ARTICLE

COLLATERAL DAMAGE AND INDIVIDUAL RIGHTS IN ARMED CONFLICT

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I.INTRODUCTION

The tragic war in Gaza has focused the world's attention on the humanitarian consequences of armed conflict. Residential buildings, schools, places of worship, and hospitals have been destroyed. Tens of thousands of civilians, including children, have been killed and much of the Palestinian population has been displaced.[1]

While the sheer number of civilian casualties has prompted moral condemnation, many of these civilian deaths were likely inflicted consistent with international humanitarian law (IHL), the legal framework that governs the conduct of hostilities in armed conflict. IHL prohibits the direct targeting of civilians and civilian objects, but it permits incidental harm to civilians (collateral damage) in connection with attacks against military objectives. IHL's principle of proportionality,[2] the rule of IHL that addresses collateral damage, only prohibits those attacks that are expected to cause incidental harm to civilians or civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. Even

1. *See, e.g.*, Sofia Ferreira Santos, *Kamala Harris says "too many" civilian deaths in Gaza*, BBC NEWS (August 11, 2024), https://www.bbc.com/news/articles/cn0lx2xgn55o [https://perma.cc/J4DB-DS7A].

2. Although the principle of proportionality is generally referred to as a "principle" of IHL, it is also codified as a concrete rule in treaty law. *See infra* Part III.A.

disproportionate attacks are not war crimes unless the expected harm to civilians is "clearly" excessive in relation to the military advantage.

The shocking number of civilian deaths in Gaza, and in other conflicts over the past two decades, casts doubt on whether IHL serves its purported humanitarian objectives. This death toll demands that we urgently examine the premises underlying fundamental IHL principles, like the principle of proportionality. Under what circumstances, if any, should collateral damage be permitted in war?

The principle of proportionality was first codified in 1977 in Additional Protocol I to the Geneva Conventions, a treaty applicably only to conflicts between states, known as "international armed conflicts" (IACs). Codification of the proportionality principle granted civilians in IACs modest protections that they had previously lacked in the total war paradigm that existed throughout most of the twentieth century. At the same time, I argued in a recent article that the principle rested on morally questionable grounds and that it permits attacks causing foreseen civilian casualties that may not be morally justified.[3]

Although the principle of proportionality was developed in the specific context of IACs, it has more recently been applied to a different type of conflict: non-international armed conflicts (NIACs). These conflicts, which involve states fighting terrorist groups or non-state armed groups (NSAGs), were historically regulated in a different manner than IACs. States traditionally understood NIACs to be internal conflicts, and thus more appropriately regulated by domestic law than international law. The disparity in treaty law applicable to IACs and NIACs became strikingly apparent in 2001, when the United States entered into a "transnational NIAC" against Al-Qaeda and then the Taliban. The concern that states fighting such transnational conflicts might be unencumbered by international legal restraints precipitated an effort to treat the fundamental rules of IAC (including the principle of proportionality) as rules of customary international law applicable in NIACs. The harmonization of the IHL rules applicable in both types of conflict has generally been viewed as a positive development, and the idea that the principle of proportionality now applies in all conflicts is largely unquestioned.

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3. *See generally* Charles P. Trumbull IV, *Proportionality, Double Effects, and the Innocent Bystander Problem in War*, 59 STAN. J. INT'L L. 35 (2003).

This Article tells a different, and more critical, story about the emergence of the principle of proportionality in NIACs. I argue that the concerted effort to extend this principle to NIACs—which was championed by different actors with different motivations—was misguided as a matter of law and morality. Rather than protecting civilians in NIACs, the application of the principle of proportionality to these conflicts set back the significant advancements in human rights law over the past decades, and particularly the idea that the protection of individual rights is a proper function of international law.[4] The rise of the principle of proportionality as a rule of customary international law allows states to sweep aside these human rights protections, including the right to life, through the doctrine of *lex specialis*.

