



## Back to the basics: Core law of war principles through the lens of the DoD manual

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**PART III**  
**SUBSTANTIVE CONTRIBUTIONS AND CONTROVERSIES**

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## Back to the Basics: Core Law of War Principles through the Lens of the DoD Manual

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### 1 INTRODUCTION TO CHAPTER II: PRINCIPLES

Chapter II is simply entitled “Principles.” It begins with a statement reiterating the interdependent nature of the basic principles – military necessity, humanity, and honor. These provide the foundation for other law of war principles, namely proportionality and distinction and most of the treaty and customary rules of international humanitarian law (IHL). It is then that the principles of proportionality and distinction come into play. Taken in their totality, these general principles provide an overarching and reinforcing set of rules that form part of a coherent system. Acknowledging the priority attached to military necessity and the interdependence of this principle with that of humanity and honor at the outset is significant.

By their very nature such principles are not specific but must underpin all military action taken during all aspects of armed conflict. They are not based on a separate source of international law, but on treaties, custom, and general principles of law.<sup>1</sup> In this way they can and must often be derived from the existing rules, expressing their substance and meaning. At the same time they inspire, reinforce, and render understandable existing rules and must be taken into account when interpreting them.<sup>2</sup>

These general principles are reflected in most military manuals<sup>3</sup> and not to have included them would have constituted a serious omission. It appears that each State remains at liberty to decide the status of such manuals.

<sup>1</sup> M. Sassòli, A. Bouvier, and A. Quentin (eds.), *How Does Law Protect in War*, 3 vols. (Geneva: ICRC, 2011), I, 158.

<sup>2</sup> *Ibid.*

<sup>3</sup> E.g., Swiss Military Manual on Behaviour during Deployment, *Rechtliche Grundlagen für das Verhalten im Einsatz*, Reglement 51.007/IV, ¶ 158. See also ICRC Customary Law Study, Vol. II.

In particular, it is for each State to decide whether its manual constitutes a binding authority. The German and Swiss manuals, unlike the US or British versions, are issued as binding “regulations” within their respective domestic systems. This probably reflects different legal systems and traditions.

## 2 MILITARY NECESSITY

Military necessity may seem like a straightforward concept to grasp and apply in armed conflict. In reality it is anything but simple.<sup>4</sup> This is reflected in the fact that there is more than one definition of military necessity depending on whether the source derives from military publications, judicial decisions, or scholarly works.<sup>5</sup> The US Department of Defense (DoD) Law of War Manual (the Manual) provides a concise working definition: “*Military necessity* may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”<sup>6</sup>

### 2.1 *The Lieber Code*

Military necessity was fundamental in the first modern attempt to draft a binding set of rules or code of conduct for armed forces during armed conflict. The Lieber Code was promulgated by President Lincoln during the American Civil War. Although only binding on US forces, it was based on what Lieber considered the generally accepted law of the day.

The Lieber Code prescribed that:

Military necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.<sup>7</sup>

...

Military necessity does not admit of cruelty – that is the infliction of suffering for the sake of suffering or for revenge . . .<sup>8</sup>

It is important to stress that military necessity cannot be invoked to avoid compliance with IHL. Otherwise the principle could be used to justify a range

<sup>4</sup> N. Hayashi, “Requirements of Military Necessity in International Humanitarian Law and International Criminal Law” (2010) 28 *Boston University International Law Journal* 39.

<sup>5</sup> DoD Law of War Manual, ¶ 2.2. <sup>6</sup> *Ibid.*

<sup>7</sup> General Order No. 100, Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), reprinted in *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Series III, Vol. 3 (GPO 1899) (the Lieber Code), [www.loc.gov/frd/Military\\_Law/Lieber\\_Collection/pdf/Instructions-gov-armies.pdf](http://www.loc.gov/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf), Art. 14.

<sup>8</sup> *Ibid.*, Art. 16.

of actions that could constitute a violation of the laws of war. This is clear when the Manual states that it “justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible *that are not prohibited by the law of war*” (emphasis added).<sup>9</sup> Though there are valid criticisms that the Manual often couches legal and policy pronouncements in broad and imprecise terms, the text is explicit that “*Military necessity* does not justify actions that are prohibited by the law of war.”<sup>10</sup>

In this way, military necessity is a requirement or justification for any military action proposed or carried out. This includes destroying and seizing persons and property, or the capture of enemy persons.<sup>11</sup> A good example in practice is in relation to children engaged in hostilities, a common occurrence in many contemporary conflicts. They are legitimate targets while participating in hostilities and showing hostile intent but military necessity as a restriction to violence should require that they be arrested rather than killed whenever possible.<sup>12</sup> However, IHL principles are unclear on an affirmative duty to arrest in lieu of applying normal *jus in bello* principles. Thus, it is noteworthy that the Manual talks about alternative ways of fighting an enemy other than violence and destruction (e.g., capture enemy persons, propaganda, intelligence-gathering).<sup>13</sup>

Military necessity can seldom be assessed without reference to the other principles. For example, attacks against persons other than combatants would violate both the principles of necessity and distinction.<sup>14</sup> Military victory can only be achieved by defeating enemy combatants. This does not preclude military objectives such as armaments factories from being attacked. However, any such attack must satisfy the military necessity test and is not unlawful because of the risk to a civilian in the same location who may be harmed, provided the principle of proportionality is applied.<sup>15</sup> The importance of what constitutes military objectives in this context is discussed later in this chapter under “Distinction.”

<sup>9</sup> DoD Law of War Manual, ¶ 2.2. <sup>10</sup> *Ibid.*, ¶ 2.2.2.1. <sup>11</sup> *Ibid.*

<sup>12</sup> Sassòli, Bouvier, and Quentin (1), 218. The Manual makes this linkage in the context of military necessity as follows: “*Military necessity* also justifies certain incidental harms that inevitably result from the actions it justifies. The extent to which *military necessity* justifies such harms is addressed by the principle of proportionality.” DoD Law of War Manual, ¶ 2.2.1.

<sup>13</sup> DoD Law of War Manual, ¶ 2.2.1. This is discussed further under “Humanity” later in this chapter.

<sup>14</sup> Sassòli, Bouvier, and Quentin (1), 255. Manual, ¶ 2.2.1.

<sup>15</sup> The Manual makes this linkage in the context of military necessity as follows: “*Military necessity* also justifies certain incidental harms that inevitably result from the actions it justifies. The extent to which *military necessity* justifies such harms is addressed by the principle of proportionality.” DoD Law of War Manual, ¶ 2.2.1. See also Sassòli, Bouvier, and Quentin (1), 256.

