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Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare

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FINDING FACTS BUT MISSING THE LAW: THE GOLDSTONE REPORT, GAZA AND LAWFARE

*Laurie R. Blank**

Civilian deaths in Gaza often produce immediate conclusions of Israeli war crimes and other violations of international law. We now see similar statements in the aftermath of U.S. or allied attacks resulting in civilian deaths in Afghanistan. The increasing use of law as a tool of war—a practice termed “lawfare”—offers a likely and potentially disturbing explanation for the attempts to fashion every civilian death caused by a regular military as a war crime. As military forces find themselves increasingly under attack for alleged violations of IHL in conflicts in Iraq, Afghanistan, Gaza, Lebanon and elsewhere, one crucial contributing factor is the manipulation of international law—the very principles enshrined in the Geneva Conventions and customary law—to create an appearance of war crimes and other atrocities being committed by the United States and Israel in particular.

This article will explore these developments through the lens of the Goldstone Report, the report of the U.N. fact-finding mission tasked with investigating alleged violations of IHL and human rights in the 2008–2009 war in Gaza. It will examine how the Goldstone Report contributes to—even puts a stamp of approval on—the use of lawfare. In particular, this article will examine how the misapplication of IHL in the Goldstone Report exacerbates the manipulation of IHL by insurgents and terrorists, who use the law, and Western militaries’ adherence to the law, as a tool of war in today’s conflicts. Key areas include perfidy, military objectives and the targeting of protected objects, and the defending party’s obligations to take precautions to protect the civilian population. The Goldstone Report’s approach to IHL, if followed, would facilitate and encourage such manipulation of the law and, rather than leading to greater protection for civilians, actually produce conflict scenarios where civilians are at ever greater risk.

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Civilian deaths in Gaza—whether during Operation Cast Lead, the May 31 flotilla incident, or other incidents—seem to produce immediate conclusions regarding Israeli war crimes and other violations of international law. Recently, we have seen similar statements in the aftermath of U.S. or allied attacks leading to civilian deaths in Afghanistan. International law recognizes, indeed accepts, that civilians will die during war, and yet we now see a growing trend in which every civilian death necessarily seems to connote a crime. Neither the growing public awareness of international law nor the twenty-four hour news cycle can fully explain this phenomenon.

Instead, the increasing use of law as a tool of war, a practice termed “lawfare,” offers a more likely and more disturbing explanation for the attempts to fashion every civilian death caused by a regular military as a war crime.¹ International humanitarian law (IHL), otherwise known as the law of armed conflict or the laws of war, governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.² IHL contains extensive provisions requir-

¹ Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov't, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

² See International Committee of the Red Cross, *International Humanitarian Law in Brief*, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_ihl_in_brief (last visited Oct. 10, 2010). The law of armed conflict is set forth primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted by Conference June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.unhcr.org/refworld/pdfid/3ae6b36b4.pdf>

ing protection of civilians and proscribing attacks that target civilians and indiscriminate attacks. These provisions form part of the legal doctrine of militaries around the world, including those of the United States, United Kingdom, Israel, and other Western allies.³ And yet these militaries find themselves increasingly under attack for alleged violations of IHL in conflicts in Iraq, Afghanistan, Gaza, Lebanon, and elsewhere. Politics play a role in these developments, naturally, but one crucial contributing factor is the manipulation of international law—the very principles enshrined in the Geneva Conventions and the above-mentioned military manuals—to create an appearance of war crimes and other atrocities being committed by the United States and Israel in particular.

This article will explore these developments through the lens of the Goldstone Report, the report of the U.N. fact-finding mission tasked with investigating alleged violations of IHL and human rights in the 2008–2009 war in Gaza.⁴ The Goldstone Report presented an opportunity to examine critically how the law applies in complicated modern warfare and might be used to solve difficult problems such conflict poses. Mandated to investigate possible violations of IHL and human rights law during the conflict in Gaza, the Goldstone Report engages in a sweeping review of the conflict, as well as the historical underpinnings of the Israeli-Palestinian conflict, human rights in the West Bank and in Israel proper, and Israel's strategic aims. This article will not engage in a thorough discussion of the report's mandate or the shortcomings in the report's application of IHL and human rights

[hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted by Conference* June 8, 1977, 1125 U.N.T.S. 609, *available at* <http://www.unhcr.org/refworld/pdfid/3ae6b37f40.pdf> [hereinafter AP II].

³ See, e.g., DEPARTMENT OF THE ARMY, DEPARTMENT OF THE ARMY FIELD MANUAL 27–10: LAW OF LAND WARFARE (1956), *available at* www.aschq.army.mil/supportingdocs/Fm27_10.pdf; UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT—AMENDED TEXT (2004), *available at* www.mod.uk/aboutus/laws_and_regs/lawmanual/index.html; OFFICE OF THE JUDGE ADVOCATE GENERAL, THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS (1992), *available at* [http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20\(13%20Aug%202001\).pdf](http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%202001).pdf); AUSTRALIAN DEFENCE FORCE PUBLICATION, INFORMATION OPERATIONS PLANNING MANUAL (1994), *available at* <http://www.defence.gov.au/publications/dcdm.pdf>; THE STATE OF ISRAEL, THE OPERATION IN GAZA 27 DECEMBER 2008–18 JANUARY 2009 (2009), *available at* <http://www.mfa.gov.il/NR/ronlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperation.pdf>.

⁴ See generally Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, Sept. 15, 2009, *available at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf, [hereinafter “Goldstone Report”].

law.⁵ Rather, it will examine how the Goldstone Report contributes to—even puts a stamp of approval on—the use of lawfare. In particular, this article will examine how the misapplication of IHL in the Goldstone Report exacerbates the manipulation of IHL by insurgents and terrorists, who use the law, and Western militaries' adherence to the law, as a tool of war in today's conflicts. The Goldstone Report's approach to IHL, if followed, would facilitate and encourage such manipulation of the law and, rather than leading to greater protection for civilians, actually produce conflict scenarios where civilians are at ever-greater risk.

Section I will provide an overview of the concept of lawfare and the nature of warfare in asymmetrical conflicts, and will also briefly examine the key principle of IHL at issue in this analysis, the principle of distinction. Section II will discuss the shortcomings in the Goldstone Report's application of IHL and will demonstrate how those errors will actually exacerbate the use of lawfare and greatly undermine IHL's fundamental protections for civilians and civilian objects during armed conflict. Finally, Section III will explore what these challenges mean for the future, given the continuing trend of complex conflicts between state and non-state actors.

I. LAWFARE, ASYMMETRICAL CONFLICTS AND IHL

A. *Lawfare*

Lawfare is generally defined as “the strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.”⁶ The term was first popularized in a 2002 article by Major General Charles Dunlap, in which he explained:

Lawfare describes a method of warfare where law is used as a means of realizing a military objective. Though at first blush one might assume lawfare would result in less suffering in war (and sometimes it does), in practice it too often produces behavior that jeopardizes the protection of the truly innocent. There are many dimensions to lawfare, but the one increasingly embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather than seeking battlefield victories, *per se*, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principal way of bringing about that

⁵ See Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y. B. INT'L HUM. L. 347–402 (2009) (discussing the application of IHL in the Goldstone Report).

⁶ See Colonel Kelly D. Wheaton, “*Strategic Lawyering*” *Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1, 6 (2006).

end is to make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC.⁷

Two aspects of lawfare are relevant to the instant discussion: strategic and tactical. The above description of lawfare highlights the strategic aspect, in which technologically and militarily disadvantaged forces target public support and seek to force a political end to the fighting because of opposition to a seemingly extra-legal war.⁸ The tactical piece occurs when the disadvantaged side—insurgents, terrorists, etcetera—openly violate the law of war to gain a tactical advantage in specific operations by handicapping the ability of the IHL-compliant military to carry out its mission within the bounds of the law.

