



LEGAL STUDIES RESEARCH PAPER SERIES  
RESEARCH PAPER 11-39  
September 16, 2011

---

## **Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule**

**Valerie Epps**  
**Professor of Law, Suffolk University Law School**

This paper can be downloaded without charge from the Social Science Research Network:  
<http://ssrn.com/abstract=1929029>

---

SUFFOLK UNIVERSITY LAW SCHOOL | BOSTON, MASSACHUSETTS  
120 Tremont Street, Boston, MA 02108-4977 | [www.law.suffolk.edu](http://www.law.suffolk.edu)

Electronic copy available at: <http://ssrn.com/abstract=1929029>

# **Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule**

**by Valerie Epps\***

## **I. The Changing Nature of Warfare**

- 1. The Threshold of War/Armed Conflict**
- 2. Categorizing Types of Armed Conflict**
  - A. Inter-State Armed Conflict**
  - B. Armed Conflict by States Against Overseas Non-State Entities**
  - C. Internal Armed Conflict**
- 3. Transnational and National Conflicts and Their Transmutation**
- 4. The Changing Prevalence of the Types of Armed Conflict**
  - A. The Prevalence of Inter-State Armed Conflicts**
  - B. The Prevalence of Extra-Territorial Armed Conflicts by States Against Non-State Entities**
  - C. The Prevalence of Internal Armed Conflicts**
  - D. Conclusion on the Prevalence of Types of Armed Conflicts**

## **II. The Shifting Ratio of Military to Civilian War-Related Deaths**

- 1. Introduction**
- 2. Problems With Compiling Data on War-Related Casualties**
- 3. War-Related Casualties**
  - A. U.S. Military Deaths**
  - B. Overall Military Deaths**
  - C. Civilian War-Related Deaths**
    - 1. Problems With Data Compilations of Civilian War-Related Deaths**
    - 2. Problems With Calculating the Ratio of Military to Civilian War-Related Deaths**
      - A. The 10:1; 9:1 and 8:1 Ratios**
      - B. The Range of Acceptable Ratios of Civilian to Military War-Related Deaths**

---

\* Professor of Law and Co-Director of The International Law Concentration: Suffolk University Law School, Boston, MA.

### **III. The Collateral Damage Rule**

- 1. Introduction**
- 2. A Brief History of the Collateral Damage Rule**
  - A. The Idea of Restraints on Warfare**
  - B. The Principle of Distinction**
  - C. The Formulation of the Collateral Damage Rule**
    - (i) The Prohibition on Indiscriminate Attacks**
    - (ii) Proportionality in Attack**
    - (iii) Precautions in Attack**
    - (iv) Precautions Against the Effects of Attack**
- 3. Criticisms of, and Problems With, the Collateral Damage Rule**
- 4. Does the Collateral Damage Rule Require a Direct Link from Military Attack to Civilian Death or Damage to Violate the Rule?**
- 5. Conclusions on the Protection Afforded to Civilians by the Collateral Damage Rule**

### **IV. The Regulatory Effect of the Collateral Damage Rule in Light of Its Overall Failed Purpose**

- 1. Introduction**
- 2. The Purposes of the Collateral Damage Rule Viewed Narrowly and Broadly**
- 3. The Fate of Legal Rules That Cannot Fulfill Their Overall Purpose**

### **V. Conclusion: A Few Modest Suggestions to Assist the Fulfillment of the Collateral Damage Rule**

## **Introduction**

Members of armed forces are sent off to war to kill enemy combatants. They are not sent off to kill civilians. Nonetheless, modern wars invariably result in far more civilian deaths than military deaths. This article examines the collateral damage rule, one of the central operational rules regulating the conduct of hostilities, that essentially only permits civilian casualties when they are incidental to an attack on a legitimate military target. The rule is explored in light of the changing nature of warfare over the last two centuries including the shifting ratios of military to civilian war-related deaths. The article ultimately questions the continuing validity of this rule when, in recent decades, the overall statistics for war-related deaths reveal that civilian fatalities are considerably greater than military deaths.

The collateral damage rule is meant to offer protection to civilians in war time and to give content to the principle of distinction in contexts where military and civilian targets are interwoven. That statement reflects the usual assessment of the collateral damage rule but this article asks whether that assessment simply tricks us into thinking that ethical military advisors, by following the rule, will, in fact, avoid all but incidental damage to civilians. If the many and varied studies on the ratios of civilian to military war-related deaths reveal disproportionate civilian deaths (as they do) and if the many and varied epidemiological studies reveal war-related civilian displacement, disease, deprivation, and famine (which they do), the article asks whether the collateral damage rule has become simply an organized deceit to persuade us that when we condone the combatant's privilege (soldiers being permitted to kill enemy soldiers) we are not signing the death warrant for civilians, except "incidentally." The article will argue that in the context of modern warfare, the collateral damage rule can never accomplish what it purports to do,

except in the most temporarily restricted sense. It will then explore what should be the fate of a legal rule, in this case at the heart of the laws of armed conflict, that cannot, by the nature of the context in which the rule is operative, be effective.

Trying to determine when there is sufficient armed violence to constitute armed conflict or war is difficult and varies depending on what is being studied. Classifying the different types of armed conflict is controversial and changes depending on the focus of research. Quantifying military and civilian deaths in armed conflict presents multiple classification problems and much disputed or unavailable data. Nonetheless, despite all of these difficulties, it is possible to discern significant trends within the last two centuries. This article will first examine the changes that have taken place, over roughly the last two centuries, in the types of wars that occur. It will next focus on the shifting ratio of military to civilian war-related deaths during this period, noting that we now live in an era where wars result in a hugely disproportionate loss of civilian lives. The final part of the article will trace the history and applicability of the collateral damage rule, also known as the proportionality rule. The article then brings together the data on the changes in the types of wars fought and the shift from mainly military to mainly civilian war-related deaths and asks what continuing regulatory effect the collateral damage rule can be expected to exert when the data on war-related deaths will inevitably mean that the rule has utterly failed to achieve its purpose. The final part of the article makes a few modest suggestions that may, in some measure, help fulfill the purpose of the collateral damage rule.

## **I**

### **The Changing Nature of Warfare**

#### **1. The Threshold of War/Armed Conflict**

Characterizing different types of armed conflict is difficult and different authors have taken somewhat different approaches. First, there is the question of which armed conflicts are sufficiently serious to step out of the category of “internal disturbances and tensions”<sup>1</sup> and into the category of armed conflict. Picking which armed conflicts merit study will often depend upon the issues being researched. Many authors choose a certain level of deaths in armed conflict per year to qualify for inclusion in statistical data. For example, in their seminal book, *Resort to War*, Meredith Reid Sarkees, and Frank Whelon Wayman use the standard of conflict that produces “1,000 [battle-related] deaths per year (or twelve month period).”<sup>2</sup> This was the war typology used by Singer and Small<sup>3</sup> in two earlier studies, and is also used by authors such as R.J. Rummel<sup>4</sup> and many others.<sup>5</sup> It should be noted here that this typology does not address the issue of when international humanitarian law becomes applicable either to international (inter-state armed conflict) (IAC) or to non-international armed conflict (NIAC). That very different question is answered by examining the language of the Four Geneva Conventions, common article 2 (inter-state wars and occupation); common article 3 (conflict not of an international character); Additional Protocol I, article 1 (inter-state wars, but including fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination); Additional Protocol II, article 1 (internal armed conflicts: “conflicts...which take place in the

---

<sup>1</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, signed 8 June 1977, entered into force 7 Dec. 1978 [hereinafter APII].

<sup>2</sup> *Resort to War: A Data Guide to Inter-State, Extra-State, Intra-State, and Non-State Wars, 1816-2007* (CQ Press 2010) at 61 [hereinafter Sarkees & Wayman].

<sup>3</sup> J. David Singer & Melvin Small, *The Wages of War, 1816-1965: A Statistical Handbook* (1972); *Resort to Arms: International and Civil War, 1816-1980* (1982). These studies were part of the Correlates of War Project originally established at the University of Michigan in 1963 and now carried out at various U.S. universities, available at: [www.correlatesofwar.org](http://www.correlatesofwar.org)

<sup>4</sup> R.J. Rummel, *Conflict in Perspective (Understanding Conflict and War)* (1977).

<sup>5</sup> E.g., Jack Levy, Thomas Walker & Martin Edwards, *Continuity and Change in the Evolution of Warfare*, in *War in a Changing World* (Zeev Maoz & Azar Gat eds. 2001). Other compilations have much lower thresholds, e.g., 25 annual battle deaths as used by Nils Peter Gleditsch et al., *Armed Conflict 1946-2001: A New Dataset*, 39 *J. of Peace Research* 615 (2002).

territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups....” which meet certain conditions).<sup>6</sup> Before discussing classifications of warfare, it should be noted that there is an enormous literature on this issue, largely engaged in by political scientists. The categories discussed below are intended to be broad brush categories as the overall purpose of this article is not to support or attack any particular categorizations of warfare, but rather to examine the overall changing nature of combat particularly as it relates to the collateral damage rule.

## **2. Categorizing Types of Armed Conflict**

Using the “1,000 [battled related] deaths per year” typology, wars can be characterized in a number of ways depending upon the particular focus of study. Law categorizes armed conflict into inter-state or international armed conflict (IAC) and non-international armed conflict or armed conflict taking place within a state (NIAC). Because a number of changes have taken place in the international community, including the capacity of a wider variety of entities with the power to wage war, a more nuanced categorization of armed conflict is necessary in order to grasp the extent of the changing nature of armed conflict. The typologies discussed below largely, but not entirely, follow the categories used by Sarkees and Wayman.<sup>7</sup>

### **A. Inter-State Armed Conflict**

---

<sup>6</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), 75 U.N.T.S. 31, signed 12 August 1949, entered into force 21 Oct. 1950 [hereinafter GI]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II); 75 U.N.T.S. 85, signed 12 August 1949, entered into force 21 Oct. 1950, art. 62 [hereinafter GII]; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), 75 U.N.T.S. 135, signed 12 August 1949, entered into force 21 Oct. 1950 [hereinafter GIII]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), 75 U.N.T.S. 287, signed 12 August 1949, entered into force 21 Oct. 1950. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflict (Protocol I), 1125 U.N.T.S. 2, signed 8 June 1977, entered into force 7 Dec 1978 [hereinafter API]. APII, *supra* note 1, preamb.

<sup>7</sup> Sarkees & Wayman, *supra* note 2.

For the purposes of this article, inter-state wars are those that include participants on either side of the battle that are states. Such a war may have multiple parties but this article does not seek to include or exclude them on the basis of troops committed or forces killed, provided the overall battle-related deaths in the conflict amount to at least 1,000 and most of the fighting is carried out by state entities. Non-state entities, such as colonies, non-autonomous territories, and organized armed groups, may well take part in such conflicts but the state entities will engage in the bulk of combat activities.

### **B. Armed Conflict by States Against Overseas Non-State Entities**

In one type of armed conflict by states against overseas non-state entities, a state engages in armed conflict with an entity outside its territorial boundaries where the entity is in a dependent relationship with the state, such as a colony, protectorate, special territory, mandate territory or dependency. Frequently these conflicts will involve combat designed to curb/achieve independence from the controlling state.<sup>8</sup> Another form of these conflicts arises when the state is engaged in combat against a non-state entity, such as Al Qaeda, but where the non-state entity has not been under the power or control of the state party to conflict. Here the aims of the non-state entity may well include removing the state participant from wielding military or other economic power from certain parts of the globe but does not focus on gaining political statehood for itself. Authorities, such as Sarkees and Wayman, describe this type of conflict as “Extra-state War.”<sup>9</sup>

### **C. Internal Armed Conflict**

Internal armed conflicts occur within the boundaries of a particular state. There are various types of these conflicts. One is a civil war in which an established state government’s armed forces are fighting with an organized group or groups within the state’s territory when such groups

---

<sup>9</sup> Sarkees & Wayman, *supra* note 2, at 63-64.

are capable of sustained military activity.<sup>10</sup> The requirement that the non-state entity should be capable of sustained military activity is used principally to distinguish massacres or sporadic riots where the death toll may well be more than 1,000 but there is no systematic organization within, or between, the attacked groups. Additional Protocol II includes this requirement as part of the article explaining that the Protocol is applicable to:

all armed conflicts...which take place in the territory of the High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>11</sup>

Other forms of internal armed conflict occur within a state when different non-state entities fight each other but are not engaged in combat against the central government. Sometimes a regional or sub-state government may be engaged in combat with rebel groups. Sometimes none of the fighting entities will be connected with any governing authority.

