to accepted practice in war on land, the civilian population in a beleaguered fortress enjoys no such immunity.”¹⁴⁴ The blockade might be considered a larger version of a siege.¹⁴⁵

Certainly the blockade was not the product of a mere emotional impulse to avenge battle losses on the Western Front. In 1929, after a decade of postwar peace, the British government was confronted with a diplomatic initiative from the new U.S. President, Herbert Hoover (who had distributed food to refugees during the war). Hoover proposed a treaty stipulating

141. *Id.* at 674.

142. *Id.* at 671–73. Bell reports, without challenge, statistical evidence compiled by German authorities, showing that civilian deaths were markedly higher during the last years of the war than in pre-war years. There was much hardship in Germany in the last years of the war, owing to fuel shortages, loss (or feared loss) of relatives in the army, general anxiety about the future—and an influenza epidemic. Isolating the precise effects of the blockade on larger statistical patterns must be a matter of conjecture.

143. Sir Hersch Lauterpacht, *The Revision of the Law of War*, 29 BRIT. Y.B. INT’L L. 365 (1952).

144. *Id.* at 374.

145. *Id.* (noting British war manual that authorized commanders, when conducting siege operations, to refuse to allow evacuations of civilians so as to hasten the surrender of the defending combatants). He also notes that the U.S. Military Tribunal, in the German High Command Trial (*War Crimes Trials*, Vol. 12 at 84), accepted this defense of German policies in Russia in the Second World War. *Id.*

that, in any future war, belligerent navies would not interfere with ordinary food shipments to their enemies.¹⁴⁶ The British government, in the hands of the Labour party at that moment, declined. A memo for the Cabinet's Committee of Imperial Defence explained the reasons for rejection:

Blockade in general and food blockade in particular are the greatest deterrent to war and are recognized as such by the adoption of economic pressure as a sanction in the Covenant of the League of Nations. To remove or weaken the greatest deterrent is not to make war less probable. To tell a potential enemy that in all circumstances you will feed him, is not to reduce the risk of an aggression.¹⁴⁷

In the Second World War, Britain again imposed severe blockade measures, almost from the outset.¹⁴⁸ Neville Chamberlain defended the practice as analogous to siege.¹⁴⁹ Churchill, soon after succeeding Chamberlain in the spring of 1940, was more emphatic, defending food blockade as a tactic of coercion but not vengeance.¹⁵⁰ “There will always be held up before the eyes of the peoples of Europe, including—I say deliberately—the German and Austrian peoples, the certainty that the

146. See President Hoover, Address at the Ceremonies on the Eleventh Anniversary of Armistice Day Under the Auspices of the American Legion 377 (Nov. 11, 1929) (Washington, U.S. Govt. Print. Off., 1929) (stating that “food ships should be made free of interference in times of war” to eliminate “one of the underling causes” of naval arms races).

147. Memorandum from the Secretary of the Committee of Imperial Defense to the Subcommittee on Belligerent Rights at Sea 389–408 (Dec. 23, 1929), *reprinted in* SEA POWER AND THE CONTROL OF TRADE 407 (Nicholas Tracy ed., 2005).

148. But not quite; as in the First World War, the British government initially worried about the reaction of neutrals, especially—but not only—in the United States. By June of 1940, there were few neutrals left in Europe to worry about. See W.N. MEDLICOTT, *THE ECONOMIC BLOCKADE* 46–47 (1952) (reporting criticism of blockade policies in Parliament in March 1940, for “economic appeasement”).

149. See 351 PARL. DEB., House of Commons (1939) (noting that Prime Minister Chamberlain stated, “a naval blockade is in no way different from a land siege and no one has ever suggested that a besieging commander should allow free [food] rations to a besieged town”).

150. Winston Churchill, Prime Minister of the United Kingdom, Speech to House of Commons: *The Few* (Aug. 20, 1940). “What would indeed be a matter of general complaint would be if we were to prolong the agony of all Europe by allowing food to come in to nourish the Nazis and all their war effort, or to allow food to go in to the subjugated peoples, which certainly would be pillaged by the Nazis.” The speech also noted that Hitler had recently commended the plan of President Hoover to exempt food from blockades. Churchill’s response: “we can and we will arrange in advance for the speedy entry of food into any part of the enslaved area, when this part has been wholly cleared of German forces and has genuinely regained its freedom.”

shattering of the Nazi power will bring to them all immediate food, freedom and peace.”¹⁵¹

IV. BOMBING AND CIVILIANS: BEFORE, DURING AND AFTER THE SECOND WORLD WAR

What was new in World War II was the bombing of cities—new, at least, on the scale on which it was ultimately pursued. The Red Cross *Commentary* seems to have this tactic in mind when it depicts the eclipse of “the customary rule” as resulting from a cycle of mutual retaliation, which finally left new technologies of destruction to operate outside all control.¹⁵²

The kernel of truth in this account is that both Britain and Germany claimed that the other side had initiated the bombing of cities and both claimed, on this basis, the right to bomb enemy cities in reprisal. Reprisals, however, were supposed to intimidate the opponent into abandoning a particular tactic. Here, Britain launched into the bombing of Berlin as soon as the first German bombs fell on civilian areas in London, in August of 1940, without trying to test the German claim that the attack on London neighborhoods had been inadvertent.¹⁵³ Both sides then continued the bombing of cities without any serious effort to seek a return to mutual restraint.¹⁵⁴ In the spring of 1941, Germany finally abandoned attacks on British cities to concentrate its resources for its impending war against Soviet Russia. Britain continued an ever more intense bombing campaign against German cities.¹⁵⁵

Britain’s bombing offensive was not launched on sudden impulse of fury and then sustained by blind rage. Britain had established a separate air force in 1918—the first country in the world to do so—with the explicit aim of allowing the air arm, like the navy, to pursue its own strategy,

151. *Id.*

152. RED CROSS COMMENTARY, *supra* note 9, at 613–28.

153. GEORGE QUESTER, DETERRENCE BEFORE HIROSHIMA 117 (1966) (“the bombs dropped [on London] on the 24th [of August] were not the all-out attack for which Britain had been braced since 1939, and a serious German assault on London, in the absence of provocation, could by no means be a certainty . . . most of London still stood untouched” when Churchill decided “to bomb Berlin”).

154. *See id.* at 120–21 (noting that “while certain later German moves could possibly be interpreted as ‘feelers’ aimed at re-establishing restraints . . . September 1940 marked the end of British desires for such restraints”).

155. *See id.* at 136–45 (emphasizing that “lulls” in bombing by Germans of Britain and British air force of Germany were motivated by independent tactical concerns, not correlated with actions by the other side).

independently of the army's ground campaigns.¹⁵⁶ Britain was preparing a great air offensive for the spring of 1919, when the Germans unexpectedly sued for peace in November of 1918.¹⁵⁷ It was Britain that pioneered the design and construction of long-range bombers in the mid-1930s.¹⁵⁸ It was Britain that embarked on a crash program to build thousands of long-range bombers in the first years of the war. Germany never built fleets of long-distance bombers. Only one other country made preparations for long-range bombing efforts before the Second World War—the distant United States.¹⁵⁹

Two legacies of the First World War stimulated British thinking about bombing in the inter-war years. First, the vast scale of casualties on the Western Front reinforced a determination to find means of fighting that would avoid the carnage of trench warfare. Second, the war left Britain with new colonies in the Middle East and doubts about whether it could afford the costs of extended military deployments in places like Iraq. In December 1919, War Minister Winston Churchill—who was also in charge of the new Air Ministry—explained to the House of Commons: “The first duty of the Royal Air Force is to garrison the British Empire.”¹⁶⁰ Of the RAF's twenty-five squadrons, nineteen were deployed to India and the Middle East and an RAF commander was made military governor of

156. H. MONTGOMERY HYDE, *BRITISH AIR POLICY BETWEEN THE WARS, 1918–1939*, at 27–35 (1976) (Among leading voices advocating an independent air service to launch attacks on German interior were Winston Churchill and Jan Smuts, culminating in establishment of independent air service on April 1, 1918).

157. See MORTON WILLIAM ROYSE, *BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE* 184–86 (1928) (noting that the Allies planned “general widespread destruction” by bombing for spring 1919, with “a six fold increase in bombing operations”—which “only the [Nov. 1918] Armistice prevented [them] from carrying out”).

158. J.M. SPAIGHT, *BOMBING VINDICATED* 10 (1944), available at <http://www.jrbooks online.com/spaight.htm>. Plans for long-range bombers were well under way in 1936, with what became the Stirling Bomber, followed by the Halifax and Lancaster bombers—all of which would see service in the first years of the next war. By contrast, Germany in the 1930s “was thinking only in terms of short-range bombers and particularly of dive-bombers for employment with her powerful mechanized army.” *Id.*

159. See RONALD SCHAFER, *WINGS OF JUDGMENT, AMERICAN BOMBING IN WORLD WAR II* 28–29 (1985) (describing evolving doctrine at the U.S. Air Corps Tactical School in the mid-1930s, which envisioned massive attacks on the enemy's war economy and development of B-17 bomber in 1935 to implement this strategy). Planners assumed such attacks would “affect German civilians severely but indirectly.” *Id.* at 33.

160. LAWRENCE JAMES, *CHURCHILL AND EMPIRE* 165 (2014).

Iraq.¹⁶¹ Air attacks did prove quite effective in suppressing local revolts in Iraq, in India and elsewhere in the 1920s and 1930s.¹⁶²

By the mid-1920s, the military strategist Basil Liddell Hart celebrated air attacks as an extension of the traditional “British way of war” and claimed that short attacks on native tribes were actually more “humane” than ground assaults, because they could strike at valued property (such as sheep herds and corrals) without much loss of life.¹⁶³ Critics did worry that a strategy of “air control” might “involve the death by bombing of women and children.”¹⁶⁴ However, the critics did not force any great rethinking within the RAF. One who learned his trade in colonial air attacks was Arthur Harris, who became commander of Bomber Command in the Second World War.¹⁶⁵ Winston Churchill remained alert to the potential of air attacks when he moved from the Air Ministry to the Colonial Office in 1921.¹⁶⁶

The strategic bombing practiced by Britain and the United States was vastly more destructive, of course, than the colonial air attacks of the inter-war years. In 1943, Britain’s Royal Air Force sent a thousand bombers against Cologne and then mounted another such raid on Hamburg, igniting fire storms that consumed the city centers. With these attacks, the RAF was not seeking to destroy specific munitions factories. As early as 1941, careful study of bombing results persuaded the RAF that bombers did not have the accuracy to hit specific targets, such as particular factories. Destroying whole neighborhoods, it was hoped, would disrupt production by forcing workers to relocate, as had happened in British cities.¹⁶⁷ U.S. bombers, joining the campaign in strength by 1943, strove for greater accuracy in daylight raids, but in practice left a similar trail of devastation.¹⁶⁸

161. *Id.* at 166. *See also* HYDE, *supra* note 156, at 120–27 (on pacification of northern Iraq by Air Officer Commanding John Salmond in early 1920s).

162. JAMES, *supra* note 160, at 160.

163. *See* BASIL LIDDELL HART, *THE BRITISH WAY OF WAR* 158–60 (1932) (claiming RAF attacks to quell colonial risings in Iraq were preceded by warnings and were targeted on particular villages so “air operations left no ‘legacy of hatred’ as had been alleged” by critics).

164. JAMES, *supra* note 160, at 167.

165. CHARLES MESSENGER, ‘BOMBER’ HARRIS AND THE STRATEGIC BOMBING OFFENSIVE 16 (1984) (describing Harris’ experience leading air force units in India and Iraq in aftermath of First World War).

166. JAMES, *supra* note 160, at 160.

167. Analysis of RAF raids in the fall of 1941 found (based on photographic evidence) that only 15 percent of aircraft bombed within five miles of their intended targets. RICHARD OVERY, *THE BOMBERS AND THE BOMBED: ALLIED AIR WAR OVER EUROPE 1940–1945*, at 69–70 (2013). On RAF readiness to strike worker housing as an alternative (along with early hopes of undermining German morale), *see id.* at 56–57.

168. *Id.* at 204 (“American bombing, though intended to be directed at oil and transport targets, was often little distinguishable from area raiding.”).

Still, strategic bombing was not designed to torment civilians. Churchill had doubted, during the First World War, that bombing of cities would have a decisive effect.¹⁶⁹ He continued to express that view in memos to Royal Air Force commanders in the Second World War.¹⁷⁰ That does not mean bombing was pursued out of sheer spite.

First, the bombing campaign was quite costly to those who waged it. Britain's Bomber Command lost some 50,000 fliers—nearly a quarter of all British combat losses in the Second World War and over 40 per cent of all those who flew with Bomber Command.¹⁷¹ Britain was still a democracy and such losses would have been very hard to sustain if commanders did not think (and insist in public) that these sacrifices were securing tangible military benefits. By the last years of the war, American air units suffered comparable casualties as the British, but the United States, untouched at home by German bombers, can hardly have been actuated by emotional craving for revenge.¹⁷² Meanwhile, nearly fifteen per cent of American military production was devoted to building and equipping bombers¹⁷³—a diversion of resources that could hardly have been approved if military planners did not believe bombing would prove militarily rewarding.

A second point to notice is that bombing in Europe was not limited to targets in Germany. A sizable proportion of casualties from Anglo-American bombing were in occupied countries—especially in France, Belgium, and

169. 1 CHARLES WEBSTER & NOBLE FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939–1945*, at 47 (1961). Reacting to German zeppelin attacks on London in October 1917, Churchill, then Minister of Munitions, prepared a memo expressing doubt that “any terrorization of the civilian population which could be achieved would compel the government of a great nation to surrender.” *Id.*

170. In September 1941, now Prime Minister, Churchill submitted a memo to Air Marshal Portal of the RAF: “It is very disputable whether bombing by itself will be a decisive factor in the present war . . . There is no doubt the British people have been stimulated and strengthened by the [German bombing] attacks made upon them so far.” *Id.* at 182.

171. MARTIN VAN CREVALD, *THE AGE OF AIR POWER* 137 (2011).

172. RAF Bomber Command reported 47,268 combat fatalities among bomber crews—representing a loss rate of 41% of the 135,000 men engaged in bombing missions, the highest loss rate of any service. Total American losses from bombing in Europe: 30,099. OVERY, *supra* note 167, at 229.

173. See KENNETH P. WERRELL, *DEATH FROM THE HEAVENS: A HISTORY OF STRATEGIC BOMBING* 127 (2009) (reporting estimates that the same resources could have equipped an additional 25 tank divisions).

the Netherlands.¹⁷⁴ There was no reason at all to take satisfaction from killing civilians in the territory of former allies or neutrals. There was, to the contrary, solid reason to fear antagonizing populations that might otherwise wish to help the Allied cause. Allied commanders still decided to strike targets in these countries, even with the known risk that nearby civilians would be injured. In the early years of the war, British officials took the precaution of asking governments in exile for approval and inevitably received it.¹⁷⁵ Later on, American commanders insisted on bombing targets in France in preparation for the Normandy invasion, despite pleas from Churchill to avoid levels of civilian casualties that would embitter the French.¹⁷⁶

A third point: as destructive as it was to German cities, bombing was not aimed at killing civilians. British authorities found that German attacks in the Battle of Britain (September 1940—May 1941) killed 43,000 civilians, but destroyed over 1,000,000 homes.¹⁷⁷ This experience encouraged the view that attacks on urban centers could be extremely disruptive to war production, even if bombers could not pinpoint specific factories. Workers would be “de-housed.”¹⁷⁸ The enemy could adapt measures to protect civilians from the worst by, for example, evacuating women and children from cities, by providing underground shelter for those remaining, and by situating likely targets away from cities. Germany did generally resort to such protective measures.¹⁷⁹ Allied commanders did not give a

174. OVERY, *supra* note 167, at 361. “France Belgium, the Netherlands, Norway, Denmark absorbed almost 30 percent of bomb tonnage dropped by the American and British bomber forces . . . countries in eastern Europe and the Balkans absorbed another 6.7 per cent . . . they cost at least 70,000–75,000 lives, most of them among peoples sympathetic to the Allied cause.” *Id.* Some 10,000 people died in the Netherlands as a result of bombing—90 per cent of them from Allied bombing. *Id.* at 426.

175. See 2 CHARLES WEBSTER & NOBLE FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939–1945*, 462–63 (1961) (describing British practice in 1942: “Consent was obtained more easily than might have been expected and both information and encouragement to attack was supplied in most cases”).