As a matter of ethics, the principle of proportionality permits attacks that cannot be morally justified. Revisionist Just War theorists have persuasively argued that war does not alter the moral principles governing killing or deprive individuals of inherent moral rights.[5] As in other contexts, individuals in war must do something morally relevant, or non-innocent, to forfeit their inherent immunity against an attack that is intended or expected to cause harm. The risk that morally innocent civilians will be wrongfully killed as collateral damage is heightened in NIACs, where civilians are often bystanders to the conflict and should be presumed morally innocent. The collateral damage permitted by the principle of proportionality in NIACs has led to tragically high numbers of civilian casualties (including women and children)[6] and is impossible to reconcile with the moral prohibition on knowingly killing innocent bystanders.

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4. Jennifer Welsh et al, *Understanding Individualization*, *in* THE INDIVIDUALIZATION OF WAR 1 (Jennifer Welsh, Dapo Akande & David Rodin eds., 2023) ("The rights and responsibilities of the individual are at the centre of today's armed conflicts in a way that they have never been before.").

5. *Id*. at 9; Just War Revisionism, "a powerful stream within moral philosophy," disputes the notion that immunities and liabilities in war should be based on membership in a particular class, such as combatant or civilian, as IHL provides. *Id.* Rather, as with human rights, liabilities should be based on individual conduct. While Just War Revisionism calls into question some of the general principles of IHL, such as the moral equivalency of combatants, my focus in this article is limited to the rights of civilians injured or killed in collateral damage. *Id.*

6. U.N. Secretary-General, *Protection of Civilians in Armed Conflict*, ¶ 6, U.N. Doc. S/2024/385 (May 14, 2024) (noting that the UN recorded 33,443 civilian deaths in armed conflicts in 2023, and that among those killed forty percent were women and thirty percent were children).

International humanitarian law has historically evolved in response to perceived failures in the law to protect civilians and combatants from the horrors of war. The civilian death toll in recent NIACs, including Afghanistan, Iraq, Syria, Ethiopia, Myanmar, and now Gaza,[7] makes clear that IHL needs to be significantly strengthened. The collateral damage that IHL implicitly authorizes is both immoral and strategically misguided. The time is ripe to bring IHL into the twenty-first century.

This Article proceeds as follows. Part II, drawing on my prior work, sets forth the predominant legal and moral justifications for collateral damage in armed conflict: the IHL principle of proportionality and the Doctrine of Double Effect (DDE). It then discusses criticisms of the DDE in moral philosophy and argues that this doctrine cannot morally justify collateral damage. Killing in war can only be justified by traditional principles of self-defense, which require that the victim do something morally non-innocent to forfeit their right to life. Part III argues that the application of the principle of proportionality in NIACs rests on a shaky legal foundation. There is no treaty basis for its extension to NIACs and states' assertions that it is a rule of customary IHL were, at least initially, based on scant evidence. While the principle's application to NIACs has been framed as a positive humanitarian development, this narrative is deeply misleading. In particular, the principle of proportionality legitimizes violence affecting civilians and undermines their human rights protections. Part IV explains why the principle of proportionality is especially concerning in NIACs given the unique situation of the civilian population caught in the hostilities. Part V addresses how states can better protect civilians from collateral damage.

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7. I acknowledge that there is significant debate as to whether the conflict in Gaza is more appropriately considered an international armed conflict. *See, e.g.*, Jérôme de Hemptinne, *Classifying the Gaza Conflict Under International Humanitarian Law, a Complicated Matter*, EJIL: TALK! (Nov. 13, 2023), https://www.ejiltalk.org/classifying-the-gaza-conflict-under-international-humanitarian-law-a-complicated-matter/ [https://perma.cc/UHZ8-HTPV].

II.COLLATERAL DAMAGE IN ARMED CONFLICT: LEGAL AND MORAL JUSTIFICATIONS

IHL prohibits the intentional targeting of civilians per the principle of distinction,[8] but it does not immunize civilians from the risks of warfare. In many conflicts, a disproportionate number of casualties are civilian. The ratio of civilian to combatant deaths has increased over the past century, particularly with the advent of aerial warfare, the development of more destructive weapons, and the urbanization of societies.[9] Although statistics on civilian casualties are often disputed, numerous studies have found that over seventy five percent of casualties in recent wars have been civilian.[10] The rise in civilian deaths does not mean that soldiers are intentionally targeting more civilians, although such violations of IHL inevitably occur. Under the IHL principle of proportionality, civilians may be lawfully killed as collateral damage under certain circumstances.