### **3. Transnational and National Conflicts and Their Transmutation**

Inter-state armed conflict will, of course, take place between at least two states and possibly more. Where rebel groups are fighting a central or sub-state government, the combat is likely to be contained within the territory of a particular state, although, sympathizers from other states may join the fight. Non-state armed groups may carry on armed activities in a number of

---

<sup>10</sup> Difficult issues can arise when power shifts, such as when an existing government is largely ousted from power by a rebel group and some members of the international community recognize the rebels as the new government, while others continue to support the earlier government.

<sup>11</sup> APII, supra note 1, at art. 1, para. 1. Additional Protocol I, however, whose title states that it relates “To The Protection of Victims of **International** Armed Conflict” (emphasis added) states in art. 1, para. 4, that it also applies to:

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.... APII, supra note 6.

This requirement for application of Protocol I, does not include any particular level of organization other than having declared purposes within the definition above which would require some sort of communication sufficient to pursue the purpose.

different states simultaneously. Their combat activities may be directed against state entities or against other non-state groups.

Armed conflict categories are seldom static. Conflict can start out in one category of combat and change over time into another category. It may change several times during the course of the conflict. Fighting in one part of a state's territory may be designated as a particular category of conflict but fighting in another part of the state's territory may be differently categorized. The International Criminal Tribunal for the Former Yugoslavia has noted this mutability phenomenon.

In *Prosecutor v. Duško Tadić* the Tribunal noted:

It is indisputable that an armed conflict is international if it takes place between two or more states. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another state intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state.<sup>12</sup>

Indeed, in the *Tadić* case, the Tribunal devotes a whole section, running to 57 paragraphs over 26 pages, to: “The Legal Criteria for Establishing When, in an Armed Conflict which is *Prima Facie* Internal, Armed Forces May be Regarded as Acting on Behalf of a Foreign Power, Thereby Rendering the Conflict International.”<sup>13</sup> The Tribunal also noted the disagreement that has arisen between the International Court of Justice and the Tribunal on certain issues in the classification of armed conflict.<sup>14</sup> The fact that armed conflicts can change from internal to international and back again, or can have both types of conflict operating alongside each other, obviously complicates the compilation of data on war classification.

#### **4. The Changing Prevalence of the Types of Armed Conflict**

---

<sup>12</sup> IT-94-1-A (15 July 1999) at para. 84.

<sup>13</sup> Id. heading between paras. 87 & 88.

<sup>14</sup> Id. at paras. 115-145 discussing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits) 1986. 1. C. J. 14, at paras. 109 & 115.

There are many studies on the prevalence of armed conflict stretching over the last two hundred years. Sarkees and Wayman's study in *Resort to War: 1816-2007* is perhaps the most comprehensive and current and this section of the article relies heavily on their data.

### **A. The Prevalence of Inter-State Armed Conflicts**

Sarkees and Wayman report that: "Inter-state wars are relatively rare, with only ninety-five inter-state wars over the past 192 years."<sup>15</sup> What the data also reveals is that the early years of the nineteenth century were relatively peaceful for this category of war. This might be explained by the low number of states at the time except for the fact that several succeeding decades (1847-1856; 1857-1866; 1877-1866), when the number of states had not risen significantly, experienced a marked rise in the onset of inter-state wars. Beginning with the decade 1897-1906, the figures indicate that each decade experienced at least five onsets of inter-state war. Three decades log the highest number of inter-state war onsets with 1857-1866 having the greatest number, followed by 1967-1976, and then by 1977-1986. For the last two decades studied, 1987-1996 and 1997-2006, the number of inter-state war onsets have logged in at five per decade which equals the overall average for the entire period studied.<sup>16</sup> One further point of interest: American, Canadian and European scholars are often (rightly) berated for their Euro-centric outlook. It is salient to note, therefore, that Sarkees and Wayman have undertaken a global study and the area of the world with the greatest number of inter-state wars for the period studied is Asia, followed by Europe and the Middle East.<sup>17</sup>

---

<sup>15</sup> Sarkees & Wayman, *supra* note 2, at 188.

<sup>16</sup> *Id.* Figure 3.3, at 190.

<sup>17</sup> *Id.* Figure 3.4, at 190.

## **B. The Prevalence of Extra-Territorial Armed Conflicts by States Against Non-State Entities**

Wars that take place between a state and a non-state entity largely outside the territory of the state are “much more common than inter-state wars, with 163...[such]wars, compared with 95 inter-state wars...between 1816 and 2007. Even so, ...[such] wars do not occur that frequently.”<sup>18</sup> Because these wars are fought by states against non-state entities capable of engaging in combat, the figures are necessarily tied to the number of state entities with the capacity for combat and the number of non-state entities with such capacity. In the decades when colonies were seeking independence, for example, the incidence of these wars rise, as it does more recently with the rise of para-military international organizations such as Al Qaeda.<sup>19</sup> There is a high incidence of state versus non-state entity wars in the late nineteenth and early twentieth centuries when the imperial powers were fighting indigenous peoples in order to establish colonies. The incidence of these wars rises again in the decade from 1947-1956 which saw the start of the struggle for independence by colonies. After that time, the colonial powers rapidly realized that independence for colonies was a forgone conclusion and they seldom resorted to war to retain a colony. Asia is again the area of the world that has experienced the highest incidence of this type of armed conflict.

## **C. The Prevalence of Internal Armed Conflicts**

Sarkees and Wayman catalogue 335 internal armed conflicts during the period studied, 1816-2007, more than three times the number of inter-state wars, and more than double the number of extra-territorial state versus non-state entity wars in the same period. Excluded from this number are another 62 wars which are labeled as “non-state wars.”<sup>20</sup> These are wars that take place

---

<sup>18</sup> Id. at 333. Sarkees and Wayman call these wars “Extra-state Wars.” Id. at chap. 4.

<sup>19</sup> Id. Figure 4.3, at 335.

<sup>20</sup> Id. at chap. 6 & 537 ff.

between non-state entities either in territory not yet under the control of a state (61) or that take place across state borders (1). If we combine all of these wars into the broader category of internal armed conflicts, obviously, their incidence rises even higher. If we exclude the latter 62 wars, the great increases in internal armed conflict begins in the 1957-1966 decade and keeps rising until the last decade studied 1997-2006, which sees a modest decline from the highest incidence.<sup>21</sup> Many of these internal armed conflicts became internationalized in the sense that one or more states ultimately intervened in the conflict.<sup>22</sup> Looking at the figures for the 62 wars that are categorized as between non-state entities taking place in non-state territory or taking place across state borders, the greatest prevalence occurs in the nineteenth century in what Sarkees and Wayman refer to as the “prestate-formation” period.<sup>23</sup> Given their definition of this category of wars, this is not surprising. Africa, Asia and the Western Hemisphere see by far the greatest incidence of these 62 wars. Again, this is unsurprising given the history of the formation of states.

#### **D. Conclusions on the Prevalence of Types of Armed Conflicts**

From the categories of armed conflict and the data discussed above, it is easy to discern that during the last two centuries, inter-state wars are the least prevalent (95); state versus non-state entities are at the mid-prevalence level (163); and internal armed conflicts top the prevalence chart at 335, plus another 62, totaling 397. It is also clear that the incidence of internal armed conflicts has seen a dramatic rise since the middle of the twentieth century.

In any decade in the last two centuries the maximum number of inter-state wars is ten. For wars between states and non-state entities, the maximum number of wars in any decade is eighteen, with a very marked decline after 1956; five being the maximum number for any decade

---

<sup>21</sup> Id. Figure 5.3, at 483.

<sup>22</sup> Id.

<sup>23</sup> Id. at 537.

since then. For internal armed conflicts, the pattern is wholly different. The second half of the twentieth century sees a dramatic rise in such wars. From 1957 on, every decade has seen more than twenty such wars, with the decade 1987-1996 experiencing forty internal armed conflicts, and 1997-2006 logging thirty-five such wars. As Bethany Lacina and Nils Peter Gleditsch note, there are “declining numbers of major interstate conflicts and internationalized civil wars...[and] most warfare is in the form of civil conflict and wars of state failure...”<sup>24</sup> The Human Security Report 2009/2010 comes to the same conclusion:

The overwhelming majority of armed conflicts are now fought *within* states. These intrastate conflicts have relatively low annual battle-death tolls on average and have made up an increasing proportion of all conflicts since the end of World War II. In the late 1940s, they made up little over half of all conflicts; by the early 1990s, their share was closer to 90 percent.<sup>25</sup>

However, that Report also notes that: “with very few exceptions, international conflicts have been far more deadly than intrastate conflicts.”<sup>26</sup>

## II

### The Shifting Ratio of Military to Civilian War-Related Deaths

#### 1. Introduction

In a 2001 study sponsored by the International Committee of the Red Cross (ICRC) the authors make the following assessment of the ratio of civilian-to-military deaths in modern wars:

The research reveals, in essence, that modern wars have become conflicts without limits. Civilians have — both intentionally and by accident — been moved to center stage in the theater of war, which was once fought primarily on battle fields. This fundamental shift in the character of war is illustrated by a stark statistic: in World War I, nine soldiers were killed for every civilian life lost. In today’s wars, it is estimated that ten civilians die for every soldier or fighter killed in battle.<sup>27</sup>

---

<sup>24</sup> Bethany Lacina & Nils Peter Gleditsch, Monitoring Trends in Global Combat: A New Dataset of Battle Deaths, 21 Eur. J. Pop. 145, at 160 (2005) [hereinafter Lacina & Gleditsch].

<sup>25</sup> Pt. III: Trends in Human Security, at 160, Human Security Report 2009/2010 (2010); see also, Kalevi J. Holsti, *The State, War, and the State of War* (1996).

<sup>26</sup> See Security Report 2009/2010, supra note 25, at Pt. I: The Causes of Peace, at Fig. 1.2, at 22.

<sup>27</sup> Stanley B. Greenberg & Robert O. Boorstin, *People On War: Civilians in the Line of Fire*, Public Perspective 18 (Nov/Dec. 2001) at 19 [hereinafter Greenberg & Boorstin].

It is this shift in the ratio of military to civilian war-related deaths that is the primary focus of this section of the article. There have been several rigorous critiques of the accuracy of this ratio which will be discussed below.<sup>28</sup>

## **2. Problems With Compiling Data on War-Related Casualties**

This article claims no in-depth knowledge of statistics and does not seek to endorse any particular method of compiling data on war-related casualties. There are many articles that assess various statistical models used for this task.<sup>29</sup> Each compilation tends to be idiosyncratic<sup>30</sup> and often has to rely, to some extent, on data supplied by non-impartial parties to conflict, such as opposing military forces. The estimates of military and civilian deaths can vary widely. Some studies give figures compiled from various data bases and then give average or median numbers.<sup>31</sup> Even with careful explanations and limiting provisos, it remains true that “such figures at times display enormous variance.”<sup>32</sup> Nonetheless, through examining a variety of available reports on war casualties, broad trends are observable over time. It is these trends, discussed below, that are relevant to the argument pursued in this article.

## **3. War-Related Casualties**

### **A. U.S. Military Deaths**

An examination of U.S. military deaths is instructive. In 2010, the U.S. Congressional Research Service issued a compilation of American military war-related deaths and injuries

---

<sup>28</sup> See section II, 3, C, 2, *infra*.

<sup>29</sup> See, e.g., Beth Osborne Dapoint, *Wartime Estimates of Iraqi Civilian Casualties*, 89 *Int'l Rev. of Red Cross* 943 (Dec. 2007).

<sup>30</sup> By “idiosyncratic” I mean that a study covers statistics of one, or some, particular wars in a particular time frame or geographic area. The studies also differ on exactly which types of deaths are included in the data.

<sup>31</sup> See, e.g., Matthew White, *Death Tolls for the Majors Wars and Atrocities of the Twentieth Century*, available at: <http://necrometrics.com/20c1m.htm>.