176. SCHAFFER, *supra* note 159, at 40–43. American commanders bridled at “letting German propaganda decide which objectives to attack” when Germans placed “military objectives behind friendly civilians.” *Id.* at 40. They concluded that “death and injury among friendly civilians were. . . analogous to casualties among the Allies’ own troops.” *Id.*

177. VAN CREVALD, *supra* note 171, at 101.

178. See OVERY, *supra* note 167, at 92 (noting that “damage done to a large working class area was expected to affect the output of numerous factories through absenteeism or death where an attack on a single factory target would affect only that one”).

179. See *id.* at 311 (noting that the “civil defense structure . . . proved sufficiently flexible to continue . . . coping with consequences of [air] raids”), 317 (asserting that the German peoples’ “experience of being bombed . . . was balanced” by “redistributing Jewish apartments and furnishings, using [concentration] camp and foreign labor to clean up debris”).

moment's thought to pursuing urban refugees into their rural retreats or developing bombs that could not only destroy surface structures, but also reach people in underground shelters.¹⁸⁰

After the attack on Hamburg, Germany's Armaments Minister, Albert Speer, warned that a few more attacks of that kind would completely paralyze German war industry.¹⁸¹ At the time, however, the Allies lacked the capacity to pursue more attacks on that scale against major cities.¹⁸² Bombing priorities kept shifting. Britain's Ministry of Economic Warfare tried to suggest "economic bottlenecks" whose destruction would have a decisive effect.¹⁸³ So, for example, many air crews were lost in efforts to destroy German production of ball-bearings—to no great effect, as replacements were imported from neutral Sweden.¹⁸⁴ In the midst of war, it was very hard to judge whether specific raids or bombing priorities were or were not having substantial effects on German war industry.¹⁸⁵

The effectiveness of bombing was a major focus of post-war inquiry by Allied specialists.¹⁸⁶ German commanders acknowledged that it was a considerable source of concern.¹⁸⁷ It certainly diverted German resources

180. See SCHAFFER, *supra* note 159, at 72–78 (noting that proposals for bombing of German small towns for political effect were advanced in early 1944 by Lowell Weicker, a U.S. Army Air Force intelligence officer—and dismissed at the outset by career air force officers.).

181. After the July 1943 raid on Hamburg—causing “devastation” which “could be compared only with the effects of a major earthquake”—Speer reported to Hitler that “a series of attacks of this sort, extended to six more major cities, would bring German armament production to a total halt.” ALBERT SPEER, *INSIDE THE THIRD REICH* 284 (1970).

182. On the difficulties in mounting large scale attacks on German cities in the face of improved German air defenses and limited Allied air strength, see OVERY, *supra* note 167, at 148–70.

183. See 1 WEBSTER & FRANKLAND, *supra* note 169, at 466 (noting that, in 1942, the Ministry of Economic Warfare “was constantly engaged in trying to discover economic bottlenecks, the destruction of which would, they thought, exert a far more paralyzing effect on German industry than the indiscriminate damage by general area bombing”).

184. OVERY, *supra* note 167, at 286–87.

185. See 3 CHARLES WEBSTER & NOBLE FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939–1945*, at 290 (1961). (Explaining that “[o]ne of the major problems of the bombing offensive was the achievement of a strategic concentration or, in other words, the establishment of a main aim . . . This problem persisted throughout the war . . .”).

186. SPEER, *supra* note 181, at 499.

187. Speer reports that barely a week after the German surrender, the commander of the U.S. 8th Air Force, General F.L. Anderson, came to see him with a retinue that included the wartime economic administrator, J.K. Galbraith, the military strategist and diplomat, Paul Nitze, and others associated with the U.S. Strategic Bombing Survey and discussions

into large-scale efforts to relocate industry and build air defenses—all of which consumed manpower and resources that would otherwise have served direct military action. The strategic air campaign was, in effect, a separate front in the war, which made land campaigns on other fronts much more effective than they would otherwise have been.¹⁸⁸

It is true that “strategic bombing” was sometimes justified as a way to undermine “enemy morale”—an aim that might seem to justify almost any sort of destruction as a contribution to victory. When Churchill and Roosevelt met at Casablanca in early 1943, they agreed, among other things, on a “combined bomber offensive” which would aim at “undermining the morale of the German people to a point where their capacity for armed resistance is fatally weakened.”¹⁸⁹ Allied planners believed that the severity of the naval blockade had undermined civilian morale and so forced Germany’s surrender in 1918.¹⁹⁰ However, even the Casablanca directive did not depict “civilian morale” as an isolated objective, stressing instead the “progressive destruction and dislocation of the German military, industrial and economic system.”¹⁹¹ American air commanders, urging targeted attacks on crucial strategic infrastructure (such as transportation links), saw the Casablanca directive as an endorsement of their own approach.¹⁹² A year later, they resisted proposals from psychological warfare experts to bomb every small town in Germany simply to undermine German civilian morale.¹⁹³

Not even British air commanders, however, thought bombing cities would force German surrender until the military balance on the ground

were so “comradely” that Speer regarded their exchanges as a “university of bombing.” *Id.*

188. Most of German aircraft production during the war had to focus on fighter planes to counter the bombers and most of its planes had to remain at home, to counter Allied attacks, allowing the Red Army to maintain air supremacy on its own fronts by 1943 and a similar advantage for Allied operations in the Mediterranean. OVERY, *supra* note 167, at 226. Some 900,000 people in Germany were diverted into the antiaircraft service by 1944 and another 900,000 into civil defense operations; though “few of those involved would have been potential soldiers” (because they were too old or too young), they might have been used in other forms of war service. “The military consequences of the bombing were clearly more important than the economic, psychological, or political ones.” *Id.* at 227–28.

189. See 5 WINSTON CHURCHILL, THE SECOND WORLD WAR 519–20 (1951) for text of this “Casablanca directive” of Feb. 4, 1943.

190. HART, *supra* note 163, at 38.

191. CHURCHILL, *supra* note 189.

192. SCHAFFER, *supra* note 159, at 38.

193. *Id.* at 72–79.

had shifted so decisively that Germans could nurture no hope of victory.¹⁹⁴ In the last months of the war, British commanders did revert to massive bombing of German cities in the hopes of hastening Germany's surrender, often with participation of American bombers. Critics have claimed these attacks did not force German surrender, so they were gratuitous. Even if bombing did not hasten Germany's surrender, that was not an implausible hope. And the attacks did, at least, effect sufficient demoralization that Germans made no effort at guerrilla resistance after the surrender of their organized forces¹⁹⁵—a prospect that Allied commanders had feared beforehand.¹⁹⁶

The claim that bombing of cities proved “ineffective” must also reckon with the fact that Japan surrendered before a single Allied soldier had landed on its home islands—but after years of tightening sea blockade and months of devastating air attacks, culminating in the dropping of two atomic bombs. Those who defend the use of atomic weapons against Hiroshima and Nagasaki argue that this terrible tactic saved lives, since a full scale invasion would have been far more costly, even to the Japanese.¹⁹⁷

Still, the resort to atomic bombs required only a bit more ruthlessness than the strategy already practiced. Twice as many civilians died in earlier, conventional air attacks on Tokyo and other cities as in the culminating nuclear strikes on Hiroshima and Nagasaki.¹⁹⁸ Truman

194. 1 WEBSTER & FRANKLAND, *supra* note 169, at 10. “The theory of victory through air power alone never gained currency in the high strategic counsels of the Chiefs of Staff during the period of the Second World War.” *Id.*

195. Lothar Kettenacker, *The German Debate*, in TERROR FROM THE SKY: THE BOMBING OF GERMAN CITIES IN WORLD WAR II 214, 218 (Igor Primoratz ed., 2010) “After May 1945, the much propagated Volksgemeinschaft [national community] had been immobilized overnight and transformed into an atomized society of individuals craving to hold on to life” so “morale bombing. . . did make a most important contribution to the long-lasting reorientation of the German nation.” *Id.*

196. Allied concerns about the threat of German guerrilla resistance—“werewolves”—were not borne out by experience. MAX HASTINGS, ARMAGEDDON: THE BATTLE FOR GERMANY, 1944–1945, at 360, 499 (2004).

197. Henry Stimson, *Least Abhorrent Choice*, TIME, Feb. 3, 1947. A review of debates among historians emphasizes that even critics argue that Japan's surrender could have been secured at approximately the same time without the use of atomic bombs—thereby implicitly acknowledging the central question as one of military necessity. See J. Samuel Walker, *Recent Literature on Truman's Atomic Bomb Decision*, 29 DIP. HIST. 311, 312 (2005).

198. The U.S. Strategic Bombing Survey estimated fatalities from air attacks on Tokyo and other cities (exclusive of atomic attacks at the very end) at 220,000. See United

acknowledged no policy change, describing the first use of the atomic bomb as directed at “Hiroshima, a military target.”¹⁹⁹ What is fair to say is that the earlier fire-bombing of Japanese cities had not been narrowly focused on military objectives, but had never been acknowledged as sheer terror raids against civilians.²⁰⁰

Finally, if Allied bombing has come to be viewed in recent decades as another sort of “war crime,” that reflects retrospective views—some of which were stirred by effective propaganda. During the war, German propaganda depicted Allied bombing as a “terror campaign,” conducted by “vandals” and “barbarians.”²⁰¹ That view was generally rejected in Allied countries. While a few churchmen raised questions about the morality of bombing cities, the “large majority” of Anglican and Catholic bishops in Britain denied that the RAF was engaged in “atrocities.”²⁰² According to a recent study by a German scholar, religious publications in Britain at the time defended Allied bombing without ever expressing “military triumphalism or the aggressive rhetoric of war.”²⁰³ In America, *The New York Times* defended the fire-bombing of Hamburg in 1943, with an editorial rejecting German claims that the aim was simply to spread “terror.”²⁰⁴ The *Times* defended the bombing of Dresden in similar terms in February 1945.²⁰⁵

States Strategic Bombing Survey, Summary Report, Pacific War, 20 (July 1, 1946), www.anesi.com/ussbs01.htm#thamotjc. The same report estimated immediate deaths from the attack on Hiroshima at 70,000 (of whom 30,000 were military personnel) and 40,000 at Nagasaki. *Id.* at 23–24.

199. Truman’s first public comment in a prepared statement released to the press in written form, stressed the analogy with strategic bombing of military targets: “We are now prepared to obliterate more rapidly and completely every productive enterprise the Japanese have above ground in any city. We shall destroy their docks, their factories, and their communications. Let there be no mistake; we shall completely destroy Japan’s power to make war.” 2 HARRY S. TRUMAN, MEMOIRS 422 (1955). However improbable it may sound, Truman had told the Secretary of War that he wanted the atomic bombs used so that “military objectives and soldiers and sailors are the target and not women and children.” SCHAFFER, *supra* note 159, at 174.

200. See SCHAFFER, *supra* note 159, at 151 (noting that Gen. Curtis LeMay insisted even incendiary attacks on Tokyo did not aim “to bomb indiscriminately civilian populations. No point in slaughtering civilians for the sake of slaughter”).

201. OVERY, *supra* note 167, at 310. German “propaganda had always described Allied bombing as ‘terror bombing’ and the air crew as gangsters or air pirates.” *Id.*

202. DIETMAR SUESS, DEATH FROM THE SKIES: HOW BRITONS AND GERMANS SURVIVED BOMBING IN WORLD WAR II 244 (2014).

203. *Id.*

204. Douglas Lackey, *The Bombing Campaign: the USAAF, in* TERROR FROM THE SKY: THE BOMBING OF GERMAN CITIES IN WORLD WAR II 55–57 (Igor Primoratz ed., 2010). Lackey concludes that, from the fact that some criticism from church leaders “fizzled out” by 1944, “the mass killings of German citizens in air attacks were implicitly endorsed by a large majority of the American people.” *Id.* at 57.

205. *Id.*

In later years, Dresden came to be viewed quite differently, largely owing to the influence of a book published in 1963. It asserted that “at least 150,000 civilians” had died as a result of Allied air attacks on that one city at a time when the Allies were already on the verge of complete victory.²⁰⁶ That account led the centrist German newspaper *Die Zeit* to call the Dresden bombing “probably the largest mass murder in the whole of human history.”²⁰⁷ However, the book turned out to be highly misleading. The author, David Irving, subsequently served a prison term in Austria for violating its law against Holocaust denial.²⁰⁸ His figures were taken from assertions by Nazi Propaganda Minister Josef Goebbels in the immediate aftermath of the Dresden attacks.²⁰⁹ In 2004, the city of Dresden commissioned a panel of historians to establish the actual scale of civilian losses. They reported that the number of fatalities was somewhere between 18,000 and 25,000.²¹⁰

In recent years, serious historians have acknowledged that the Dresden attacks were not unreasonable in the context of military operations at the time.²¹¹ One of these is British historian Geoffrey Best, whose 1980 history of humanitarian law was respectfully cited by the Red Cross *Commentary*.²¹² In a 2004 study of Churchill’s war leadership, Best defended the attack on Dresden as a reasonable application of a reasonable policy, aiming at the destruction of legitimate military targets in the path of the Red Army’s still fiercely resisted invasion of eastern Germany.²¹³

206. DAVID IRVING, *THE DESTRUCTION OF DRESDEN* 210 (1963). It was the primary source for Kurt Vonnegut’s 1969 best-selling novel, *SLAUGHTERHOUSE FIVE*, which was subsequently made into a successful film. Ten days after the attack on Dresden, the RAF bombed Pforzheim, killing nearly as many people, but a far higher proportion of the population—some one in four residents, compared with 1 in 20 at Dresden—making it in percentage terms “the most lethal attack of the war.” FREDERICK TAYLOR, *DRESDEN* 373–74 (2004). The Pforzheim raid remains little known, however, because it was not the subject of polemical histories, fanciful novels, popular films. Taylor concludes that the “long-lasting international outrage that followed the Dresden bombing represents, at least in part, Goebbels’s final, dark masterpiece.” *Id.* at 372.

207. SUESS, *supra* note 202, at 502.

208. Ian Traynor, *Irving Jailed for Denying Holocaust*, *THE GUARDIAN*, Feb 21, 2006, available at <http://www.theguardian.com/world/2006/feb/20/austria.thefarright>.

209. OVERY, *supra* note 167, at 214.

210. SUESS, *supra* note 202, at 521.

211. For the most recent study, emphasizing the military value of the attack on Dresden, see TAYLOR, *supra* note 206, at 148–63.

212. RED CROSS COMMENTARY, *supra* note 9, at 586.

213. See GEOFFREY BEST, *CHURCHILL AND WAR* 280–84 (2005) (commenting that “Dresden, far from being the non-industrial city of pacifist and humanitarian belief (following

In the years immediately following the Second World War, there was not much disposition to question strategic bombing. One indication is that, in the new war that broke out in Korea in 1950, American commanders quickly reverted to bombing cities. By November of 1950, General MacArthur's air force chief announced that "military targets" could extend to "every installation, facility and village in North Korea."²¹⁴ The policy was implemented with "incendiary raids against urban areas reminiscent of World War II."²¹⁵ "Proportionality and precision were at a discount; opportunities for destruction always seemed to be taken to maximal extent."²¹⁶ The fact that American commanders were acting for a broad international coalition, under the authorization of the UN Security Council, does not seem to have imposed any constraint at all on bombing.

American bombing in the Vietnam War was more restrained. President Johnson prohibited attacks on dams and dikes and other proposed targets whose destruction might lead to large-scale civilian casualties. Still, when President Nixon authorized direct bombing of Hanoi in December of 1972, the attacks were denounced as "area bombing" akin to "Dresden."²¹⁷ This bombing venture caused 1,318 civilian deaths—less than a tenth of those who died in Dresden. But there was more sensitivity to civilian casualties by then.²¹⁸

In contrast to the war in Korea, Americans were fighting almost alone in Vietnam. American efforts provoked shrill condemnation not only from communist countries, but also from critics in Western Europe. The Red Cross began preparations for a new international convention (what became AP-I) just as the United States was withdrawing from its long, unhappy involvement in Vietnam.

However, a look at the longer background to that treaty does not confirm that it worked a systematic repudiation of Anglo-American military tactics, even in regard to bombing.

Goebbels' propaganda) was in fact of even more industrial importance than British intelligence knew" and the destruction of "bridges and railways" achieved "stoppage of traffic through the city . . . with which the Russians were delighted" in the midst of their offensive toward central Germany.).