The Manual acknowledges that military necessity is a difficult concept to define and apply. According to the Manual, the laws of war seeks to ameliorate the difficulties in applying the principle by:

- (1) “Permitting consideration of the broader imperatives of winning the war as quickly and efficiently as possible (and not only the demands of the immediate situation)”;
- (2) “Recognizing that certain types of actions are, as a general matter, inherently militarily necessary”; and
- (3) “Recognizing that persons must assess the military necessity of an action in good faith based on the information available to them at the relevant time and that they cannot be judged based on information that subsequently comes to light.”<sup>16</sup>

In this way the Manual provides a coherent interpretation of how military necessity may be implemented in practice. It also reflects the jurisprudence of the United States Military Tribunal in the *High Command Trial* which offered a concise interpretation of the principle when it declared:

It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war. We content ourselves on this subject with stating that such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations.<sup>17</sup>

Other complexities surrounding this principle were evident in the *Hostages* case before the Nuremberg Military Tribunals.<sup>18</sup> The German General Lothar Rendulic was acquitted of the charge of wanton devastation on the grounds that although he may have erred in believing that there was military necessity for the widespread environmental destruction entailed by his use of a “scorched earth” policy in Norway, he was not guilty of a criminal act. This demonstrates how actual or constructive knowledge of the grave environmental consequences of an attack may be difficult to prove. In the same case, however, cited in the Manual to support the proposition that military necessity cannot be perverted into an all-consuming norm, the military tribunal rejected the right of commanders to ignore the law *vis-à-vis* civilian rights:

<sup>16</sup> DoD Law of War Manual, ¶ 2.2.3.

<sup>17</sup> *United States v. von Leeb et al.* (“*The High Command Trial*”) (1948) 11 LRTWC 1, 9 TWC 462 (United States Military Tribunal), 541.

<sup>18</sup> 11 *Trials of War Criminals* (1950), 1296.

It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules.<sup>19</sup>

## 2.2 *The International Criminal Tribunal for the former Yugoslavia*

At the outset it is important to state that findings in the international tribunal and court judgments are not binding on States.<sup>20</sup> They are, however, of abiding importance in the interpretation and application of IHL as practiced.<sup>21</sup>

There is authority for invoking military necessity as a defense in the post-World War II trials.<sup>22</sup> Although the principle of military necessity does not imply that the rules of IHL can be disregarded, some rules of war offer a possibility to invoke military necessity. “Military necessity” is explicitly mentioned in the Statute of the International Criminal Tribunal for the former Yugoslavia:

- Under Article 2(d) it is possible to prosecute someone for: “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”
- Under Article 3(b), a person may be prosecuted for “wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”<sup>23</sup>

<sup>19</sup> DoD Law of War Manual, ¶ 2.2.2.1 fn. 26 (citing *United States v. List et al. (The Hostage Case)*, Trials of War Criminals Before the IMT XI, 1255–56. The citation neglected to include the pertinent conclusion that “International Law is prohibitive law. Articles 46, 47, and 50 of the Hague Regulations of 1907 make no such exceptions to its enforcement. The rights of innocent population therein set forth must be respected even if military necessity or expediency decree otherwise.”)

<sup>20</sup> The Manual recognizes this principle but cites former Legal Advisor Harold Koh for the proposition that “Although these decisions cannot, as a strictly legal matter ‘bind’ other courts, there is no doubt that the jurisprudence of the ICTY and ICTR has been influential in the broader development of international criminal law.” DoD Law of War Manual, ¶ 1.9.1 fn. 155.

<sup>21</sup> Y. Sandoz, “The Dynamic but Complex Relationship between International Penal Law and International Humanitarian Law,” in J. Doria, H.-P. Gasser, and M. C. Bassiouni (eds.), *The Legal Regime of the ICC: Essay in Honour of Professor Igor Pavlovich Blishchenko* (Leiden: Martinus Nijhoff, 2009), 1049, 1061.

<sup>22</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), 495.

<sup>23</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), annex, Arts. 2(d) and 3(b).

The International Criminal Tribunal for the former Yugoslavia (ICTY) Statute does not define military necessity. It depends on the context and it needs to be decided on a case-by-case basis. There are two categories of crime in which the ICTY has issued judgments on the question of military justification:

1. large-scale destruction of property
2. forced displacements of persons.

It is also important to differentiate between combat and noncombat circumstances. The general rule is that in noncombat situations there can be no military necessity.

It is noteworthy that the *Orić* case (2006), the Trial Chamber stated that it could be legitimate to invoke military necessity as a justification for carrying out “preventive destruction” in limited circumstances.<sup>24</sup> However, “except for the rare occasions in which such preventive destruction could arguably fall within the scope of ‘military necessity’, the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime.”<sup>25</sup>

In 2003, the Trial Chamber issued the judgment in the *Galić* case and reverted to the findings of the *Hostage* case from the World War II era; the Chamber stated that civilians and the civilian population as such should not be the object of attack.<sup>26</sup> Such action can never be justified by invoking military necessity. The case involved, among other incidents, the shelling of a football match when there were both civilians and off-duty soldiers present in the stadium. The Chamber found that the attack did not discriminate between civilians and soldiers.<sup>27</sup> It should have been possible to foresee the outcome in terms of casualties and loss of lives. The damages were excessive in relation to the anticipated military advantage and were thus not militarily necessary.

<sup>24</sup> *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Judgment, ¶ 588 (ICTY, June 30, 2006) (“The Trial Chamber finds that ‘collateral damage’ may occur in the course of combat, when, as a result of the destruction of objects which make an effective contribution to military action, other objects, such as adjacent buildings, are destroyed that do not fulfil this criterion. However, after the fighting has ceased, destruction can in principle no longer be justified by claiming ‘military necessity’. A different situation arises if a military attack is launched against a settlement from which previously, due to its location and its armed inhabitants, a serious danger emanated for the inhabitants of a neighbouring village who are now seeking to remove this danger through military action. It may be the case that, after such a settlement has been taken, destruction of houses occurs in order to prevent the inhabitants, including combatants, to return and resume the attacks. A submission that such destruction is covered by ‘military necessity’ will be entertained on a case-by-case basis.”).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, ¶¶ 44-45 (ICTY, Dec. 5, 2003).

<sup>27</sup> *Ibid.*, ¶¶ 372-76.

When the court assesses a situation, it looks to the information that was available at the time when a decision was taken and what the “commander” reasonably knew. A court cannot judge someone based on information that became known at a later stage.

In the appeal judgments in respect of the *Blaškić* and the *Kordić and Čerkez* cases, which came after the *Galić* decision in the Trial Chamber, the Appeals Chamber reversed the decisions of the first instance which suggested that military necessity might be a defense to a charge of targeting civilians.<sup>28</sup> The Appeals Chamber followed the reasoning in *Galić* stating that there is an “absolute prohibition on targeting civilians and referred to the principle of distinction as a ‘cardinal principle’ of IHL.”<sup>29</sup>

Other ICTY Trial Chambers accepted that attacks on civilian property could be justifiable under certain circumstances and supported findings by referring to the recognition of military necessity as a defense to the war crime of destruction of civilian property.<sup>30</sup> It is noteworthy that cultural objects are considered civilian objects under special protection. They may not be attacked or used for military purposes. Their immunity may only be waived in the case of “imperative military necessity.”<sup>31</sup>

### 2.3 The International Criminal Court

The International Criminal Court (ICC) is bound to apply established principles of the law of armed conflict by virtue of Article 21(1)(b) of the Rome Statute.<sup>32</sup> According to the Manual, “although military necessity cannot justify actions that have been prohibited by the law of war, some law of war rules expressly incorporate military necessity.”<sup>33</sup> Similarly, under the Rome Statute

<sup>28</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgment, ¶¶ 109, 145 (ICTY, July 29, 2004); *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Appeal Judgment, ¶ 54 (ICTY, Dec. 17, 2004).