<sup>32</sup> Milton Leitenberg, *Deaths in Wars and Conflicts in the 20<sup>th</sup> Century* (3d ed. 2006), available at [http://www.clingendael.nl/publications/2006/20060800\\_cdsp\\_occ\\_leitenberg.pdf](http://www.clingendael.nl/publications/2006/20060800_cdsp_occ_leitenberg.pdf).

beginning with the Revolutionary War (1775-1783) and ending with the current Iraq War named Operation Iraqi Freedom (OIF) and Afghan War named Operation Enduring Freedom (OEF).<sup>33</sup> The highest totals for U.S. military deaths, in declining order, occurred during World War II (WWII): 405,399; The Civil War (Union forces only): 364, 511; World War I (WWI): 116,516; the Vietnam Conflict: 58,220; and the Korean War: 36,574.<sup>34</sup> The more recent U.S. wars have seen far fewer U.S. military deaths ranging from 4,365 in the Iraq War<sup>35</sup> to 1,948 deaths in the Persian Gulf War<sup>36</sup> and 973 in the Afghan War (through February 6, 2010).<sup>37</sup> Of course, if Confederate Army deaths are included in the statistics (estimates range from roughly 258,000- to roughly 289,000),<sup>38</sup> the Civil War would have the highest number of military deaths for the U.S.

What the figures above reveal is that since WWII, military deaths for U.S. soldiers have dropped dramatically. Of course, those figures are for only one armed contingent in wars that always had at least two opposing contingents and often had many military and other armed contingents. Milton Leitenberg has been compiling figures on war-related deaths for many years. In his 2006 compilation he presents figures for all deaths in wars and conflicts from 1945-2000 broken down by civilian and military deaths.<sup>39</sup> For example, he estimates the overall military deaths in the Vietnam Conflict as 1,158,000 and in the Korean War as 1,672,000.

## **B. Overall Military Deaths**

---

<sup>33</sup> Anne Leland & Mari-Jana "M-J" Oboroceanu, American War and Military Operations Casualties: Lists and Statistics, Feb. 26, 2010.

<sup>34</sup> Id. at Table 1, at 2 & 3.

<sup>35</sup> Id. at Table 13, at 16.

<sup>36</sup> Id. at Table 9, at 12.

<sup>37</sup> Id. at Table 11, at 14.

<sup>38</sup> How many Confederate soldiers died in the Civil War? Wiki Answers: available at [http://wiki.answers.com/Q/How\\_many\\_soldiers\\_died\\_in\\_the\\_Civil\\_War](http://wiki.answers.com/Q/How_many_soldiers_died_in_the_Civil_War); see also, Civil War Statistics: available at [http://phil.muni.cz/~vndrzl/amstudies/civilwar\\_stats.htm](http://phil.muni.cz/~vndrzl/amstudies/civilwar_stats.htm).

<sup>39</sup> Milton Leitenberg, Deaths in Wars and Conflicts in the 20<sup>th</sup> Century, Table 2, at 73-79 (3d ed. 2006) available at [http://www.clingendael.nl/publications/2006/20060800\\_cdsp\\_occ\\_leitenberg.pdf](http://www.clingendael.nl/publications/2006/20060800_cdsp_occ_leitenberg.pdf).

There are a number of compilations of world wide military deaths. Milton Leitenberg's comprehensive study covers the 20<sup>th</sup> century.<sup>40</sup> The Peace Research Institute, Oslo (PRIO) has released a series of "battle death" statistics which has been updated from time to time, most recently in 2009, covering the years 1946-2008.<sup>41</sup> Michael Clodfelter's massive compendium of military deaths runs from 1494-2007.<sup>42</sup> The Correlates of War Data Sets<sup>43</sup> list "battle-related combatant fatalities" from 1816-2007, suffered by the state, in the case of inter-state wars, or suffered by each side in the case of intra-state wars and non-state wars. An earlier version of the data sets also lists these fatalities for extra-state wars, although 30 of these wars have been reclassified as intra-state wars and the data only runs until 1997.<sup>44</sup> The latest data set lists 95 inter-state wars, running from the Franco-Spanish War of 1823 to the invasion of Iraq in 2003; 335 intra-state wars running from the First Caucasus War (Russia/Georgians) 1818-1822 to the Second Yemeni Cleric War (Yemen/Zaidi Muslims) 2007; and 62 non-state wars, running from The First Maori Tribal War of 1818-1824 to The Hemda-Lendu War of 1999-2005. The data set also includes 108 extra-state wars, running from the British-Mahrattan War, 1817-1818 to the Western Saharan War, 1975-1983. As the criteria for inclusion in each list is the same,<sup>45</sup> the overall battle-related combatant fatalities for each list during this period are revealing. The total fatalities for inter-state wars are 32,145,485; for extra-state wars are 2,645,294; for intra-state wars are 8,193,883; and for non-state wars (between or among non-state entities) are 255,736. In a number

---

<sup>40</sup> Id.

<sup>41</sup> Gabriel Uriarte & Bethany Lacina, PRIO Battle Deaths Dataset (2009). These statistics combine military and civilian deaths occurring in combat.

<sup>42</sup> Michael Clodfelter, *Warfare and Armed Conflicts: A Statistical Encyclopedia of Casualty and other Figures, 1494-2007* (3d ed. 2008).

<sup>43</sup> Available at: <http://www.correlatesofwar.org>. The war data sets are now hosted at American University and The University of Michigan-Dearbon and are compiled by Meredith Reid Sarkees & Frank Whelon Wayman.

<sup>44</sup> Id.

<sup>45</sup> The criteria for inclusion is that the war "must involve sustained combat, involving organized armed forces, resulting in a minimum of 1,000 battle-related combatant fatalities within a twelve month period." Id.

of these wars the data is entered as unknown so that presumably the actual overall military deaths are higher than the figures reported.

### **C. Civilian War-Related Deaths**

One problem with the various tabulations on civilian war-related casualties is that it is often impossible to discover what percentage of the civilian deaths and injuries were incidental to legitimate military attacks. Many of the statistical datasets have rejected the notion of disaggregating military casualties from civilian casualties caused by military attacks. For example, Lacina and Gleditsch report on world-wide “battle deaths” covering the years 1946-2002. By the term “battle-deaths” they mean to include “all people, soldiers and civilians, killed in combat.”<sup>46</sup> Their figures are compilations of all persons killed in military operations during war. They report that the five wars that inflicted the largest numbers of battle-deaths in the period studied were: Vietnam War (1955-1975): 2,097,705; Korean War (1950-1953): 1,254,811; Chinese Civil War (1980-1988); 644,500; and the Afghan Civil War (1978-2002): 562,995.<sup>47</sup> They also recognize that many other deaths come in the wake of war “due to insecurity, displacement, deprivation, and disease.”<sup>48</sup>

The public health consequences of war are also receiving considerable scholarly attention.<sup>49</sup> Some estimates suggest that indirect effects of military conflicts on mortality may be as large as the direct effect of armed conflict.<sup>50</sup> Governments tend to keep detailed statistics on military deaths but seldom have comprehensive civilian death statistics. Sometimes they keep statistics on

---

<sup>46</sup> Lacina & Gleditsch, *supra* note 24, at 148. The authors also state: “Measuring battle deaths answers the question of how many people were killed in military operations during a war and, therefore, it is the best measure of the scale, scope, and nature of the military engagement that has taken place.” *Id.*

<sup>47</sup> *Id.* at Table 1, at 154.

<sup>48</sup> *Id.* at 158.

<sup>49</sup> E.g., World Report on Violence and Health (Etienne G. Krug et al. eds., World Health Organization, 2002): available at: <http://whqlibdoc.who.int/hq/2002/9241545615.pdf>; C.J.L. Murray et al., Armed Conflict as a Public Health Problem, 324 *Brit. Med. J.* 346 (2002): available at: <http://www.bmj.com/content/324/7333/346.full.pdf>.

<sup>50</sup> *Id.* at 347.

their own civilian deaths (killed by the enemy) but almost never keep public statistics or estimates of civilians they have killed in the enemy country. For example, in the U.S., the Congressional Research Service publishes figures on U.S. military deaths compiled by the Department of Defense<sup>51</sup> but publishes only sporadic limited figures on civilian deaths.<sup>52</sup> As Adam Roberts concludes: “despite extensive investigations in many war zones, and significant methodological development, there is still a shortage of reliable data on civilian victims of war.”<sup>53</sup> Beth Osborne Daponte has undertaken a careful analysis of the statistical methodologies of five different civilian war death studies. Even for the study she finds to have the “most credence,” she also concludes that it presents “imperfect figures....”<sup>54</sup>

In all of the compilations there is disagreement about who should count as a civilian, and also who, among those designated as civilians, should be included in the statistics. Roberts distinguishes seven categories that have appeared in various compilations. He states:

All too often there is, a lack of clarity about which of the following categories of civilian casualties are included in any given set of figures:

1. Those killed as a direct effect of war;
2. Those injured as a direct effect of war;
3. Those dying, whether during or after war, from indirect effects of war such as disease, malnutrition and lawlessness, and who would not have been expected to die at such rates from such causes in the absence of war;
4. Victims of one-sided violence, such as when states slaughter their own citizens in connection with war;
5. Victims of rape and other forms of sexual violence in connection with war;
6. Those uprooted in war – that is, refugees and Internally Displaced Persons (IDPs);

---

<sup>51</sup> Available at: <http://web1.whs.osd.mil/mmid/casualty/castop.htm>.

<sup>52</sup> See, e.g., the report of the U.S. Dept. of Defense (DOD) civilian casualties (meaning civilians who work for DOD) occurring in Operation Iraqi Freedom through Aug. 15, 2011: available at: <http://www.defense.gov/news/casualty.pdf>.

<sup>53</sup> Adam Roberts, Lives and Statistics: Are 90% of War Victims Civilians? 52 *Survival* 115, at 118 (June-July 2010), available for subscribers at: <http://www.informaworld.com/openurl?genre=article&issn=0039-6338&volume=52&issues=3&page=115> [hereinafter Roberts].

<sup>54</sup> Beth Osborne Daponte, Wartime Estimates of Iraqi Civilian Casualties, 89 *Int'l Rev. of the Red Cross* 943, at 956-957 (Dec. 2007).

7. Those who, even after war is over, die prematurely from injuries sustained in war.<sup>55</sup>

Obviously, without agreement on who and which categories of civilians are to appear in civilian war-related deaths, the figures are problematic.

## **2. Problems With Calculating the Ratio of Military to Civilian War-Related Deaths**

### **A. The 10: 1; 9: 1, and 8: 1 Ratios**

A number of high level studies give the ratio of civilian to military deaths in war as somewhere between 10 to 1 and 8 to 1. For example, the 2001 ICRC Study quoted (in section II, 1) above states that “it is estimated that ten civilians die for every soldier or fighter killed in battle.”<sup>56</sup> Unfortunately, this study gives no authority for that statement. Some European Union documents indicate that since 1990, 90% of those dying in war have been civilians.<sup>57</sup> Ruth Leger Sivard’s well known compilations estimated civilian deaths in the 1980s as 74% of total deaths and at “close to 90 percent” for the year 1990.<sup>58</sup> Various UN documents and reports state that civilian war-related deaths now account for more than 90% of war deaths,<sup>59</sup> although some have the slightly lower estimate of 75 % civilian casualties.<sup>60</sup> Kofi Annan, Secretary-General of the UN (1997-2006), who cited the 75% figure did go on to add that with respect to the percentage of civilian war deaths: “no one really knows.”<sup>61</sup> Later statistics repeat these ratios although the language often talks of civilian “casualties” or “war victims” and it is unclear whether the figures

---

<sup>55</sup> Roberts, *supra* note 53, at 116.

<sup>56</sup> Greenberg & Boorstin, *supra* note 27, at 19.

<sup>57</sup> Javier Solana, A Secure Europe in a Better World: European Security Strategy (European Union Institute for Security Studies 2003) at 5: available at <http://www.iss.europa.eu/uploads/media/solanae.pdf>, adopted by the European Council, Dec. 12, 2003.

<sup>58</sup> Ruth Leger Sivard, *World Military and Social Expenditures 1991* (1991) at 20.

<sup>59</sup> Graca Machel, *Impact of Armed Conflict on Children*, Aug. 26, 1996, at para. 24: available at: <http://www.unicef.org/garca/graright.htm>; Human Development Report 1998: Consumption for Human Development (UNDP 1998) at 35: available at: <http://www.undp.org/en/reports/global/hdr1998>.