214. SAHR CONWAY-LANZ, *COLLATERAL DAMAGE: AMERICANS, NON-COMBATANT IMMUNITY AND ATROCITY AFTER WORLD WAR II* 105 (2006).

215. *Id.* at 103.

216. BEST, *supra* note 11, at 351.

217. CONRAD CRANE, *BOMBS, CITIES AND CIVILIANS* 153 (1999).

218. *Id.* For robust defense of the Nixon administration's "Christmas bombing" of North Vietnam, see W. Hays Parks, *Linebacker and the Law of War*, AIR UNIV. REV. (Jan.–Feb. 1983). The author, a military lawyer, argued that earlier U.S. bombing of North Vietnam (under the Johnson administration) had been less effective because it was hobbled by "too much attention to the potential for collateral damage." W. Hays Parks, *Rolling Thunder and the Law of War*, AIR UNIV. REV. (Jan.–Feb. 1982).

V. EVOLUTION OF INTERNATIONAL STANDARDS: NO U-TURNS ON THE PATH TO THE GENEVA CONFERENCE

Additional Protocol I (“AP–I”) clearly did repudiate some tactics pursued by the western Allies in the world war. Most notably, it prohibited deliberate efforts to starve civilians²¹⁹—which might seem to cast doubt on the legality of the efforts to include foodstuffs in the wartime blockades.²²⁰ AP–I also prohibited “area bombing”—treating an entire locality as an undifferentiated military target.²²¹ That might seem to cast a retroactive judgment on the actual pattern of Allied bombing in the Second World War.

The Red Cross *Commentary* tries to present these prohibitions not as tightening of the rules, but as particular applications of an encompassing principle – that harm to civilians and civilian objects must always be quite minimal, because anything more than that would be “excessive.”²²² The *Commentary* argues that this more general principle was the traditional rule, which happened to be temporarily overwhelmed in the Twentieth Century, under the stress of the world wars.²²³

The preceding section should confirm that Allied commanders in the world wars did not adopt more severe tactics in a fit of absent-mindedness or in the grip of mindless rage. After the Second World War, Air Marshal Arthur Harris, who commanded Britain’s strategic bombing offensive, insisted that RAF targeting had been entirely consistent with existing international law.²²⁴ Distinguished commentators such as Hersch Lauterpacht

219. AP–I, *supra* note 1, at art. 54.

220. See ELMAR RAUCH, PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS AND THE U.N. CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE 93–94 (1984) (acknowledging that the application of article 54 to naval blockades is disputable, since a number of delegates at Geneva insisted this provision did not change the existing law of naval warfare and an early commentary expressed doubt on the question).

221. AP–I, *supra* note 1, at art. 51, ¶ 5(a).

222. RED CROSS COMMENTARY, *supra* note 9, at 626.

223. *Id.* at 585–89.

224. See ARTHUR HARRIS, BOMBER OFFENSIVE 177 (1947) (Contending that “international law can always be argued pro and con, but in this matter of the use of aircraft in war, there is, it so happens, no international law at all.”). As Best soundly comments, Harris “would not have gone too far if he had restricted himself to saying that there was not much [international law on this subject] and that what there was lay mostly in the realm of principles, to whose practical application in circumstances of desperate total war against an exceptionally nasty enemy there was bound to be much controversy . . .” BEST, *supra* note 11, at 200.

(subsequently a judge on the International Court of Justice) also defended the bombing of cities as consistent with international law.²²⁵ Such conclusions might seem self-serving. If one looks at the diplomatic history, however, both before and after the Second World War, the actual path from The Hague Conventions to Additional Protocol I offers considerable support for such defenses of Allied war measures.

During the First World War, Allied leaders denounced the “barbarism” of German military measures—unannounced submarine strikes against civilian passenger ships, seizing and then murdering of hostages in occupied territories, wanton destruction of villages behind the front lines.²²⁶ Allied commentators pointed accusing fingers at German military manuals which openly advocated “terrorism” as a method of war.²²⁷ Allied commentators interpreted zeppelin attacks on London—dropping bombs from balloons—as attempts to “terrorize” the civilian population.²²⁸

The Versailles Peace treaty offered one response: Germany was forbidden to maintain an air force.²²⁹ Even with that safeguard in place, however, the victors still concerned to clarify, among themselves, how air power should or should not be used in future wars. With the encouragement of Western governments, legal experts gathered at the Hague in the winter of 1922–23 to formulate a new treaty. Neither Germany nor Soviet Russia was represented at this conference.²³⁰

225. Lauterpacht, *supra* note 143, at 365.

226. See, e.g., J.H. MORGAN, GERMAN ATROCITIES, AN OFFICIAL INVESTIGATION 90–91 (1916) (noting that when British soldiers “drove the enemy out” from towns in Belgium and France, they found Germans had imposed a “reign of terror” sustained by “brutal and licentious fury”); JACQUES DAMPIERRE, GERMAN IMPERIALISM AND INTERNATIONAL LAW 200 (1917) (translation of French original) (remarking that “terrorism is the normal consequence of German imperialism”); JAMES W. GARNER, INTERNATIONAL LAW AND THE WORLD WAR 328 (1920) (arguing that “doctrines of German militarists” justify “violence, ruthlessness, terrorism” even “against the civilian population” as “legitimate measures”).

227. See, e.g., WAR BOOK OF THE GERMAN GENERAL STAFF 89 (J.H. Morgan, ed. and trans., 1915) (citing 1902 German military manual’s admonition to “resort to terrorism” to quell civilian resistance to German military occupation); James W. Garner, *The German War Code*, 15 U. ILL. BULL. 9, 11, 16, 21, 26–27 (1918) (contrasting brutalities sanctioned by German military manuals with restraints upheld in British, French and U.S. counterparts); James Edmund Traube, *Law of the Sea and the Great War*, 7 A.B.A. J. 33, 35 (Jan. 1921) (asserting that Germany “deliberately discarded all rules of international law built up for centuries by really civilized nations . . . and voluntarily returned to the methods of savagery . . . its motto being that not only must the armies of its foe in the field be overcome but the morale of the civil population destroyed by terrorism.”).

228. *Hide Zeppelin Terror*, WASH. POST, Sept. 5, 1915; Elbridge Colby, *Laws of Aerial Warfare* 10 MINN. L. REV. 123, 134 (1925).

229. Treaty of Versailles, 28 June 1919, Art. 198 (“The armed forces of Germany must not include any military or naval air forces.”).

230. LEE KENNETT, HISTORY OF STRATEGIC BOMBING 63–67 (1982) (British military authorities embraced the principle of confining air attacks to “military objectives” but

The fact that such a conference was convened at all is revealing: it shows that Western powers did not regard pre-war Hague conventions as adequate to govern modern air war. It is even more revealing that this post-war effort failed to deliver an acceptable treaty text. No ratified treaty set out standards for air attacks in the decades before the Second World War, nor for three decades thereafter. AP-I was the first widely ratified treaty to codify limits on air attacks.²³¹

The various diplomatic initiatives in the interim period are still revealing about expectations of air war before the Second World War. The proposals from this period suggest a much greater degree of latitude or ambiguity in earlier understandings, compared with the simple formulas propounded in the Red Cross *Commentary*. Governments recognized that new technology raised some new challenges, but major powers were not prepared to commit to precise rules for resolving them.

Before the First World War, it had been common practice for an invading army to use artillery against a city held by the defending side.²³² The Hague Conventions accepted this tactic, only prohibiting bombardment of “undefended cities.”²³³ Against an undefended city, the invading force could simply march in and seize control. Bombarding such a place seemed like gratuitous violence. With the advent of aviation, however, it became possible to drop bombs on cities that were hundreds of miles from the front line. If the defending army could stop invaders from reaching such interior cities, these cities could not be described as “undefended.” In contrast to a city on the front lines, however, an inland city could not be induced to surrender by aerial bombardment. Could an entire nation be forced to surrender because bombs had been dropped on interior cities? Or was that strategy an invitation to pointless destruction?

The legal experts gathered at The Hague in 1922–23 sought to cut off such temptations with a blanket prohibition on “air bombardment for the

expressed “skepticism” that Hague rules could generate reliable consensus on proper definition of “military objectives”)

231. For a detailed analysis of inconclusive debates in the inter-war era on possible applications of earlier Hague conventions to the new challenges of bombardment from modern aircraft, *see* Parks, *supra* note 15.

232. *See* accounts of shelling against Vicksburg in 1863 and Paris in 1870, *supra* notes 114–15.

233. 1907 Version, *supra* note 32, at art. 25.

purpose of terrorizing the civilian population”²³⁴ To avoid making the prohibition turn on the meaning of “terrorizing,” the same provision also covered bombardment “for the purpose of . . . destroying or damaging private property not of military character or of injuring non-combatants.”²³⁵ The proposed Rules on Air Warfare then distinguished permissible categories of “bombardment” not in reference to status (i.e., “defended” or not), but location. It would be “legitimate” to conduct “bombardment of cities, towns, villages, dwellings and buildings” when they were situated in “the immediate neighborhood of the operations of land forces.”²³⁶ At greater distances, “aerial bombardment” must be “directed exclusively” at permissible “objectives”—including “military forces,” military supply “depots,” “factories” making “military supplies,” “lines of communication or transportation used for military purposes.”²³⁷

The proposed rules also offered differentiated cautions. In the first category (direct attack on cities and towns) attackers were admonished to show “regard to the danger caused to the civilian population,” with the suggestion that this danger be weighed differently if the “military concentration” in the city or town were “sufficiently important.”²³⁸ In the latter category (“military objectives” at a distance), the proposed rules

234. *Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare*, Drafted by a Commission of Jurists at the Hague, art. 22 (1923) [hereinafter 1923 Hague Rules], reprinted in *THE LAWS OF ARMED CONFLICT*, *supra* note 1, at 319.

235. *Id.* If the prohibition on “destroying or damaging private property” is understood as a separate prohibition from “terrorizing,” that would indicate a narrow understanding of “terrorizing”—and the narrower understanding might be the prohibition that survived the collapse of this effort in the 1920s.

236. *Id.* at art. 24, ¶ 4.

237. *Id.* at art. 24, ¶ 3. The wording here is somewhat confusing, as it begins by seeming to impose a total prohibition: “The bombardment of cities, towns, villages . . . not in the immediate neighborhood of the operations of land forces is prohibited.” But, it then immediately offers a further restriction: “In cases where the objectives specified in paragraph 2 [“military establishments or depots . . . factories . . . lines of communication” etc] are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment”—a restriction that would make no sense if the previous sentence were meant to impose an absolute prohibition against bombing of “cities . . . not in the immediate neighborhood of the operations of land forces.” Since the following paragraph (4) does authorize “bombardment of cities,” paragraph 3 seems intended to indicate that bombing of “cities” outside the “neighborhood” of land combat is not entirely prohibited, but must be restricted to specific military targets. This reading was assumed by commentators at the time. See James W. Garner, *Proposed Rules for the Regulation of Aerial Warfare*, 18 AM. J. INT’L L. 56, 72 (1924) (commenting that “While [the Hague rule] prohibits the bombardment of the town or city [outside the “neighborhood” of military “operations”] it allows the bombardment of the “military objective” itself” even if located in that place).

238. *Id.* at art. 24, ¶ 4.

cautioned attackers to avoid “indiscriminate bombardment of the civilian population.”²³⁹

These formulations were subject to differing interpretations. Both in Britain and America, commentators on the law of war endorsed the general logic of the proposals. J.M. Spaight, a specialist on the law of war then serving in Britain’s Air Ministry, published a full-length treatise on *Air Power and War Rights* in 1924.²⁴⁰ He argued that attempts to undermine civilian morale by bombing might tempt belligerents to unlimited atrocities against enemy civilians.²⁴¹ Still, Spaight gave forthright support to the use of air power “to deprive the enemy’s forces of supplies and shelter”—the air equivalent, as he saw it, to “Sherman’s devastations” in Georgia during the American Civil War, “and Kitchener’s devastation of the Boer Republics in 1901–02.”²⁴² The actual practice of the Second World War did not shake his opinion. In 1944, he published *Bombing Vindicated*²⁴³ and a few years later published a revised edition of *Air Power and War Rights*,²⁴⁴ both of which defended the bombing of German cities as entirely lawful and proper.

American commentators in the 1920s also endorsed the general formulas in the Hague Air Rules, seeing them as compatible with vigorous bombing from the air.²⁴⁵ A full-length study published by a Harvard

239. *Id.*

240. J.M. SPAIGHT, *AIR POWER AND WAR RIGHTS* (1924). In his earlier work, *WAR RIGHTS ON LAND*, Spaight justified General Kitchener’s “devastation” of Boer farmland as following the precedent of General Sherman’s marches through Georgia and the Carolinas in the American Civil War—and defended them as proper. J.M. SPAIGHT, *WAR RIGHTS ON LAND* 308–10 (1911). Spaight attended the Hague conference of jurists in 1922–23 and dedicated *AIR POWER AND WAR RIGHTS* to John Bassett Moore, the chief American delegate to that conference.

241. SPAIGHT, *AIR POWER AND WAR RIGHTS*, *supra* note 240, at 8–22.

242. *Id.* at 242.

243. See SPAIGHT, *BOMBING VINDICATED*, *supra* note 158. Chapter 1 is entitled, “The Bomber Saves Civilisation,” Spaight argues that all of Hitler’s “frantic bellowing and . . . blather” against British air attacks were stirred by the dictator’s awareness “that, in the end, our air offensive, if it did not win the war for us, would certainly prevent Germany from winning it.” *Id.* at 12.

244. See J.M. SPAIGHT, *AIR POWER AND WAR RIGHTS* 261–62 (3d ed., 1947) (commenting that the “war industry” in Germany had come to be “concentrated more and more in the cities, so only by closing “one’s eyes to the facts” could one believe “there are no bad cities, that they are all good little cities and must be tenderly treated.”).

245. See Paul Whitcomb Williams, *Legitimate Targeting in Aerial Bombardment*, 23 AM. J. INT’L. L. 570 (1929). Hague Air Rules, prohibiting “bombing of military objectives . . . if [that] requires indiscriminate bombardment of civilian population,” would

scholar in the 1920s concluded that nations at war were not likely to observe serious restraints on their use of air attacks—apart from measures which aroused so much shock, they might be viewed as equivalent to medieval torture.²⁴⁶

By then the British government had already declined to commit, even to the rather elastic standards in the 1923 Hague Air Rules, from fear of entanglement in disputes about what would constitute a “legitimate” “military objective.”²⁴⁷ When Britain abandoned the 1923 Hague Rules, other powers lost interest.²⁴⁸ There were no further efforts to negotiate restraints on air power until the late 1930s, when war again seemed a likely possibility.

In 1938, the International Jurists Association (“IJA”) proposed a new set of standards. This proposal again prohibited bombing “for the purpose of terrorizing the civilian population.”²⁴⁹ It still tried to limit air attacks to targets of military relevance.²⁵⁰ It still condemned air attacks even on

encourage “each belligerent to locate his important military factories beneath the shelter provided by this provision,” but it is “inconceivable that nations which have come to regard the air services as a major means of attack will forego the advantages derived from [air power] . . . [so] ultimately any such prohibition must be disregarded.” *Id.* at 577. Williams specifically approves bombing to kill workers in munitions factories, because “it is no longer possible to distinguish at all times . . . the men at the front and the workers in factories.” *Id.* at 580. Similarly Colby, *Aerial Law and War Targets*, 19 AM. J. INT’L L. 702 (1925), endorsed “the doctrine set forth by Mr. Spaight.” Elbridge Colby *Aerial Law and War Targets*, 19 AM. J. INT’L L. 702, 708 (1925). He also argued that when the “objective” has “military importance,” demands to limit harm to civilians in attacking it “would be ‘the pound of flesh’ which the air commander must take without drawing civilian blood.” *Id.* at 710.

246. See ROYSE, *supra* note 157, at 240–41 (commenting that “[n]ations will employ an effective weapon to its utmost extent checked only by social sanction as manifested in the accepted minimum standards of the time. Skinning prisoners alive or breaking them on the wheel is no longer countenanced in western warfare. It is, however, questionable whether devastation in war as a means of moral pressure falls below the accepted minimum standards today.”).