The conflicts in Iraq and Afghanistan abound with examples of this type of tactical lawfare. Storing munitions in mosques or hospitals, launching rockets from residential compounds, and generally fighting from within the civilian population without any distinguishing markings all create situations where an IHL-compliant military often appears forced to choose between engaging a legitimate target and endangering civilians. For example, Taliban militants have stored heavy weaponry in mosques and reportedly positioned two large anti-aircraft guns in front of the office of a major international humanitarian aid organization.⁹ “By shifting soldiers and military equipment into civilian neighborhoods and taking refuge in mosques, archaeological sites and other nonmilitary facilities, Taliban forces are confronting U.S. authorities with the choice of risking civilian casualties and destruction of treasured Afghan assets or forgoing attacks.”¹⁰ Similarly, U.S. and allied forces in Iraq encountered multiple examples of insurgents using civilians as human shields, attacking from locations protected under IHL, fighting without wearing a uniform or other distinctive sign, and using protected places for weapons storage and command posts.¹¹ Operation Desert

⁷ Dunlap, *supra* note 1.

⁸ See, e.g., W. MICHAEL REISMAN & CHRIS ANTONIOU, *THE LAWS OF WAR* xxiv (1994) (explaining that “[i]n modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people *believe* that the war is being conducted in an unfair, inhumane, or iniquitous way.”) (emphasis added).

⁹ See, e.g., Mark Mazzetti & Kevin Whitelaw, *Into the Thick of Things*, U.S. NEWS & WORLD REP., Nov. 5, 2001, at 24 (“Heavy weaponry is being sheltered in several mosques to deter attacks. The Taliban has even placed a tank and two large antiaircraft guns under trees in front of the office of CARE International . . .”).

¹⁰ Bradley Graham & Vernon Loeb, *Taliban Dispersal Slows U.S.*, WASH. POST, Nov. 6, 2001, at A1.

¹¹ See Dexter Filkins, *In Taking Falluja Mosque, Victory By the Inch*, N.Y. TIMES, Apr. 27, 2004, at A1; Tony Perry & Rick Loomis, *Mosque Targeted in Fallouja Fighting*, L.A. TIMES, Apr. 27, 2004, at A1; *Coalition Forces Continue Advance Toward Baghdad* (CNN television broadcast Mar. 24, 2003) (transcript available at <http://archives.cnn.com/>)

Storm involved similar attempts to manipulate U.S. law of war compliance. As the United States explained in a communication to the United Nations at the time, the Iraqis

[M]oved significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets; [and] Iraqi fighter and bomber aircraft were dispersed into villages near military airfields where they were parked between civilian houses and even placed immediately adjacent to important archaeological sites and historic treasures.¹²

Operation Cast Lead, the Israeli military operation in Gaza in 2008–2009, faced the same challenges: Palestinian militants hid or stored rockets, missiles, and other munitions in mosques, hospitals, schools, and other civilian buildings.¹³

All of these examples of lawfare impact the fundamental IHL principle of distinction, discussed below. Thus, “the most typical and also most damaging form of lawfare in recent conflicts has been the decision of disadvantaged combatants to not distinguish themselves from the local populace.”¹⁴ By hiding amongst otherwise protected persons and objects, such fighters take advantage of the more advantaged military’s compliance with IHL principles and obligations, using both the law and the presence of civilian persons and objects as a tactical weapon.

B. *The Principle of Distinction*

The principle of distinction, one of the “cardinal principles of IHL,”¹⁵ requires that any party to a conflict distinguish between those who

TRANSCRIPTS/0303/24/se.17.html); *The Rules of War are Foreign to Saddam*, OTTAWA CITIZEN, Mar. 25, 2003; David Blair, *Human Shields Disillusioned with Saddam, Leave Iraq after Dubious Postings*, NATIONAL POST (Canada), Mar. 4, 2003, available at <http://www.FPinfomart.ca>.

¹² Letter dated March 5, 1991 from the Permanent Rep. of United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/22341 (Mar. 8, 1991).

¹³ ANTHONY H. CORDESMAN, THE “GAZA WAR”: A STRATEGIC ANALYSIS 24, Center for Strategic & International Studies (Feb. 2, 2009) (describing how Hamas used a mosque to store Grad missiles and Qassam rockets), available at http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf; Jeffrey Fleishman, *Charges Fly in Battle Over What Happened in Gaza*, L.A. TIMES, Jan. 23, 2009, at A1 (detailing how Hamas used a bunker beneath a hospital as a headquarters).

¹⁴ Eric Talbot Jensen, *The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and An Entry Point for Lawfare*, 35 DENV. J. INT’L L. & POL’Y 241, 270 (2007).

¹⁵ Legality of the Threat and Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) [hereinafter Nuclear Weapons] (Higgins, J. dissenting on

are fighting and those who are not and direct attacks solely at the former.¹⁶ Similarly, parties must distinguish between civilian objects and military objects and target only the latter. Article 48 of Additional Protocol I sets forth the basic rule:

[I]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.¹⁷

Distinction lies at the core of IHL's seminal goal of protecting innocent civilians and persons who are *hors de combat*. This purpose is emphasized in Article 51 of Additional Protocol I, which states that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."¹⁸ The obligation to distinguish forms part of the customary international law of both international and non-international armed conflicts, as the International Criminal Tribunal for the former Yugoslavia (ICTY) held in the *Tadic* case.¹⁹ As a result, all parties to any conflict are

unrelated grounds) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of international humanitarian law).

¹⁶ Distinction was first set forth in Article 22 of the Lieber Code: "Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." Francis Lieber, War Department, Instructions for the Government of Armies of the United States in the Field art. 22 (1863), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [hereinafter Lieber Code]. A few short years later, the international community reinforced the rule in the St. Petersburg Declaration, which stated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, preamble, Nov. 29 (Dec. 11), 1868, reprinted in 1 *AJIL* Supp. 95; see also 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3 (2005) [hereinafter CIHL] (description of the concept of distinction in Rule 1).

¹⁷ Article 48 is considered customary international law. See AP I, *supra* note 2, art. 48; see also CIHL, *supra* note 16, Rule 1.

¹⁸ AP I, *supra* note 2, art. 51(2).

¹⁹ Prosecutor v. Tadic, Case No. IT-94-1-Tbis-R117, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 110, 127 (citing U.N. General Assembly Resolution 2675: "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: . . . 2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations."); See also Nuclear Weapons, *supra* note 15, ¶ 79 (distinction is one of the "intransgressible principles of international customary law"); CIHL, *supra* note 16, at 3

obligated to distinguish between combatants, or fighters, and civilians, and concomitantly, to distinguish themselves from civilians and their own military objects from civilian objects.

C. *Asymmetrical Conflicts*²⁰

Modern warfare is increasingly characterized by asymmetry in the military capabilities of the parties. “Wars between powerful states, those conflicts that prompted the development of humanitarian law, are increasingly rare. Instead of large-scale combat between organized militaries, modern warfare is becoming asymmetrical.”²¹ As such asymmetry grows, the “disadvantaged party has an incentive to blur the distinction between its forces and the civilian population in the hope that this will deter the other side from attack.”²²

Contemporary conflicts thus pose particular challenges for distinction precisely because of the lack of boundaries between conflict areas and civilian areas, between those actively participating in hostilities and those who are not. U.S. and NATO forces in Iraq and Afghanistan have been wrestling with the difficult legal and moral questions contemporary conflict raises for nearly a decade and continue to face complicated questions about who to target, how to target, and when to target. For example, as one news article explained about combat in Afghanistan:

[T]he elusive insurgents blend easily into the population, invisible to Marines until they pick up a weapon. They use villagers to spot and warn of U.S. troop movements, take up positions in farmers’ homes and fields, and attack Marines from spots with ready escape routes. The Marines, under strict rules to protect civilians, must wait for insurgents to attack and then attempt to ensnare them. Limited in their use of airstrikes and artillery—because of the danger to civilians and because aircraft often frighten the

(Rule 1); *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 178 (1997).