<sup>60</sup> Kofi Annan, *Intervention* (1998): available at: <http://www.ditchely.co.uk/page/173/lecture-xxxv.htm>.

<sup>61</sup> *Id.*

include displaced people or persons who die from causes not directly related to warfare.<sup>62</sup>

Recently, there have been some outright attacks on the 10:1 or 9:1 ratios. These ratios have been called an “urban myth” of modern warfare.<sup>63</sup> At the same time more studies include both military and civilian deaths in “battle deaths” and give no disaggregated figures.<sup>64</sup>

After a comprehensive and rigorous examination of numerous high level studies that use the 9 civilian deaths to every 1 military death ratio, or sometimes a slighter lower ratio of 8 civilian deaths to every 1 military death, Roberts concludes that these figures are “based on shaky foundations.”<sup>65</sup> He does admit that it is possible that some conflict situations, such as the Cambodian killings (1975-1979) and the Rwandan genocide (1994), “have something close to a 9:1 ratio.”<sup>66</sup> He does not come to any conclusion about what an overall more accurate ratio would be but calls for “more systematic recording on casualties” and “high standards of rigour and professionalism in this work...”<sup>67</sup>

## **B. The Range of Acceptable Ratios of Civilian to Military War-Related Deaths**

Many sources can be cited to support the proposition that from the time that the distinction between soldiers and the general non-military population was established, roughly the 18<sup>th</sup> century, to the beginning of the 20<sup>th</sup> century, military deaths in wars generally far outnumbered civilian deaths.<sup>68</sup> For example, White reports median estimates of military deaths in the Napoleonic Wars

---

<sup>62</sup> See, e.g., Paul Collier, et al., *Breaking the Conflict Trap: Civil War and Development Policy* 17 (World Bank 2003).

<sup>63</sup> Kristine Eck, *The “Urban Myth” About Civilian War Deaths*, Pt. II, in *Human Security Report 2005* (Andrew Mack ed., 2005): available at: <http://www.humansecurityreport.com>

<sup>64</sup> Figure 1.2, *Human Security Report 2009/2010*, Pt. I, at 22: available at: <http://www.humansecurityreport.com>

<sup>65</sup> Roberts, *supra* note 53, at 115.

<sup>66</sup> *Id.* at 126.

<sup>67</sup> *Id.* at 128. Roberts also raises “the admittedly difficult question of whether parties involved in armed conflict are now, or should in future be, under an obligation to report on numbers and possibly even names of civilians casualties, or whether the task should be left to independent bodies.” *Id.*

<sup>68</sup> E.g., A.P.V. Rogers, *Zero-casualty Warfare*, 82 *Int’l Rev. of the Red Cross* 165 (2000); Luc Reydam, *A la Guerre Comme à la Guerre: Patterns of Armed Conflict, Humanitarian Law Responses and New Challenges*, 88 *Int’l Rev. of the Red Cross* 734-736 (2006).

(1803-1815) as roughly 2 million with the median estimate for civilian deaths being roughly 1 million.<sup>69</sup> Often there are either no figures for civilian deaths in wars before the 20<sup>th</sup> century or sometimes civilian deaths will include deaths from epidemics, such as small pox, which admittedly may have been caused or aggravated by war-time conditions.

Many authors support the view of the historically rising civilian death toll from war.

Walter Clemens and J. David Singer state:

From the end of the Thirty Year's War in 1648 to the French Revolution in 1789, Europe's princes fought one another with relatively small armies. France's upheavals, however, gave birth to the concept of a 'nation in arms.' Starting at the same time, the Industrial Revolution turned cities and factories into prime targets. In most wars of the past century [20<sup>th</sup> century], civilian deaths have outnumbered military deaths.<sup>70</sup>

Clemens and Singer have produced charts with the breakdown of military and civilian deaths of the "principal international conflicts of the past two centuries...."<sup>71</sup> Their figures include:

"Soldiers killed in combat" (military deaths); "Civilians killed, plus soldiers who died from wounds, accidents or disease, (civilian deaths)."<sup>72</sup> Although some of the 19<sup>th</sup> century wars had considerable civilian deaths, in the 20<sup>th</sup> century, in virtually all of the wars included in the charts, civilian deaths outnumber military deaths even though the civilian deaths include "soldiers who died from wounds, accidents or disease." These wars included: WWI (1914-1918); the Russian Civil War and Russo-Polish War (1917-1921); Chaco (Bolivia-Paraguay, 1932-1935); WWII (1939-1945); the Franco-Vietnam War (1945-1954) and U.S.-Vietnam War (1963-1973); Arab-Israeli Wars (1948-1949, 1967, 1973); Korean War (1950-1953); Belgian Congo (1960-1965); Angolan-Portuguese and Civil War (1961-1975; 1975-1995); Iraq-Iran War (1986-1988); Iraq-

---

<sup>69</sup> Matthew White, *Statistics of Wars, Oppression and Atrocities of the Nineteenth Century* (2004).

<sup>70</sup> Walter C. Clemens, Jr. & J. David Singer, *A Historical Perspective: The Human Cost of War*, 282 *Scientific American* 56, at 57 (June 2000); Sobhi Tawil, *International Humanitarian Law and Basic Education*, 82 *Int'l Rev. of the Red Cross* 851 (2000).

<sup>71</sup> Clemens & Singer, *supra* note 70, at 56.

<sup>72</sup> *Id.* at 57.

Kuwait-U.N. War (1990-1991). In the Spanish Civil War (1936-1939); and the Bangladesh-Pakistan-India War (1971) military and civilian deaths are reported as roughly equal. In the Sino-Japanese War (1937-1941) military deaths slightly outnumber civilian deaths. Only in the Mozambique-Portuguese and Civil War (1965-1975; 1975-1995); the Soviet-Afghanistan War (1979-1989) and the Serbia-Croatia-Bosnia War (1991-1995) do military deaths outnumber civilian deaths.

Widely available overall statistics report that in World War I (1914-1918) there were 16.5 million deaths.

The total number of deaths includes 9.7 million military personnel and about 6.8 million civilians.... [T]he majority of military deaths in World War I were caused by combat as opposed to disease.<sup>73</sup>

It is important to note that the military figures include those combatants who died of war-related wounds as well as general diseases. The civilian death statistics include “about 6 million civilian deaths due to war related famine and disease....<sup>74</sup> Another widely quoted study, Necrometrics, reports 8.5 million military deaths for WWI and a broad range of civilian death figures running from 13 million to 5 million, although the report admits that some of these figures include the Russian Civil War (1917-1922) and the Armenian Genocide (1915-1922), while others do not.<sup>75</sup>

Matthew White’s Necrometrics estimate of World War II dead comes in at 65.6 million which he compiled from a large number of sources, although he gives the median estimate as 50 million.<sup>76</sup> Of these deaths he estimates roughly 19.6 military deaths and 45.9 million civilian

---

<sup>73</sup> Wikipedia, World War I Casualties: available at [http://en.wikipedia.org/wiki/World\\_War\\_I\\_casualites](http://en.wikipedia.org/wiki/World_War_I_casualites).

<sup>74</sup> Id.

<sup>75</sup> Matthew White, Necrometrics, in *The Historical Atlas of the Twentieth Century* (2003): available at: <http://necrometrics.com.20c5m.htm>.

<sup>76</sup> Id.

deaths.<sup>77</sup> Wikipedia agrees that over 60 million people were killed in World War II, acknowledging reports ranging from 50 million to 70 million. The military deaths reported range from 22 to 25 million and the civilian deaths range from 40 million to 52 million, including “13 to 20 million from war-related disease and famine.”<sup>78</sup> Wikipedia also cites a large number of studies.

The debates over the accuracy of particular statistics is often rancorous but there is universal agreement that military deaths outnumbered civilian deaths in WWI, but that civilian deaths outnumber military deaths in WWII.

Ruth Leger Sivard also supports the view of rising civilian deaths.

Increasingly, civilians are the major victims of war. In the first half of this century [20<sup>th</sup> century] they represented about 50 percent of war-related deaths. In more recent years the proportion of civilians in total deaths has been rising. Wars are now more life-threatening for non-combatants than for those fighting them. In the 1960s civilians counted for 63 percent of recorded war deaths; in the 1980s for 74 percent; and in the 1990s the rate seems to be going higher still.<sup>79</sup>

All of the above cited material includes discussion of the difficulty of compiling such statistics. Often they have slightly different terminology for inclusion in certain deaths categories. The numbers they report do differ somewhat and all of them have been subjected trenchant criticism about their statistical methodologies.<sup>80</sup> Nonetheless, it seems more than fair to conclude that since the turn of the 20<sup>th</sup> century, in nearly all wars civilian deaths have outnumbered military deaths.

---

<sup>77</sup> Id.

<sup>78</sup> Wikipedia, World War II Casualties: available at [http://en.wikipedia.org/wiki/World\\_War\\_II\\_casualites](http://en.wikipedia.org/wiki/World_War_II_casualites).

<sup>79</sup> Ruth Leger Sivard, *World Military and Social Expenditures 1996* (16<sup>th</sup> ed. 1996): available at: <http://www.ruthsivard.com.wmse96selections.html>.

<sup>80</sup> I used to think that law professors engaged in rather acrimonious debates. Having waded through a good number of the articles attacking the figures cited, I have now concluded that social scientists far outdo the lawyers on the scale of rabid debate.

### III

## The Collateral Damage Rule

### 1. Introduction

There are two proportionality rules found in the law of armed conflict: one found in the *jus ad bellum*<sup>81</sup> and the other found in the *jus in bello*.<sup>82</sup> The United Nations Charter restricts the initiation of inter-state force to two instances: 1) self-defense after suffering an armed attack;<sup>83</sup> 2) when authorized to use force by the Security Council.<sup>84</sup> In the *jus ad bellum* the proportionality rule restricts the amount of force used to that which is necessary to repel the initial illegal use of force.<sup>85</sup> The second proportional rule, also known as the collateral damage rule,<sup>86</sup> is a central operational provision of the law of the conduct of hostilities. That rule emanates from the fundamental rule of distinction between military personnel (combatants) and military objects, on the one hand, and civilians and civilian objects, on the other hand.<sup>87</sup> Civilians and civilian objects may not be attacked.<sup>88</sup> Combatants and military objects can be attacked<sup>89</sup> and for a combatant to kill an opposing combatant or destroy a military object is not a crime. Although civilians or civilian objects may end up being killed, injured or destroyed in warfare, such casualties are only permitted when the civilian destruction is incidental to an attack on a legitimate military target and

---

<sup>81</sup> The law that regulates when it is permissible to initiate armed force.

<sup>82</sup> The law that applies in armed conflict regardless of which party initiated the conflict.

<sup>83</sup> U.N. Charter, art. 51.

<sup>84</sup> *Id.* at art. 42.

<sup>85</sup> The International Court of Justice (I.C.J.) mentioned this rule of proportionality as a customary norm. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1986 1.C.J. 14 (Merits), at 94 & 103. See also Daniel Webster's correspondence relating to the *Caroline* Incident, 2 Moore, *Dig. of Int'l L.* 412 (1906). Webster wrote that for the British to justify as permissible self-defense the destruction of an American ship called the *Caroline* moored at a U.S. port, the British would need to show that they "did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." 29 *British and Foreign State Papers* 1137-1138 (1857).

<sup>86</sup> API, *supra* note 6, art. 51, para. 5(b).

<sup>87</sup> *Id.* at art. 48.

<sup>88</sup> *Id.* at art. 52, para. 1.

<sup>89</sup> *Id.* arts. 48 & 52, para. 2.

then only when the civilian casualties are not considered likely to be “excessive in relation to the concrete and direct military advantage anticipated.”<sup>90</sup> The difficulty of interpreting this rule will be covered below in section III, 3. These two proportionality rules are usually thought of as separate although it can be argued that they are related<sup>91</sup> and certainly both rules seek to restrain uses of force that might otherwise be thought permissible. This article focuses on the collateral damage rule found in the *jus in bello* in light of the changing nature of warfare and the disproportionate loss of war-related civilian lives.