247. British service chiefs disputed among themselves how to interpret the 1923 Hague rules. Hugh Trenchard, Marshal of the Royal Air Force, argued that while it was proper to prohibit indiscriminate air attacks on the civilian population, it was an “entirely different matter to terrorise munitions workers (men and women) into absenting themselves from work or stevedores into abandoning the loading of a ship with munitions through fear of air attack upon the factory or dock concerned.” 4 CHARLES WEBSTER & NOBLE FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939–1945* 71–83 (1961). A more focused account concludes: “The crux of the problem was the difficulty in defining and reaching agreement on what constituted a military objective.” Uri Bialer, *Humanization of Air Warfare in British Foreign Policy on the Eve of the Second World War*, J. CONTEMP. HIST. 79, 93 n.8 (1978).

248. QUESTER, *supra* note 153, at 78.

249. *Draft Convention for the Protection of Civilian Populations Against New Engines of War*, International Jurists Association, art. 4 (1938) reprinted in *THE LAWS OF ARMED CONFLICT*, *supra* note 1, at 332.

250. *Id.* at art. 5.

such military “objectives” when “so situated” that they could only be reached through “indiscriminate bombardment of the civilian population.”²⁵¹ But instead of distinguishing attacks in the “vicinity” of land forces from attacks on more distant places, the IJA proposal sought to ban all attacks on places without “belligerent establishments,” while defining the latter to include “factories” and “aerodromes.”²⁵²

The drafters evidently had so little confidence in the actual implications of these restrictions—in terms of preventing harm to civilians—that they also included an elaborate scheme for “safety zones” which would “enjoy immunity from attack or bombardment”²⁵³ so long as they contained only persons over age sixty and under age fifteen and “such other persons (not exceeding in the aggregate five per cent)” of the zone’s population to take care of the young and the elderly.²⁵⁴ Only by expelling almost all persons of potential military relevance could a town claim complete immunity from attack.

A month later, the League of Nations, instead of endorsing the detailed formulas of the IJA proposal, simply adopted a resolution condemning “intentional bombing of civilians,” attacks on other than “legitimate” and “identifiable” “military objectives,” and attacks which affected “civilian populations” through “negligence.”²⁵⁵ In 1938, the British government did not resist the League resolution setting forth these standards. It was not a treaty, its status in international law was ambiguous,²⁵⁶ and it largely summarized a then-recent statement by the British Prime Minister.²⁵⁷

That statement, however, was made by Neville Chamberlain in peacetime. When Winston Churchill became prime minister in the midst of a full-scale war, he gave a freer reign to Britain’s bombers. It can certainly be argued that the actual practice of strategic bombing in the Second World War—with firebombing of heavily populated cities in Germany and Japan—did go much beyond the limits of acceptable “aerial

251. *Id.* at art. 4, ¶ 2.

252. *Id.* at art. 2.

253. *Id.* at art. 10.

254. *Id.* at art. 12.

255. *Protection of Civilian Populations Against Bombing from the Air in Case of War*, Resolution of the League of Nations Assembly (Sept. 30, 1938), *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 330.

256. PITTMAN POTTER, INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATIONS 494, 500 (1925).

257. Neville Chamberlain, Statement of the Prime Minister in the House of Commons (June 21, 1938), *reprinted in* BEST, *supra* note 11, at 200.

bombardment” envisioned by diplomats in the inter-war era. Still, it remains telling that diplomats and jurists did not repudiate such wartime practices when the war ended.

The UN Charter was drafted at a conference in San Francisco in the spring of 1945, when the ashes of Dresden were still warm and when American bombers were still releasing devastating payloads of napalm on Japanese cities. The Charter drafters took the precaution of stipulating that none of its provisions would apply to the ongoing war against the Axis powers.²⁵⁸ For the future, the Charter authorized the Security Council to make use of “air force contingents” to undertake “urgent military measures” for “international enforcement action.”²⁵⁹ The Charter offers no word of caution about the permissible limits of such “measures”—though in the circumstances of the time, the main participants would have been American and British air force units, who had learned their craft in massive raids against cities.²⁶⁰

The Nuremberg trials did nothing to clarify existing law, either.²⁶¹ The commander of the Luftwaffe was convicted along with top Luftwaffe officers, but not for bombing cities.²⁶² Perhaps the tribunals were reluctant to condemn Germans for actions which Allied forces had conducted on a far larger scale.²⁶³ There were, of course, many other, unique atrocities for which German commanders could be blamed.

German defendants occasionally pointed to the incongruity of judgment from those who had wreaked devastation upon so many cities. Jurists on the Allied side did not respond defensively. In a proceeding against commanders of SS murder squads, German defense lawyers compared the defendants to pilots of Allied bombers, who also left a trail of death and destruction. The American judges rejected the comparison with scorn:

258. U.N. Charter art. 107.

259. *Id.* at art. 45.

260. Rather than providing the Security Council with its own air force, the Charter directs UN members to “hold immediately available national air-force contingents for combined international enforcement action” *Id.* In 1945, only Britain and the United States could have provided such forces.

261. See BEST, *supra* note 11, at 205 (noting that “[n]othing appeared in the judgments [at Nuremberg] that could take the law regarding aerial bombardment one inch further than where it had been on the day the war started.”).

262. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 325–26 (1992).

263. *Id.* (noting that “the great city air raids of the war—Hamburg, Berlin, Dresden . . .—had been conducted by Britain and the United States which made it most unlikely that the prosecution would make a big thing out of Germany’s earlier raids which, destructive as they were, paled by comparison.”).

A city is bombed for tactical purposes, communications are destroyed, railroads wrecked, ammunition plants demolished, factories razed, all to the purposes of impeding the military. In these operations, it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but civilians are not individualized. The bomb falls, it is aimed at railroad yards, houses along the track are hit and many of their occupants are killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad trains, entering the houses abutting them, dragging out the men and women and children and shooting them.²⁶⁴

In other words, devastation was not “wanton destruction” or “cruelty”—much less the deliberate infliction of “terror.”

As if to confirm the distinction, another Nuremberg tribunal rejected a “war crimes” charge against General Lothar Rendulic, German commander in Norway, who had devastated a vast amount of property to impede an expected Allied invasion—which, as it turned out, never arrived.²⁶⁵ Destruction of property, even on a large scale, seemed to Nuremberg judges an acceptable tactic, especially if it did not involve large numbers of civilian deaths.²⁶⁶

American commentators in the 1950s and 60s, at least those associated with the U.S. Defense Department, accordingly treated World War II bombing as within the accepted range of permissible tactics under the law of war.²⁶⁷ In the decades following the war, the victors were not disposed to reconsider the tactics that won them the victory. They did participate in a 1949 conference in Geneva to elaborate “humanitarian” protections

264. United States v. Ohlendorf, Case No. 9, Judgment, 466–67 (Nuremberg Military Trib. Apr. 8–9, 1948).

265. United States v. Wilhelm List, Case No. 7, Judgment, 1296–97 (Nuremberg Military Trib., Feb. 19, 1948). The ruling is cited as continuing authority for the interpretation of “military necessity” in U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER, LAW OF ARMED CONFLICT DESKBOOK 134–35 (2014) [hereinafter JAG DESKBOOK].

266. The same tribunal that acquitted General Rendulic of war crimes for devastation of property condemned Rendulic and others for executing civilian hostages. JAG DESKBOOK, *supra* note 265, at 134–35.

267. See MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 335–36 (1959). “Under the category of factories, it is logical, in these days of total war, to include not only those which furnish the finished war products but also the factories which supply the materials, such as steel, from which those finished products are made.” When the Germans disguised their factories, “the Allies evolved the tactic of target area bombing . . . that bombing is selective to the extent that the target is confined to a particular area and the purpose of the bombing is the destruction of a military objective, all other damage being incidental.” *Id.* See also K.J. RABY, BOMBARDMENT OF LAND TARGETS—MILITARY NECESSITY AND PROPORTIONALITY 70 (1968) (defending attacks on Hiroshima and Nagasaki as “proportionate”).

in war. The four resulting conventions focused on humanitarian concerns at the periphery: protections for wounded soldiers, for wounded and shipwrecked sailors, for prisoners of war, for civilians in zones of occupation in wartime.²⁶⁸ None of the 1949 conventions supplied rules for the conduct of ongoing fighting, such as permissible targeting in the conduct of military operations.

A few years later, the Red Cross offered a model for a new convention to do that. The “Draft Rules,” published by the ICRC in 1956, gave wide scope to air attacks. The proposal re-emphasized the historic prohibition on “attacks against the civilian population, whether with the object of terrorizing it or for any other reason”²⁶⁹ It depicted protection for property as merely a derivative concern: “*In consequence* [of the immediately preceding prohibition on attacking “the civilian population”], it is also forbidden to attack dwellings, installations or means of transport, which are for the *exclusive* use of, *and occupied by*, the civilian population.”²⁷⁰ It went on to reassert the connection in a somewhat broader prohibition: “*In order to limit the dangers incurred by the civilian population*, attacks may only be directed against military objectives.”²⁷¹ It then characterized such “objectives” as those “generally acknowledged to be of military importance”²⁷² and offered the additional qualification that even if a target met this formal requirement, it could not be attacked unless “their total or partial destruction, in the circumstances ruling at the time, offers *no* military advantage.”²⁷³

On the whole, the ICRC’s formulation did not go very far from the sort of admonition that higher commanders might have offered their own air squadrons—don’t waste effort on attacks that offer “no military advantage.”²⁷⁴ In two particulars, the Draft rules ventured a bit further.

268. The four conventions signed at Geneva on 12 August 1949: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) Relative to the Treatment of Prisoners of War; Convention (IV) Relative to the Protection of Civilian Persons in Time of War. See THE LAWS OF ARMED CONFLICT, *supra* note 1, at 459–631.

269. ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, art. 6 (Oct. 15, 1956) [hereinafter 1956 Draft Rules], *reprinted* in THE LAWS OF ARMED CONFLICT, *supra* note 1, at 341.

270. *Id.* at art. 6, ¶ 2 (emphasis added).

271. *Id.* at art. 7, ¶ 1 (emphasis added).

272. *Id.*

273. *Id.* (emphasis added).

274. 1 WEBSTER & FRANKLAND, *supra* note 169, at 15. “The moral argument about strategic bombing . . . tended to degenerate into the drawing of distinctions between necessary and unnecessary destruction. But at that point it merged with and became indistinguishable from the strategic argument, for clearly it was against every strategic

When there is a “choice open between several objectives” for the same “military advantage,” commanders are “required to select the one [objective] . . . which involves least danger for the civilian population.”²⁷⁵ Even then, commanders must “refrain from the attack if, after due consideration, it is apparent that the loss and destruction [to “dwellings” of “civilians”] would be disproportionate to the military advantage anticipated.”²⁷⁶

Even these formulations might be subject to varying interpretations, depending on how commanders define “military advantage” or how high (or low) a weight they gave to “loss and destruction.” But in the 1950s, no major power embraced the Red Cross proposals.

What gave momentum to the project was the sudden embrace of “humanitarian law” by the United Nations. This embrace began at the UN conference in Tehran in 1968, which was supposed to commemorate the twentieth anniversary of the Universal Declaration of Human Rights and propose ways of giving more effect to international human rights standards.²⁷⁷ By 1968, however, the UN had a much larger membership than in 1948 and “human rights” did not have such broad appeal with the new majority.²⁷⁸ The Tehran conference took place a year after Israel’s victory over Arab States in the Six Day War and at a time when the United States had deployed over half a million troops to an ongoing war in Vietnam. Amidst denunciations of “imperialist” and “racist and colonial regimes,” the Tehran conference voted for a resolution calling for expansion of humanitarian protections.²⁷⁹

The UN General Assembly also voted resolutions to this effect in 1968²⁸⁰ and again in 1970.²⁸¹ Major western States seem to have decided that if there had to be new conventions on the law of armed conflict, it

precept to waste bombs, bombers and bomber crews upon attacks which were not held to be necessary.” *Id.*

275. 1956 Draft Rules, *supra* note 269, at art. 8(a).

276. *Id.* at art. 8(b).

277. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 84–119 (2010).

278. *Id.*

279. International Conference on Human Rights Resolution XII, May 12, 1968, *reprinted in THE LAWS OF ARMED CONFLICT*, *supra* note 1, at 347–48.

280. G.A. Res. 2444 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc A/7433 at 164 (Dec. 19, 1968), *reprinted in THE LAWS OF ARMED CONFLICT*, *supra* note 1, at 349–50.

281. G.A. Res. 2675 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc A/2675 (Dec. 9, 1970), *reprinted in THE LAWS OF ARMED CONFLICT*, *supra* note 1, at 353–54.

was safer to negotiate them under the auspices of the Red Cross than of the UN. Still, it is worth noting that even the UN resolutions placed emphasis on saving lives rather than mere property.²⁸²

After an initial round of consultations with self-selected “experts,” the Red Cross produced drafts for two new conventions in 1973. It then hosted a “diplomatic conference”—with representatives chosen by participating States—which set about adapting these proposed standards into formal treaty texts. It took more than three years of negotiations to reach the results. They were notably different from earlier Red Cross proposals.

What emerged as Additional Protocol I was more demanding than the Red Cross draft of 1973 and certainly more so than the Draft Rules of 1956. Where the 1956 draft puts almost all emphasis on protecting the “civilian populations”—lives, rather than property—the 1973 draft and the 1977 final text of AP-I contain a separate section on protection for “civilian objects.”²⁸³ Where the 1973 draft offered a seemingly limited list of “civilian objects”—“objects designed for civilian use, such as houses, dwellings, installations and means of transport”²⁸⁴—the final text of AP-I prohibits attacks on all “objects” which are not “military objectives.”²⁸⁵

Where the 1956 Draft Rules defined “military objectives” as those “generally acknowledged to be of military importance,”²⁸⁶ AP-I defines the term as “objects . . . which 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.”²⁸⁷ Where the 1973 Draft prohibited reprisals against “the civilian population

282. The 1968 resolution makes no mention of property: “[a]ffirms . . . That it is prohibited to launch attacks against the civilian population as such; That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.” G.A. Res. 2444, *supra* note 280, at ¶ 1. The 1970 resolution again emphasizes protection for civilian life: “In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.” The one reference to physical “installations” links them to this overriding concern with civilian life: “Dwellings and other installations that are used only [emphasis added] by civilian populations should not be the object of attack.” G.A. Res. 2675, *supra* note 281, at ¶¶ 3, 5.

283. AP-I, *supra* note 1, at art. 52 (“General protection of civilian objects”).

284. ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, art. 47, (Oct. 1973) [hereinafter 1973 Draft], available at <http://www.loc.gov/rr/frd/MilitaryLaw/pdf/RC-Draft-additional-protocols.pdf>.

285. AP-I, *supra* note 1, at art. 52, ¶ 1.

286. 1956 Draft Rules, *supra* note 269, at art. 7.

287. AP-I, *supra* note 1, at art. 52, ¶ 2.

or civilians,”²⁸⁸ the final text of AP-I augments this with a separate prohibition against “reprisals” directed at “civilian objects.”²⁸⁹

Such surface comparisons, however, miss one of the central political dramas at the Diplomatic Conference. In the first weeks of the conference, as a specialized committee scrutinized the proposed provisions on the conduct of hostilities, Arab delegations moved to amend the Red Cross proposal for what became Art. 51. In the Red Cross version it prohibited “attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.”²⁹⁰ Eleven Arab States proposed to “substitute ‘or’ for ‘and’ before ‘cause’”—so that attacks would be forbidden, even if they caused “disproportionate” harm to “civilian objects,” even if there were no actual injuries to civilians.²⁹¹ The same amendment then proposed to “put a full stop after ‘objects’ and delete the rest of the paragraph.”²⁹² If this proposal had been adopted, damage to “civilian objects” would be prohibited, even if it might provide “direct and substantial military advantage” and even if such advantage might be regarded as “proportionate” to the harm involved. As the delegate from Iraq explained, “it would be impossible to prove that the military advantage expected was in fact disproportionate.”²⁹³

A few years earlier, Egypt and Israel had repeatedly traded attacks as Egypt tried to harry Israeli forces entrenched on the Suez Canal. The Egyptians launched small-scale raids at Israeli military forces, and Israeli bombers struck at bases in Egypt. In one such Israeli attack, an Egyptian school was hit, provoking indignant denunciations from Cairo and other Arab capitals.²⁹⁴ The area behind the Israeli forces was largely empty

288. 1973 Draft, *supra* note 284, at art. 46, ¶ 4.

289. AP-I, *supra* note 1, at art. 52, ¶ 1.

290. *Id.* at art. 46, ¶ 3(b).