A. The Principle of Proportionality

The principle of proportionality, a rule of customary IHL,[11] is codified in Articles 51 and 57 of Additional Protocol I (1977) to the Geneva Conventions.[12] It prohibits "an attack which may be expected to cause incidental loss of life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation

8. The principle of distinction is codified in several provisions of the Additional Protocols, including Articles 48 and 51 of Additional Protocol I (applicable in IACs) and Article 13 of Additional Protocol II (applicable in certain NIACs). *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 48 & 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

9. *See, e.g.*, Valerie Epps, *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule*, 41 GA. J. INT'L & COMP. L. 307, 327 (2013).

10. Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX. INT'L L.J. 453, 455 (2008).

11. The principle of proportionality is clearly a rule of customary international law in IACs. I address its customary status in NIACs in Part IV.

12. *See* William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 96 (1982) (providing an excellent overview of the development of the principle, the negotiating history of Article 51, and state practice).

to the concrete and direct military advantage anticipated."[13] Thus, civilians cannot be targeted directly, but they can be killed as collateral damage in attacks against military objectives. This rule is framed as a restraint on the use of force in armed conflict, but it also acknowledges and "implicitly authorizes" the incidental killing of civilians provided there is a sufficient military rationale.[14]

Several aspects of the principle of proportionality are important to highlight. First, it permits the foreseeable or knowing, rather than merely accidental, killing of civilians as collateral damage. Second, there is no set limit on the number of civilians that can be killed in an attack. The greater the importance of a military objective, as determined by those planning the attack, the greater the civilian harm permitted.[15] As the late Yoram Dinstein noted, "Even extensive civilian casualties may be acceptable, if they are not excessive in light of the concrete and direct military advantage anticipated."[16] Third, there is no agreed metric for determining how much civilian harm would be excessive in light of the expected military advantage, a test which requires balancing dissimilar values. In practice, commanders and combatants have a "considerable margin of appreciation" in making such assessments.[17] Fourth, there is no analog to the principle of proportionality in human rights law. It authorizes collateral damage that would generally be prohibited in a law enforcement context governed by human rights law.

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13. Additional Protocol I, *supra* note 8, art. 51(5)(b).

14. *See* Charles P. Trumbull IV, *Re-Thinking the Principle of Proportionality Outside of Hot Battlefields*, 55 VA. J. INT'L L. 521, 541 (2015); *see also* Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 50 (1994).

15. W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 174 (1990) (explaining that proportionality only prohibits "collateral civilian casualties so excessive . . . as to be tantamount to the intentional attack of the civilian population").

16. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 121 (2004).

17. Stefan Oeter, *Methods and Means of Combat*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 105, 178–79 (Dieter Fleck ed., 1995); WILLIAM H. BOOTHBY, THE LAW OF TARGETING 126 (2012).

B. The Doctrine of Double Effect (DDE)

The DDE has long been understood as the moral justification for the incidental killing of civilians in war.[18] The DDE distinguishes between intentional killings of civilians (which are prohibited) and unintended but foreseen killings (which may be permitted), and it provides grounds for determining when the latter may be justified. The DDE's purported ability to reconcile the moral prohibition on killing innocent persons with the realities of war made it an integral part of Just War theory for centuries.[19]

The DDE states in general terms that an act may be morally permitted, despite causing bad consequences, provided (1) the act itself is directed at achieving a moral good; (2) the actor intends solely to achieve that moral good; (3) the bad consequence is not a means to produce the moral good; (4) and the positive intended effects of the act outweigh the unintended negative ones.[20]

The principle of proportionality closely resembles, and is likely modeled on, the DDE.[21] As one commentator states, "[t]he doctrine of double effect is the bedrock upon which the *jus in bello* norm of proportionality sits."[22] Jens Ohlin argues that "core IHL principles are

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18. *See* Stephen Kershnar & Robert Kelly, *The Right-Based Criticism of the Doctrine of Double Effect*, 34 INT'L J. APPLIED PHIL. 215, 215 (2020) (the DDE "is thought to be central to the moral status of violence and causing harm in such areas as abortion, self-defense, suicide, and war").