<sup>29</sup> *Prosecutor v. Kordić and Čerkez* (above n. 28), quoting *Legality of the Threat or Use of Nuclear Weapons* (ICJ Advisory Opinion) [1996] ICJ Rep 226, [78].

<sup>30</sup> *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgment, ¶¶ 593, 615 (ICTY, Jan. 17, 2005). It also noted that forcible transfer or displacement of a civilian population could be justified on the grounds of “overriding, i.e. imperative, military reasons” (¶ 598). See also *Prosecutor v. Gotovina, Markač and Čermak*, Case No. IT-06-090-T, Trial Chamber Judgment, ¶ 1770 (ICTY, Apr. 15, 2011) (re destruction of civilian objects).

<sup>31</sup> Sassöli, Bouvier, and Quentin (1), 269. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber Judgment, ¶¶ 229–33, 298–329 (ICTY, Jan. 31, 2005).

<sup>32</sup> Article 31(1)(c) of the Statute also provides a controversial provision for the exclusion of criminal responsibility for certain acts, including those reasonably taken in defense of property essential to accomplishing a military mission. Schabas (22), 390–93 and 487–89.

<sup>33</sup> DoD Law of War Manual, ¶ 2.2.2.2.

the absence of military necessity is an element of each of the crimes listed below:

1. “Extensive destruction and appropriation of property, not justified by military necessity” (A Grave Breach of the Geneva Conventions (Article 8(2)(a)(iv).)
2. Destruction or seizure of the enemy’s property, “unless . . . imperatively demanded by the necessities of war.” (A serious violation of the laws and customs of war in international armed conflict (Article 8(2)(b)(xiii).)
3. Ordering the displacement of the civilian population for reasons related to the conflict, “unless the security of the civilians involved or imperative military reasons so demand.” (A serious violation of the laws and customs of war in a non-international armed conflict (NIAC) (Article 8(2)(e)(viii).)
4. Destruction or seizure of the property of an adversary, “unless . . . imperatively demanded by the necessities of the conflict.” (A serious violation of the laws and customs of war in a NIAC (Article 8(2)(e)(xii).)

In this way military necessity is an exception, rendering “unless” a key word in Article 8 of the Rome Statute. This concept is also reflected in the ICC Elements of Crimes (which it must be noted included the US delegation in its consensus adoption) in the sense that the general chapeau provides that the element of unlawfulness is not replicated in each and every set of elements, but is implicit in every *actus reus*. Pleading military necessity does not constitute a defense. Rather, it challenges the notion that a crime was committed in the first place. This principle is reflected in the provisions of the Manual dealing with incorporation of military necessity into IHL.<sup>34</sup>

The *Katanga* case before the ICC provides a good example of how military necessity may be invoked under the Rome Statute. The Trial Chamber stated that it is important to assess the “military advantage” from the attacker’s perspective for each targeted object, and such an advantage must be definite and cannot in any way be indeterminate or potential.<sup>35</sup> The Trial Chamber went on to state that:

<sup>34</sup> *Ibid.*

<sup>35</sup> *Prosecutor v. Katanga and Mathieu Chui*, Case No. ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ¶¶ 477–518 (Sept. 30, 2008); ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, Martinus Nijhoff, 1987), ¶¶ 2024, 2028. See also *Galić* (26), ¶ 51: “Whether a military advantage can be achieved must be decided . . . from the perspective of the ‘person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.’”

The destruction of property therefore does not constitute a crime under article 8(2)(e)(xii) of the Statute where such destruction is justified by military necessity. As did the Appeals Chamber of the ICTY in *Kordić and Čerkez*, the Chamber will adopt the definition of “military necessity” in article 14 of the Lieber Code of 24 April 1863, which lays down: “Military necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”. With respect to this exception, article 8(2)(e)(xii) refers explicitly to cases where the destruction “[is] imperatively demanded by the necessities of the conflict”. The Chamber observes that only “imperative” reasons of military necessity, where the perpetrator has no other option in this regard, could justify acts of destruction which would otherwise be proscribed by this provision. To determine whether the destruction of property fell within military necessity, the Chamber will conduct a case-by-case assessment by considering, for example, whether the destroyed property was defended or whether specific property was destroyed.<sup>36</sup>

There are several offences in the ICC Statute that implicitly admit exceptions on account of military necessity; for example, the crime of unlawful deportation or transfer, a Grave Breach of the Geneva Conventions and listed as a war crime in Article 8(2)(a)(vii) of the Rome Statute. This Grave Breach is based on Articles 45 and 49 of the Fourth Convention. Article 49 exceptionally permits temporary evacuation of an area in occupied territory if “imperative military reasons so demand,” among other things. As such, temporary evacuations demanded for similar reasons are not “unlawful” within the meaning of Article 8(2)(a)(vii) of the Rome Statute.

The offence of deportation or forcible transfer of a population, a crime against humanity under Article 7(1)(d) of the Rome Statute, contains as one of its elements the requirement that the victim was forcibly displaced “without grounds permitted under international law,” hence allowing for the possibility for military necessity, as prescribed in Article 7(2)(d).

Article 31(1) of the Rome Statute allows for the exclusion of criminal liability for acts essential for a military mission, extending the focus from self-defense to encompass the principle of military necessity. The potential use of military necessity as a justification or excuse affects those war crimes that do not provide for military necessity exceptions and, accordingly, of which the absence of military necessity is not an element.

<sup>36</sup> *Prosecutor v. Katanga* (35), ¶ 894.

### *Bemba Case*

In the case of *Bemba*,<sup>37</sup> the defendant was charged with the war crime of pillaging.<sup>38</sup> The defense argued that the property allegedly seized was not in fact “pillaged,” but rather “required for military necessity” and the prosecution failed to establish beyond a reasonable doubt that it was not appropriated on the grounds of military necessity.<sup>39</sup>

The Trial Chamber held that:

The concept of military necessity is mentioned in footnote 62 of the Elements of Crimes, which specifies, with reference to the requirement that the perpetrator intended to appropriate the items for “private or personal use”, that “[a]s indicated by the use of the term ‘private or personal use’, appropriations justified by military necessity cannot constitute the crime of pillaging.”<sup>40</sup>

The Chamber found that if the Prosecution proves that property was appropriated for private or personal use, it is not obliged to disprove military necessity for the purpose of a charge.<sup>41</sup> Furthermore, in the context of the war crime of destroying or seizing the enemy’s property, military necessity “can only be invoked ‘if the laws of armed conflict provide for it and only to the extent that these laws provide for it’.”<sup>42</sup>

### 2.4 *The DoD Manual*

Although the cases before the ICTY primarily deal with the narrow issue of property destruction and to a lesser degree enforced disappearances, they provide insights into how military necessity may be interpreted by international tribunals. The Manual provides somewhat of a general definition of military necessity. It is difficult to compare them since the focus of the ICTY judgments and the Manual is quite different. However, while the Manual is quite broad in its approach, it emphasizes that fundamental rules such as military necessity cannot justify departures from IHL because States have crafted the law specifically with exigencies of war in mind.<sup>43</sup> They are similar in their treatment of incidental harms. Such harm may be justified by military

<sup>37</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Art. 74 of the Statute (21 Mar. 2016).