## **2. A Brief History of the Collateral Damage Rule**

### **A. The Idea of Restraints on Warfare**

The idea of restraint on the methods and means of warfare finds expression in the 1868 Declaration of St. Petersburg which provides: “That the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy.”<sup>92</sup> From this principle sprang the requirements that weapons causing “superfluous injury or unnecessary suffering” are prohibited.<sup>93</sup> Certainly combatants are authorized to kill the enemy but their methods are restricted to those that enhance military advantage. Causing superfluous injury, by definition, means that the injury is greater than useful to achieving military success. Similarly, unnecessary suffering will, by definition, go beyond what is deemed sufficient to achieve military advantage.

Before the sixteenth century, war was waged not only “against States and their armies, but also against their people. As a result civilians were at the mercy of the conquerors....The notion

---

<sup>90</sup> Id. at art. 51, para. 5(b).

<sup>91</sup> Judith Gardam, Proportionality and Force in International Law, 87 *Amer. J. Int'l L.* 391, 393 ff. (1993).

<sup>92</sup> St. Petersburg Declaration Renouncing The Use, in Time of War, of Explosive Projectiles Under 400 grammes Weight, Dec. 11, 1868, 138 Consolidated Treaty Series 297 (1868-1869).

<sup>93</sup> The modern rule is contained in API, *supra* note 6, art. 35, para. 2.

that war is waged between soldiers and that the population should remain outside hostilities... became established by the eighteenth century.”<sup>94</sup> During the nineteenth century, wars were generally fought between state armies or organized armed militias. Non-combatants were relatively unaffected by the immediate consequences of warfare.<sup>95</sup> Thus the earlier examples of limits on warfare, such as the prohibition on superfluous injury and unnecessary suffering, protect combatants rather than civilians. The prohibition on the denial of quarter, that is, not permitting the enemy to surrender and be taken prisoner,<sup>96</sup> is another example of an early rule limiting the treatment of combatants derived from humanitarian purposes.

In order to protect non-combatants, the law first had to develop the definition of combatants. In other words, the law had to distinguish between those people and objects that were lawful targets and those people and objects that were not to be targeted. The principle of distinction, which is fundamental to humanitarian law, once developed, could then endorse the notion that those persons or objects that could not be targeted should, as far possible, be immune from the effects of war.

The idea of protecting certain groups from war has ancient roots. Historically, most major religions have developed doctrines defining the occasions when fighting war was justified.<sup>97</sup> Saint Augustine developed a Roman Catholic doctrine of the “just war.”<sup>98</sup> Islamic tradition also defined when the use of armed force was permissible.<sup>99</sup> Most of these traditions also exempted

---

<sup>94</sup> API, supra note 11, Commentary, Part IV: Civilian Population, Section I: General protection against effects of hostilities, paras. 1822 & 1823, available at: <http://www.icrc.org/ihl.nsf/WebPrint/470-750059-COM?OpenDocument>.

<sup>95</sup> Geoffrey Best, *Restraints on War on Land Before 1945*, in *Restraints on War: Studies in the Limitation of Armed Conflicts* 17, at 27 (Michael Howard ed., 1979).

<sup>96</sup> The modern rule is found in API, supra note 6, art. 40: “It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”

<sup>97</sup> See generally, William V. O’Brien, *The Conduct of Just and Limited War* (1981).

<sup>98</sup> See, R.A. Markus, *Saint Augustine’s Views on The “Just War,”* in *The Church and War* (W.J. Sheils ed. 1983).

<sup>99</sup> *Just War and Jihad, Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (John Kelsay & James Turner Johnson eds. 1991).

certain categories of people from the effects of war. Priests, monks and friars were considered “entitled to full security against the ravages of war....”<sup>100</sup> Suárez argued for the exemption from death of mercenary soldiers taken prisoner because they could not be expected to understand the justness of the captor’s cause.<sup>101</sup> The U.S. Supreme Court ruled in the *Paquete Habana* case that unarmed fishing vessels were exempt from capture as prize of war by customary international law binding on the U.S.<sup>102</sup> The Court also quoted the 1785 Treaty of Amity and Commerce between the U.S. and Prussia, article 23, which provided that if war broke out between the parties:

all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fisherman unarmed and inhabiting unfortified towns, villages or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed forces of the enemy into whose power, by the events of war, they may happen to fall;....<sup>103</sup>

Certain objects were also declared protected from warfare. The Catholic Church, which had used its influence to protect priests and monks, was also successful in getting church real property and chattels protected. In Shakespeare’s *Henry V*, Bardolph, one of the English soldiers, is hung for stealing a pyx from a church. Theodor Meron’s marvelous article: *Shakespeare’s Henry the Fifth and The Law of War*, gives a detailed catalogue of the protection from war provided to persons and property in Medieval Europe, including church property, agricultural tools and work animals.<sup>104</sup> Although plunder and pillage of towns and villages was condoned and

---

<sup>100</sup> James Turner Johnson, *Just War Tradition and the Restraint of War* 127 (1981).

<sup>101</sup> As cited in A. Nussbaum, *A Concise History of the Laws of Nations* 90 (1954).

<sup>102</sup> 175 U.S. 677 (1900).

<sup>103</sup> *Id.* at 690-691, citing 8 Stat. 96.

<sup>104</sup> 86 *Amer. J. Int’l L.* 1, at 21-44 (1992).

widely practiced at the time, Henry showed restraint and ordered that “there be nothing compelled from the villagers, nothing taken but paid for...”<sup>105</sup>

## **B. The Principle of Distinction**

The twentieth century saw the development of aerial bombardment, particularly in World War I. Non-combatants were exposed to the effects of war as never before.<sup>106</sup> Gradually, the disparate categories of person and objects protected from war evolved into the principle of distinction. This principle requires the parties to armed conflict to distinguish between civilians and civilians objects, on the one hand, and combatants and military objects on the other hand. Civilians and civilians objects may not be attacked. All weapons must be able to distinguish between the two categories. The principle of distinction is obviously dependent on a careful definition of who or what is counted as a combatant or military object, as opposed to who or what is counted as a civilian or civilian object. In general, combatants are members of the armed forces of a party to the conflict (except for religious and medical personnel) together with certain other persons who take a direct part in hostilities.<sup>107</sup> Military objects are defined broadly as:

those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>108</sup>

Civilians are those people who take no direct part in hostilities and are not members of the armed forces. If civilians take an active or direct part in hostilities, they lose their civilian status and the

---

<sup>105</sup> William Shakespeare, *Henry V*, act 3, scene vi, lines 112-115.

<sup>106</sup> This concern is expressed in the Commentaries to API, see Commentary, Part IV; Civilian Population, Section I: General protection against effects of hostilities, para. 1842: “In view of the development of air warfare and the increasing resort to bombardment, the situation of the population remained a cause for concern...” : available at web site, supra note 94.

<sup>107</sup> GIII, supra note 6, at art. 4 (A), paras 1 & 2.

<sup>108</sup> API, supra note 6, art. 52, para. 2.

protections that goes with it.<sup>109</sup> Civilian objects are defined as any object that is not a military object.<sup>110</sup>

Although the principle of distinction was developed in the context of inter-state warfare, it is increasingly accepted that, by custom, this distinction also applies to internal armed conflict.<sup>111</sup> Indeed, with the exception of the definition of “armed forces of a party to the conflict,” (which are covered by the ICRC Study on Customary International Humanitarian Law in rules 3 and 4) 25 of the other 28 rules found under the heading of “The Principle of Distinction” are all listed as applicable in both international armed conflict (IAC) and non-international armed conflict (NIAC). The remaining 3 rules are listed as arguable applicable in NIAC.<sup>112</sup> The rules falling under the general category of “The Principle of Distinction” include not only the generally required distinction discussed above but also the prohibition on indiscriminate attacks, the collateral damage rule, the rules on precautions in attack, and precautions against the effects of attack, and also the rules on specifically protected persons and objects.<sup>113</sup>

### **C. The Formulation of the Collateral Damage Rule**

It was always understood that although civilians and civilian objects may not be attacked, nonetheless, the nature of warfare being what it is, some civilians and civilian objects might be killed, injured or destroyed incidental to an attack on a military target. In order to afford even greater protection to civilians and civilian objects a number of other rules were developed.

---

<sup>109</sup> Id. at art 51, para. 3 art. 51, para. 3. See also Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC 2009).

<sup>110</sup> API, *supra* note 6, art. 52, para. 1.

<sup>111</sup> Jean -Marie Henckaerts & Louise Doswald-Beck, *I Customary International Humanitarian Law*, chap. 1 (ICRC & Cambridge Univ. Press 2005) [hereinafter Henckaerts].

<sup>112</sup> “Arguably” applicable is explained as: “some rules are indicated as being ‘arguably’ applicable because practice generally pointed in that direction but was less extensive.” Jean -Marie Henckaerts, *Annex to Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 ICRC No. 857, at 198-212 (2005).

<sup>113</sup> Id.

### **(i). The Prohibition on Indiscriminate Attacks**

Indiscriminate attacks are those attacks which are either not directed against combatants or military objects or are unable to distinguish between military personnel and military objects, and civilian personnel and objects. Such attacks are prohibited, as are attacks that treat as a single military objective different military objectives located in an area interspersed by concentrations of civilians, such as cities and towns.<sup>114</sup> This rule is applicable in both IAC and NIAC.<sup>115</sup>

### **(ii). Proportionality in Attack**

The *jus in bello* proportionality rule, discussed above in the introduction to section III and now codified in API, article 51(5)(b), is another rule providing broader protection to civilians and civilian objects in IAC. The weight of scholarly opinion also finds this rule applicable in NIAC.<sup>116</sup>

The rule prohibits launching an attack on a military target:

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>117</sup>

Attacks where the collateral civilian damage is expected to be excessive in relation to the concrete and direct military advantage anticipated are classified as indiscriminate attacks.<sup>118</sup>

### **(iii). Precautions in Attack**

The precautions in attack rules call upon the parties to do everything possible to minimize civilian casualties.<sup>119</sup> They must do everything feasible to verify that a target is a military target rather than a civilian or civilian object.<sup>120</sup> Parties must assess whether an attack may be expected

---

<sup>114</sup> API, supra note 6, art. 51, paras. 4 & 5.

<sup>115</sup> Henckaerts, supra note 111, at Rule 13.

<sup>116</sup> Id. at Rule 14; Prosecutor v. Kupreškić et al., IT-95-16-T (14 Jan. 2000) at para.524.

<sup>117</sup> API, supra note 6, art. 51, para. 5(b); Henckaerts, supra note 111, at Rule 14.

<sup>118</sup> API, supra note 6, art. 51, para. 5(b).

<sup>119</sup> Id. at, art. 57, para. 2(a)(i); Henckaerts, supra note 111, at Rules 15-21.

<sup>120</sup> API, supra note 6, art. 57, para. 2(a)(i).

to cause incidental death or injury to civilians or damage to civilian objects which would be excessive in relation to concrete and direct military advantage anticipated. If it is discovered that the target is not a legitimate military target or civilian injury, death, or damage would be excessive, the attack must be canceled or suspended.<sup>121</sup> Where any civilian loss or damage is expected, advance warning must be given<sup>122</sup> and when there is a choice of targets, the target likely to cause the least civilian loss or damage must be selected.<sup>123</sup>

#### **(iv). Precautions Against The Effects of Attacks**

The precautions against the effects of attacks rules require parties to conflict to protect civilians and civilian objects from the dangers of military operations. They must try to remove civilians and civilian objects from the area where military targets are located. Similarly, a party's military objects must not be located in densely populated areas.<sup>124</sup>

### **3. Criticisms of, and Problems With, the Collateral Damage Rule**

Ever since the collateral damage rule was articulated it has been subject to a variety of criticism. Problems with how to weigh expected civilians casualties or civilian damage against anticipated concrete and direct military advantage were perhaps predictable. Professor Gary Solis sums up the dilemma starkly: “On the battlefield, how is a commander to balance human life against the destruction of an enemy target? How can human lives be compared to ‘things’? That is the terrible and impossible problem of proportionality.”<sup>125</sup> Questions about how to assess “excessive” civilian damage were quickly posed and difficulties about whether the assessment of military advantage should relate to one attack, a series of attacks, or a whole campaign were

---

<sup>121</sup> Id. at art. 57, paras. 2(a)(iii) & 57 (b).

<sup>122</sup> Id. at art. 57, para. 2(c).

<sup>123</sup> Id. at art. 57, para. 3.