²⁰ Asymmetrical warfare is generally used to describe “a situation where an adversary can take advantage of its strengths or an opponent’s weaknesses.” ROGER W. BARNETT, *ASYMMETRICAL WARFARE: TODAY’S CHALLENGE TO U.S. MILITARY POWER* 15 (2003). In “the modern context, asymmetrical warfare emphasizes what are popularly perceived as unconventional or nontraditional methodologies.” Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 USAFA J. LEG. STUD. 71, 72 (1997).

²¹ Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT’L L. 733, 743 (2005).

²² Michael N. Schmitt, *The Impact of High Tech and Low Tech Warfare on Distinction*, in *INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY’S CONFLICTS: CHANGES AND CHALLENGES* 169, 178 (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005).

Taliban away—Marine riflemen must use themselves as bait and then engage in the riskier task of pursuing insurgents on foot.²³

Similarly, during Operation Iraqi Freedom, Iraqi insurgents commonly wore civilian clothing when approaching American and British forces in order to get closer without seeming to present a threat.²⁴ Perhaps most nefariously, insurgent groups that employ suicide bombing as a tactic have now turned to the use of women and children, for they have proven more likely to evade measures designed to identify suicide bombers.²⁵ In all of these situations, when those who are fighting (insurgents, guerrillas, terrorists, or comparable terms) melt into the civilian population and persons who appear to be civilians periodically engage in hostilities, determining who is a legitimate target becomes nearly impossible.

Indeed, the great fluidity between hostile persons and innocent civilians and the conscious blending of hostile persons into the civilian population makes a soldier's task nearly impossible.²⁶ For example, a soldier manning a checkpoint sees a jeep speeding toward him. It could be civilians seeking aid or fleeing from danger, or it could be insurgents bent on driving the vehicle into the checkpoint as a suicide bomb. The soldier who reacts too soon and fires on the jeep risks killing innocent civilians; the soldier who waits too long to make a positive identification risks dying in a fiery explosion.²⁷ Neither choice is acceptable from a tactical or legal standpoint. Insurgents take advantage of this dilemma every day to gain an edge over the superior fighting capabilities of state forces. In Afghanistan, for example, the Taliban regularly "use a tactic of engaging coalition forces from

²³ Ann Scott Tyson, *In Afghanistan, a Test of Tactics Under Strict Rules to Protect Civilians, Marines Face More Complex Missions*, WASH. POST, Aug. 13, 2009, at A6.

²⁴ *Id.* See also *Official: Afghan Militants Fled Dressed as Women*, CNN.COM, July 6, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.standoff/index.html>.

²⁵ See, e.g., *Pakistan: Taliban Buying Children for Suicide Attacks*, CNN.COM (July 7, 2009), <http://edition.cnn.com/2009/WORLD/asiapcf/07/07/pakistan.child.bombers/index.html> (explaining that "young suicide bombers may be able to reach targets unnoticed");

Cassandra Clifford, *The Battle for Suicide Bombers*, FOREIGN POL.'Y BLOGS NETWORK, (Jan. 8, 2010), <http://children.foreignpolicyblogs.com/category/suicide-bombers/>; *Child Bombers-in-Training Arrested in Iraq*, UPI.COM, (April 21, 2009, 11:14 AM), http://www.upi.com/Top_News/2009/04/21/Child-bombers-in-training-arrested-in-Iraq/UPI-48761240326883/; Dan Abrams, *Turning a Blind Eye to Child Suicide Bombers*, MSNBC.COM (March 26, 2004, 11:37:21 AM), <http://www.msnbc.msn.com/id/4601244>.

²⁶ Laurie R. Blank & Amos N. Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 65–66 (2010).

²⁷ See, e.g., *Suicide Bomber Attacks Afghan Army Base*, N.Y. TIMES, Aug. 15, 2009, at A10 (describing how a suicide car bomber tried to drive into the army base, was stopped at the gate and then detonated his explosives at the gate, killing one soldier and wounding five other people); see also Amos N. Guiora, *Teaching Morality in Armed Conflict: The Israel Defense Forces Model*, 18 JEWISH POL. STUD. REV. 1, 3 (2006).

positions that expose Afghan civilians to danger.”²⁸ This tactic is designed to force U.S. troops to either hold their fire in the face of an attack or endanger innocent civilians, a lose-lose situation. By not distinguishing themselves from civilians—thus violating the principle of distinction—these militants deliberately create such situations.

Israel’s conflicts, particularly with Hezbollah in Lebanon in 2006 and with Hamas and other Palestinian armed groups in Gaza in December 2008—January 2009, offer perhaps the most searing commentary about the nature of asymmetrical war. Indeed, in the Gaza Strip, “one of the most densely populated tracts of land in the world,” where militants intermingle with the civilian population, store munitions in residential buildings, hospitals and mosques, and launch rockets from farmers’ fields and residential rooftops, the implementation of IHL faces one of its gravest tests.²⁹ Israeli troops, faced with Hamas militants firing from schools, storing munitions in mosques and using hospitals as command posts, face the same challenging decisions as U.S. troops in Afghanistan. Unfortunately, rather than examine critically how the law applies in complicated contemporary conflicts and how to use the law to solve difficult problems that arise, the Goldstone Report misapplied and misconstrued IHL in ways that only exacerbate the use of lawfare and threaten the vital goal of protecting civilians in combat zones.

II. THE GOLDSTONE REPORT’S CONTRIBUTION TO THE DANGERS OF LAWFARE

Conflicts that know no differentiation between the traditional battlefield and populated urban areas and pit states against non-state actors create a natural inclination to focus on the innocent civilian casualties and the civilian infrastructure that endures significant damage. In Gaza, both Hamas tactics and the urban environment in which most of the relevant military operations occurred demonstrate how this natural focus can be manipulated

²⁸ Jim Garamone, *Directive Re-emphasizes Protecting Afghan Civilians*, AM. FORCES PRESS SERVICE (July 6, 2009), <http://www.af.mil/news/story.asp?id=123157435>; see also UNITED NATIONS ASSISTANCE MISSION TO AFGHANISTAN, HUMAN RIGHTS UNIT MID YEAR BULLETIN ON PROTECTION OF CIVILIANS IN ARMED CONFLICT ¶ 35 (2009), <http://unama.unmissions.org/portals/unama/human%20rights/09july31-unama-human-rights-civilian-casualties-mid-year-2009-bulletin.pdf> (“In several cases investigated by UNAMA, it is apparent that important traditional codes of hospitality and power imbalances inhibit the ability of villagers living in areas with a strong [anti-government element] presence to refuse shelter to an [anti-government element] commander or his men. Information indicates that [anti-government elements] take advantage of these factors to use civilian houses as cover, to deter [pro-government force] raids, or to increase the likelihood of civilian casualties if raided by [pro-government forces], potentially violating international humanitarian law.”).

²⁹ *Key Maps*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlements.stm (last visited Oct. 10, 2010).

and perverted into a tactic in specific operations and an all too effective strategy impacting an entire operation. Indeed, the challenges presented in that conflict are emblematic of some of the most difficult dilemmas asymmetrical warfare poses, dilemmas that place both soldiers and innocent civilians at grave risk every day.