<sup>38</sup> Rome Statute of the International Criminal Court, Art. 8(2)(e)(v).

<sup>39</sup> *Prosecutor v. Bemba Gombo* (37), ¶ 122. <sup>40</sup> *Ibid.*, ¶ 123.

<sup>41</sup> *Ibid.* (under Art. 8(2)(e)(v) of the Statute). <sup>42</sup> *Ibid.*, ¶ 123.

<sup>43</sup> DoD Law of War Manual, ¶ 2.2.2.1.

necessity and this requires that the principle of proportionality be taken into account.<sup>44</sup>

In outlining the challenges in applying military necessity, the Manual reflects the jurisprudence of the ICTY, even if this is not the intention.<sup>45</sup> Necessity is something that must be assessed from the perspective of the “person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.”<sup>46</sup>

### 3 HUMANITY

The principle of humanity and the prohibition on causing unnecessary suffering are long established. The Manual defines humanity “as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.”<sup>47</sup> It should be recalled that the broader purpose of IHL is to protect the victims of armed conflicts and regulate hostilities based on a balance between military necessity and humanity.<sup>48</sup> This is reflected in the manner in which the Manual stresses the relationship between both humanity and military necessity.<sup>49</sup> Its centrality as a principle within the framework of IHL is captured in the following definition offered by the International Committee of the Red Cross (ICRC):

IHL is a compromise between two underlying principles, of humanity and of military necessity. These two principles shape all its rules. The principle of military necessity permits only that degree and kind of force required to achieve the legitimate purpose of a conflict, i.e. the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources. It does not, however, permit the taking of measures that would otherwise be prohibited under IHL. The principle of humanity forbids the infliction of all suffering, injury or destruction not necessary for achieving the legitimate purpose of a conflict.<sup>50</sup>

The United Kingdom Manual of the Law of Armed Conflict describes the principle as forbidding “the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military

<sup>44</sup> *Ibid.*, ¶ 2.2.1. <sup>45</sup> *Ibid.*, ¶ 2.2.3.

<sup>46</sup> *Prosecutor v. Galić* (26), ¶ 51; *Prosecutor v. Katanga* (35), ¶ 894.

<sup>47</sup> DoD Law of War Manual, ¶ 2.3 Humanity.

<sup>48</sup> N. Melzer, *International Humanitarian Law: A Comprehensive Introduction* (Geneva: ICRC, 2016), 16.

<sup>49</sup> DoD Law of War Manual, ¶ 2.3.1.1.

<sup>50</sup> ICRC, “International Humanitarian Law: Answers to Your Questions” (Jan. 22, 2015), 6.

purposes.”<sup>51</sup> This is a view that is widely shared and not dissimilar to that expressed in the Manual and outlined in a range of relevant treaties going back to the 1863 Lieber Code (and indeed predating that code in American conscience).<sup>52</sup> In this way the position outlined in the Manual is consistent with the generally accepted view of the principle of humanity. Linked to this is the prohibition on causing unnecessary suffering which is especially relevant to the nature and type of weapons used in combat. It is a general principle by which all means and methods of warfare have to be measured.<sup>53</sup> According to the International Court of Justice (ICJ), “[i]t is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering . . . States do not have unlimited freedom of choice of means in the weapons they use.”<sup>54</sup>

Later in the seminal *Tadić* decision before the ICTY it was held that regardless of whether the armed conflict is international or internal:

Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.<sup>55</sup>

The ICTY invoked the principle when considering reprisals and declared that due “to the pressure exerted by the requirements of humanity and the dictates of public conscience,” a customary rule of international law has emerged with regard to reprisals.<sup>56</sup> Furthermore, the principle of humanity can be found in the Martens Clause,<sup>57</sup> which “enjoins, as a minimum, reference to those principles [humanity] and dictates [of public conscience] any time a rule of

<sup>51</sup> UK Ministry of Defence, *Law of Armed Conflict Manual* (Oxford University Press, 2005), ¶ 2.1.

<sup>52</sup> J. F. Witt, *Lincoln’s Code: The Laws of War in American History* (New York: Free Press, 2012), 31.

<sup>53</sup> Melzer (48), 110.

<sup>54</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226, ¶ 78 (July 8).

<sup>55</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 119, 129 (ICTY, Appeal Chamber, 2 Oct. 1995).

<sup>56</sup> *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Trial Judgment, ¶ 531 (ICTY, Jan. 14, 2000).

<sup>57</sup> The Martens Clause was first set forth in the preambular provisions of the 1899 Hague Convention concerning the Laws or customs of War on Land which reads as follows: “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.”

A modern version of the clause may be found in Art. 1(2) of Additional Protocol I of 1977, which refers, instead, to “the principles of humanity and . . . the dictates of public conscience.”

international humanitarian law is not sufficiently rigorous or precise.”<sup>58</sup> The ICTY Trial Chamber also invoked the principle of humanity in defining what constitutes inhuman treatment and described this as “intentional treatment which does not conform with the fundamental principle of humanity.”<sup>59</sup>

In recent years there has been controversy regarding the implications of this principle.<sup>60</sup> Should enemy soldiers be captured rather than be killed or wounded whenever this is possible? This is an example of the expansion of human rights principles into IHL. There are valid arguments on both sides, but it is submitted that the appropriate response to this and other related questions can only be judged when all of the principles, especially military necessity, are taken into account. This is how balance between military necessity and humanity is ascertained and is expressed in the other core principles discussed below. The final word is given to the ICRC Manual:

Accordingly, the principle would restrict the permissibility of inflicting injury and suffering on combatants to that which is not otherwise prohibited under IHL and which, additionally, is reasonably necessary to achieve a lawful military purpose in the prevailing circumstances. For example, where the same military advantage can be achieved through less harmful means, considerations of humanity would require the use of such means. While this interpretation of military necessity as a restrictive factor in the use of means and methods of warfare against combatants and other military objectives is not generally accepted, it corresponds best to the original spirit of the St Petersburg Declaration and reflects the official position of the ICRC.<sup>61</sup>

There are a number of IHL provisions that limit the means of warfare and certain weapons during an international armed conflict (IAC).<sup>62</sup> The Manual refers to “prohibitions on weapons that are inherently indiscriminate.”<sup>63</sup> Any weapons used must not be calculated to cause unnecessary suffering or superfluous injury. In reality, the implementation of this basic rule is a compromise between military necessity and humanity. The principle of avoiding unnecessary suffering refers to the harmful consequences that would not be justified by

<sup>58</sup> *Prosecutor v. Kupreškić* (56), ¶ 525.

<sup>59</sup> *Prosecutor v. Delalić*, Case No. IT-96-21-T, Trial Judgment, ¶ 543 (ICTY, Nov. 16, 1998).

<sup>60</sup> N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009), 78; and G. Solis, *The Law of Armed Conflict*, 2nd ed. (Cambridge University Press, 2016), 269.

<sup>61</sup> Melzer (48), 110.