19. *See* KAI DRAPER, WAR AND INDIVIDUAL RIGHTS: THE FOUNDATIONS OF JUST WAR THEORY 123–26 (2016) (explaining the DDE's prominent place in Just War Theory). The Just War tradition, which dates to the Middle Ages, was initially an effort by theologians and philosophers to determine when and how war could be waged consistent with moral and religious principles. This tradition has greatly influenced the current international legal framework, particularly the rules of *jus ad bellum*. *See generally* John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221 (2004).

20. *See* Sophie Botros, *An Error About the Doctrine of Double Effect*, 74 PHILOSOPHY 71, 72–73 (1999); Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 292 (1991); Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 119 (2013); Whitley R. P. Kaufman, *The Doctrine of Double Effect and the Trolley Problem*, 50 J. VALUE INQUIRY 21, 22 (2016).

21. *See* DRAPER, *supra* note 19, at 124–25 (noting similarities between DDE and IHL principles, and stating that the principle of distinction and proportionality were "quite likely" modeled on this doctrine); Ohlin, *supra* note 20, at 118 (calling principle of proportionality a "direct outgrowth" of DDE).

22. Kieran R.J. Tinkler, *Does International Humanitarian Law Confer Undue Legitimacy on Violence in War?*, 100 INT'L L. STUD. 605, 615–16 (2023). "The doctrine of double effect

based on the Doctrine of Double Effect" and that it is "also normatively correct, thus adding urgency to any legal interpretation that fails to respect the doctrine."[23]

There are clear commonalities between IHL principles and the DDE. Both prohibit intentional attacks against civilians to achieve a military advantage. Thus, it would be prohibited to bomb civilians with the goal of spreading terror and convincing the enemy to surrender—a frequent practice in WWI—even if the good achieved by the surrender outweighed the civilian casualties. Terror bombing of civilians is prohibited because the civilian deaths are specifically intended. The targeted individuals are the means for achieving the good rather than the unintended consequence of an otherwise permissible act.

On the other hand, the DDE and the principle of proportionality permit combatants to inflict foreseeable, but unintended, harm to civilians under certain circumstances. An attack causing collateral damage may be justified (under both IHL proportionality and the DDE) so long as the attack is directed at lawful military objectives, the commander intends only to destroy the military objectives, and the expected military advantage of the attack (or the overall good for the DDE) outweighs the expected civilian harm. A pilot is permitted to bomb a munitions factory and incidentally kill the workers inside, so long as she does not specifically intend to kill them, and the benefit of destroying the factory outweighs the loss of those workers' lives.[24]

C. Criticisms of DDE

Despite the DDE's general acceptance among IHL scholars, it is much more controversial in the literature on moral philosophy.[25] F. M.

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provides an ethical pathway to conciliate the absolute prohibition against attacking civilians with genuine military activity." *Id.* at 616.

23. Ohlin, *supra* note 20, at 123.

24. *See* Botros, *supra* note 20, at 74 ("[B]ombing enemy munitions plants next to civilian dwellings is now standardly held to be justifiable under the DDE in so far as its intended good effects outweigh its unintended bad effects.").

25. *See, e.g.*, Kaufman, *supra* note 20, at 22 (noting the "much larger debate about the validity of Double Effect both as explanation of our moral beliefs and practices and as a plausible normative principle"); Peter Singer, *Ethics and Intuitions*, 9 J. ETHICS 331, 348 (2005) (arguing that responses to different trolley scenarios are driven by evolutionary emotional responses rather than considered moral judgments, and that there is likely no moral difference between the scenarios); Judith Lichtenberg, *War, Innocence, and the Doctrine of Double Effect*, 74 PHIL.