Instead of engaging in a careful and precise analysis of how the law applies and grappling with these very difficulties, however, the Goldstone Report seemingly ignores these challenges and applies IHL simplistically, incorrectly, and in a manner that only encourages the abuse of the law for tactical and strategic purposes in future conflicts. Three areas of the report that raise particular concern regarding the use of lawfare are perfidy, the designation of military objectives and precautions. The report's goals appear to be greater protection for civilians during conflict; unfortunately, the impact of its misapplication of IHL and encouragement of lawfare is that civilians will consistently be at greater risk as a result.

A. *Perfidy*

The traditional definition of perfidy is “[t]o kill or wound treacherously individuals belonging to the hostile nation or army,” as set forth in Article 23(b) of the 1907 Hague Convention.³⁰ Suicide bombers disguising themselves as civilians to gain closer access to military checkpoints or other locations are a prime example of killing “treacherously.” Article 37(1) of Additional Protocol I offers a more comprehensive formulation, forbidding killing, capturing or injuring the enemy “by resort to perfidy.”³¹ In particular, the Protocol states that “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or *is obliged to accord*, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”³² Based on notions of honor, this prohibition unquestionably forms part of customary international law.³³

³⁰ Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, U.S.T.S. 539 [hereinafter Hague IV]. The prohibition on killing treacherously dates back to the Lieber Code, which states that military necessity “admits of deception, but disclaims acts of perfidy.” Lieber Code, *supra* note 16, art. 16.

³¹ AP I, *supra* note 2, art. 37(1). Examples of perfidy in Article 37(1)(a)–(d) include feigning truce or surrender, feigning civilian status, or feigning protected status by using emblems of the United Nations or neutral states.

³² AP I, *supra* note 2, art. 37(1) (emphasis added).

³³ YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES IN INTERNATIONAL ARMED CONFLICT 199 (2004); Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F.L. REV. 1, 22–3 (2008), (citing to NWP 1–14M, ¶ 12.7); U.S. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL, LAW OF WAR HANDBOOK 192 (2005); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (1995) (Rule 111); *see also* CIHL, *supra* note 16, 221–26 (Rule 65).

The Commentary to the Additional Protocols (the “Commentary”) explains that “[t]he central element of the definition of perfidy is the deliberate claim to legal protection for hostile purposes. The enemy attacks under cover of the protection accorded by humanitarian law.”³⁴ Thus, when fighters intentionally disguise themselves as civilians in order to lead soldiers on the opposing side to believe that they need not take defensive action to guard against attack, they commit perfidy. The indirect consequence of such actions is that civilians are placed at greater risk, since soldiers previously attacked by fighters disguised as civilians may be more likely to view those who appear to be civilians as dangerous and respond accordingly.

Notwithstanding the nature of Hamas’s tactics and the combat involved in Operation Cast Lead, the Goldstone Report does not even mention perfidy in discussing the activities of Hamas and other armed groups,³⁵ an unfortunate omission. During Operation Cast Lead, Palestinian armed groups generally operated in civilian clothes and from civilian areas, enabling them to take advantage of the protections IHL affords civilians. The Goldstone Report discusses such behavior only in the context of human shielding, itself a violation of IHL.³⁶ Rather than reprise the debate over human shields, however, this section will focus on how the report’s omission of perfidy contributes to the use of lawfare.

The Goldstone Report does state that Palestinian armed groups fired rockets and mortars from urban areas, citing, for example, a January 2009 interview with three Palestinian militants in which they stated that “rockets and mortars were launched in close proximity to homes and alleyways ‘in the hope that nearby civilians would deter Israel from responding.’”³⁷ Similarly, the report recognizes that members of Palestinian armed groups did not wear uniforms. Instead, after the start of military operations, “members of al-Qassam Brigades abandoned military dress and patrolled streets ‘in

³⁴ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUG 1949, ¶ 1500 (Yves Sandoz, Christophe Swinarki & Bruno Zimmermann eds., 1987) [hereinafter PROTOCOL COMMENTARY] (explaining that the “definition is based on three elements: inviting the confidence of an adversary, the intent to betray that confidence (subjective element) and to betray it on a specific point, the existence of the protection afforded by international law applicable in armed conflict (objective element).”).

³⁵ The word “perfidy” appears three times in the Goldstone Report, all in paragraph 1102, addressing the alleged practice of Israeli troops urging militants to exit a building because the ICRC was present. See Goldstone Report, *supra* note 4, ¶ 1102.

³⁶ See AP I, *supra* note 2, art. 51(7) (“The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.”).

³⁷ Goldstone Report, *supra* note 4, ¶ 450–51.

civilian clothes.”³⁸ What the report fails to mention, however, is that the Palestinian militants were not just shielding the mortars from attack, but were attacking—firing mortars and rockets—while in civilian dress and while feigning civilian status, the fundamental element of perfidy.³⁹ “A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may not feign civilian status and hide amongst a crowd.”⁴⁰ Militants who wear civilian dress in order to launch attacks while benefitting from the protection of apparent civilian status are thus guilty of perfidy.

The failure to adequately explore what appears to have been the use of perfidious—and therefore unlawful—tactics, regardless of whether specific situations on the ground actually constituted perfidy once thoroughly investigated, demonstrates a disregard for the complexities of asymmetrical warfare. From the soldier’s perspective, all persons appear to be civilians, and yet some are acutely dangerous even though dressed like innocent civilians. Recognizing that the soldier’s obligation to somehow distinguish between this individual and the truly innocent individuals deserving of protection is unwavering under IHL, we must then consider how to improve the soldier’s ability to do just that. The Goldstone Report instead effectively chooses to tell the soldier that the non-state actors can dress like innocent civilians—thus gaining protection from attack—and attack him while so disguised—thus granting him no warning or ability to protect himself. By upending IHL’s delicate balance between military necessity and humanity, the Goldstone Report offers those who use lawfare’s unlawful tactics unwarranted protection from the law. In fact, the report essentially encourages militants to embed themselves within the civilian population.

At its core, the report’s acceptance of the militants’ practice of disguising themselves as civilians suggests that: (1) it also accepts that non-state parties will fight using perfidious tactics and (2) it believes militaries and the international community should accept that practice as well. The true victims of this mistaken approach are the innocent civilians. First, they are trapped—literally and figuratively—in the conflict zone by fighters using them as shields and as cover for their perfidious tactics. Second, they become the unintentional and tragic targets of soldiers who mistake them

³⁸ *Id.*, ¶ 478.

³⁹ See, e.g., Int’l Humanitarian Law Research Initiative, *Legal Aspects of Suicide Attacks in IHL*, MONITORING IHL IN IRAQ (Apr. 6, 2003) IHLRESEARCH.ORG, available at <http://web.archive.org/web/20030626085305/www.ihlresearch.org/iraq/feature.php?a=19> (“However, the fact that the attackers in recent suicide operations have posed as civilians and therefore concealed their combatant status constitutes an act of perfidy prohibited under IHL.”).

⁴⁰ PROTOCOL COMMENTARY, *supra* note 34, ¶ 1507.

for legitimate targets when unable to distinguish between fighters and civilians.

B. Military Objectives

Beyond the obligation to differentiate between innocent civilians and persons who are fighting (and therefore can be targeted), the principle of distinction requires comparable determinations regarding the targeting of objects. The obligation to target only military objectives is one means of implementing the age-old principle that the means and methods of warfare are not unlimited.⁴¹ Operation Cast Lead, even more than other asymmetric conflicts, demonstrated the complexities of determining when buildings and other objects constitute military objectives. Like insurgents and other fighters in Afghanistan, Lebanon, and Iraq, Hamas and other armed groups in Gaza used the civilian infrastructure extensively to hide, store, and launch rockets, missiles, and other weapons. In any conflict, such conduct makes targeting decisions extraordinarily difficult given the obligations to minimize civilian casualties and operate within the framework of proportionality. In densely populated Gaza, the demands and dangers increase exponentially.