<sup>62</sup> 1907 Hague Regulations, Arts. 22 and 23; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, 1125 UNTS 3 (AP I), Art. 35.

<sup>63</sup> DoD Law of War Manual, ¶ 2.3.2.

military necessity, either because of the lack of military advantage or because any advantage is outweighed by the suffering caused.<sup>64</sup>

According to Melzer, despite the absence of distinct treaty criteria as to what suffering is “unnecessary” and what injury “superfluous,” the rule requires that a balance be struck between considerations of military necessity and of humanity.<sup>65</sup> The ICRC study on Customary Rules indicates that this is the approach taken by many States.<sup>66</sup> Furthermore, the ICJ in its Advisory Opinion on nuclear weapons, argues that “it is prohibited to cause unnecessary suffering to combatants.”<sup>67</sup> Accordingly, it is “prohibited to use weapons causing them such harm or uselessly aggravating their suffering” and “states do not have unlimited freedom of choice of means in the weapons they use.”<sup>68</sup> The prohibition on causing unnecessary suffering makes it unlawful to cause combatants “harm greater than that unavoidable to achieve legitimate military objectives.”<sup>69</sup>

In this way, the principle would restrict the permissibility of inflicting injury and suffering on combatants to that which is not otherwise prohibited under IHL and which, additionally, is reasonably necessary to achieve a lawful military purpose in the prevailing circumstances. According to the ICRC, where the same military advantage can be achieved through less harmful means, considerations of humanity would require the use of such means. This is a controversial interpretation of military necessity that seeks to restrict the right to resort to means and methods of warfare against combatants and other military objectives during armed conflict. As such, it is an interpretation that is not generally accepted.<sup>70</sup>

#### 4 PROPORTIONALITY

The principle of proportionality is one of the more challenging and imprecise concepts to apply in practice. The Manual states in unambiguous terms “that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.”<sup>71</sup> It would be difficult to find a clearer statement

<sup>64</sup> Sassòli, Bouvier, and Quentin (1), 284. <sup>65</sup> Melzer (48), 110.

<sup>66</sup> J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, I: Rules* (Cambridge University Press, 2005), rule 70, 237–44.

<sup>67</sup> *Legality of the Threat or Use of Nuclear Weapons* (above note 54), ¶ 78. <sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> Melzer (60), Section IX. For a critique of this approach and the ICRC’s official response, see “Forum on ‘Direct Participation in Hostilities’” (2010) 42 *New York University Journal of International Law and Politics* 769–916.

<sup>71</sup> DoD Law of War Manual, ¶ 2.4 Proportionality.

of the principle so readily comprehensible to military personnel of all ranks and services.

The death of civilians and collateral damage does not automatically imply there has been a war crime. However, there remains a broader duty to minimize civilian casualties, even if they cannot be eliminated entirely.<sup>72</sup> This duty finds expression in the principle of proportionality. One useful definition can be found in AP I which proscribes “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>73</sup>

The imprecise nature of the principle means it is more easily stated than applied in practice.<sup>74</sup> However, in “applying this principle, it is necessary to assess the importance of the target in relation to the incidental damage expected: if the target is sufficiently important, a greater degree of risk may be justified.”<sup>75</sup> However, this test is only relevant if the principle of distinction is applied and the target is a legitimate military objective. Furthermore, the military necessity test must also be met before proportionality comes into play and this is reflected in the Manual.<sup>76</sup> This is important, as meeting the military necessity test at the outset is fundamental to IHL. The restatement of this rule in the Manual is a welcome confirmation of this principle. It is then that the requirement outlined in the Manual to take all reasonable precautions in planning and conducting attacks to reduce the risk comes into play.<sup>77</sup>

Unfortunately, the customary rule of proportionality does not include any concrete guidelines on the critical question of what kind of damage can be considered to be excessive.<sup>78</sup> Balancing military advantage and anticipated incidental damage is critical to respecting this principle. Any effort to assess this in hindsight is also problematic. Each case and set of individual factors must be considered on its merit.

A practical application of this principal would occur where a commander has a choice of different means or methods of attack; in such instances the attacker should choose the option that would avoid or minimize incidental

<sup>72</sup> Y. Dinstein, “Discussion: Reasonable Military Commanders and Reasonable Civilians,” in A. E. Wall (ed.), *Legal and Ethical Lessons of NATO’s Kosovo Campaign*, International Law Studies 78 (Newport: Naval War College, 2002), 173, 219.

<sup>73</sup> AP I, Art. 51(5)(b).

<sup>74</sup> UN International Criminal Tribunal for the former Yugoslavia, “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia” (1999), ¶ 19.

<sup>75</sup> *Ibid.* <sup>76</sup> DoD Law of War Manual, ¶ 2.4.1.1, Justification in Acting.

<sup>77</sup> DoD Law of War Manual, ¶ 2.4.1.2. <sup>78</sup> Final Report NATO Bombing (74), ¶ 20.

damage. The principle was discussed in the Prosecutors Report on the NATO Bombing in 1999:

Taken together, this suggests that in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable.<sup>79</sup>

#### 4.1 ICTY

The ICTY considered proportionality on a number of occasions and first addressed the principle in the *Kupreskić* case when the Trial Chamber held that “any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack.”<sup>80</sup>

[I]t is nevertheless beyond dispute that at a minimum, large numbers of civilian casualties would have been interspersed among the combatants . . . Even if it can be proved that the Muslim population of Ahmici was not entirely civilian but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality.<sup>81</sup>

Subsequently in the *Galić* judgment, the Trial Chamber held that when assessing the responsibility for crimes committed during the siege of Sarajevo:

[o]nce the military character of a target has been ascertained, commanders must consider whether striking this target is “expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack.<sup>82</sup>

<sup>79</sup> *Ibid.*, ¶ 22. <sup>80</sup> *Prosecutor v. Kupreskić* (56), ¶ 524. <sup>81</sup> *Ibid.*, ¶ 513.

<sup>82</sup> *Prosecutor v. Galić* (26), ¶ 58. The Appeals Chamber affirmed the Trial Chamber’s legal findings in respect of the principle of proportionality: *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, Appeals Chamber, Nov. 30, 2006 (*Galić* Appeals Judgment), ¶¶ 190–92.

In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.<sup>83</sup>

#### 4.2 ICC

The ICC Statute<sup>84</sup> provides that in an IAC “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” constitutes a war crime.<sup>85</sup> The Manual reflects this provision in its outline of what is unreasonable or excessive.<sup>86</sup> In that sense the Manual is consistent with established international practice which affords some appropriate degree of deference to the warfighter subject to the good faith application of the underlying principles of distinction and proportionality.<sup>87</sup>

An obvious weakness in this provision is its applicability to situations of IAC only. The ICC has also reaffirmed the basic principle of proportionality and made it clear that collateral damage *per se* is not a violation of the principle and therefore not unlawful.<sup>88</sup> Under “customary law, attacks directed at military objectives may cause ‘collateral civilian damage’ which is not unlawful *per se*, provided that the rules of custom prescribing proportionality in the conduct of hostilities were respected.”<sup>89</sup>

The Manual does not elaborate on the degree of care required to be taken to respect the principle of proportionality. It is noteworthy, however, that the edits between its first edition published in June 2015 and its second iteration published on May 31, 2016 clarified that the principle of proportionality in its

<sup>83</sup> *Prosecutor v. Galić* (26), ¶ 58. Since “in the circumstances of the actual perpetrator” includes the position of the accused as a commander, this finding is similar to what is suggested in the Final Report to the Prosecutor, namely to use the standard of the “reasonable military commander”: Final Report NATO Bombing (74), ¶ 50.