291. HOWARD LEVIE, PROTECTION OF WAR VICTIMS, PROTOCOL I TO THE 1949 GENEVA CONVENTION, VOL. III 129 (1980).

292. *Id.*

293. *Id.* at 133.

294. Raymond Anderson, *30 Pupils in U.A.R. Said to Die in Raid*, N.Y. TIMES, Apr. 9, 1970, at 1. William Touhy, *Mystery Engulfs Bomb Deaths of 30 Egyptian School Children*, WASH. POST, Apr. 10, 1970 (reporting disputes about whether school was located next to a military base, as Israel claimed: foreign journalists were not allowed to inspect the site). For the context, see BENNY MORRIS, RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881–1998, at 355–58 (1999) (describing Soviet provision of surface to air missiles for Egyptian defense against Israeli Air Force attacks, culminating in an attack

desert, while the Egyptian army was operating from areas with much civilian infrastructure. Israeli bombers could strike at some distance, while Egyptian rockets at that point could not.²⁹⁵ The formula proposed by Arab delegates in Geneva was perfectly designed to condemn Israeli actions while leaving an open field to Egyptian tactics.

Even the Red Cross draft of 1973 acknowledged the problem, while at the same time accommodating the tactic. The last paragraph of the article that became Article 51 admonished that the “presence or movements of the civilian population shall not be used for military purposes, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.”²⁹⁶ Yet it then immediately offered a countering admonition, that even where one side “in violation of the foregoing provision, uses civilians with the aim of shielding military objectives from attack,” the opposing side must still take required “precautions” to avoid “losses in civilian lives and damage to civilian objects” which would be “disproportionate.”²⁹⁷ The Federal Republic of Germany, along with Canada, Brazil, and Nicaragua, moved to strike the entire follow-on sentence (regarding the continuing obligation to take “precautions”) lest it diminish the force of the main prohibition on using civilians to shield military placements. That proposed amendment was not approved.²⁹⁸

Western States remained all the more determined to retain references to “proportionality.” As a Canadian delegate explained, “a reference to proportionality was necessary. An absolute prohibition would result in a very difficult situation [for commanders], for instance when there was a single civilian near a major military objective whose presence might deter an attack.”²⁹⁹ East German and Romanian delegates urged that “proportionality” be stricken, as did China and North Korea, the latter explaining that “acceptance of the principle of proportionality would provide war criminals with a pretext for their crimes.”³⁰⁰ The U.K. delegate responded that it would be wrong to “put forward formulations which would not in practice be followed. To do away with proportionality

that hit an elementary school—after which the U.S. declined to supply to equipment to the Israeli Air Force).

295. See CHAIM HERZOG, *THE ARAB-ISRAELI WARS* 214–18 (2d. ed., 2005) (noting that during the 1969–1970 “War of Attrition,” Israeli jets struck “deep into Egypt,” including some bases on the Nile, while Soviet supplied surface-to-air (SAM) missiles allowed the Egyptians a range of less than 18 miles)

296. 1973 Draft, *supra* note 284, at art. 46, ¶ 5.

297. *Id.*

298. LEVIE, *supra* note 291, at 125.

299. *Id.* at 134.

300. *Id.* at 138.

would remove a valuable humanitarian protection from the civilian population”³⁰¹

British and American delegates both insisted, in separate presentations, that the “rule of proportionality” was based on “existing international law”³⁰² This claim was challenged by the delegate of North Vietnam, who demanded to know “what documents in positive international law had provided any foundation for such an assertion?”³⁰³ He did not receive an explicit response.

The formulation that ultimately emerged in AP-I was, in effect, a victory for western States, acknowledging that harm to civilians and damage to civilian objects was, indeed, permissible. Even the wording of this concession was somewhat improved from the western perspective. The 1973 Red Cross draft required that harm not be “disproportionate to the direct and substantial military advantage anticipated.”³⁰⁴ The final text of AP-I only required that such harm not be “excessive in relation to the concrete and direct military advantage anticipated.”³⁰⁵ Arguably the new wording permitted even “disproportionate” harm, if not “excessive” and if balanced against a “concrete advantage,” even if not necessarily a “substantial advantage.” At any rate, the final text of AP-I clearly acknowledged that attacks would still be regarded as lawful even if they did impose some level of harm to civilians and civilian objects.

This permissive reading of the AP-I formula gains additional support from the fate of the second convention negotiated at the same Geneva conference, Additional Protocol II (“AP-II”).³⁰⁶ Here, the debate over the proportionality language in AP-I was almost turned inside out. The Red Cross prepared a draft that largely tracked the provisions for AP-I.³⁰⁷ The idea was to provide comparable protections for victims of non-international

301. *Id.* at 140.

302. *Id.* at 142. According to U.S. delegate Aldrich, “[t]he rule of proportionality . . . was based on existing international law and it was important to record.” *Id.* According to U.K. delegate Freeland “[t]he . . . rule of proportionality was a useful codification of a concept that was rapidly becoming accepted by all states as an important principle of international law relating to armed conflict.” *Id.* at 165.

303. *Id.* at 148.

304. 1973 Draft, *supra* note 284, at art. 46, ¶ 3(b).

305. AP-I, *supra* note 1, at art. 52, ¶ 5(b).

306. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP-II], *reprinted* in THE LAWS OF ARMED CONFLICT, *supra* note 1, at 776–83.

307. RED CROSS COMMENTARY, *supra* note 9, at 1225–36.

conflicts as for international conflicts. The two conventions were actually discussed in tandem throughout most of the proceedings. After years of deliberation, however, delegates from less-developed countries—those most likely to face internal conflicts spiraling into full-scale war—began to resist the project.³⁰⁸ Early on, they won agreement that struggles for “liberation” from “colonial or racist” regimes should be treated as “international conflicts,” as the opening article for AP–I eventually stipulated.³⁰⁹ They decided they did not want these rules applied to what they considered entirely internal conflicts.

The Pakistani delegation accordingly proposed a drastic reduction in the text of AP–I. Rather than rewriting AP–I, the proposal offered a selective sampling of AP–I provisions, reducing the length by half.³¹⁰ The provisions regarding “excessive” harm in relation to “military advantage”—the proportionality provisions—were excluded.³¹¹ That was the price for getting Third World delegates (as they were then considered) to agree to any convention on non-international conflicts.

The Red Cross tried to salvage the bargain by insisting that the spirit of the provisions remained in AP–II’s abbreviated presentation of rules spelled-out in AP–I. The main AP–II provision on permissible attacks says this: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”³¹² According to the Red Cross *Commentary*, this “radical simplification” of the scheme set out in AP–I (proportionality and so on) “does not reduce

308. *Id.* at 1335; BEST, *supra* note 11, at 417.

309. AP–I, *supra* note 1, at art. 52, ¶ 4. This paragraph extends AP–I coverage to “include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. . .” *Id.*

310. RED CROSS COMMENTARY, *supra* note 9, at 1335. The draft version of AP–II, prepared by a conference of legal experts in 1973, had 49 articles, which were reduced to 24 in the Pakistani proposal. *Id.* at 1333. The text agreed-to in 1977 has 28 articles, with the addition of several non-substantive provisions at the end. In THE LAWS OF ARMED CONFLICT, *supra* note 1, the text of AP–I occupies 51 pages, while the text of AP–II takes up only 8 pages.

311. In AP–I, the “proportionality” rule appears in the middle of a somewhat elaborate set of requirements limiting attacks that might affect civilians. AP–I, *supra* note 1, at art. 51 (“Protection of the Civilian Population”); the corresponding article in AP–II contains only three short paragraphs, the most substantive of which (Par. 2) prohibits making the civilian population “the object of attack” but says nothing about incidental harm to civilians from attacks not primarily aimed at civilians. AP–II, *supra* note 306, at art. 13 (“Protection of the civilian population”).

312. AP–II, *supra* note 306, at art. 13, ¶ 2.

the degree of protection which was originally envisaged, for despite its brevity [this provision] reflects the most fundamental rules.”³¹³

This claim is entirely plausible if one views the specifications omitted as mere elaboration, rather than free-standing, entirely new requirements. If that is true, however, the ultimate text of AP–II is additional evidence for the proposition that AP–I does not impose ambitious new restrictions. The AP–I requirements merely clarify the logic of what AP–II provides. As UN resolutions before the conference had indicated, the main point of humanitarian law is to protect human lives—not the whole range of inanimate objects that might be labeled “civilian.”³¹⁴

Specific innovations in AP–I suggest a similar priority. One provision prohibited, for the first time in an international convention, “starvation of civilians as a method of warfare.”³¹⁵ This prohibition was reinforced with an ensuing prohibition against seeking to destroy “objects indispensable to the survival of the civilian population, such as foodstuffs . . . drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population.”³¹⁶ A subsequent provision prohibited attacks on “installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations.”³¹⁷

All of these specific prohibitions might be seen as tacitly acknowledging the limited reach of the general rules limiting attacks on “civilian objects” and “excessive” loss or damage to civilians and civilian objects. If the general provisions were to be interpreted very strictly, the specific prohibitions would not have been necessary.

Western States do not seem to have viewed AP–I as changing the earlier understandings of permissible targets or permissible levels of collateral damage. American critics, urging that the text of AP–I should not be ratified by the Senate, focused on new protections for guerrilla fighters

313. *Id.* at art. 13. Though the Commentary does not call attention to this fact, the AP–II version omits any reference to destruction of “civilian objects”—inanimate stuff, as opposed to actual human beings. It bars deliberate attacks on civilians *for the purpose* of terrorizing them—and attacks on “objects indispensable to the survival of the civilian population (Art. 14)—but does not provide express general protection for “civilian objects” as such.

314. *See supra* notes 310–11.

315. AP–I, *supra* note 1, at art. 54, ¶ 1.

316. *Id.* at art. 54, ¶ 2.

317. *Id.* at art. 56.

and a number of other changes.³¹⁸ There was remarkably little controversy about the provision of AP-I on proportionality.

In July 1976, even before the final text of AP-I was settled, the Chief of Staff of the U.S. Army notified army lawyers of updates to the Manual of Land Warfare. Among other small changes, it reworded the language from the 1956 Manual to accommodate the AP-I formula, stating that “loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.”³¹⁹ The U.S. Air Force also released a new manual on the law of armed conflict in 1976, which also embraced a version of the proportionality rule.³²⁰ This manual still discussed World War II bombing as if it were perfectly consistent with the rule.³²¹

Two years later, a Swedish participant in the Geneva negotiations published an article assessing the implications of AP-I.³²² He noted that the U.S. Defense Department had claimed all bombing in Indochina had been consistent with the rule of proportionality. He expressed considerable uneasiness with this claim, indicating that “If it [is still] . . . a considered U.S. opinion that the rule of proportionality was observed by U.S. forces throughout the war in that region [Indochina], the value of the rule to induce restraint could indeed be queried.”³²³ Indeed, it could be.

318. See, e.g., Guy Roberts, *The New Rules for Waging War: The Case Against Ratification*, 26 VA. J. INT'L L. 109 (1985); Douglas Feith, *Law In the Service of Terror—The Strange Case of the Additional Protocol*, 1 NAT'L INT. 45 (1985); Richard Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165 (1977).

319. Memorandum from General Fred Weyand, Chief of Staff and Paul Smith, Adjutant General (15 July 1956), *reprinted in* THE LAWS OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 250 (International and Operational Law Dept, U.S. Army Judge Advocate General's Legal Center 2012).

320. DEPARTMENT OF THE AIR FORCE, JUDGE ADVOCATE GENERAL ACTIVITIES, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 5–10 (1976).

321. *Id.* at 5–5. “The Allies [in World War II] did not regard civilian populations and their housing as proper military targets and generally preferred to seek to destroy only the military aspects of cities. . . . The U.S. justified this use of the [atomic] weapons on the basis that the two cities destroyed [Hiroshima and Nagasaki] were involved in war production. The destruction of the two cities persuaded the Japanese government to seek peace quickly.” *Id.*

322. Hans Blix, *Area Bombardment: Rules and Reasons*, 49 BRIT. Y.B. INT'L L. 31 (1978).

323. *Id.* at 51, n.2.

VI. MORAL BEARINGS: THE CONDUCT OF WAR CANNOT BE ENTIRELY SEPARATED FROM THE CAUSES OF WAR

Regardless of actual legislative history or plausible parsing of textual provisions, when a measure aims at a compelling public purpose, interpreters are bound to read it in ways that seem to serve the underlying purpose. Since “humanitarian” protection in war serves an obviously compelling purpose, the tendency might seem particularly hard to resist. Accordingly, the Red Cross has struggled to interpret restrictions in the Additional Protocols as restrictively as possible. Even if one sets aside treaty texts and looks at underlying moral claims, however, the issues are by no means as simple as the Red Cross version suggests. Advocates for humanity are not always the best judges of what serves their own professed aims.

One way of seeing the point is to notice that the International Committee of the Red Cross does not have a record to inspire great confidence in its moral judgment. Before the Second World War, it focused on ancillary issues, mostly protection for medical personnel, wounded combatants, and prisoners of war—the subjects of the Geneva Conventions of 1864 and 1929.³²⁴ Amidst the challenges of the Second World War, it sought to play a larger role. Its efforts in this direction were not taken seriously at the time.³²⁵ In retrospect, it is clear that the Red Cross did not deserve to be taken seriously.

In the fall of 1940, as German bombers were battering London, the ICRC proposed to monitor bomb damage in Britain and Germany so that each side could avoid unintended harm to civilians and civilian property. Churchill rejected the proposal on the grounds that the Red Cross, “under German influence or fear,” was “very likely [to] report that we had committed the major breaches.”³²⁶

324. CAROLINE MOOREHEAD, *DUNANT’S DREAM: WAR, SWITZERLAND, AND THE HISTORY OF THE RED CROSS* 309–13 (1998). Since there was also a 1925 Geneva Convention banning the use of poison gas in warfare, the Red Cross was urged to protest gassing of civilians in Italy’s war against Ethiopia in 1936; the Red Cross declined to make any public comment, declined even to share what it knew with officials of the League of Nations. *Id.*

325. *Id.* at 389–90. When the ICRC protested Britain’s food blockade in 1940, the British Foreign Office gave it little attention: “the British government seems to have been unaware of precisely what the International Committee [of the Red Cross] did.”

326. 6 MARTIN GILBERT, *WINSTON CHURCHILL, FINEST HOUR, 1939–1941*, at 832 (1983) (citing Prime Minister’s Personal Minute, addressed to Lord Halifax, 13 October

Churchill's initial suspicions were borne-out by subsequent events. The Red Cross declined to make any public condemnation of the murder campaign against the Jews, despite repeated pleas to do so from anguished observers (including clergymen) in occupied territories. The ICRC decided that adding its own voice to Allied condemnations would compromise the neutrality of the Red Cross.³²⁷ At the very end of the war, a Red Cross emissary helped to save thousands of concentration camp inmates from a final massacre by summoning a nearby American patrol to their rescue. He was banished from the Red Cross and hounded out of Switzerland. Neutrality was a much higher priority for the Red Cross than humanity.³²⁸

1940). Apart from questioning the ICRC's neutrality, Churchill rejected the Red Cross approach to humanitarian law, declaring "we do not want these people thrusting themselves in, as even if Germany offered to stop the bombing now, we should not consent to it. Bombing of military objectives, increasingly widely interpreted, seems at present our main road home." *Id.*

327. See JEAN-CLAUDE FAVEZ, *THE RED CROSS AND THE HOLOCAUST* 81, 282 (John & Beryl Fletcher trans., Cambridge Press 1999) (1988). This careful study by a senior Swiss scholar, to whom the ICRC and the Swiss government opened their files, documents that the actual policy was not "indecisive," as later claimed, but relentlessly consistent: the ICRC considered a number of different options but always decided to remain aloof – in the name of neutrality. In practice, the ICRC was influenced by pressures from the Swiss government, answering to the priorities of a particular nation, anxious to avoid provoking a dangerous neighbor (which, through most of the war, controlled territory on all sides of Switzerland). Only in the last months of the war did the Red Cross make concerted efforts to persuade German authorities to allow food parcels to be sent to concentration camps. "The [impending] Allied victory was fraught with danger not only for the traditional position of Switzerland in Europe and especially for its neutrality but also for the ICRC . . . The attitude of the United States and therefore of the powerful American Red Cross almost spelt the end of the ICRC and a complete overhaul of the Red Cross's world. . . . the probability of speedy victory in the West increased the pressure on the ICRC to approach things anew, to make a protective gesture for once. . . . The Swiss authorities, finally, pressed the ICRC to act, to widen its scope and to raise itself to the level of energetic action demanded by a continent once again [sic!] at war." *Id.* at 81. Even then, the ICRC's efforts did not amount to much, as "even the material aid it was able to deliver ha[d] not succeeded in convincing the world that it had given sufficient proof in this instance of its effectiveness, all the more so because it did not take the supreme risk of throwing the full weight of its moral authority into the scales on behalf of these particular victims [in Nazi concentration camps]. . . we have no choice but to recognize that it really should have spoken out . . . In its way of working, in its methods of analysis, in its political perspective, the ICRC was by then out of phase with the ideological struggle that was what World War II was really about." *Id.* at 282. In the supreme humanitarian catastrophe of modern times, all the ICRC's rhetoric about "humanity"—as a set of claims abstracted from the needs of any particular nation—proved to be mere words, making no serious claim at all on its actions.