Kamm writes, "we have known for many years that the DDE is problematic in its justification of side effect deaths."[26] Joshua Greene, a psychologist and neuroscientist, similarly concludes, "the venerable Doctrine of Double Effect has no justification beyond the fact that it's supported (imperfectly) by some of our intuitions."[27] Kai Draper writes that the DDE, "is not only untenable—it is pernicious in that often it is used to rationalize the murder of innocent bystanders in war."[28]

I described and assessed various objections to the DDE in a previous article,[29] so I will only briefly summarize two categories of criticisms here. One line of criticism concerns the inability of an actor's intentions to determine the moral permissibility of an act. (Recall that intentions are critical to the DDE analysis as the permissibility of an act depends in part on whether the bad effect is intended or merely foreseen). Some commentators point out that intentions are indeterminate and mixed.[30] It is not possible to compartmentalize intentions in the categorical manner that the DDE requires. Even if we can determine an actor's specific intentions, it is not clear whose intentions are morally relevant. Military operations often involve multiple actors who may each act with different intentions or motivations. A commander may wish he could avoid civilian casualties in an attack, but the pilot that carries out the attack may be indifferent or happy about the civilian casualties.

The DDE's focus on intentions can also lead to inconsistent moral judgments. Robert Holmes writes that the DDE "violates a fundamental requirement . . . that one be consistent."[31] Consistency "requires that we judge similar cases similarly, or, better, that we judge cases

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STUD. 347, 350 (1994); Camillo C. Bica, *Another Perspective on the Doctrine of Double Effect*, 13 PUB. AFFS. Q. 131, 132 (1999).

26. F. M. Kamm, *Terror and Collateral Damage: Are They Permissible?*, 9 J. ETHICS 381, 396 (2005).

27. JOSHUA GREENE, MORAL TRIBES 223 (2013). Greene argues that "our sensitivity to the much beloved means/side-effect distinction is bound up with our not beloved sensitivity to personal force." *Id.*

28. DRAPER, *supra* note 19, at 3. *See also* Richard Hull, *Deconstructing the Doctrine of Double Effect*, 3 ETHICAL THEORY AND MORAL PRAC. 195, 195 (2000) ("[M]oral philosophy should dispense with the doctrine.").

29. *See* Trumbull, *supra* note 3, at 54–59.

30. See, e.g., R. George Wright, *Noncombatant Immunity: A Case Study in Relation Between International Law and Morality*, 67 NOTRE DAME L. REV. 335, 345 (1991).

31. ROBERT L. HOLMES, ON WAR AND MORALITY 196 (1989).

similarly unless there are relevant dissimilarities between them. One cannot perform virtually identical acts and judge them differently unless they differ in morally relevant aspects."[32] It is the objective facts of the situation, rather than the intentions on which one acts, that morally justify one's actions.[33]

The second category of criticism is that the DDE undervalues the rights of potential victims. Kershnar and Kelly write:

> If people have stringent moral rights, and we think they do, then the doctrine of double effect is false or unimportant, at least when it comes to making acts permissible or wrong. A person's intentions or mere foresight might still be relevant to his or her blameworthiness or virtue, but this is a separate issue.[34]

A moral right, like the right to life, means that others have a corresponding duty to respect that right.[35] This duty does not apply solely to intentional violations of another's right but also to foreseen or reckless violations.[36]

In short, the DDE cannot provide a moral account for collateral damage in war, at least under a deontological framework. Rejecting the DDE, however, does not mean that civilian harm in war is categorically prohibited. Rather, it means that we need a better account of when and why harm is morally justified. A state of war does not itself provide moral justification to kill.[37] War may alter the legal rules governing the use of force, but it does not fundamentally alter the moral rules

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32. *Id.* at 196–97.

33. *See* Kamm, *supra* note 26, at 391. Judith Jarvis Thomson similarly argues that it is "irrelevant to the question whether X may do alpha what intention X would do alpha with." Thomson, *supra* note 20, at 294.