<sup>84</sup> Schabas (22), 213.

<sup>85</sup> Rome Statute of the International Criminal Court, Art. 8(2)(b)(iv). See R. Bartels, “Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials” (2013) 46 *Israel Law Review* 271–315.

<sup>86</sup> DoD Law of War Manual, ¶ 2.4.1.2 Unreasonable or Excessive.

<sup>87</sup> M. A. Newton and L. May, *Proportionality in International Law* (Oxford University Press, 2014), 157–64.

<sup>88</sup> *Prosecutor v. Katanga* (35), ¶ 895.

<sup>89</sup> *Ibid.* See also Decision on the Confirmation of Charges, ¶ 313. See also *Prosecutor v. Kordić and Cerkez* (28), ¶ 52; Henckaerts, and Doswald-Beck (66), rule 14, 46–50.

broadest sense embodies the underlying obligation to take feasible precautions when conducting attacks. That said, how is proportionality to be responsibly measured? Sometimes a commander will have to accept a high level of risk to his or her own forces to avoid collateral damage. In this regard the overall military purpose of the operation is crucial. These are fundamental issues for any military commander and a law of war manual can only offer general guidance. Although the section dealing with proportionality in the Manual is relatively short, it is consistent with international jurisprudence. In the end, each situation must be assessed on its own merit. Here reliance will also be placed on the professionalism and training of US military personnel.

## 5 DISTINCTION

The principle of distinction requires military commanders to distinguish between military objectives and civilian persons or objects. It has been described as the most significant battlefield concept a combatant must observe.<sup>90</sup> According to Pilloud and Pictet, “[a]lthough it was never officially contained in an international treaty, the principle of *protection* and of *distinction* forms the basis of the entire regulation of war, established in Brussels in 1874 in the form of a draft, and later in the Hague Conventions of 1899 and 1907.”<sup>91</sup>

### 5.1 Current Jurisprudential Approaches

According to the ICTY, the principle of distinction is a fundamental principle of IHL, which “obliges warring parties to distinguish *at all times* between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives.”<sup>92</sup> The Trial Chamber considered that direct attacks on a hospital constituted examples of the campaign of attacks on civilians.<sup>93</sup> The Manual is consistent with this principle and highlights the need for all parties, whether in attack or defense, to ensure they distinguish themselves and all enemy forces and military objectives from the civilian population and civilian objects.<sup>94</sup> The Manual emphasizes the practical implications of the duty to distinguish and this is appropriate in such a publication. However, distinction raises some complex issues.

<sup>90</sup> Solis (60), 269. <sup>91</sup> ICRC (35), ¶ 1826. Emphasis in original.

<sup>92</sup> *Prosecutor v. Galić* (26), ¶ 45. <sup>93</sup> *Ibid.*, ¶ 509.

<sup>94</sup> DoD Law of War Manual, ¶ 2.5.2 to 2.5.3.1.

The practical application of this principle today is reflected in Article 57 of AP I which, in part, requires those who plan or decide upon an attack to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects.”<sup>95</sup> The obligation to do everything feasible is high, but not absolute. Nevertheless, reckless disregard for the possibility that persons being attacked are civilians may be enough to violate this principle.<sup>96</sup>

How would this work in practice? A military commander must establish effective intelligence-gathering systems to collect and evaluate relevant information concerning potential targets. In addition, the commander must direct the use of available technical means to properly identify targets during operations. Commanders at all levels engaged in operations must be permitted some degree of discretion to determine which resources are available and in what manner they shall be used. Furthermore, when assessing whether adequate efforts have been made to distinguish between military objectives and civilians or civilian objects, account should be taken of the operations as a whole and not focused exclusively on a specific incident.<sup>97</sup> If precautionary measures adopted have proved adequate in a very high percentage of cases in the past, then the fact they have not worked well in a small number of incidences does not necessarily mean they are generally inadequate.<sup>98</sup>

The Manual emphasizes the need to discriminate in conducting attacks against the enemy.<sup>99</sup> According to the ICTY, “Attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians.”<sup>100</sup>

The principle of distinction is linked to other broad principles and definitions. For example, there is a divergence of opinion on what constitutes a military objective and this has significant implications for commanders seeking to respect the need to distinguish between military objectives and civilian objects and in so doing abide by the principle of distinction and laws of war. The definition of military objective contained in Protocol I has been subject to criticism by Hays Parks, the Special Assistant for Law of War Matters to the US Army Judge Advocate General. He considers it too narrowly focused on definite military advantage with too little attention paid to war-sustaining

<sup>95</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 (AP I).

<sup>96</sup> *Prosecutor v. Kupreškić* (56), ¶ 523. <sup>97</sup> Final Report NATO Bombing (74), ¶ 29.

<sup>98</sup> *Ibid.* <sup>99</sup> DoD Law of War Manual, ¶ 2.5.2.

<sup>100</sup> *Prosecutor v. Kupreškić* (56), ¶ 524. The Trial Chamber considered these principles have to some extent been spelled out in Arts. 57 and 58 of the First Additional Protocol of 1977.

capability.<sup>101</sup> In this context, it has been suggested that war-sustaining capabilities should include economic targets such as export industries. This is a controversial subject over which opinions differ. For example, there was criticism of the Coalition conduct in the Gulf War which suggested that the air campaign, despite being directed against legitimate military objectives within the scope of the Protocol I, caused excessive long-term damage to the Iraqi economic infrastructure with a consequential adverse effect on the civilian population.<sup>102</sup>

It has been suggested that it may be necessary to establish exactly what the effect has been of the damage to the civilian infrastructure brought about by the hostilities, including the likely cumulative effect on the civilian population.<sup>103</sup> A similar view was expressed by the ICTY which offers a glimpse of how these fundamental principles are interlocked:

[R]egard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within

<sup>101</sup> W. Hays Parks, "Air War and the Law of War" (1990) 32 *Air Force Law Review*, 135–45.

<sup>102</sup> Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War* (New York:HRW, 1991), Introduction and Summary of Conclusions: Despite this exceptional opportunity to conduct the allied bombing campaign in strict compliance with the legal duty to take all feasible precautions to avoid civilian harm, we find that the actual conduct of the war fell short of this obligation in several significant respects. This divergence between legal duty and actual practice emerged both in the choice of the means and methods to prosecute the air war and in the selection of targets for attack. All of these shortcomings appear to have involved deliberate decisions by allied commanders to take less than the maximum feasible precautions necessary to avoid harm to civilians. In noting these discrepancies between duty and conduct, we do not suggest that the allies in general violated the requirements of the laws of war. To the contrary, in many if not most respects the allies' conduct was consistent with their stated intent to take all feasible precautions to avoid civilian casualties. At the same time, the existence of these shortcomings in allied conduct reveals that the effort of U.S. and allied commanders to portray the bombing campaign as a near-perfect attempt to avoid civilian harm was not entirely accurate, and that in some instances coalition forces appear to have violated the laws of war. We believe these findings are important both for understanding the extent to which the suffering of Iraqi civilians might have been lessened and for avoiding similar deficiencies in any future air war. See also J. G. Gardam, "Proportionality and Force in International Law" (1993) 87 *American Journal of International Law* 391, 404–10.