328. Johannes Starmuehler, Dissertation, *Louis Haefliger und die Befreiung des Konzentrationslagers Mauthausen* 55–66 (Jan. 2008), available at http://othes.univie.ac.at/447/1/01-22-2008_0104393.pdf. As Starmuehler reports, the ICRC not only officially repudiated Haefliger for assisting an armed force (the American liberators) but then refused

For all its emphasis on neutrality, the ICRC did, during the war, maintain close and respectful relations with the Red Cross of the Third Reich, headed by an SS doctor who performed ghoulish experiments on inmates of concentration camps. He was celebrated in Geneva publications.³²⁹ After the war, the Red Cross played a large role in helping Nazi war criminals, including Adolf Eichmann and Josef Mengele, escape capture by Allied investigators and reach safe havens in South America.³³⁰ The Red Cross was devoted to “humanity” at such a high level of abstraction that leading war criminals had as much claim on its sympathy as other “displaced persons.”

All this might seem remote history for which the Red Cross eventually expressed regret, but the same perspective shines through ICRC pronouncements on humanitarian law in the post-war era. Four decades after the end of the Second World War, the Red Cross *Commentary* on AP-I continued to cast that war as a conflict in which both sides departed from traditional norms, equally so, in this account:

to compensate him for financial losses he incurred in his service, then disparaged him to former and prospective employers in the Swiss banking community, so that Haefliger was unable to find work in Switzerland and lived the rest of his life in exile. In 1997, after a series of smaller gestures beginning in 1990, ICRC President Cornelius Sommaruga offered public recognition to Haefliger—who by then had streets named after him in Vienna and in Tel Aviv. Sommaruga also offered a general “apology”—of sorts—for the ICRC’s “indecisiveness” during World War II. To preserve the tradition of neutrality, he accompanied these statements with a criticism of the Israeli occupation of Palestinian territories. “Protecting War Victims: Lessons of the Past, Challenges for the Future,” Address at Chatham House, London, Sept. 15, 1997.

329. MOOREHEAD, *supra* note 324, at 356–63, 467–69 (1998). Articles about Dr. Ernst Grawitz and the DRK (Deutsche Roten Kreuze, German Red Cross) did not, of course, mention medical atrocities. On the issue of medical experiments on civilians—technically, not covered by previous treaties—the Red Cross remained neutral. And silent.

330. GERALD STEINACHER, *NAZIS ON THE RUN: HOW HITLER’S HENCHMEN FLED JUSTICE* 70–71, 97, 99 (Oxford Univ. Press 2011) (2008). The ICRC provided false identity papers to Eichmann and Mengele and many other leading war criminals, even after the U.S. State Department urged “immediate and drastic action” to reform the Red Cross practice of handing out documents with little or no inquiry or verification, warning that existing Red Cross practices would “arouse suspicion and distrust” toward the International Red Cross role. Steinacher concluded “The ICRC continued issuing unverified travel documents, long after it became aware of abuses. Thus the ICRC bears a certain amount of moral responsibility.” *Id.* at 99.

Although the basic principle [regarding “protection of the civilian population”] remained unquestioned, the enormous development of the means of warfare jeopardized the principle in practice. Finally, alleging that they were only carrying out reprisals, the belligerents went so far as to wage war almost indiscriminately, which resulted in heavy losses among the civilian population and culminated in the dropping of the nuclear weapons on Hiroshima and Nagasaki.³³¹

Some 350,000 German civilians were killed in Allied bombing raids; some forty times that number of civilians were killed by German execution squads or in German extermination camps during the war.³³² It makes a difference, after all, whether killing is the actual object of one’s policies. One must be extremely committed to neutrality to find, as the Red Cross does, some underlying symmetry between the war policies of the western allies and the Third Reich. Red Cross officials did display that sort of commitment, both during and after the war and even when off-duty.

During the Second World War, when the Red Cross contemplated issuing protests against Germany’s attempt to destroy European Jewry, its staff drafted texts that would simultaneously denounce Allied bombing of German cities.³³³ Even decades later, the ICRC’s leading commentator, a veteran of these wartime drafting exercises, published a book in which Allied bombing was linked with the Holocaust, as comparable or at least parallel horrors.³³⁴

The Red Cross, vaunting its neutrality, insists that it does not take a position on when war is justified, a branch of law known to scholars as *jus ad bellum* (the law on resort to war). It simply tries to ensure that

331. RED CROSS COMMENTARY, *supra* note 9, at 586. A note indicates this passage was contributed by “JP,” which is short for Jean Pictet. Pictet studied in Vienna in the 1930s and was a Red Cross lawyer in his early 30s during the Second World War. He was involved in several abortive efforts to craft ICRC public protests against wartime atrocities.

332. Estimates by post-war German researchers placed the number of German civilians killed by Allied bombing at 650,000, a figure that has been widely reported since. More recent research indicates a more “plausible” figure is about 350,000. OVERY, *supra* note 167, at 307. Recent studies by German historians calculate that apart from 5.7 million Jews, there were probably more than 7 million others deliberately murdered on the ground, though their deaths were not as carefully tabulated at the time; see DIETER POHL, VERFOLGUNG UND MASSENMORD IN NS-ZEIT, 1933–1945, at 153 (2003). The resulting 13 million figure is 37 times larger than the estimated civilian casualties now attributed to Allied bombing.

333. MOOREHEAD, *supra* note 324, at 420 (describing abortive discussions of a public statement condemning abuses of humanitarian law by all sides in the war—drafted by the young Jean Pictet).

334. JEAN PICTET, L’EPOQUE DES PEAUX-ROUGES [Epic of the Red Skins] 20 (1988) “Since the Second World War and the horror of the concentration camps and the indiscriminate bombing, where millions of innocents found a hideous death, one looks at the barbarism of the Indians with different eyes: they, at least, behaved with savagery because they were savages.” *Id.* (Rabkin translation from French original).

when armed conflict occurs, it will be bound by rules for conducting war, the so-called *jus in bello* (law on the conduct of war). Some such division of rules has helped to encourage restraint in the conduct of war. An army that sees itself fighting for a just cause will think that its enemy is wrong to be fighting at all. In such circumstances, armies might be tempted to engage in limitless brutality—if they did not recognize separate rules of restraint regarding the conduct of war, as opposed to rules regarding resort to war, in the first place. Commanders and commentators have recognized the logic of this distinction for many centuries.³³⁵

Until the second half of the Twentieth Century, however, the impulse to isolate rules of conduct in war was not regarded as a fundamental principle, overriding all distinctions of context and circumstance. The Latin terminology—*jus ad bellum* and *jus in bello*—seems to lend these formal terms the authority of Cicero or, at least, Grotius. In fact, they are coinages from the 1930s that have no established or generally accepted predecessors.³³⁶ The prevalent use of this terminology in recent decades owes much to the insistent rhetorical efforts of the Red Cross and associated humanitarian advocates.

The campaign is designed to suggest that one set of rules covers all conflicts, at least for the way wars are fought. The Red Cross has insisted that all “armed conflict” is now covered by the same rules, a claim endorsed by the International Tribunal for the Former Yugoslavia.³³⁷ If

335. Robert Stacey, *The Age of Chivalry*, in *THE LAWS OF WAR, CONSTRAINTS IN THE WESTERN WORLD* 29 (Michael Howard ed., 1994) (noting that by the Tenth and Eleventh Centuries, “the bearing of arms was seen as a noble dignity connected with a code of conduct, the violation of which might cost a man his status as a warrior” and the code sought to “define and protect the status of non-combatants,” though not in wars against non-Christians); Christopher Allmand, *War and the Non-Combatant in the Middle Ages*, in *MEDIEVAL WARFARE* 262, 265 (Maurice Keen ed., 1999) (commenting that while “the person of the non-combatant should be respected unless he offered resistance, his property . . . constituted a legitimate target,” by the Fourteenth Century, even attacks on property were protested when done to “excess”—as the “principle of proportionality . . . was beginning to find widespread support” in opinion).

336. Robert Kolb, *Origin of the Twin Terms, Jus ad Bellum, Jus in Bello*, 320 INT’L REV. RED CROSS 553 (1997).

337. See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal for Jurisdiction, Int’l Crim. Trib. For the Former Yugoslavia, Oct. 2, 1995. “Why protect civilians from belligerent violence or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State?” *Id.* at para. 97.

the rules are meant to protect humanity, shouldn't they be the same in all conflicts? Whatever the merits of such reasoning in respect of ongoing civil wars, it does not follow that all wars should be fought by the same rules. The distinction between "international" and "non-international" conflicts is not the only distinction that matters.

The political theorist Michael Walzer sparked renewed interest in philosophic questions about war in his 1977 work, *Just and Unjust Wars*.³³⁸ On the whole, it tries to offer a rigorous defense of civilian immunity based on a separation of *jus in bello* obligations from disputes about *jus ad bellum*. Even Walzer, however, conceded that extreme challenges might justify extreme measures—if, say, this were the only way to avoid total defeat by an unrestrained aggressor. In such cases, he acknowledged, it might be morally defensible to apply a "sliding scale," giving more tactical leeway to tactics employed by the defending side against unjust aggression.³³⁹ On this basis, he argued that British bombing of German cities might have been morally justifiable, but only in the early years of the war, when Britain was at serious risk of losing the war altogether.³⁴⁰

There is intuitive appeal to this argument, which is why other critics of Allied bombing have endorsed it.³⁴¹ It faces obvious difficulties, however. If it was morally justifiable to bomb Berlin in 1940, there must have been some reason to hope that such air attacks would achieve some militarily significant result in impeding German war efforts. If that was plausible in 1940, when Britain had only very limited bombing capacity, why not in 1943, when Germany still dominated most of Europe, but Britain could deliver far more damage from the air? If it was morally defensible to bomb Berlin in 1940, why not Dresden in February 1945? As noted above, some 20,000 German civilians died in that attack, but why did they have more claim to British concern than the hundreds of thousands of prisoners (most from Allied nations) still held in concentration camps and work camps inside Germany? After all, such prisoners were held in such extreme conditions that their lives might have been lost or saved, depending on whether the war dragged on for many more months (as was feared in

338. See generally MICHAEL WALZER, *JUST AND UNJUST WARS* (1977).

339. *Id.* at 229–32.

340. *Id.* at 255–62.

341. See, e.g., STEPHAN GARRETT, *ETHICS AND AIRPOWER IN WORLD WAR II* 183 (1993) (commenting that "[w]hatever rationales may be offered for the British area bombing offensive against Germany prior to the spring of 1944, after that date it was quite without ethical foundation") Sven Lindqvist, *The War Against Women and Children*, in INVENTING COLLATERAL DAMAGE 287 (Stephen Rockel and Rick Hapern eds., 2009) (arguing that he "agree[s] . . . that the residential raids [on German cities] were militarily and politically necessary in 1940–41 . . . but from 1942 on [defenders of the strategy] can no longer show that [these raids] were necessary").

February 1945) or whether hard blows would allow Allied armies to smash into Germany within a few more weeks.

Different wars justify different responses. To think about what kind of war is involved, it is not plausible to think about *jus in bello* and *jus ad bellum* claims as if they could be considered in total isolation from each other. If it is more urgent to win, it is more permissible to use destructive means of winning when that does promise to bring a surer or speedier victory.

A recent example makes the point. When Russia seized the Ukrainian province of Crimea in March 2014, the UN General Assembly denounced the action as a clear violation of the UN Charter.³⁴² Throughout the Cold War, NATO threatened nuclear retaliation against westward aggression by the Soviet military. Nobody thought of doing that to stop Russian aggression against Ukraine. Nobody was willing to offer any serious military response. As the Russian seizure of Crimea was accomplished by the infiltration of special agents with no bloodshed, international protests were not followed up with serious retaliatory measures.³⁴³ Had Moscow enforced its claims on Crimea through a nuclear strike on Kiev, the response would surely have been very different.

In the mid-1980s, the Red Cross suggested in its *Commentary* that AP-I implied a rule against the use of nuclear weapons.³⁴⁴ A decade later, however, when the question of nuclear weapons use was put to the International Court of Justice, the court still could not muster a majority in support of that conclusion.³⁴⁵ In an extreme circumstance, it might be proper to use nuclear weapons to avoid national annihilation. Most western countries, when ratifying AP-I, included a reservation stipulating that it did not make resort to nuclear weapons unlawful in all circumstances.³⁴⁶ Germany, which had prided itself on its faithful adherence to international law, accordingly has supplied nuclear submarines to Israel, with the clear

342. G.A. Res. 68/242, U.N. GAOR, 68th Sess., U.N. Doc. A/Res/68/242 (Apr. 1, 2014), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262.

343. For compelling analysis of the technical disputes about whether cross-border infiltration in Crimea constituted “armed attack” under the UN Charter, see Robert Delahunty, *The Crimean Crisis*, U. ST. THOMAS J. L. PUB. POL. (forthcoming 2015).

344. RED CROSS COMMENTARY, *supra* note 9, at 589–96.

345. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 66 (July 8).

346. See *supra* note 28.

understanding that they would be equipped with nuclear tipped missiles as a deterrent against nuclear attack.³⁴⁷

Relaxing *jus in bello* restrictions in this way might seem justified only for extremely urgent defense claims. In fact, historically, a similar relaxation of *jus in bello* rules was thought to apply at the other end of the spectrum, where the stakes were too low for all-out war.

In the Nineteenth Century and even down to the Second World War, major powers often resorted to limited uses of force to compel a lesser state to refrain from abusive conduct.³⁴⁸ Among other things, affronted powers would use naval forces to close the ports of an offending state, as Britain and Germany did to Venezuela in 1902 to compel payment of debts to British and German creditors.³⁴⁹ The practice was sometimes called “gunboat diplomacy,” because it relied on naval war ships for coercive measures that were not regarded as “war.” No one seems to have thought such “pacific reprisals” were governed by the details of the Hague Convention, at least with regard to provisions against destruction of non-military property.³⁵⁰ Destruction of non-military property—such as warehouses with civilian goods—was one of the main tactics.³⁵¹

As a legal matter, governments and legal commentators could argue that the law of war did not apply because such punitive measures were not “war.” As a strategic matter, “pacific reprisals” were designed to address very discrete disputes, so there was far less concern that reprisals would provoke counter-measures, spiraling into unrestrained violence. Bright-line rules distinguishing civilian property from legitimate “military objectives” seemed less compelling than in full-scale war.

While the terminology has changed, the tactic remains. When the United States bombed Tripoli in 1987, in reprisal for terror attacks on American servicemen in Europe, the point was to impose a cost on the Libyan dictator,

347. *Israel Deploys Nuclear Weapons on German Built Submarines*, DER SPIEGEL (June 3, 2012, 10:12 AM), <http://www.spiegel.de/international/world/israel-deploys-nuclear-weapons-on-german-submarines-a-836671.html>.

348. See generally, S. Macoby, *Reprisals as a Measure of Redress Short of War*, 2 CAMBRIDGE L.J. 60 (1924).

349. ALBERT EDMOND HOGAN, *PACIFIC BLOCKADE* 151–57 (1908) (describing 15 episodes of “pacific blockade” between 1832 and 1903, including Venezuela episode).

350. OPPENHEIM, *supra* note 106, at 42–44 (“an act of reprisal [in peacetime] may be performed against anything and everything that belongs ... to the delinquent State or its citizens”)

351. JAMES CABLE, *GUNBOAT DIPLOMACY, 1919–1991: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE* (3d ed., 1994). In 1926, for example, bombardment from British warships severely damaged the Chinese city of Wanh sien, but did persuade the Chinese to release British merchant ships and crew members they had seized. *Id.* at 164–75. In 1923, Italian warships bombarded non-military buildings on the Greek island of Corfu as a means of persuading the Greek government to comply with Italian demands for reparation, after the killing of an Italian diplomat on Greek territory. *Id.* at 37–42.