Article 52 of Additional Protocol I sets forth the definition of military objectives:

[T]hose 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.⁴²

Nature, location, and use or purpose are the main criteria. Nature refers to “all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff head-

⁴¹ The modern version of this principle appears in AP I, *supra* note 2, art. 35; earlier formulations appear in the writings of Vitoria, Grotius, and Vattel, as well as in early codifications of the laws of war. See AP I, *supra* note 2, art. 35; CIHL *supra* note 16; FRANCISCUS DE VITORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES (John Pawley Bate trans., Ocean Publications 1964) (1557); HUGO GROTIUS, THE LAW OF WAR AND PEACE 3 (Francis W. Kelsey trans., Oceana Publications 1964) (1646); EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (Charles G. Fenwick trans., Carnegie Institute of Washington 1916) (1785); FRANCIS LIEBER, LL.D., INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, art. 16 (1898); DECLARATION RENOUNCING THE USE, IN TIME OF WAR, OF EXPLOSIVE PROJECTILES UNDER 400 GRAMMES WEIGHT, preamble, Nov. 29 (Dec. 11), 1868, reprinted in 1 *AJIL* Supp. 95; THOMAS ERSKINE HOLLAND, THE LAWS OF WAR ON LAND, art. 4 (1880 Oxford Manual).

⁴² AP I, *supra* note 2, article 52(2).

quarters, communications centres etc.”⁴³ Location is an important factor because certain objects, such as bridges, make a direct contribution to military action regardless of whether they have a military function. Finally, use and purpose refer respectively to an object’s present or intended function. The Commentary explains that many civilian objects are or become useful to the armed forces. “Thus, for example, a school or a hotel is a civilian object, but if . . . used to accommodate troops or headquarters staff, [it will] become [a] military objective [].” For example, during Operation Iraqi Freedom, the United States attacked, among other buildings, the Baath Party Headquarters, which at first blush appeared to be a civilian object. Yet Iraqi forces were firing at the U.S. troops from within and near the building, and a weapons cache was subsequently found inside the facility.⁴⁴ This episode shows how actual use is a critical component to understanding whether a building is a legitimate target. Even though the Protocol emphasizes, importantly, that all doubts as to the civilian or military nature of an object should be resolved in favor of civilian status, the actual use of a building must be taken into account in targeting determinations.

The Goldstone Report’s analysis of Israeli attacks on hospitals and mosques highlights one key shortcoming in how it assesses military objectives. Like the omission of perfidy, the report’s errors in assessing military objectives in this area contribute to the use of lawfare and the corresponding endangerment of civilians. Normally protected under international law, these buildings lose their immunity from attack if used for military purposes. For example, Article 18 of the Fourth Geneva Convention sets forth the obligation to refrain from attacking—and to protect—civilian hospitals.⁴⁵ Article 19 then states that “the protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.”⁴⁶ Launching rockets from or storing munitions in a hospital clearly qualify. Similarly, Hague Convention IV recognizes limits on the protection of cultural and religious buildings:

[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and

⁴³ PROTOCOL COMMENTARY, *supra* note 34, ¶ 2020.

⁴⁴ Michael N. Schmitt, *Conduct of Hostilities During Operation Iraqi Freedom: An International Humanitarian Law Assessment*, 6 Y.B. INT’L HUMANITARIAN L. 73, 96 n.119 (2003) (citing U.S. CENT. COMMAND News Release No. 03-03-105, *U.S. Marines Destroy Ba’ath Party Headquarters* (Mar. 31, 2003)).

⁴⁵ GC IV, *supra* note 2, art. 18 (“Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.”).

⁴⁶ *Id.* art. 19; see also PROTOCOL COMMENTARY, *supra* note 34, ¶ 1948 (“[P]urely civilian objects may in combat conditions become military objectives.”).

wounded are collected, provided they are not being used at the time for military purposes.⁴⁷

Hamas used hospitals, schools, mosques, residential houses, and other civilian objects extensively for the storage of weapons, firing of rockets, and other military purposes.⁴⁸ In fact, Hamas does not have a “war ministry” or many other identifiable military locations—because it deliberately comingles military and civilian buildings and objects. Conflicts in Afghanistan, Iraq, and Lebanon, among others, also involved similar use of protected objects by insurgents and other fighters.⁴⁹ During Operation Iraqi Freedom, for example, human rights organizations condemned the Iraqi practice of using hospitals and mosques for military uses. Emphasizing that such use was illegal under IHL, Human Rights Watch’s report *Off Target* explains that the “protection ceases [when] medical establishments are used to commit ‘acts harmful to the enemy.’ By using hospitals as military headquarters, Iraqi forces turned them into military objectives.”⁵⁰

The Goldstone Report addresses several examples of Israeli targeting of erstwhile-protected objects. In assessing the Israeli shelling of the United Nations Relief and Works Agency (UNRWA) school, the Goldstone Report does consider that Palestinian armed groups were firing at Israeli forces from near the school in determining whether the school, or at least the area near the school, was a legitimate target. In other cases, however, the Goldstone Report fails to mention that use of otherwise civilian objects for military purposes causes such objects to lose their immunity from attack. For example, the only comments the report makes about the use of mosques

⁴⁷ See Hague IV, *supra* note 30, art. 30. See also Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Trial Judgment, ¶ 310, (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), available at <http://www.unhcr.org/refworld/pdfid/48ad42092.pdf> (stating that “the protection accorded to cultural property is lost where such property is used for military purposes.”).

⁴⁸ See CORDESMAN, *supra* note 13, at 43–47, 49, 51–52, 54–55 (describing how Hamas uses mosques, houses and cemeteries for military operations and to store weapons).

⁴⁹ See Filkins, *supra* note 11; Carlotta Gall, *Americans Face Rising Threat from Taliban*, INT’L HERALD TRIBUNE, July 15, 2008; Jeremy Rabkin, *The Fantasy World of International Law: The Criticism of Israel Has Been Disproportionate*, WKLY. STANDARD, Aug. 21, 2006; Department of Defense Final Report to Congress, Conduct of the Persian Gulf War (1992), available at <http://www.nduedu/library/epubs/cpgw.pdf> [hereinafter Gulf War Final Report]; Permanent Rep. of United States of America to the U.N., Letter dated March 5, 1991 from the Permanent Rep. of United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/22341 (Mar. 8, 1991) (explaining that the Iraqis “moved significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets” and “Iraqi fighter and bomber aircraft were dispersed into villages near military airfields where they were parked between civilian houses and even placed immediately adjacent to important archaeological sites and historic treasures.”).

⁵⁰ HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 73 (2003), available at <http://www.hrw.org/reports/2003/usa1203>.

to store weapons or as a location from which to launch attacks refer to the obligation of Palestinian armed groups to refrain from conducting attacks from civilian buildings.⁵¹ It further states that “it could not exclude that Palestinian armed groups engaged in combat activities in the vicinity of” hospitals and other protected sites, nor could it exclude that they may have used “mosques for military purposes or to shield military activities.”⁵² Given that it claims a lack of the necessary information, it may well be understandable that the report did not reach definitive conclusions regarding violations of those obligations. However, the failure to specifically state the law regarding the loss of protected status for civilian objects used for military purposes is a grave oversight that shows a fundamental failure to assess the law *in light of* the nature of combat in Gaza and other asymmetrical conflicts.

More problematic, the impact of the report’s oversight here is to suggest—indeed conclude—that attacks on protected objects are still crimes even if the objects have legitimately lost their protection. Even though the report makes an attempt at criticizing the unlawful use of protected objects for military purposes, its concomitant willingness to condemn attacks on such buildings simply undoes any such criticism and ratifies the militants’ practices. The effect can only be that insurgents, terrorists, and other militants continue to use protected objects as launching sites, command posts, and munitions depots, endangering the civilians who frequent such mosques, hospitals, and schools and depend on the services they provide.