<sup>103</sup> F. Hampson, "Means and Methods of Warfare in the Conflict in the Gulf," in P. Rowe (ed.), *The Gulf War 1990–91 in International and English Law* (London: Sweet & Maxwell, 1993), 78–96. Final Report NATO Bombing (74), ¶ 41.

the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.<sup>104</sup>

With regard to attacks on civilians based on military necessity, the ICTY Appeals Chamber did not accept the contention that attacks against civilians and civilian objects would not be a crime when justified by military necessity. It declared:

[The] prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants, between civilian objects and military objectives and accordingly to direct military operations only against military objectives. Article 48 of Additional Protocol I enunciates the principle of distinction as a basic rule.<sup>105</sup>

The Appeals Chamber went on to cite the ICJ *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion where distinction was described as a cardinal principle “aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack.”<sup>106</sup> These fundamental rules are to be observed by all States whether or not they have ratified the relevant conventions “because they constitute intransgressible principles of international customary law.”<sup>107</sup>

## 5.2 Military Objective and Distinction

The concept of a military objective is central to the principle of distinction insofar as “[a]ttacks shall be limited strictly to military objectives” as set out in AP I.<sup>108</sup> Although this rule is not found in AP II, it is included in other treaty provisions that refer to NIACs.<sup>109</sup> It is important to note that the ICRC Customary Law Study states that “[S]tate practice establishes this rule as

<sup>104</sup> *Prosecutor v. Kupreškić* (56), ¶ 526. <sup>105</sup> *Prosecutor v. Kordić and Cerkez* (28), ¶ 54.

<sup>106</sup> *Legality of the Threat or Use of Nuclear Weapons* (54), ¶ 78. <sup>107</sup> *Ibid.*

<sup>108</sup> 1977 Additional Protocol I, Art. 52(2). E.g., Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, Oct. 10, 1980, EIF Dec. 2, 1983, 2(6); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property, Art. 1(f); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, Oct. 10, 1980, EIF Dec. 2, 1983, 2(6).

<sup>109</sup> E.g., Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, Oct. 10, 1980, EIF Dec. 2, 1983, 2(6); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property, Art. 1(f); Protocol on

a norm of customary international law applicable in both international and non-international armed conflicts.”<sup>110</sup> Likewise, the San Remo Manual concludes that this definition represents customary law and points out that while the United States has not ratified AP I, it has accepted the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended,<sup>111</sup> which includes, at Article 2(6), essentially the same definition (as AP I).<sup>112</sup>

In examining the targeting policies adopted in Kosovo and Iraq, Sassòli posits that the term “effective” [contribution] and “definite” [advantage] “exclude” the possibility of “indirect contributions and possible advantages.”<sup>113</sup> He concludes that “the separate requirement that the attack must offer a definite military advantage means that even an attack on an objective of a military nature would not be lawful if its main purpose is to affect the morale of the civilian population and not to reduce the military strength of the enemy.”<sup>114</sup> In this way he is critical of the US position that a target which supports the “war-sustaining capability” (the DoD instruction includes this in a definition of a military objective<sup>115</sup>) being legitimate in effect means the abandonment of the limitation on military targets and admits “political, financial . . . and psychological targets, as long as they influence the possibility or the decision . . . of the enemy to continue the war.”<sup>116</sup> Dinstein is also of the opinion that the US concept of “war-sustaining” (as opposed to military advantage) “goes too far” and says that “[f]or an object to qualify as a military objective, there must exist a proximate nexus to military action (or ‘war-fighting’).”<sup>117</sup>

The Manual also includes the statement that: “[a]lthough terms such as ‘war-fighting’, ‘war-supporting’, and ‘war-sustaining’ are not explicitly reflected

Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, Oct. 10, 1980, EIF Dec. 2, 1983, 2(6).

<sup>110</sup> Henckaerts and Doswald-Beck (66), rule 8, 29.

<sup>111</sup> The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on May 3, 1996 (Amended Protocol II).

<sup>112</sup> M. Schmitt, C. Garraway, and Y. Dinstein, *The Manual on the Law of Non-International Armed Conflict* (Leiden/Boston: Martinus Nijhoff, 2006), 6.

<sup>113</sup> M. Sassòli, “Targeting: The Scope and Utility of the Concept of Military Objectives for the Protection of Civilians in Contemporary Armed Conflict,” in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (New York: Transnational Publishers, 2005), 181–210, 186. Emphasis in original.

<sup>114</sup> *Ibid.*, 186. Emphasis added.

<sup>115</sup> DoD, Military Commission Instruction No. 2, Apr. 30, 2003 (2003), section 5 (D).

<sup>116</sup> Sassòli (113), 196.

<sup>117</sup> Y. Dinstein, “Legitimate Military Objectives Under the Current Jus in Bello,” in A. E. Wall (ed.), *Legal and Ethical Issues of NATO’s Kosovo Campaign*, International Law Studies 78 (Newport: Naval War College, 2002), 139, 146.

in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts.”<sup>118</sup> In November 2016 DoD General Counsel Jennifer O’Connor referred to a “specific set of targets that have generated a lot of discussion lately.” She said that “these targets include such things as oil production or oil transportation assets and bulk cash storage sites” and considered that such targets meet “[t]he definition of military objective” which she says “is generally broken down into two prongs: (1) ‘effective contribution to military action’ and (2) ‘definite military advantage’.”<sup>119</sup> The reference to “two prongs” dates to the 1982 commentary on the Additional Protocols which includes the following definition of military objective:

The objects classified as military objectives under this definition include much more than strictly military objects such as military vehicles, weapons, munitions, stores of fuel and fortifications. Provided the objects meet the two-pronged test, *under the circumstances ruling at the time* (not at some hypothetical future time), military objectives include activities providing administrative and logistical support to military operations such as transportation and communications systems, railroads, airfields and port facilities and industries of *fundamental importance for the conduct of the armed conflict*.<sup>120</sup>

State practice would suggest that the United States is in a minority, if not alone, in adopting such a broad view.<sup>121</sup> Parks considers that “[t]he debate regarding the distinction between ‘war-sustaining’, ‘war-fighting’ and ‘military action’ is not clear, and perhaps primarily academic”<sup>122</sup> but adds that “[h] owever disagreeable the term may be to some, ‘war-sustaining’ is accurately descriptive of the actual practice of States in armed conflict.”<sup>123</sup> Meyer refers to Clausewitz’s much-quoted view that “war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on

<sup>118</sup> DoD Law of War Manual, ¶ 5.7.6.2.

<sup>119</sup> DOD General Counsel Jennifer O’Connor, “Applying the Law of Targeting to the Modern Battlefield,” NYU School of Law (Nov. 28, 2016), [www.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf](http://www.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf).