Muammar Gadhafi.³⁵² When President Clinton bombed Iraq in the mid-1990s, the point was to impose a cost on Saddam Hussein for resisting the monitoring efforts of international weapons inspectors.³⁵³ In both cases, efforts seem to have been made to avoid harm to civilians, perhaps even “civilian objects”—at least in the sense of private houses. Yet, destruction of the targets—government buildings—did not present a “concrete and direct military advantage” in an ongoing war. Certainly not in the sense of making it harder for Gadhafi to organize terror raids or making it harder for Saddam to resist weapons inspectors—in the way that destroying a weapons depot would make it harder to equip an army in the field.

The logic that applies to such limited reprisals may also apply to larger and longer interventions. As the subsequent interventions in Libya and Iraq illustrate, contemporary wars don’t usually end with a formal surrender ceremony that brings a complete end to conflict. In an age of ongoing guerrilla conflict, the meaning of “military advantage” is quite disputable. The implicit target might not only be guerrillas, but the civilian support system or the political authorities that provide them assistance. The United States (under President Obama) claimed to be acting against a lawful target when it launched cruise missiles against Anwar al-Awlaki, a spiritual adviser to Al Qeda forces who seems to have had no particular military expertise or command authority.³⁵⁴

The truth is that AP-I itself implicitly recognizes that different wars authorize different rules, or that different rules may apply to different sides in the same war. The Red Cross *Commentary* explains the provision that allows guerrillas to operate out of uniform with the argument that, in some circumstances, reliance on disguised combatants—though it puts other civilians at risk—might be the only available form of resistance. And, as Red Cross commentators note, sometimes such resistance is approved by international law, as when it is resistance to colonial domination.³⁵⁵ That line of reasoning, however, implicitly recognizes that

352. Christopher Greenwood, *International Law and the United States’ Air Operation Against Libya*, 89 W. VA. L. REV. 933, 936 (1987).

353. Sean Condon, *Justification for Unilateral Action Against the Iraqi Threat*, 161 MIL. L. REV. 115, 148–49 (1999).

354. Scott Shane & Souad Mekhennet, *From Condemning Terror to Teaching Jihad*, N.Y. TIMES, May 9, 2010, at A1.

355. Marco Sassoli [ICRC legal analyst], *The Separation Between Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULT-LINES 252 (Michael Schmitt ed., 2007). “[I]f national liberation wars and armed resistance against a technologically overwhelming

some methods of fighting may be justified in some conflicts, though they would not be proper in other conflicts. If that is so, it offers another reminder that we cannot, after all, think about *jus in bello* (how fighting should be conducted) in complete abstraction from *jus ad bellum* (when and why it may be proper to fight).³⁵⁶

Many advocates in the 1960s and 70s justified “wars of national liberation” as intrinsically just, or at least reflecting sufficient moral authority that resistance to guerrillas ought to operate within strict humanitarian limits, even if guerrillas could not themselves respect all humanitarian restraints.³⁵⁷ Walzer’s *Just and Unjust Wars*, first published shortly after the end of the American involvement in Vietnam, argued that difficulty in suppressing a guerrilla movement was proof that it was unjust to do so, because the guerrillas had broad civilian support.³⁵⁸ Whatever attraction that argument might have had to critics of the American involvement at the time, the subsequent triumph of the Khmer Rouge guerrillas should have given pause—as it led to the murder of nearly a million civilians in

aggressor or foreign occupier are lawful under *ius ad bellum*, international humanitarian law cannot outlaw every efficient method to win such a war Thus Protocol I had to lower the distinction regulation [requiring combatants to distinguish themselves from non-combatants] to what is both possible to comply with in a guerrilla war and the minimum necessary to ensure respect for the civilian population. Those who criticize this [accommodation] as ‘law in the service of terror’ want to have *ius in bello* bar the realization of *ius ad bellum*.” *Id.*

356. WALZER, *supra* note 338, at 195–96. The point is argued by a number of philosophic papers published in the past decade. For some of the most compelling versions of this argument, see Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFFAIRS 34 (2005); Jeff MacMahn, *Just Cause for War*, 19 ETH. & INT’L AFF. 1 (2005); Christopher Toner, *The Logistical Structure of Just War Theory*, 14 J. ETH. 81 (2010); see also Cannizzaro, *supra* note 7, at 348 (commenting that proportionality is “far from being two separate legal regimes, *ius in bello* and *ius ad bellum* continuously overlap . . . the full achievement of one might even make more difficult and even impossible the achievement of the aims of the other”).

357. See, e.g., discussion of “wars of national liberation” in RED CROSS COMMENTARY, *supra* note 9, at 41–55 (citing UN resolutions and arguing that concessions must be made to “guerrilla tactics” in such wars).

358. WALZER, *supra* note 338, at 188–96. The argument does not acknowledge that Viet Cong guerrillas were, in fact, effectively suppressed by American and South Vietnamese forces, which is why American withdrawal in 1973 was described at the time as “peace with honor.” It was the invasion of an entirely conventional army from North Vietnam, powered by large numbers of tanks, which overwhelmed South Vietnam the following year. Subsequent editions of Walzer’s book (the latest appeared in 2006) offer no qualification of the original argument about the “justice” of guerrilla victories. See generally MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (4th ed. 2006).

the name of a crazed ideology.³⁵⁹ What if insurgents succeed, not because they are more popular, but more ruthless in intimidating surrounding civilians?

The moral challenge has reappeared with the Islamic State in Syria and Iraq. It is hard to imagine that the victory of people who engage in public beheadings will be a boon for humanity. That does not prove that those who battle ISIS can claim exemption from all restraints on their own war methods. But perhaps the limits may be interpreted with more accommodation, given the context of a war in which displays of terrorist cruelty are one of the main tactics.³⁶⁰

The point is not that extremely brutal enemies license countering brutality because “they deserve it.” The point is that an enemy’s depravity may make it more urgent to prevail. When there is greater moral urgency for success, there is more claim to invoke Walzer’s “sliding scale” in which the just side may justly claim the right to pursue methods of combat that would seem improper in other circumstances.

AP-I purports to impose the same limits not only in all conflicts, but in all conditions of compliance, even in conflicts where one side repudiates all rules of restraint. A Red Cross scholar concluded that Israel had violated proportionality in its conflict with Hezbollah, while acknowledging that Hezbollah had defied the very idea of rules from the outset of the conflict.³⁶¹ The answer, he concluded, was that the international community must talk more about international standards.³⁶² Perhaps that is not quite sufficient if it gives strategic advantage to the avowed enemies of humanitarian restraint. In practice, Israeli bombing of Lebanese villages, which imposed a good deal of destruction and suffering on civilians, including bystanders, seems to have exercised a deterrent effect. In subsequent campaigns against the Hamas terror apparatus in Gaza, the

359. BEN KIERNAN, *THE POL POT REGIME* 458 (1996) (stating that nearly 1.7 million Cambodians were killed by Khmer Rouge, about 21% of the 7.9 million person population before the guerrillas gained power).

360. As Cannizzaro puts it, the argument is “very seductive indeed” that a state cannot be required “to forego its indispensable means of defence and to submit to inexorable defeat in order to avoid excessive civilian damage . . . No damage is excessive if the ultimate end is self-preservation.” Cannizzaro, *supra* note 7, at 348.

361. Andrea Zimmermann, *The Second Lebanon War*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 99 (2007).

362. *Id.* at 141.

Lebanese border stayed quiet.³⁶³ A sustained campaign on the ground would almost certainly have produced more loss and damage to civilians.

The traditional view, as expressed in the Lieber Code, was that restraints in the conduct of war would facilitate a return to peace. The view was always understood to be less persuasive in conflicts involving side(s) not much disposed to peace. The traditional argument for restraint did not seem compelling in the extreme situation of the Second World War. It is no credit to the Red Cross that it could see no legal or moral difference between Allied bombing of German cities and German genocide of Jews, Gypsies, and others on the ground.

Proportionality is not meaningless, even in extreme conflicts. Some advocates have endorsed the use of the atomic bomb against Hiroshima, but question the need for the atomic strike Nagasaki, before the Japanese had time to absorb the meaning of the first attack.³⁶⁴ Some who defend bombing of German cities wonder whether it was continued too long.³⁶⁵ These are by no means frivolous distinctions or idle questions. Extreme situations may justify extreme measures, but do not excuse heedless indifference to lives lost. However, it is one thing to say proportionality applies, another to decide what it requires.

VII. THE FOG OF WAR AND THE SMOKE OF POLITICS

The preceding section focused on the moral challenge in seeking to apply the same rules to all conflicts with all enemies. Even if one does try to apply the rule set out in AP–I, however, there is bound to be great difficulty in applying the proportionality requirement to concrete challenges.

The proportionality formula in AP–I requires that harm to civilians be weighed against “anticipated military advantage.”³⁶⁶ The rule thus assumes that commanders can usually forecast the likely effects when they order an “attack.” That assumption may well be questioned, however. If it were easy to “anticipate” the consequences of an attack, why would there ever be battles? Why wouldn’t defenders simply anticipate the same consequences and so flee from a foredoomed defeat?

363. Anshel Pfeffer, *Hezbollah refused Hamas request to bomb Israel in Gaza war, Shi’a militants feared devastating Israeli response in repeat of 2006 Lebanon war, analysts say*, HAARETZ, Nov. 10, 2010; Jamie Dettmer, *Hezbollah Talks Big but Bows Out of Gaza War*, DAILY BEAST, (July 23, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/07/23/hezbollah-talks-big-but-bows-out-of-the-gaza-war.html>.

364. See, e.g., Barton Bernstein, *Atomic Bombings Reconsidered*, 74 FOREIGN AFF. 135 (1995).

365. See examples cited *supra* note 341.

366. See AP–I, *supra* note 1, at art. 51, ¶ 5(b).

In practice, it is often far from easy to “anticipate” the “military advantage” to be gained from an “attack.” In July of 1916, the British army mounted an attack on German trenches near the Somme River in France. By the time the offensive ended, the British army had suffered more than 400,000 casualties—for a gain of some seven miles. The French army suffered some 200,000 casualties in its efforts to support the British offensive. Anglo-French armies together suffered more casualties than the defending Germans.³⁶⁷ Seven decades later, Britain’s leading military historian described the result this way: “The Somme marked the end of an age of vital optimism in British life that has never been recovered.”³⁶⁸

What makes that failure most notable is that it did not result from faulty intelligence in the run-up to the battle, since the battle continued for four months, giving plenty of time to check optimistic “anticipations” against experienced realities. The British commander, Douglas Haig, was not removed in the aftermath, but continued to remain in command of British forces to the end of the war—and continued to mount hideously costly and ineffective offensives, until somewhat similar offensives did finally overwhelm exhausted German troops in the last months of the war.³⁶⁹

Commanders in war can make terrible mistakes. If we think they are inclined to be indifferent to the suffering of civilians on the enemy side, we should remember that they can make terrible mistakes even when (as at the Somme) they are reckoning almost entirely with the lives of their own troops, rather than civilian bystanders. Commanders do often make bad mistakes even in “anticipating” what will yield “military advantage.”

In mid-February of 1944, Allied armies in Italy found their path blocked by German troops entrenched on strategic heights at Monte Cassino. On the heights was an abbey founded by St Benedict in the 6th Century. General Eisenhower issued an order reminding troops that such historic monuments were landmarks of western civilization and that “[they] are bound to respect those monuments as far as war allows.”³⁷⁰ At the same time, he indicated the priority of more immediate concerns: “If we have to choose between destroying a famous building and sacrificing our own men, then our men’s lives count infinitely more and the buildings must

367. JOHN KEEGAN, *THE FIRST WORLD WAR* 199 (1998).

368. *Id.* at 199.

369. *Id.*

370. AMERICAN COMM’N FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, REPORT 48 (1946).

go.”³⁷¹ The abbey was “blasted by artillery” and then “largely destroyed” by “aerial bombardment,” ordered by local Allied commanders.³⁷²

It turned out that German forces had not entered the abbey while it was standing, but swarmed into the rubble after these attacks and defended it so effectively that the Allied advance was stymied for another three months. The U.S. Army’s own study of the episode concluded that the bombing gained “nothing beyond destruction, indignation, sorrow and regret.”³⁷³ German propaganda denounced Allied “barbarism”—as was to be expected.³⁷⁴ The cause of the mistake was simple to understand: commanders do not have perfect understanding, even when it comes to targets close at hand.

What is true for immediate battlefield challenges is likely to be even more applicable to ancillary tactics, such as the enforcement of a naval blockade. To enforce a blockade, the belligerent’s navy must intercept merchant ships heading for the blockaded port. Naval warships may then be drawn into combat operations, causing loss of life to civilians and damage to civilian ships and cargoes. The latter might be considered “civilian objects” even if, in the circumstances, they contribute—to some disputable extent—to the military resources of the enemy. What sort of “concrete and direct military advantage” can be “anticipated” from a particular attack against a particular blockade runner?

The precise harm to the enemy in losing any one particular cargo might be too small to be classified as a “concrete military advantage.” The attack on one ship might well serve to deter future efforts to run the blockade, but that “advantage” might be too speculative or indirect to call it a “direct military advantage.”³⁷⁵ By this reasoning, since no particular effort to enforce a blockade would clearly constitute a “concrete and direct

371. *Id.*

372. *Id.* at 67.

373. RICK ATKINSON, *THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943–1944*, at 440 (2007).

374. *Id.*

375. AP–I article 49 seems to limit the convention’s application to naval tactics. AP–I, *supra* note 1, at art. 49. Commentators are divided on whether AP–I’s prohibition on using “starvation of civilians” as a method of war (art. 54) actually does prohibit naval blockade of food shipments. *See* RAUCH, *supra* note 220; *see also* MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 380 (2d. ed., 2013) (acknowledging statements at the Geneva negotiations that AP–I was not intended to effect the law of naval blockade, but suggesting that Art. 70 obligates belligerents to allow passage of relief supplies to civilians); Wolf Heintschel von Heinegg, *Naval Blockade*, 75 INT’L L. STUD. 203 n.120 (listing authors who still question AP–I’s application to naval blockade.) Even if AP–I does prohibit blockades aimed at actual “starvation” of civilians, blockades would still be allowed for the interception of military supplies and for other purposes that might impose considerable hardship on civilians.

military advantage,” one might plausibly conclude that blockades are never justified—if the history of war did not prove the contrary.

Naval blockade is a tactic that can only be fully deployed by countries rich enough to maintain sizable fleets. A similar logic applies, however, to the tactics of the weak. If a belligerent force cannot risk open battle against armies in the field, it may resort to guerrilla raids. Almost by definition, guerrilla forces cannot strike a decisive blow against an entire army. When it works, a guerrilla campaign may demoralize the opposing forces by creating an atmosphere of insecurity and induce an accumulation of blood loss through a thousand small cuts. No single guerrilla raid, however, would make an enemy substantially worse off. No one raid, by itself, would likely give grounds to anticipate “concrete and direct military advantage.”

It might seem to follow that no guerrilla force can ever impose civilian casualties, lest it violate the principle of “proportionality.” The drafters of AP-I clearly did not embrace that conclusion, however. Far from discouraging guerrilla tactics, AP-I gives special protection for irregular combatants, allowing them to practice stealth and disguise in ways that are still forbidden to regular armies.³⁷⁶

Many nations ratifying AP-I recognized the problem of weighing the advantage to-be-anticipated in any individual attack in their instruments of ratification. They would adhere to proportionality requirements on the understanding that they apply to a campaign as a whole, not to individual attacks.³⁷⁷ The Statute of the International Criminal Court, drafted nearly a quarter century after the completion of AP-I, implicitly acknowledges

376. AP-I, *supra* note 1, at art. 44, ¶ 3 admonishes that “to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while . . . in a military operation preparatory to an attack.” But, it immediately adds the qualification that “where, owing to the nature of the hostilities [that is, guerrilla conflict] an armed combatant cannot so distinguish himself,” he will still qualify for prisoner of war protections if he “carries arms openly” when “visible to the adversary . . . preceding the launching of an attack . . .” And if even if a fighter does not meet this minimal requirement, “he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war” under Geneva conventions. *Id.* at art. 44, ¶ 4.