C. *Precautions*

In pursuit of the goal of protecting civilians and those *hors de combat* from unnecessary suffering in war, IHL imposes obligations to take “constant care” during military operations to protect the civilian population.⁵³ Thus, in addition to the rules governing legitimate targets of attack and methods of warfare, the law mandates that parties take certain precautionary measures to protect civilians. In contemporary conflicts, where combat takes place in urban areas and civilians in essence live, work, and play in the combat zone, these precautions are critical to the protection of civilians during conflict.

The Goldstone Report addresses precautions taken by both Israel and Palestinian armed groups, with a significantly greater factual and legal emphasis on the former. In so doing, the report interprets the law in ways that pose grave consequences for future conflicts, again by encouraging the use of lawfare tactics. First, the report applies an unduly strict standard for the obligation to issue advance warning of attacks. Second, the report’s mi-

⁵¹ Goldstone Report, *supra* note 4, ¶ 498.

⁵² *Id.* ¶ 495.

⁵³ AP I, *supra* note 2, art. 57(1).

nimalist standards for the obligations of defending parties to offer protections for their own civilians would, if followed, leave civilian populations even more vulnerable to the dangers of modern warfare. Both of these shortcomings in the Goldstone Report enable and exacerbate the use of lawfare and, in so doing, place civilians and civilian objects in greater danger in the combat zone.

1. Precautions in attack: effective advance warning

Precautions are, understandably, a critical component of the law's efforts to protect civilians. For this reason, even if a target is legitimate under the laws of war, failure to take precautions can make an attack on that target unlawful.⁵⁴ Article 57 of Additional Protocol I sets forth the precautions that attacking parties must take. First, parties must refrain from launching attacks that violate the principle of proportionality.⁵⁵ Parties also must do everything feasible to ensure that targets are military objectives and must choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage.⁵⁶ When choosing between two possible attacks offering similar military advantage, parties must choose the objective that offers the least likely harm to civilians and civilian objects.⁵⁷ Finally, article 57(2)(c) mandates that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."⁵⁸ With particular relevance to the conflict in Gaza, the Commentary emphasizes that these precautions "will be of greatest importance in urban areas because such areas are most densely populated."⁵⁹

The main purpose of warnings is to give civilians an opportunity to leave and find a place of greater safety. Article 26 of the Regulations annexed to the 1907 Hague Convention is the most oft-cited statement of the obligation to warn: "[t]he officer in command of an attacking force must,

⁵⁴ See, e.g., *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. Ct. H.R. 847 (2005), available at <http://www.unhcr.org/refworld/docid/4223422f6.html> (holding that a Russian aerial assault on the village of Katyr-Yurt violated the right to life in Article 2 of the European Convention on Human Rights because the military continued its aerial bombardment of the village and its outskirts even as the civilians tried to leave via a safe passage corridor.) The Court found no evidence that, although the attack may have been against a legitimate target—insurgents entrenched in the village—"it was planned and executed with the requisite care for the lives of the civilian population." *Id.* ¶ 200. Although the ECHR applied the human rights framework and analysis of Article 2(2) of the European Convention rather than Article 57 of Additional Protocol I, the court's analysis is comparable and offers useful information for understanding when the failure to take precautions will make an attack unlawful.

⁵⁵ AP I, *supra* note 2, art. 57(2)(a)(iii) and 57(2)(b).

⁵⁶ *Id.* art. 57(2)(a)(i).

⁵⁷ *Id.* art. 57(3).

⁵⁸ *Id.* art. 57(2)(c).

⁵⁹ PROTOCOL COMMENTARY, *supra* note 34, ¶ 2190.

before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.”⁶⁰ Like Article 57(2)(c) of Additional Protocol I, this requirement provides a practical limitation taking into account the circumstances and the feasibility of issuing such a warning. In essence, the obligation to warn is not absolute and can be avoided if issuing a warning would seriously compromise the chances of success, such as in the case of a surprise attack.⁶¹

Recent international jurisprudence emphasizes that the obligation extends to those precautions that are feasible in the circumstances, given the information available to the commanders and military planners. Among other incidents during the 1999 NATO bombing campaign in Yugoslavia, the committee investigating the bombing examined NATO’s attack on Korisa, a village near Pristina, where 87 civilians, mostly refugees, died when NATO attacked a Serbian military camp and command post near the village. After examining the pilot’s efforts to identify the target and the surrounding area, including the identified military characteristics of the vehicles and buildings, the committee accepted NATO’s position that “all practicable precautions were taken” and recognizing that the pilot and air controllers took appropriate steps to identify the target, the committee determined that no violation of the law occurred.⁶² The Ethiopia-Eritrea Claims Commission took a similar approach, finding that, “[b]y ‘feasible,’ Article 57 means those measures that are practicable or practically possible, taking into account all circumstances ruling at the time.”⁶³ IHL contains no further guidance to help understand what actions make a warning “effective,” but state practice supports the Commentary’s view that “[w]arnings may also have a general character.”⁶⁴ Examples in the Commentary include giving notice by radio of attacks on certain types of facilities or providing a list of objectives to be attacked.⁶⁵

⁶⁰ Hague IV, *supra* note 30, art. 26.

⁶¹ DINSTEIN, *supra* note 33, at 126 (“[p]robably, no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith”).

⁶² Int’l Criminal Tribunal for the Former Yugoslavia [ICTY], *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, reprinted in 39 INT’L LEGAL MATERIALS 1257, 1281–82 (2000).

⁶³ Ethiopia v. Eritrea, Western and Eastern Fronts, Ethiopia’s claims 1 & 3, Partial Award, ¶ 33 (Eritrea-Ethiopia Claims Commission Dec. 19, 2005), <http://www.pca-cpa.org/upload/files/FINAL%20ET%20FRONT%20CLAIMS%281%29.pdf>.

⁶⁴ PROTOCOL COMMENTARY, *supra* note 34, ¶ 2225; *see also Id.* ¶ 2224 (giving examples from WWII of warnings by radio, by pamphlets and by flying low over the objectives to give civilians time to leave).

⁶⁵ In the 1991 Gulf War, for example, the U.S. military dropped leaflets to warn before attacks in Basra, Faw, Zubair, Tannuwa, and Abdul Khasib, among other cities. *See* C.B. Shotwell, *Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War*, 4 U.S. A.F. ACAD. J. LEGAL. STUD. 15, 36 (1993); *see also*

The Goldstone Report sets forth several criteria to determine whether a warning is effective:

[I]t must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon.⁶⁶

Although these criteria may seem reasonable at first glance, in actually applying them, the report diverges from the general understanding of and state practice regarding warnings in two ways that are particularly problematic in the arena of lawfare.

First, the report's standard for measuring the "effectiveness" of warnings is unduly high. According to the Israeli Government, and as stated in the report, Israel's warnings consisted of: 165,000 telephone calls, 300,000 warning notes on December 28, 2008 alone, 2,500,000 leaflets overall, radio broadcasts, and roof-knocking.⁶⁷ After detailing the content of the leaflet and radio broadcast warnings, the report concludes that the warnings were not sufficient because Israel had the capability to issue more effective warnings, civilians in Gaza were uncertain about whether and where to go for safety, and some places of shelter were struck after the warnings were issued.⁶⁸ As a simple factual matter, this conclusion that warnings far exceeding those given in any other conflict are insufficient is patently unreasonable on its face.