<sup>124</sup> Id. at art 58; Henckaerts, *supra* note 111, at Rules 22-24.

<sup>125</sup> Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* 273 (2010) [hereinafter Solis].

debated. The Commentaries to API try to tackle some of these issues but with commendable honesty confess that the text “is not always as clear as one might have wished, . . .”<sup>126</sup> They add, perhaps as an excuse, that “it seemed necessary to leave some margin of appreciation to those who have to apply the rules. Thus their [the rules’] effectiveness will depend to a large extent on the good faith of the belligerents and on their wish to conform to the requirements of humanity.”<sup>127</sup> Good faith, of course, is required in the interpretation and performance of all treaties<sup>128</sup> but if the terms of the treaty leave open a variety of possible interpretations, good faith will not ensure uniform application. Again with respect to putting these provisions into practice, the Commentaries call for “complete good faith on the part of the belligerents, as well as the desire to conform with the general principle of respect for the civilian population.”<sup>129</sup>

Some issues are resolved by the Commentaries. To the suggestion that API, article 51, paragraph 5 (b) might authorize any type of attack provided civilian losses were not excessive in relation to military advantage, the Commentaries boldly state: “This theory is manifestly incorrect.”<sup>130</sup> It is pointed out that “the attack must be directed against a military objective with means that are not disproportionate in relation to the objective. . . .”<sup>131</sup> In other situations, the Commentaries acknowledge more ambiguity. On the issues of weighing civilian losses against military advantage, there are admitted problems:

of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room

---

<sup>126</sup> Commentary, Part IV: Civilian Population, Section I; General protection against effects of hostilities, para. 1835, available at <http://www.icrc.org/ihl.nsf/WebPrint?470-750059-COM?Open Document>.

<sup>127</sup> Id.

<sup>128</sup> Vienna Convention on the Law of Treaties, arts. 31 & 26, 1155 U.N.T.S. 331, signed 23 May 1969, entered into force 27 Jan. 1980.

<sup>129</sup> Commentaries, supra note 126, at para. 1978.

<sup>130</sup> Id. at para. 1979.

<sup>131</sup> Id.

for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail....<sup>132</sup>

This comment does not exactly tell us what are “excessive” civilian losses but it does give some guidance in some situations. William Fenrick’s excellent article reviewing the development of Protocol I’s articles on proportionality concludes that attacks where the evidence makes it clear that they were directed against civilians are clearly excessive, “but how much higher the standard is to be drawn is unclear...”<sup>133</sup> Leslie Green also concludes that: “there is no definition as to what is ‘excessive’ ....”<sup>134</sup>

The question of whether military advantage should be weighed against civilian damage for each individual attack or on a cumulative basis of many attacks, or perhaps a whole campaign, has spawned different answers. Professor Farrer argues that using the cumulative approach could have dire consequences for civilians.<sup>135</sup> Professor Gardam thinks that the word “concrete and direct” military advantage indicates “that the Protocol requires that proportionality be assessed in relation to each individual attack, rather than on a cumulative basis.”<sup>136</sup> Professor Dinstein generally concludes that proportionality “has to be calculated in relation to a given attack, rather than on an ongoing cumulative footing....”<sup>137</sup> However, he cautions that: “If an extensive air campaign is undertaken, it would be mistaken to focus on the outcome of an isolated sortie.”<sup>138</sup> The Statute of the International Criminal Court in its list of war crimes requires that the intentional launching of an attack must be done in the knowledge that the likely collateral civilian damage will be “*clearly*

---

<sup>132</sup> Id.

<sup>133</sup> William J. Fenrick, Canadian Forces, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 Mil. L. Rev. 91-127, 102 (Fall 1982).

<sup>134</sup> Leslie C. Green, The Contemporary Law of Armed Conflict 391 (3d ed. 2008): Green continues: “the decision must be made in accordance with reasonable assessments and expectations....” Id.

<sup>135</sup> Tom Farrer, The Laws of War 25 Years After Nuremberg, Int’l Conciliation (May 1971) at 16-17.

<sup>136</sup> Judith Gardam, Proportionality and Force in International Law, 87 Amer. J. Int’l L. 375, 407 (1993).

<sup>137</sup> Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 123 (2004) [hereinafter Dinstein].

<sup>138</sup> Id.

excessive in relation to the concrete and direct *overall* military advantage anticipated;...” (emphasis supplied).<sup>139</sup> The assessment in light of *overall* military advantage would seem to require a broader scope than simply one individual attack. Leslie Green seems to propose that either a limited campaign or the overall war effort can be an acceptable mode of assessment:

the definition whether an objective is legitimate or not, depends upon the contribution an attack upon that object will make to ultimate victory [i.e. the entire war effort] or the success of the operation of which the attack is part [i.e. the particular campaign within the wider war].<sup>140</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY) has tackled the issue of whether the single or cumulative attack approach to proportionality is appropriate. In *Prosecutor v. Kupreškić et al.*, the Tribunal engaged in a general discussion of the protection of civilians in armed conflict recognizing that “deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.”<sup>141</sup> It nonetheless mentioned three exceptions to this general proscription including unavoidable “collateral damage to civilians...”<sup>142</sup> The Tribunal discussed the principle of proportionality and the Martens Clause<sup>143</sup> which requires the application of “principles of humanity” and the “dictates of public conscience” in cases not covered by treaties or, as the Tribunal states, “when interpreting and applying loose international rules...”<sup>144</sup> Weaving together the proportionality rule and the Martens Clause, the Tribunal considered whether a group of individual attacks that might each meet the proportionality

---

<sup>139</sup> Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, adopted 17 July 1998, entered into force 1 July 2002, at art. 8, para. 2(b)(iv).

<sup>140</sup> Leslie C. Green, *The Contemporary Law of Armed Conflict* 391 (3d ed. 2008).

<sup>141</sup> IT-95-16-T (14 Jan. 2000) at para. 521.

<sup>142</sup> *Id.* at para. 522.

<sup>143</sup> The Martens Clause was first included in the 1899 Preamble to Hague Convention II with Respect to the Laws and Customs of War on Land (available at: <http://icrc.org/ihl.nsf/FULL/150?OpenDocument>) and now appears in all four Geneva Conventions and in API and APII with slightly varying language. GI, supra note 6, art. 63; GII, supra note 6, art. 62; GIII, supra note 6, art. 142; GIV, supra note 6, art. 158; API, supra note 6, art. 1, para. 2; APII, supra note 1, preamb.

<sup>144</sup> *Prosecutor v. Kupreškić et al.*, supra note 141, at paras. 524 & 525.

requirements, might nevertheless be found violative of the laws of armed conflict when looked at cumulatively:

As an example of the way in which the Martens Clause may be utilised, regard 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 [of API] (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within 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>145</sup>

The Tribunal's discussion in *Kupreškić* might well lead any military commander with authority over a broad geographic area of conflict to understand that having commanders of individual attacks engage in proportionality assessments for each attack might relieve those commanders of criminal responsibility (unless they knew or should have known of the likely effects of the overall campaign) but might not protect the commander of the overall campaign.

Yet another proportionality issue has proved troublesome. Since the rule calls for balancing civilian damage against military advantage, naturally enough people have asked what happens to this balancing when it is agreed that eliminating a particular military object or combatant has an extremely high value and would result in considerable military advantage even though many civilians may have to be killed in the process. In other words, are more civilian deaths, injury or damage permitted because the high value target is perceived to increase the military advantage? Dinstein accepts that the higher the military value the target holds (necessarily a subjective judgment), the higher the acceptable number of civilian losses:

---

<sup>145</sup> Id. at para. 526.

Even extensive civilian casualties may be acceptable, if they are not excessive in light of the concrete and direct military advantage anticipated. The bombing of an important army or naval installation (like a naval shipyard) where there are hundreds or even thousands of civilian employees need not be abandoned merely because of the risk to those civilians.<sup>146</sup>

Solis gives several hypothetical and real examples illustrating the problem of the changing ratio of civilian deaths when compared with military advantage. He asks

how many noncombatant lives would be acceptable forfeit for the targeting and killing of Saddam Hussein and his two sons, the three of whom were legitimate and military targets? Would the anticipated direct military advantage gained by their deaths, while the international armed conflict was still in progress, mitigate the deaths of ten civilians? Twenty? A hundred?<sup>147</sup>

In April 2003, U.S. forces dropped four satellite-guided bombs on a Baghdad restaurant, killing at least twelve civilians, because they had been incorrectly informed that Saddam and his sons were at the location. Was the attack disproportional? The May 1, 2011 killing of the Al Qaeda leader, Osama bin Laden was apparently accomplished by storming the compound where he lived in Abbotabad, Pakistan, with only four other deaths of people who lived in the compound who may, or may not, have been entitled to civilian status.<sup>148</sup> Suppose instead that reliable information had finally tracked bin Laden to the compound and U.S. forces had decided to bomb the compound killing bin Laden but also killing fifty civilians, injuring sixty more and razing twenty houses in the adjacent area. Would such an attack be disproportional? Solis, apparently admitting the insolubility of the ratio calculation, comments: “Such calculations are one of the burdens of high military command.”<sup>149</sup>

---

<sup>146</sup> Dinstein, *supra* note 137, at 121.

<sup>147</sup> Solis, *supra* note 125, at 278.

<sup>148</sup> Those dead were reported as one of bin Laden’s sons, two of his brothers, and one of his wives. Scott Wilson, Craig Whitlock & William Brangigin, *The Washington Post*, May 2, 2011, at 1. Some members of bin Laden’s family have suggested he was not permitted to surrender even though he was unarmed. Raffi Khatchadouria, *Bin Laden: The Rules of Engagement*, *The New Yorker*, online only, May 4, 2011 available at:

<http://www.newyorker.com/online/blogs/newsdesk/2011/05/bin-laden-the-rules-of-engagement.html>

<sup>149</sup> Solis, *supra* note 125, at 280.

In some recent wars, the outrage produced by any civilian deaths has been so great that civilian and military commanders have used rules of engagement that are considerably stricter than required by proportionality. Before the internet, cell and I-phones, and the ever growing battery of social media communication systems, the only people that would be likely to know what happened in a particular attack or campaign in a remote area would be the people directly involved. Even in populated areas, the number of people with knowledge of the event would likely be very limited. That has now changed fundamentally. First, it seems as if almost no act, however small and possibly insignificant, takes place outside the range of some recording system. As soon as there is an explosion, riot or weapon discharge, photographs and sound track will rapidly find their way onto all sorts of media outlets and soon the whole world can view the event. This phenomenon allows civil society to express its views as never before. The death of one civilian can mobilize thousands. During the U.S. invasion of Iraq in 2003, civilian deaths were antagonizing the Iraqi population to such an extent that Secretary of Defense, Donald Rumsfeld, required that any attack where it was estimated that thirty or more civilians might be killed had to be approved by him personally.<sup>150</sup>

More recently, civilian deaths in Afghanistan have been viewed as so antithetical to the overall military mission that the Rules of Engagement (ROE) have severely limited attacks where any civilian deaths are expected.<sup>151</sup> Colonel Clay Hall, who has served in both Iraq and

---

<sup>150</sup> Michael R. Gordon & Bernard E. Trainor, *Cobra II* 110 (2006).