377. See THE LAWS OF ARMED CONFLICT, *supra* note 1, at 793–816 for “understandings” that “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 that attack,” by Australia, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Spain, and the United Kingdom; see also NEWTON & MAY, *supra* note 6, at 114–16 (Discussing the significance of these reservations).

the point by rephrasing the AP–I provision to refer to civilian harm “which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.”³⁷⁸

The ICC Statute also limits the Court’s jurisdiction to “war crimes . . . when committed *as part of a plan or policy* or as part of a *large-scale* commission of such crimes.”³⁷⁹ Particular abuses might thus be immunized if they occurred in the context of generally correct behavior. That was hardly an unknown pattern in earlier wars. American commanders indulged clearly unlawful killing of SS-troops in the last months of the Second World War because they recognized special provocations and they expected American conduct to be judged by the general pattern.³⁸⁰

Even with more stringent rules, it is not easy to establish what was or should have been known to commanders when it comes to assessing responsibility for tactics that impose “excessive” harm to civilians. The International Criminal Tribunal for the Former Yugoslavia, unlike the ICC, had many cases in which commanders of undisciplined militia forces were charged with abusive attacks. The tribunal did not find a defendant guilty of violating the proportionality rule in a single case.³⁸¹ If the rule is not reduced to automatic guilt when civilians are harmed, it is hard to establish guilt in such cases.

Still more difficult challenges arise when irregular forces do not simply launch attacks that threaten civilians on the opposing side, but deliberately seek to lure opposing forces to attack civilians in their own community. What is a “proportional” amount of injury to “civilians” or “civilian

378. Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute] (emphasis added), *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 1309–1374. The Elements of Crimes subsequently adopted by parties to the ICC Statute further clarifies that the “expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable . . . at the relevant time. Such an advantage may or may not be temporally or geographically related to the object of the attack.” Assembly of States Parties to the Rome Statute of the International Criminal Court, *Elements of Crimes of the International Criminal Court*, U.N. Doc. PCNICC/2000/1/Add.2 (2000) (Sept. 9, 2002).

379. ICC Statute, *supra* note 378, at art. 8(1) (emphasis added). Similarly, the Court’s jurisdiction over “crimes against humanity” is limited to acts “committed as part of a widespread or systematic attack directed against the civilian population, with knowledge of the attack.” *Id.* at art. 7(1).

380. MAX HASTINGS, ARMAGEDDON: THE BATTLE FOR GERMANY 209 (2005) (noting General Bradley’s tacit acceptance of American practice of refusing to accept surrender from SS troops after they massacred surrendered Americans at Malmedy); Rick Atkinson, THE GUNS AT LAST LIGHT: THE WAR IN WESTERN EUROPE, 1944–45, at 613 (2013) (noting the refusal of General Patch to allow prosecution of American soldiers who killed German guards at Dachau, after they had surrendered).

381. Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, 46 ISR. L. REV. 271, 280 (2013).

objects” when defenders deliberately position themselves in the midst of civilian areas, using civilians or protected civilian locations (hospitals, schools, religious centers, etc.) as “shields”?³⁸² The 1899 and 1907 Hague Conventions dealt with the problem by declaring that civilian immunity would be forfeited when protected places were used for military purposes.³⁸³ AP–I admonishes belligerents not to position troops or weapons in civilian areas—but then insists that such tactics do not absolve the attacker from taking precautions to minimize harm to civilians.³⁸⁴

There is logic to this caution in AP–I. We do not think police are absolved of responsibility to look out for innocent bystanders simply because criminals have run into a crowd or seized hostages to protect themselves.³⁸⁵ Still, if defenders do not bear at least some responsibility for protecting civilians, the rule creates a grotesque incentive. If all responsibility for civilian deaths falls on the attackers, then it is in the defenders’ interest to make attacks wound or kill as many civilians as possible on their own side. Hence reports that, in Afghanistan, Taliban guerrillas sought to maximize civilian casualties that could then be blamed on U.S. forces.³⁸⁶ In the Gaza conflict, when Israeli forces warned civilians to evacuate buildings scheduled for attack, Hamas officials demanded that civilians stay in place.³⁸⁷

382. AP–I recognizes the problem in prohibiting any “attempt to shield military objectives from attacks or to shield military operations” by directing “movement of the civilian population or individual civilians” into the vicinity of military sites. AP–I, *supra* note 1, at art. 51, ¶ 7.

383. 1907 version, *supra* note 32, at art. 27. “All necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic buildings, hospitals . . . provided they are not being used at the time for military purposes.”

384. “[T]he presence . . . of the civilian population . . . shall not be used to . . . shield military objectives from attacks.” AP–I, *supra* note 1, at art. 51, ¶ 7. But “any violation of these prohibitions shall not release the Parties . . . from their legal obligations with respect to the civilian population.” *Id.* at art. 51, ¶ 8.

385. See Roger Kirst, *Constitutional Rights of Bystanders in the War on Crimes*, 28 N. MEX. L. REV. 59 (1998) for many cases asserting rights of bystanders—almost always unsuccessfully, but the willingness of courts to consider such claims speaks to the background principle.

386. U.S. Department of Defense, Secretary of Defense Robert Gates, Press Conference (May 5, 2009), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4414>.

387. Lawrence Wright, *Letter from Gaza: Captives-What really happened during the Israeli attacks*, THE NEW YORKER 47 (Nov. 9, 2009).

American and Israeli military lawyers have pressed the argument that responsibility for civilian losses and damage should be at least partially attributed to defenders who use civilians as human shields.³⁸⁸ Red Cross commentators have firmly resisted this position, insisting that the attacker bears sole responsibility for the consequences of the attack, even if the defending side tries to make the attack as costly as possible in civilian lives and the attacker does the best it can to limit civilian casualties.³⁸⁹

The least one can say is that the language of AP-I does not clearly require the interpretation favored by the Red Cross. Even further, the Red Cross view threatens to violate the interpretive norm that legal texts should not be interpreted in ways that yield absurd results.³⁹⁰

ISIS has threatened terrorist attacks on western States that aid its opponents in Syria and Iraq. Suppose it carried out this threat and many European and American civilians thereby lost their lives. Would humanitarian advocates say their deaths were the responsibility of the western governments who defied ISIS threats? Suppose a terror-minded government threatened retaliation on civilians to punish resistance. It is not, after all, a hypothetical scenario or even a recent one. The German occupation government in wartime France threatened ten-fold reprisals on French civilians for any attacks on German forces by the French resistance. German commanders did carry out this threat on a number of occasions—most terribly against the village of Oradour in June 1944, where everyone was murdered and the village completely destroyed (to punish Resistance attacks in a completely different place).³⁹¹ Does the responsibility for these atrocities lie with the French resistance? Entirely?

388. NEWTON & MAY, *supra* note 6, at 219–27; Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for Proportionality*, 22 STAN. L. & POL’Y REV. 93, 93 (2011); Michael Skerker, *Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones*, 3 J. MIL. ETHICS (2004).

389. NEWTON & MAY, *supra* note 6, at 224 (noting ICRC “interpretative guidance” rejects assigning “combatant status”—hence forfeiting civilian immunity—even to voluntary shields).

390. For Justice Scalia’s version of the rule, see ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 234 (2012) “A provision may be either disregarded or judicially corrected as an error False if failing to do so would result in a disposition that no reasonable person could approve.” *Id.* For Scalia’s application of the rule in an actual case, see *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989) (interpreting Rules of Evidence, excluding evidence of prior criminal record when “prejudicial to the defendant,” to apply only to defendants in criminal cases since “cannot rationally” provide benefits to civil defendants when denied to civil plaintiffs). The Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 115 U.N.T.S. 331, authorizes “recourse” to “supplementary means of interpretation” when textual reading “leads to a result which is manifestly absurd or unreasonable.”

391. See MICHAEL BURLEIGH, *MORAL COMBAT* 268 (2005).

Beyond the legal and philosophical disputes, there remains the political dynamic. As a Canadian military lawyer observed, “civilian losses are often concrete, dramatic and emotive. They lend themselves to powerful picture and strong reactions. . . . The contrasting value, military advantage . . . cannot generally be photographed.”³⁹² Drawing fire on human shields becomes a reasonable tactic, if it stirs international condemnation of the attacker and so builds support for the “victims,” even if the entire spectacle is stage-managed by terrorists.

The restrictive view of proportionality lends itself to political propaganda. Hence “proportionality” gets turned, in practice, from allowance to attackers—in return for accepting other restraints—into an independent weapon for defenders ruthless enough to wield it. In effect, it generates a contest to see which side will flinch first before the spectacle of civilian casualties, captured in emotionally powerful pictures. A reasonable expectation is that western democracies will flinch first, meaning the rule rewards the most ruthless. It is hard to see that as a gain for humanity.

Much of the challenge is inherent in modern communications or in the distorting effects of background assumptions about which side had the moral high ground. Still, law should serve to brake demagoguery—not to reinforce it.

VIII. CONCLUSION: CAUTION WITH HUMANITARIAN PRECAUTION

The effort to codify laws of war, at least at the international level, began with the Hague Regulations, drafted at the Peace Conference in 1899. The Hague Regulations tried to reduce general understandings to precise rules to the extent that seemed feasible. The best example is the treatment of war prisoners. The Lieber Code, summarizing the prevailing practice, acknowledged that in extreme circumstances, commanders might refuse to take prisoners, but did not define these circumstances.³⁹³ The Hague Regulations simply pronounced a blanket rule: denial of quarter was simply forbidden.³⁹⁴ Even the Hague Conventions acknowledged that not all obligations could be reduced to clear rules.³⁹⁵ If the drafters assumed

392. Holland, *supra* note 8, at 47.

393. LIEBER CODE, *supra* note 62, at art. 60–61.

394. “[I]t is especially forbidden . . . To declare that no quarter will be given.” 1907 version, *supra* note 32, at art. 23(d).

395. “It has not . . . been found possible at present to concert regulations covering all the circumstances which arise in practice; On the other hand, the High Contracting Parties

some notion of proportionality—as an obligation not to exceed “military necessity” in the immediate conflict—they did not think it could be expressed in a rule.

Additional Protocol I was the first successful treaty to incorporate an explicit reference to proportionality. That expressed a new optimism about the capacity of legal texts to guide inherently difficult decisions—here in relation to reasonable intensity of war effort, acceptable or unacceptable destructive consequences. Perhaps AP–I reflected its era.

There would probably not have been a new Geneva Conference in the 1970s if not for advocacy, at the United Nations and elsewhere, for extending human rights norms to cover situations of armed conflict. The idea for a new convention on the conduct of war was promoted by UN resolutions in 1968, explicitly linking humanitarian restraints in war with protection for human rights. The UN General Assembly had endorsed final texts of the first international human rights treaties—the Covenant on Civil and Political Rights and the Covenant on Economic and Social Rights—only two years earlier. These initial human rights conventions had just received sufficient ratifications to take effect when delegates assembled in Geneva to negotiate new humanitarian protections in war. The human rights treaties tried to implement general endorsements of liberty, equality and dignity with elaborate lists of prohibitions and entitlements. AP–I displays a similar approach. The United Nations subsequently included the text of AP–I in a collection of UN human rights treaties.³⁹⁶

There is obvious logic behind the impulse to associate humanitarian protections in war with wider guarantees of fundamental human rights. If the world can come together to endorse lists of guaranteed human rights, why not guarantee protections for civilians in war? What is more threatening to human rights than being subject to bombardment or attack? As the 1948 Universal Declaration of Human Rights put it, “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized.”³⁹⁷

It might seem paradoxical today, but it was not surprising at the time that calls for a new convention to restrain military action were most loudly urged by some of the world’s most tyrannical governments. As a Soviet delegate explained in a submission to the UN in 1970, “in the course of

clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.” *Id.* at preamble.

396. 1 HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 866–934 (United Nations, 1994).

397. G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., UN Doc A/810, at art. 28 (Dec. 10, 1948), *available at* <http://www.un.org/en/documents/udhr/>.

aggressive wars [waged by] the imperialist States . . . not only are elementary human rights violated but frequently a policy bordering on genocide is carried out: whole centres of population, together with their peaceful inhabitants are annihilated.”³⁹⁸ The convention that emerged from the subsequent negotiations in Geneva was, at some level, a clarification by western States of the restraints they would try to observe in armed conflict. The provision on “proportionality” did not add much clarity, but did preserve some room for what western militaries regarded as “military necessity.”

In the 1970s, most western states still thought they needed to preserve some scope for effective military action. The UN’s solemn declaration that “everyone” is “entitled” to a peaceful world had not magically delivered such a world—any more than listing desirable rights in UN declarations and conventions had induced tyrannical regimes to respect them.

Just as peace-loving states may sometimes feel compelled to resort to war, states that respect rights may sometimes need to curtail them, especially in the context of war. To insist on rights in abstraction from the context is not only misleading, but often self-defeating.

The challenge of accommodating context is obvious enough in domestic settings. American law tries to protect free speech, but allows police to arrest disruptive protestors at public forums, constraining their speech to protect the speech rights of others. After a riot or civil commotion, local officials may impose a curfew—limiting people’s right to stroll the streets at night so that police can assure order. It is a restraint on liberty for the sake of assuring the conditions that make liberty possible. To denounce such measures without regard to the provocations and dangers they address is demagogic.

It is more urgent to recognize the context in situations of armed conflict. To demand precise rules for the conduct of military operations without some sense of why or when to fight—to discuss *jus in bello* in complete abstraction from *jus ad bellum*—is to indulge a fetish about means without regard to the ends they serve. G.W.F. Hegel said war “preserves the ethical health of peoples.”³⁹⁹ Friedrich Nietzsche said, “a good war hallows

398. U.N. Secretary General, Official Submission by Byelorussian Soviet Socialist Republic, *reported in Respect for Human Rights in Armed Conflicts: Rep. of the Secretary-General*, U.N. Doc. A/8052, at 118 (Sept. 18, 1970).

399. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 210 (T.M. Knox, trans., 1965). “War has the higher significance that by its agency . . . the ethical health of peoples is preserved . . . just as the blowing of the winds preserves the sea from the foulness which would be the result of prolonged calm.” *Id.*

any cause.”⁴⁰⁰ Carl Schmitt said “the essence of political existence” is choosing enemies in war.⁴⁰¹ These German doctrines glorified armed struggle.

The Swiss doctrine of the Red Cross seems to be the opposite—a glorification of restraint in war. But, it encourages war in its own way, by insisting that outcomes do not matter or do not matter enough to affect the way we view the rules of the game. It is a doctrine that rewards the most lawless, the most brutal forces, by doing more to constrain their law-respecting opponents than to inhibit them. So it is, after all, an enabler for those who glorify war and conquest.

The prohibition on military measures working “excessive” harm to civilians may have some value as a statement of aspirations. It is recognized in western military manuals, even in manuals of countries which, like the United States, have not ratified AP–I. However, its application, by sane military commanders, must depend on circumstances. The meaning of “proportionality” cannot be settled by an abstract formula, looking only to tactical decisions and their immediate consequences. It certainly cannot be settled by the blanket interpretation propounded by the Red Cross, which insists that all military “attacks which cause extensive civilian losses and destruction”—even attacks which destroy many buildings without killing many people—must now be considered unlawful.⁴⁰²

The appeal of a rule is that it obviates many disputes about the application of a general aim or standard in concrete circumstances. The reason we do not have rules for everything is that we often cannot reduce complex considerations to a single fixed rule. We should not treat the proportionality norm as if it were a simple rule. That is simply offering advantage to enemies or demagogues, utopians, or pedants—those who insist that conformity to humanitarian obligations must take precedence over military necessities. Humanity often has a greater stake in who prevails in war than in how they come to prevail.

If war is too important to be left entirely to the generals, it is too important to be left to humanitarian advocates who think the side-effects of war are more important than the outcomes.

400. FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 33 (Adrian del Caro, trans., 2006). “You should love peace as the means to new wars. . . . You say it is the good cause that hallows even war? I tell you, it is the good war that hallows any cause.” *Id.*

401. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 49 (George Schwab, trans., 2007). “For as long as a people exists in the political sphere, this people must . . . determine by itself the distinction between friend and enemy. Therein resides the essence of its political existence. . . . The justification of war does not reside in its being fought for ideals or norms of justice but in its being fought against a real enemy.” *Id.*

402. RED CROSS COMMENTARY, *supra* note 9, at 626.