In addition, while Israel certainly has capabilities far superior to those of Hamas and other Palestinian armed groups, IHL applies equally to

CIHL, *supra* note 16, ¶ 483 (citing United States, Message from the Department of the Army to the Legal Advisor of the U.S. Army Forces Deployed in the Gulf, 11 January 1991, § 8(I), in which the United States responded to ICRC queries by stating that "a warning need not be specific; it may be a blanket warning, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives."). Similarly, Israel has used leaflets, telephone calls and radio broadcasts in the past. W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 166 (1990); Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged By a Democratic State Against Terrorism?* 16 EMORY INT'L L. REV. 445, 497 (2002); Suzanne Goldberg, *Israel Launches Rocket Attacks After Frantic Mob Murders Soldiers*, THE GUARDIAN, Oct. 13, 2000, at 1.

⁶⁶ Goldstone Report, *supra* note 4, ¶ 528.

⁶⁷ *Id.*, para. 498–9. Roof-knocking is a new technology the Israelis developed in which they fire light explosives at rooftops to warn the residents inside of an impending attack. The explosives merely make a noise and do not explode.

⁶⁸ Goldstone Report, *supra* note 4, at 125–33.

belligerents regardless of capability.⁶⁹ The wording of Article 57(2)(c) speaks to feasibility, not capability, and does not require the attacking party to exhaust all possible means to warn. By qualifying Israel's obligations based on its capabilities, the Goldstone Report exacerbates the already-present tendency towards "a capabilities-based IHL regime," an approach that only legitimizes the types of lawfare highlighted in the present article.⁷⁰ In fact, IHL is not about a fair fight and condoning the use of lawfare to "even the playing field" only serves to place civilians at greater risk.

The Goldstone Report's retrospective analysis of warnings is equally problematic. Although nothing in Article 57(2)(c) of Additional Protocol I or Article 26 of the Hague Convention suggests that the effectiveness of warnings should be judged on the basis of whether civilians actually heeded the warnings or found safety, the Goldstone Report judges the warnings by looking at whether civilians followed them.⁷¹ Indeed, the law contains no requirement that the civilian population be able to act on the warnings in order to find them effective. Rather, the law requires that we examine whether the warnings generally informed civilians that they were at risk and should seek shelter.⁷² In other words, the legal issue is whether they were effective in transmitting a warning, not whether the civilians actually heeded them. The sheer numbers involved in Gaza—165,000 phone calls and 2.5 million leaflets—certainly point to an affirmative answer.

By the Goldstone Report's standards—which do not reflect existing law—states simply will not issue warnings because no warnings will meet these standards and still enable effective military operations. The effect would be the exact opposite of what the Goldstone Report purports to achieve—rather than greater protection for civilians through more effective warnings, we would be left with conflicts in which states eschew warnings completely because this (hypothetical for now) standard would simply be too high to meet, leaving innocent civilians unprotected.

⁶⁹ See Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES (SYMPOSIUM IN HONOUR OF KNUT IPSEN) 11, 35–36 (Wolff Heintschel von Heinegg & Volker Epping, eds. 2007).

⁷⁰ *Id.* at 42–43 (recognizing the danger that "the more a military is capable of conducting 'clean' warfare, the greater its legal obligations, and the more critical the international community will be of any instance of collateral damage and incidental injury (even when unavoidable).").

⁷¹ Goldstone Report, *supra* note 4, at 128–33. In fact, however, the very language of both provisions, speaking of attacks that "may affect", AP I, art. 57(2)(c), the civilian population, accounting for "circumstances" or events within the commander's "power", Hague IV, art. 26, leads to the conclusion that the law focuses on the content and nature of the warnings at the time and whether they were reasonable and effective under the circumstances.

⁷² AP I, *supra* note 2, art. 57(2)(c); Hague IV, *supra* note 30, art. 26.

2. Defender's obligation to take precautions

Although Additional Protocol I emphasizes the attacking party's affirmative obligation to take precautions in planning and launching attacks, this obligation in no way diminishes the defending party's obligations.⁷³ Recognizing that the party in control of the territory where the conflict is taking place is often best situated to protect civilians from the unfortunate consequences of war, Additional Protocol I places obligations on the defending party as well.⁷⁴ Article 58, entitled "Precautions against the effects of attacks," requires that parties shall, to the extent feasible:

[E]ndeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; [and] (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.⁷⁵

Indeed, the Goldstone Report specifically "emphasize[s] that the launching of attacks from or in the vicinity of civilian buildings and protected areas are serious violations of the obligation on the armed groups to take constant care to protect civilians from the inherent dangers created by military operations."⁷⁶ This statement recognizes what seems apparent from the wording of Article 57(1) of Additional Protocol I—and is critically important in a conflict like that in Gaza—that the obligation to take "constant care" applies to the entirety of the civilian populations affected by the conflict and is not limited only to the civilian population of the attacked party. Parties have an obligation to protect their own civilians from the consequences of their own offensive actions as well as those of the enemy.

In practice, however, the report gives the defending party's obligations short shrift. Greater focus on the attacking party's obligations in recent years has led some to argue that the recent shift in emphasis overall from defender to attacker creates perverse incentives for the defender to use the civilian population as a shield. They further insist that "the international

⁷³ See PROTOCOL COMMENTARY, *supra* note 34, ¶ 2191([A])though the obligation to take "constant care" appears in Article 57, which addresses the attacking party, the Commentary suggests that both parties have such an obligation: "the term 'military operations' should be understood to mean any movement, manoeuvres, and other activities whatsoever carried out by the armed forces with a view to combat."

⁷⁴ See *id.* ¶ 2240 ("Belligerents may expect their adversaries to conduct themselves [lawfully] and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest.").

⁷⁵ API, *supra* note 2, art. 58.

⁷⁶ Goldstone Report, *supra* note 4, ¶ 495.

community must re-direct its attention and disapproval to those who intentionally place noncombatants in danger to achieve military and political objectives; if it fails to do so, it serves as an ‘enabler’ for those who deliberately place civilians at risk.”⁷⁷ The Goldstone Report’s approach does indeed pose this risk.

Paragraph (b) of Article 58, regarding precautions against locating military objectives in densely populated areas, is particularly relevant to the conflict in Gaza. Curiously, the Goldstone Report fails to mention Article 58 at all. This approach raises two significant legal problems: first, the obvious failure to address the location of military objectives in densely populated areas; and second, the transmutation of the intent element of human shielding to potential violations of Article 58(b). The report concludes that “there are indications that Palestinian armed groups launched rockets from urban areas.”⁷⁸ It neglects to recognize, however, that in this particular conflict, the rocket launchers themselves were military objectives for Israel—one of the main goals of Operation Cast Lead was to eliminate the ability of Palestinian armed groups to fire rockets at civilian areas in southern Israel.⁷⁹ Therefore, when Palestinian armed groups launched rockets from civilian areas in Gaza, they were locating military objectives in densely populated areas, in direct violation of Article 58(b) of Additional Protocol I.⁸⁰

The failure to condemn this violation—indeed to even mention it—shows the report’s failure to recognize fully the obligations of the defending party, especially in the complicated scenarios of contemporary conflicts. Just as the densely populated nature of Gaza does not relieve Israel of its obligations to distinguish between civilian and military objectives and take precautions, so it correspondingly does not relieve Palestinian armed groups of their obligations under Article 58. For civilians caught in the zone of combat and for military planners and commanders making targeting determinations, the continued force of this obligation is critical. Unfortunately, the absence of any mention of this obligation simply gives militants free rein to exploit the civilian population and the principles of IHL.

As a result of this failure to address Article 58, the Goldstone Report analyzes precautions taken, or not taken, by Hamas and other Palestini-

⁷⁷ Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT’L L. 683, 691–92 (2009).

⁷⁸ Goldstone Report, *supra* note 4, ¶ 450.

⁷⁹ THE OPERATION IN GAZA, *supra* note 3, ¶ 16.