34. Kershnar & Kelly, *supra* note 18; Christiane Wilke & Helyeh Doutaghi, *Legal Technologies: Conceptualizing the Legacy of the 1923 Hague Rules of Aerial Warfare*, 37 LEIDEN J. INT'L L. 88, 105 (2024) ("[P]redictable but not specifically intended damage falls within the moral responsibility of the purveyors of violence.").

35. *See* Trumbull, *supra* note 3, at 44.

36 *Id.*

37. *See* Seth Lazar, *Responsibility, Risk, and Killing in Self-Defense*, 119 ETHICS 699, 700 (2009) ("If combatants in wartime are to kill without injustice . . . . [w]e need an account of how the people they kill are liable to that fate.").

concerning killing.[38] The morality of killing does "not turn on the legal context in which the violence occurs."[39]

D. Self-Defense: The Moral Justification

A moral account for killing in war can only be derived from principles of self-defense.[40] As Seth Lazar notes, principles of self-defense "are the only principles in ordinary morality . . . which seem capable of eliminating the whole wrong in killing a person."[41] The elements of individual self-defense require some analogizing for combatants in war. For example, the self-defense principle of necessity or imminence must be understood more flexibly in circumstances of prolonged, collective violence. Nevertheless, "it must be acknowledged that the norms of international law rest on the premise that, to a considerable degree and with certain modifications, an analogy can be drawn between the norms of individual self-defense and the norms of armed conflict."[42] This is logical as the only legitimate aim of war itself is national or collective self-defense. Soldiers fight to defend their nation, fellow troops, and themselves.

E. Civilian Immunity and Innocence

A fundamental premise of self-defense is that all persons have an inherent immunity against attack. Michael Walzer writes that we call individuals who are immune from attack "*innocent* people, a term of art which means that they have done nothing, and are doing nothing,

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38. *See* Tinkler, *supra* note 22, at 617 ("[K]illing in war must be justified on the same grounds as outside war.").

39. David Luban, *Just War Theory and the Laws of War as Nonidentical Twins*, 4 ETHICS & INT'L AFFS. 433, 436 (2017).

40. Tinkler, *supra* note 22, at 617 ("[F]or reductivists, the moral principles that justify death and destruction in war are entirely reducible to the moral principles that govern such behavior in ordinary life (e.g., the notion of self-defense)."). *See also* DRAPER, *supra* note 19, at 65 (stating that self-defense "must do the lion's share of the work in justifying recourse to war, and violence in war").

41. Lazar, *supra* note 37, at 700.

42. Iddo Porat & Ziv Bohrer, *Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More Than They Would Endanger Their State's Civilians*, 47 GEO. WASH. INT'L L. REV. 99, 104–05 (2015).

that entails the loss of their rights."[43] This right to life imposes a "universal negative duty not to inflict violence on the innocent" and a "positive duty to take at least some baseline level of precaution against inflicting violence unintentionally on the innocent."[44] This duty applies in all circumstances. It is "widely accepted" that there is no moral justification for killing an innocent person, even when necessary to save one's own life.[45] Judith Thomson explains, "the fact that you can save your life only by killing [innocent bystanders] . . . does not make them lack rights against you that you not kill them."[46] A person must do something morally relevant to forfeit her right to life and immunity from attack.

This moral immunity applies in war as well.[47] As Steven Lee notes, "enemy civilians are protected because they are innocent, in the sense that they are not causally responsible for the threat posed by their

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43. MICHAEL WALZER, JUST AND UNJUST WARS 146 (2d ed. 1992); *see also* Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 695 (2004) ("Those who do nothing to lose their right against attack are commonly said to be 'innocent.'"); George I. Mavrodes, *Conventions and the Morality of War*, 4 PHIL. & PUB. AFFS. 117, 120 (1975) ("The crucial argument proposed by the immunity theorists turns on the notions of guilt and innocence.").

44. David Luban, *Risk Taking and Force Protection*, *in* READING WALZER 11, 33 (Yitzhak Benbaji & Naomi Sussman eds., 2013) (noting the "universal negative duty not to inflict violence on the innocent").