<sup>151</sup> The Rules of Engagement for troops in Afghanistan are classified but were widely reported as put in place by General Stanley McCrystal in 2009 and were aimed at limiting civilian casualties. Some military factions complained about the ROEs which they claimed “have effectively forced the troops to fight with one hand tied behind their backs.” FoxNews.com, June 25, 2010: <http://www.foxnews.com/politics/2010/06/25/petraeus-afghanistan-rules-engagement-source-says/> These ROEs were apparently again revised in Feb. 2010 to further limit tactical warfare. Sarah Holewinski & James Morin, *Afghanistan War: New Rules of Engagement Don't Pit Civilians vs. Soldiers*, The Christian Science Monitor, Mar. 10, 2010: available at: <http://www.csmonitor.com/Commentary/Opinion/2010/0310/Afghan-int-don-t-pit-civilians-vs.-soldiers>

Afghanistan is reported to have stated that once the goal is articulated as stabilizing the country “it’s pretty hard to do that when you’re dropping bombs on innocent people.”<sup>152</sup>

A recent United Nations report states that civilian deaths and injuries in Afghanistan rose by fifteen per cent from 2009 to 2010.<sup>153</sup> The figures are revealing. “There were 2,777 conflict-related civilian deaths in 2010....”<sup>154</sup> Of course, pro-government forces are<sup>155</sup> only responsible for a limited proportion of such deaths and injuries and it is estimated that the proportion of civilians killed by the pro-government forces, has in fact declined from twenty-six per cent in 2009, to sixteen percent in 2010.<sup>156</sup> The UN Report, which was issued in March 2011, concludes that the number of civilian deaths has risen from 1,523 in 2007 to 2,777 in 2010. In 2010, anti-government elements<sup>157</sup> were estimated to be responsible for 2,080 of the civilian deaths, progovernment forces were responsible for 440 deaths, with 257 deaths being unattributable to any faction.<sup>158</sup>

There has been much written about the suggestion that collateral damage is reduced through the use of precision weapons, particularly unmanned drones.<sup>159</sup> The legality of drone

---

<sup>152</sup> Anna Mulrine, How Afghanistan Civilian Deaths Have Changed the Way the US Military Fights, *The Christian Science Monitor*, June 27, 2011, available at: <http://csmonitor.com/USA/Military/2011/0727/How-Afghanistan-civilian-deaths-have-changed-the-way-the-US-military-fights>.

<sup>153</sup> Afghanistan: Annual Report 2010: Protection of Civilians in Armed Conflict, UN Assistance Mission and The Afghanistan Independent Human Rights Commission, available at: <http://unana.unmissions.org/Portals/UNAMA/human%20rights/March%20PoC%20Annual%20Report%20Final.pdf>.

<sup>154</sup> UN News Centre, 9 Mar. 2011: available at: <http://www.un.org/apps/news/story.asp?NewsID=37715&Cr=Afghan&Cr1>; and id. at 57.

<sup>155</sup> Id. The UN Report’s Glossary classifies as Pro-Government Forces (PGF) the following: “Afghan Government Forces. All forces that act in all military or paramilitary counter-insurgency operations and are directly or indirectly under the control of the Government of Afghanistan. These forces include, but are not limited to, the ANA [Afghan National Army], ANP [Afghan National Police], the Afghan Border Police (ABP) and the NDS [National Directorate of Security, Afghanistan’s state intelligence service].”

<sup>156</sup> Id. at 57.

<sup>157</sup> Id.

<sup>158</sup> The UN Report’s Glossary classifies as Anti-Government Elements (AGE) the following: “all individuals and armed groups involved in armed conflict against the Government of Afghanistan and/or international military forces. They include those who identify as ‘Taliban’ as well as individuals and groups motivated by a range of objectives and assuming a variety of labels including the Haqqani Network, Hezb-e-Islami and al-Qaida affiliates such as the Islamic Movement of Uzbekistan, Islamic Jihad Union, Lashkari Tayyiba and Jaysh Muhammad.”

<sup>159</sup> Jane Mayer, *The Predator War*, *The New Yorker*, Oct. 26, 2009, available at: [http://newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

attacks, sometimes operated by non-military personnel, in countries that may not have given permission for such attacks, and that target specific people, is beyond the scope of this article.<sup>160</sup> However, I would note that the accuracy of the minimal civilian damage resulting from such attacks has been challenged<sup>161</sup> and, in any event, the overall statistics for civilian deaths and injury generally remain disproportionate to military deaths and injury, even in wars that employ such weapons.

#### **4. Does the Collateral Damage Rule Require a Direct Causal Link from Military Attack to Civilian Death or Damage to Violate the Rule?**

Causation is a slippery concept that has tested philosophers and scientist for centuries. This article does not intend, nor does it wish, to enter into debate about the complex meaning of causation in various contexts. In general, if one action brings about a result or effect that would not otherwise have occurred, then the result or effect is said to have been caused by the earlier action. It is recognized that some effects or results are “directly” caused by the earlier event and that some effects or results come about by a combination of factors so that the earlier event may be said to be only an “indirect” cause of the later results. This general understanding of causation is quite sufficient for the discussion of causation in relation to the collateral damage rule largely because civilian loss and damage only needs to be “incidental” to the attack on the military target to fall within the ambit of the rule.

---

<sup>160</sup> Mary Ellen O’Connell, *Unlawful Killing with Combat Drones*, in *Shooting To Kill: The Law Governing Lethal Force in Context* (Simon Bronitt ed. 2011); Charles Savage, *U.N. Official Asks U.S. to End C.I.A. Drone Strikes*, N.Y. Times May 28, 2010, at A8; Alston says Drone Attacks on Pakistan-Afghanistan Border May Violate International Law, NYU School of Law News, posted Oct. 30, 2009: available at: [http://www.law.nyu.edu/news/ALSTON\\_UN\\_GENERALASSEMBLY](http://www.law.nyu.edu/news/ALSTON_UN_GENERALASSEMBLY).

<sup>161</sup> Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. Times, Aug. 11, 2011, at A1; Azm Hassan Wisma Putra, *Drones in Libya Means More Collateral Damages*, The GeoStrategist, April 22, 2011: available at: <http://geostrategist.wordpress.com/2011/04/22/drones-in-libya-means-more-collateral-damage/>

Most of the war casualty figures, cited in section II, 3, above, include military deaths and civilian deaths occurring as a direct result of combat.<sup>162</sup> Some of the figures include other forms of both military deaths, such as from disease,<sup>163</sup> and civilian deaths, such as from general violence, social disruption or famine associated with war.<sup>164</sup> An argument may well be made that the military cannot be held responsible for all the civilian deaths, injury and damage that may result from the general consequences of war and that the laws of war do not ascribe culpability to the military for such overall civilian losses. The statistics that compile battle-deaths for civilians, clearly intend to imply that the civilian deaths and damage was caused directly by combat. The figures that relate to deaths caused by disease, famine and general disruption are also clearly in the camp of those who see these deaths and destruction as emanating from military engagements. When considering inter-state wars, in which only armed forces of opposing states are involved, it is easier to pin-point the civilian death and destruction as resulting from military attacks. When dealing with intra-state wars, particularly where there are several armed factions fighting, it may be difficult to decide which armed faction caused the particular civilian destruction, but it will still be the case that the fighting has led to the civilian devastation.<sup>165</sup> We may thus conclude, from all of the statistics, that the civilian deaths and destruction have come about as a result of the war. Some deaths come immediately as a result of battle. Some come later, such as death from diseases arising from battle injuries, and some take even longer to develop, such as widespread famine caused by the general societal disruption in the wake of war. In a general sense then, all of these statistics indicate that the civilian deaths, injuries and damage have been caused by war.

---

<sup>162</sup> See text at note 46, *supra*.

<sup>163</sup> See text at notes 70-72, *supra*.

<sup>164</sup> See text at notes 49-50, *supra*.

<sup>165</sup> There are studies that demonstrate that overall societal violence rises during war, leading to some civilian death, injury and damage. These death statistics are not generally included in war-deaths statistics.

One interesting aspect of the collateral damage rule is that it does not prohibit direct targeting of civilians. That is prohibited by API, article 51, paragraph 2. What the rule prohibits in connection with attacks on military targets is “incidental loss of civilian life, injury to civilian objects, or a combination thereof...” when such losses are expected to be excessive in relation to anticipated concrete and direct military advantage. API, article, paragraph 5(b). The word “incidental” is significant but is not addressed, as such, by the Commentaries. What do we understand from the word “incidental” when applied to “loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof...” which might be expected to result from a legitimate attack on a military target?

Dictionaries, prosaic though they are, may prove useful in aiding our understanding of the word “incidental.” The Oxford English Dictionary has this entry for “incidental”:

- a. Occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual.<sup>166</sup>

The American Heritage Dictionary of The English Language has this definition of “incidental”:

1. Occurring or likely to occur as an unpredictable or minor accompaniment....
2. Of a minor, casual, or subordinate nature....<sup>167</sup>

Collins English Dictionary has three relevant definitions of “incidental”:

1. happening in connection with or resulting from something more important; casual or fortuitous
2. ... found in connection (with); related (to)
3. ... caused (by).<sup>168</sup>

The Merriam-Webster Dictionary’s entry for “incidental” has two entries:

1. a: being likely to ensue as a chance or minor consequence....

---

<sup>166</sup> OED Online (2011): available at: <http://www.oed.com/view/Entry/93467?redirectFrom=incidental>.

<sup>167</sup> The American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000, updated 2009): available at: <http://www.thefreedictionary.com/incidental>.

<sup>168</sup> Collins English Dictionary – Complete and Unabridged (2003): available at: <http://www.thefreedictionary.com/incidental>.

2. occurring merely by chance or without intention or calculation.

This dictionary also list synonyms for “incidental”:

Synonyms: casual, chance, fluky (*also* fluke), fortuitous, inadvertent, unintentional, unplanned, unpremeditated, unwitting.<sup>169</sup>

It is worth noting that none of the above definitions of “incidental” indicates direct causation from one event to the next, with one exception, that being the third definition given by the Collins English Dictionary. From this we may confidently conclude that the overwhelming consensus on the definition of “incidental” is that although it follows after an earlier event (military attack) or is associated with such an event, there is no requirement that the civilian death or damage “incidental” to the military attack must be caused directly by the military attack to be prohibited. Rather, any civilian death, injury or damage that is “associated with”; “likely to ensue” from; “likely to happen as a result of or in connection with”; “related” to a military attack falls within the scope of collateral damage rule. All of the civilian death, injury and damage statistics quoted in section II, 3, C, certainly fall within the definition of occurring as “incidental” to military attacks. In any war, therefore, where the ratio of civilian to military deaths is at least equal, such consequences are surely excessive given the Commentaries clear understanding that: “Incidental losses and damage should never be extensive”<sup>170</sup> no matter what the military advantage might be.

## **5. Conclusion on the Protection Afforded to Civilians by the Collateral Damage Rule**

Despite the many interpretational and operational problems with the collateral damage rule there is little doubt that it is meant to, and does, provide protection from military attack on civilians beyond what is required by the basic rule of discrimination and the prohibition on targeting civilians or civilian objects in a context where military and civilian targets are inter-meshed.

---

<sup>169</sup> Merriam-Webster Dictionary (2011): available at: <http://www.merriam-webster.com/dictionary/incidental>.

<sup>170</sup> Commentaries, *supra* note 126, at para. 1980, and text at note 175 *infra*.

Nonetheless, in an era when civilian war-related deaths are recorded as disproportionate to military deaths,<sup>171</sup> the continuing validity of the rule demands further examination. Even in an era when high precision weapons<sup>172</sup> may in some instances, reduce civilian collateral damage, the overall civilian toll from warfare belies the notion that civilian war-related deaths, or injuries are simply incidental to, or collateral to, legitimate military deaths.

## IV

### **The Regulatory Effect of the Collateral Damage Rule in Light of Its Overall Failed Purpose**

#### **1. Introduction**

This article has examined the collateral damage rule in light of the changing nature of warfare and the shifting ratios of military to civilian war-related deaths. If the overall purpose of the collateral damage rule is to protect civilians from attack in circumstances where some civilian damage may be expected, the rule does not seem to be working very well. This section will examine the purpose of the collateral damage rule viewed both narrowly and broadly. It will then ask the general question: What happens to legal rules that cannot effectuate their overall purposes, and it will finally make some suggestions about what should happen to the collateral damage rule.

#### **2. The Purposes of the Collateral Damage Rule Viewed Narrowly and Broadly**

The overall title to API, article 51 is “Protection of the Civilian Population.” Civilians are stated to “enjoy general protection against the dangers arising from military operations.” (Article 51, paragraph 1). The rules that follow in the various succeeding paragraphs are designed “to give effect to this protection....” Civilians may not be the object of an attack (paragraph 2) and

---

<sup>171</sup> See section II, 3, C, 2, & 3, B, *supra*.

<sup>172</sup> See, e.g., Scott Shane, C.I.A. Is Disputed on Civilian Toll in Drone Strikes, *N.Y. Times*, Aug. 11, 2011, at A1.

indiscriminate attacks are prohibited (paragraph 4). Various types of indiscriminate attacks are described, including those that violate the collateral damage rule. 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” is prohibited as indiscriminate. (Article 51, paragraph 5(b)).