⁸⁰ CIHL, *supra* note 16, at 430 (citing *Australia Defence Force Manual*, § 553) (In addition, “the law of armed conflict requires that the defence should be conducted from the position which would cause the least danger to civilians and civilian objects”). One could also argue that such attacks violated Article 57(2)(a)(ii) as well, which obligates parties to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” *Id.*

an armed groups solely within the framework of the prohibition on shielding. The language of the provisions on shielding does include a measure of intent—civilians “shall not be used to render certain points or areas immune from military operations,” and parties shall not direct the movement of civilians “in order to attempt to shield military objectives.”⁸¹ That intent, however, is only necessary for the purpose of “finding that a party is using the civilian population living in the area of the fighting as a human shield,”⁸² *not* for the purpose of finding a violation of Article 58(b)’s prescription against locating military objectives in densely populated areas. By applying the incorrect standard and requiring intent where IHL requires none, the Goldstone Report identifies no violation of Article 58; rather, it merely states that it could not “obtain any direct evidence that [rockets were launched from urban areas] with the specific intent of shielding the rocket launchers from counterattacks by the Israeli armed forces.”⁸³

Aside from the fact that it is hard to envision what purpose Hamas could have had other than shielding the rocket launchers from attack, the report’s analysis encourages those who wish to take advantage of the civilian population’s presence. The report thus directly facilitates the manipulation of the law for tactical purposes—if the standard were as stated in the Goldstone Report, militants could locate rocket launchers and other military objectives in civilian areas with impunity. Again, the effect is to endanger civilians rather than protect them. In contrast, Article 58’s clear prohibition on locating military objectives in densely populated areas, regardless of intent, offers much greater protection for civilians than does the Goldstone Report’s approach.

III. INTO THE FUTURE: THE EFFECT ON LOAC ADHERENCE AND PROTECTION OF CIVILIANS

Although the term lawfare now often has a wide range of connotations, from the strategic and tactical manipulations highlighted in this article to civil litigation efforts under the Alien Tort Claims Act to criminal prosecution using universal jurisdiction, the strategic and tactical raise the greatest concerns for the effective implementation and enforcement of IHL. Indeed, in these two arenas, lawfare poses fundamental challenges to two primary and critical goals: protection of civilians during conflict and effective mission accomplishment. Although IHL recognizes and accounts for civilian deaths and injuries—meaning that the mere fact of harm to civilians does not connote a violation of the law—the Goldstone Report adopts a framework in which civilian deaths and the destruction of civilian property

⁸¹ AP I, *supra* note 2, art 51(7).

⁸² Goldstone Report, *supra* note 4, ¶ 491.

⁸³ *Id.* ¶ 480.

necessarily are violations of the law. The impact of this approach, which is not reflected in IHL, means that the tactical and strategic goals of lawfare are rewarded rather than held at bay.

First, the Goldstone Report presents grave risks for the principle of distinction. Although the report appears to place protection of civilians as its primary goal, focusing overwhelmingly on the civilian deaths in Gaza, its application of IHL actually undermines that goal time and again. The general acquiescence in the style of fighting favored by Hamas and other armed groups—fighting in civilian dress, launching rockets from civilian locations, storing munitions in hospitals, and so on—has the extraordinarily problematic result of encouraging such behavior both by failing to condemn it and by misstating the legal responsibility of state forces who respond. In effect, “[i]t does not take much military savvy as an insurgent leader to figure out how to take advantage of a legal system where only one side is required to mark themselves as combatants and the other side has the opportunity to hide amongst those it is illegal for the uniformed armies to kill.”⁸⁴ The result: more civilians at risk, more civilian casualties, and greater destruction of civilian infrastructure.

If a guerrilla movement were systematically to take advantage of the surprise element that lies in attacking while posing as civilians until – as one expert said “a split second before the attack” – it would inevitably undermine the presumption, which is vital to maintain, namely that unarmed persons in civilian dress, do not attack. The result of undermining or eliminating this presumption is bound to have dreadful consequences for the civilian population.⁸⁵

The risk to soldiers increases as well, because they are repeatedly forced to wait an additional second or more to try to identify who is an innocent civilian and who is a legitimate target—but without any way to do so effectively. As soldiers seek to protect innocent civilians by holding their fire, they continually expose themselves to the risk of perfidious suicide bombers and other attackers who hide amongst the civilian population. Beyond these dangers to soldiers and innocent civilians alike, the erosion of distinction’s mandate is also “extremely prejudicial to the chances of serious implementation of the rules of humanitarian law; any tendency to blur the distinction [between combatants and civilians] must be sanctioned heavily by the inter-

⁸⁴ Jensen, *supra* note 14, at 257.

⁸⁵ MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 254 (1982). See also Derek Jinks, *Protective Parity and the Laws of War*, 79 NOTRE DAME L. REV. 1493, 1497 (2004) (claiming “regularization” of armed forces is crucial for the Hague laws to function correctly).

national community; otherwise the whole system based on the concept of distinction will break down.”⁸⁶

Second, the strategic ramifications of the use of lawfare are equally great. Media reports on civilian casualties caused by state forces, whether in Gaza, Iraq, or Afghanistan, produce an immediate outcry and debates about the lawfulness of the military operation, the motives of the state forces, and the potential for criminal liability. In contrast, reports of civilian casualties caused by militants receive little, if any, attention. For example, there remains a general perception that U.S. forces—and the use of air power in particular—in Afghanistan are responsible for large numbers of civilian deaths, notwithstanding documented evidence that civilian casualties caused by multinational forces are steadily decreasing and casualties caused by the Taliban are increasing.⁸⁷ Militants use civilian deaths to their advantage on a strategic level to undermine support for the military campaign both domestically and internationally. In pursuing their goal of gaining “political leverage by portraying U.S. forces as insensitive to [IHL] and human rights . . . , opponents unconstrained by humanitarian ethics now take the strategy to the next level, that of orchestrating situations that deliberately endanger non-combatants.”⁸⁸ Civilians thus become a pawn at the strategic level as well, because they are used not only for tactical advantage (e.g., shelter) in specific situations, but for broader strategic and political advantage as well.

When investigations into the conduct of hostilities ignore the realities on the ground by ignoring, or condoning, the impact of lawfare on the tactical level, they greatly reinforce the use of these manipulations at the strategic level as well. The Goldstone Report’s conclusions essentially give these machinations an official imprimatur—the report faults Israel for civilian deaths and finds little or no fault with Hamas and other armed groups for their violations of the principle of distinction. The only result will be that non-state forces using these tactics will be emboldened and encouraged to continue exploiting and endangering the civilian population for their own purposes, which runs directly counter to the basic principles and goals of IHL.

The challenges these behaviors pose are vast; the response must be effective and comprehensive. First, above all, the fundamental principles of IHL must be respected even in the complexities of modern conflicts and the blurring of the lines between combatants and civilians. Both the protection of civilians and effective mission fulfillment depend on adherence to the

⁸⁶ DIETER FLECK ET AL, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 201 (1995).

⁸⁷ UN News Service, *Afghan Civilian Death Toll Jumps 31 Percent Due to Insurgent Attacks*, UN NEWS CENTRE (Aug. 10, 2010), available at <http://www.un.org/apps/news/story.asp?NewsID=35575>.

⁸⁸ Dunlap, *supra* note 1, at 12–13.

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law and its principles. Second, interpretations of the law that encourage or ratify the use of lawfare must be countered and the existing legal framework shored up to prevent erosion of key principles such as distinction, proportionality, military necessity, and humanity. Finally, we must seek effective ways of holding accountable those who engage in human shielding, perfidy, and other violations of IHL that not only endanger the civilians on the ground, but contribute to the broader challenges as well.