45. *See, e.g.*, Jonathan Quong, *Killing in Self-Defense*, 119 ETHICS 507, 508 (2009); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFFS. 74, 78 (1994) (noting "the intentional or foreseen killing of an innocent in self-defense is unjustifiable when the innocent is a Bystander"); Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57, 76 (2010) ("[O]ne is not entitled or justified to kill an innocent bystander in order to defend (or, more accurately, preserve) his own life."); Adil Ahmad Haque, *Killing in the Fog of War*, 86 S. CAL. L. REV. 63, 85 (2012) ("[I]t is not morally permissible to kill one innocent person either as a means or as a side effect of preventing another person from being killed.").

46. Thomson, *supra* note 20, at 299. This moral principle is also reflected in many common law criminal codes, which do not consider duress or necessity as a defense to murder. Sarah J. Heim, *The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians*, 46 CORNELL INT'L L. J. 165, 169 (2013). Similarly, for this reason, the German Constitutional Court struck down a law authorizing the government to shoot down a hijacked plane. It wrote, "By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights." Julian Ku, *Germany Disarms Itself Against September 11 Attacks*, OPINIOJURIS (Feb. 15, 2006), https://opiniojuris.org/2006/02/15/germany-disarms-itself-against-september-11-attacks/ [https://perma.cc/BV7F-3JWZ].

47. *See* JEFF MCMAHAN, KILLING IN WAR 156 (Oxford Univ. Press, 2009) (arguing that "[a] state of war makes no difference" to the moral principles of killing, although these principles become more complex and difficult to apply in practice).

nation's military forces."[48] Moral innocence, however, is not based on membership in a class but rather on conduct.[49] There is significant debate regarding who should be considered innocent in war, how to draw the line between moral innocence and non-innocence, whether a bright line is possible, and how to handle borderline cases. Moral philosophers have generally focused on some combination of threat,[50] responsibility,[51] or contribution to the war[52] as bases for loss of immunity. Some philosophers argue for a narrow exception to immunity, applying the elements of individual self-defense equally in peace and in war. Under this test, killing in war is only justified when necessary to prevent "immediate danger of death."[53] This test would be far more restrictive than what is permitted by IHL, as it would prohibit the killing of enemy combatants in situations where they do not pose an imminent threat.[54] In contrast, combatants can be killed at any time under IHL.

The more accepted view is that the ethical elements of self-defense must be understood more flexibly given the unique characteristics of war. Under this theory, civilians "can become non-innocent by virtue of their responsibility for or contributions to an

48. Steven Lee, *Double Effect, Double Intention, and Asymmetric Warfare*, 33 J. MIL. ETHICS 233, 238 (2004) ("[E]nemy civilians are protected because they are innocent, in the sense that they are not causally responsible for the threat posed by their nation's military forces.").

49. *See* Welsh et al., *supra* note 4, at 15 ("[A]s a moral matter, a person's liability to attack must be derived from her own choices and actions, and not merely from the group to which she belongs.").

50. *See generally* Fellmeth, *supra* note 10 (describing both moral innocence and threat as criteria of liability in war).

51. *See* Lawrence A. Alexander, *Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider*, 5 PHIL. & PUB. AFFS. 408, 415 (1976) (noting that "the right to kill in self-defense requires only that the person killed be a necessary or sufficient cause of a danger," and that "noncombatants are not necessarily more remote causes of danger than are combatants").

52. WALZER, *supra* note 43, at 146 ("[I]t is not proximity [to a military objective] but only some contribution to the fighting that makes a civilian liable to attack.").