The official Commentaries to article 51, paragraph 5(b) have already been mentioned<sup>173</sup> but it is worth adding that when it was suggested that “very high, civilian losses and damages might be justified if the military advantage at stake is of great importance,”<sup>174</sup> the immediate response was quite clear that such a view was not correct:

This idea is contrary to the fundamental rule of the Protocol; in particular it conflicts with Article 48 ‘(Basic Rule)’ [principle of distinction] and with paragraphs 1 and 2 of the present Article 51 [general protection for civilians from dangers of military operations and prohibition on attacking civilians and on acts of violence to spread terror among civilians]. **The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.**<sup>175</sup> (Emphasis supplied).

Dinstein accuses some commentators of “confus[ing] the term ‘excessive’ with ‘extensive’”<sup>176</sup> and cites Claude Pilloud’s and Jean Pictet’s, Commentary on the Additional Protocols.<sup>177</sup> Dinstein calls this “a misreading of the text.”<sup>178</sup> He concludes that: “Even extensive civilian casualties may be acceptable, if they are not excessive in light of the concrete and direct military advantage anticipated.”<sup>179</sup> While Dinstein is correct that the text of API, article 51, paragraph 5(b) uses the term “excessive”, Pilloud and Pictet were quite well aware of the language

---

<sup>173</sup> See note 126, supra.

<sup>174</sup> Id. at para. 1980.

<sup>175</sup> Id.

<sup>176</sup> Dinstein, supra note 137, at 120.

<sup>177</sup> C. Pilloud & Jean Pictet, Article 51 – Protection of the Civilian Population, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC 1987) at 626.

<sup>178</sup> Dinstein, supra note 137, at 121.

<sup>179</sup> Id.

of the text but were making the point quoted above, namely, that even if the military advantage might be great, *extensive* civilian casualties are never justified and always considered *excessive*.

Certainly, some civilian death and damage is permissible under the rule, but it was quite clear that the application of the collateral damage rule was never expected to result in ratios where civilian deaths outnumber military deaths or even where civilian and military deaths are equal. Civilian damage that could be predicted to outweigh military damage, sometimes by several multiples, was intended to be beyond the scope of permissible military activity.

Area bombardment where distinct military objects are located among concentrations of civilians and civilian objects is prohibited by API, article 51, paragraph 5(b). The Commentary on this sub-paragraph makes specific reference to “carpet bombing or saturation bombing.”<sup>180</sup> It also noted that there were many examples of such bombing in WWII and that they were characterized by “destroy[ing] all life in a specific area and raz[ing] to the ground all buildings situated there.”<sup>181</sup> The collateral damage rule, operating in concert with other protections of civilians found in this section of API, made such activity illegal.

The collateral damage rule, even if interpreted narrowly as only addressing each particular attack,<sup>182</sup> never meant to permit extensive civilian damage even if the military advantage was great. Particular attacks where the civilian damage is not extensive and the military advantage is concrete and direct might meet the rule’s requirements, but if the overall campaign, or the war itself, results in extensive civilian death, injury and damage, the collateral damage rule will have been violated. The narrow object of the rule is to protect civilians open to injury as part of an

---

<sup>180</sup> Id. at para. 1968.

<sup>181</sup> Id.

<sup>182</sup> But see, text at notes 138-140 *supra*, that tend to reject this approach.

attack on a military target. The broad object of the rule was to ensure that wars did not result in extensive civilian deaths and damage. Where wars result in extensive civilian deaths, injuries, and damage, which they almost always do, the collateral damage rule will have been violated many times.

### **3. The Fate of Legal Rules That Cannot Fulfill Their Overall Purposes**

What happens to legal rules that are frequently violated and perceived as unable to fulfill their purposes? All law faces the problem of inefficacy and there is a wide range of topics and eras where we might look for solutions. A few random examples will set the stage for thinking about approaches to this dilemma. Sometimes, in the criminal law area, statutes remain on the books but are simply never enforced. Fornication, even between consenting adults, remains an offense in many developed states but one looks in vain for its prosecution except in theocratic states. In these cases we speak of the law falling into desuetude. Eventually, its gets removed from the statute books. Sometimes a rule is seen as both ineffective and encouraging other undesired consequences. In the U.S., before 1973, abortion was prohibited. Performing or submitting to an abortion was a criminal offense except in certain instances to save the mother's life. When the U.S. Supreme Court ruled in *Roe v. Wade*<sup>183</sup> that abortions could not be prohibited prior to roughly the last trimester of pregnancy, it did so for a number of reasons. Principally, it ruled that the mother's Constitutionally protected right to privacy trumped any right to future life that the non-viable fetus might be thought to possess. Other considerations were also persuasive. Evidence was presented to the Court showing "high mortality rates at illegal 'abortion mills'...."<sup>184</sup> It was clear that the prohibition of abortion was not working and that it was bringing in its wake the

---

<sup>183</sup> 410 U.S. 113 (1973).

<sup>184</sup> *Id.* at 150.

unintended consequences of killing a large number of women every year. As a result, abortion prior to the final trimester of pregnancy is now usually permitted but must be carried out in regulated medical establishments.

In the area of treaty law, until recently, virtually every U.S. extradition treaty contained a political offense exception which basically stated that a fugitive from justice would not be extradited for political offenses. The classic definition of the political offense is that a person has engaged in a crime in the course of trying to overthrow an existing government and put another government in its place. Such crimes could include killing police officers or blowing up army barracks and a whole variety of other violent crimes against the state. When it was pointed out that the U.S. almost never entered into extradition treaties with other states unless the states shared roughly the same political values as the U.S., refusing to extradite someone who had tried to overthrow a government that basically had the same political system and values as the U.S. was seen as foolish. As a result, over the last thirty years, the U.S. has been systematically dropping the political offense exception clause from most of its extradition treaties.

In the area of weapons conventions there are two cardinal rules. First, the weapon must be able to distinguish between military personnel and objects, on the one hand, and civilian personnel and objects, on the other hand.<sup>185</sup> Second, the weapon must never cause unnecessary suffering to combatants or anyone else.<sup>186</sup> Where a weapon is shown to violate one, or both, of these cardinal rules, the international community will draft a treaty and the weapon will be banned.<sup>187</sup>

---

<sup>185</sup> The principle of distinction: API, supra note 6, at art. 48. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at 257, para. 78 (July 8).

<sup>186</sup> API, supra note 6, at art. 35, para. 2.

<sup>187</sup> See list of such conventions at the ICRC Document Database, available at: <http://icrc.org/ihl.nsf/INTRO?OpenView>.

Applying any of the solutions listed above to the collateral damage rule, however, would not solve the problem. If we left the rule as it is in the Protocol but never expected it to curb military action or to be enforced (like prohibitions on fornication), we would essentially be condoning the widespread death of civilians in the wake of war. If we struck the rule down (as with the prohibition on abortion) we would be left with the principle of distinction, but without the greater protection intended by the collateral damage rule. Such a solution would likely result in greater levels of civilian damage. Similarly, trying to dismantle part of the overall legal scheme deemed to have adverse consequences (like removing the political offense exception in extradition treaties) would not work because it is not the collateral damage rule that is causing the adverse consequences, namely the large numbers of civilian casualties. Although banning the entity or action that causes the adverse consequences, that is banning military units or military attacks (like banning particular weapons) would be effective in reducing civilian casualties, one only has to articulate such a solution to know that it would be generally unacceptable.

## V

### **Conclusion: A Few Modest Suggestions to Assist the Fulfillment of the Collateral Damage Rule**

Because of the changing nature of warfare, this article has argued that extensive civilian death and damage now, almost always, results from warfare, in violation of the collateral damage rule. The current nature of warfare, therefore, makes the violation of the collateral damage rule inevitable in all but isolated examples of war. Armed forces are sent to war to destroy the enemy's armed forces (in international armed conflict) or destroy government forces or rebel forces (in internal armed conflict). They are not sent to kill civilians except when civilians die or are injured incidental to a legitimate attack on a military target. What happens, however, is that the military

activity results, in practically all cases, with at least as many civilians dying and suffering injury as military personnel. Often the civilian casualties outweigh military casualties.

If we simply removed the collateral damage rule while leaving, as part of the laws of war, the prohibition on directly targeting civilians, two possible results might ensue. Either any amount of civilian collateral damage would be permissible so long as somehow attached to an initial attack on a legitimate target, or no amount, or possibly only very limited amounts, of civilian damage would be tolerated. Obviously to permit widespread and extensive civilian damage that was somehow tangentially connected to a legitimate attack on military personnel or military objects would fly in the face of the long struggle to protect civilians from the effects of warfare. Indeed, it would in large measure give the green light to carpet bombing whole cities and towns with weapons of mass destruction. That way lies chaos. Similarly, ruling that no amount of civilian damage will ever be tolerated and all attacks that result in any civilian losses will constitute a violation of the laws of war seems unrealistic and draconian as long as we allow wars and send out armies with instructions to kill enemy combatants.

First, we need to acknowledge we have a problem. Despite the principle of distinction and the collateral damage rule, civilians are just as likely, or often more likely, to die in war as military personnel. Next, we need to make clear how much civilian damage is, or is not, tolerated for attacks, campaigns and overall wars. Because of instant media reports on civilian death and damage, we seem to be moving in the direction of requiring even further restrictions on civilian losses. We know from the results of the recent ROEs in Afghanistan, that commanders can reduce significantly civilian deaths. Fashioning language to accomplish this will not be easy and gaining international agreement will take time.

Another concurrent step we need is a clear rule requiring states and other organized fighting groups to keep body counts of civilians dead and injured together with inventories of civilian damage. These figures should be kept both for injuries to the state's (or fighting group's) own civilian personnel and objects and also for the adversary's civilian population and civilian structures. The figures should be made public. The ICRC, or another impartial body with sufficient expertise, should also be charged with compiling similar civilian damage counts and publically reporting the figures.

It is widely agreed that three of the four Geneva Conventions of 1949 require states to record details of *military* personnel who die, are wounded, captured or missing in armed conflict.<sup>188</sup> The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War simply requires that: "As far as military consideration allow, each Party to the conflict shall facilitate the steps taken to search for the [civilians] killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment."<sup>189</sup>

Additional Protocol I does have more detailed provisions for searching for, and recovering, the bodies of civilians killed in conflict.<sup>190</sup> This Protocol currently has 171 parties, not including the United States. Additional Protocol II has a general provision requiring searching for and collecting the dead and wounded "[w]hen circumstances permit...."<sup>191</sup> This Protocol currently has 166 parties, again not including the United States. Obviously, the Geneva Conventions and Protocols have gaps in requiring the recording of all civilians deaths and injuries in armed conflict.

---

<sup>188</sup> GI, supra note 6, arts. 15, 16 & 17; GII, supra note 6, arts. 18, 19, 20 & 21; GIII, supra note 6, arts. 120 & 121.

<sup>189</sup> GIV, supra note 6, art. 16.

<sup>190</sup> API, supra note 6, arts. 33 & 34.

<sup>191</sup> APII, supra note 1, art 8.

In June 2011, Susan Breau and Rachel Joyce published a paper concluding that there already exists “an international legal obligation to record the civilian casualties of armed conflict...”<sup>192</sup> The authors reach this conclusion by drawing on a broad range of international documents. This paper has been published as part of a larger effort “to build the political will to record details of every single victim of armed conflict worldwide.”<sup>193</sup> In September of 2011, The Oxford Research Group launched the *Charter for the Recognition of Every Casualty of Armed Violence*<sup>194</sup> which sets out legal requirements for the recording of every casualty of conflict throughout the world. This is a bold and courageous step which may, one day, bring us closer to realizing the fulfillment of the principle of distinction and the collateral damage rule which at the moment, is more often breached than observed.

---

<sup>192</sup> Susan Breau & Rachel Joyce, Discussion Paper, The Legal Obligation to Record Civilian Casualties of Armed Conflict (2011): available at: [http://www.oxfordresearchgroup.org.uk/publications/briefing\\_papers\\_and\\_reports/discussion\\_paper\\_legal\\_obligation\\_record\\_civilian\\_casualties](http://www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/discussion_paper_legal_obligation_record_civilian_casualties).

<sup>193</sup> Every Casualty: available at: <http://www.oxfordresearchgroup.org.uk/rcac>.

<sup>194</sup> Available at:

<http://www.oxfordresearchgroup.org.uk/sites/default/files/Charter%20RecognitionEveryCasualtyArmedVidence.pdf>