<sup>120</sup> M. Bothe, K. Josef Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two Protocols Additional to the Geneva Conventions of 1949*, 1st ed. (Leiden/Boston: Martinus Nijhoff, 1982), 322–23. Emphasis in original. Footnote omitted.

<sup>121</sup> E. Crawford, “The Principle of Distinction and Remote Warfare,” in J. D. Ohlin (ed.), *Research Handbook on Remote Warfare* (Cheltenham: Edward Elgar, 2017), fn. 49.

<sup>122</sup> W. Hays Parks, “Asymmetries and the Identification of Legitimate Military Objectives,” in W. H. von Heinegg, and V. Epping (eds.), *International Humanitarian Law Facing New Challenges* (New York: Springer, 2007), 65–116, 99.

<sup>123</sup> *Ibid.*, 99.

with other means”<sup>124</sup> in support of her view on the benefits of “directly attack[ing] the enemy’s capability and will to fight” and the conclusion that “[r]estrictive interpretations of Article 52(2), however, limit this capability unnecessarily.”<sup>125</sup>

## 6 HONOR

Honor has a long tradition in IHL and may be traced back to the now old-fashioned concept of chivalry that created a duty to act honorably, even in war. Chivalry required soldiers to behave in a civilized manner and it remains one of its most enduring legacies.<sup>126</sup> While honor was mentioned in the Lieber Code,<sup>127</sup> it barely rates any mention in the Manual.<sup>128</sup>

The importance of honor stems from the fact that it is part of the untested foundation of all IHL principles. Relying on such an undefined concept alone would be naïve but inculcating a sense of honor into all aspects of behavior might well ensure greater observance of the law. The Manual suggests that honor “may be understood to provide a foundations for obligations that help enforce and implement the law” and explains that it forbids certain conduct that may undermine the protections of the law and prospects for restoring peace.<sup>129</sup>

In this context, the Manual reference to Hugh Thomson, the man who intervened at My Lai in Vietnam to prevent further killings of innocent civilians, is noteworthy.<sup>130</sup> Interestingly, Thompson attributed his sense of values to his parents, and not military training or regulations. The official US Army inquiry into My Lai (known as the Peers Inquiry) noted that

<sup>124</sup> C. von Clausewitz, *On War*, ed. and trans. M. Howard and P. Paret, 2 vols. (Princeton University Press, 1976), I, 87.

<sup>125</sup> J. M. Meyer, “Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine” (2001) 51 *The Air Force Law Review* 143, 181–2.

<sup>126</sup> T. Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (New York: Oxford University Press, 1998), 4–5, 49.

<sup>127</sup> Lieber Code (7), Art. 4. <sup>128</sup> UK Manual (51), ¶¶ 10.29.1 at 268 and 1.16 at 6.

<sup>129</sup> DoD Law of War Manual, ¶¶ 2.6.2.1 and 2.6.2.2.

<sup>130</sup> *Ibid.*, ¶ 2.6.1 fn. 109:

*Question* Do you attribute your ability to see through the moral fog that day, better than those who made the massacre at My Lai happen, to any prior military training or experience?  
*Mr. Thompson* No, I don’t believe it was any military training, because I had been through the training that everybody else had been. We had a 50-minute class of instruction on the Geneva Convention, a 50-minute class of instruction on the Code of Conduct, and a 50-minute class of instruction on the rules of engagement . . . But [my parents] always taught me to help the underdog. Don’t be a bully and live by the golden rule. That golden rule says so much, and it’s so simple and so basic. You know, I can’t say it was a leadership 405 or whatever. I just think it was my parents, and they taught me right from wrong.

Thompson was among a group of helicopter pilots that “were of an extremely high caliber” in part because they had “been put through an intensive course of instruction to qualify as helicopter pilots and then sent off to South Vietnam.”<sup>131</sup> Acknowledging his actions and the importance of his sense of right and wrong should remind all military personnel of the centrality of honor in ensuring observance of the basic principles. The main purpose of IHL is to minimize the horrors of armed conflict to the extent possible taking into account the need for efficient use of force to achieve victory and minimize casualties on all sides. While the law is set out in various treaties and rules, the demands of military necessity are limited by legal and moral considerations. It is in this context that ethical and humanitarian principles, often embodied in treaty provisions, play an important role. It is the realm where honor among all those engaged in armed conflict has the potential to play a positive influential role.

The Nuremberg Tribunal stated that crimes against international law are committed by men, not by abstract entities.<sup>132</sup> It was referring to the need to punish individuals. However, it is also important to emphasize the importance of honor among individual soldiers in ensuring the foundational values of IHL are respected. Invoking such a concept in a contemporary military manual is likely to be dismissed by some commentators and for this reason its inclusion in the US Manual is to be welcomed.

## 7 CONCLUSION

The principles outlined are applicable regardless of the legality or justness of the armed conflict. In practice it is important to express the basic principles of IHL in concise and simple language readily comprehensible to military personnel in the field. The Manual succeeds in doing so while indicating there are many issues that remain to be resolved on a case-by-case basis. It does not complicate the issues for a military commander. There are a number of challenges to implementation, in particular the “civilianization of armed conflicts,” that compound the principle of distinction. Direct participation in hostilities by noncombatants and concepts such as “continuous combat function” add further to the complexity of contemporary armed conflicts. Furthermore, the role played by private military and security companies

<sup>131</sup> Lieutenant General W. R. Peers, *The My Lai Inquiry* (New York: Norton 1979), 76.

<sup>132</sup> *France et. al. v. Goering et. al.*, 22 IMT 411, 466 (IMT 1946).

may be critical to their status and difficult to determine in theaters where different companies play multiple roles.

The Manual seeks to find a balance between military necessity and humanity and this finds more specific expression in the core principles outlined. However, it is in the interpretation and application of other IHL rules that the principle of humanity can be most beneficial. The principle of distinction raises complex issues that are not addressed in this chapter and reference must be made to Chapter V of the Manual, "The Conduct of Hostilities." However, the fundamental obligations enshrined in these principles are outlined with clarity and easy to follow. While the rules outlined in the Manual governing proportionality reflect customary law, they do not incorporate the express provisions of AP I and should be read in conjunction with Chapter V of the Manual. It is significant that the Manual reiterates that where there is no justification for military action, a proportionality analysis would not be necessary to reach the conclusion that the attack would be unlawful.<sup>133</sup> On the other hand, the reference to proportionality and reprisals seems out of place in a contemporary law of war manual.<sup>134</sup>

Some of the ICTY decisions outlined refer to relatively narrow issues, such as military necessity and property destruction, and to a lesser extent, enforced disappearances. Nevertheless, they provide examples of how issues in IHL were addressed before international tribunals and courts. The chapter deals with the fundamental principles and values. These are presented in a style that is practical and comprehensible for all members of the armed services to follow. In the long run this is critical as it is they who will be charged with its implementation in situations of armed conflict. The inclusion of honor as a key principle is important. Emphasis on maintaining values which support IHL and similar rules may do more to encourage compliance by a professional military than the prospect of sanctions.

<sup>133</sup> DoD Law of War Manual, ¶ 2.4.1.1. <sup>134</sup> *Ibid.*, ¶ 2.4.1.2.