53. DOUGLAS P. LACKEY, THE ETHICS OF WAR AND PEACE 19 (1989).

54. Draper argues that this test is too narrow. In his view, the question is "whether inflicting harm in defense is immediately necessary to eliminate a threat of unjust harm." DRAPER, *supra* note 19, at 186–87. The means that defensive force may be appropriate even though the risk of harm is in the future. *Id.*

unjust war."[55] This means that civilians who have significant roles in planning, financing, or sustaining wars of aggression (which are both unjust and unlawful) may become non-innocent.[56] In Russia's unlawful war against Ukraine, for example, this could include the tycoons who are financing the war as well as the workers manufacturing weapons that are used to attack Ukrainian cities. While it is not necessary for the purposes of this Article to determine a specific metric for determining civilian liability in war, minor contributions to an unjust war are not sufficient to waive one's immunity from attack.[57] Nor can forfeiture of immunity be based on notions of collective guilt. A waiver of immunity must be based on conduct, not on citizenship or status.

Speaking of civilian innocence and non-innocence admittedly makes IHL scholars uncomfortable. In particular, making moral distinctions among civilians could undermine the principle of distinction, which prohibits directly targeting any and all civilians. Claiming that some civilians are non-innocent and thus forfeit their immunity from attack would seem to jeopardize this important IHL rule. This is neither my intent nor a logical consequence of acknowledging that some civilians may be morally non-innocent.

The fact that some civilians may be deemed non-innocent does not mean that they *ought* to be attacked. The law need not permit conduct that might be morally defensible, particularly when there are countervailing societal or humanitarian justifications for prohibiting such conduct. As I noted in a prior article, basing civilian immunity solely on moral innocence would face practical difficulties and could lead down a morally slippery slope to unrestrained warfare.[58] There is

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55. Trumbull, *supra* note 3, at 60. McMahan writes that a "person becomes a legitimate target in war by being to some degree morally responsible for an unjust threat, or for a grievance that provides a just cause for war." McMahan, *supra* note 43, at 724.

56. Civilian responsibility for unjust wars was highlighted in the military tribunals following WWII. Twelve of the twenty-eight defendants charged with Class A crimes in the Tokyo Tribunals were civilians. *See* GARY J. BASS, JUDGMENT AT TOKYO: WORLD WAR II ON TRIAL AND THE MAKING OF MODERN ASIA 269 (2023).

57. *See* DRAPER, *supra* note 19, at 195 ("It would be absurd, however, to base a broad assignment of non-combatant liability on the principle that anyone who makes any sort of contribution whatsoever to unjust aggression can be liable to defense."). I think it possible, however, that the threshold for liability may be lowered in manifest cases of aggression that pose a threat of widespread harm, such as in cases of genocide.

58. Trumbull, *supra* note 3, at 68–72. *See also* Welsh et al, *supra* note 4, at 23 (noting the "difficulties and epistemic barriers in making micro-level judgements about the normative status of individuals in conflict situations").

thus a need for bright-line rules in warfare that can be easily implemented by combatants, such as the principle of distinction, which bases legal immunity on class characteristics rather than individual conduct. The fact that the principle of distinction may provide legal immunity from direct attack to civilians who engage in non-innocent conduct is an acceptable tradeoff for a rule that has proven capable in practice of protecting innocent civilians from direct or intentional attacks.

Morality, however, plays a more significant role when assessing who can be killed than when assessing who should not be killed. We do not need a moral justification for conferring legal immunity on civilians as a class. We do need a moral justification for saying that some of those civilians may nevertheless be knowingly or foreseeably killed as collateral damage, as the principle of proportionality permits. Civilians who do not meaningfully contribute to an unjust war maintain their inherent immunity from attack (including attacks directed at them and attacks that cause foreseen harm or death to them). There is no moral justification for causing foreseeable harm to innocent civilians, at least absent exceptional circumstances.[59] Even in legitimate wars of self-defense, combatants have a duty to avoid injustices in the enforcement of their nation's rights. Military advantage and good intention cannot justify morally the (foreseeable or intentional) killing of civilians who have not forfeited their right to life.

F. Moral Shortcoming of the Principle of Proportionality

The primary moral shortcoming of the principle of proportionality is that it can legally sanction foreseeable harm to innocent civilians. The principle does not distinguish between innocent and non-innocent civilians. It exposes all civilians, both innocent and non-innocent, to the risks of collateral damage. Civilians are reduced to numbers;

59. Moderate deontologists would argue that infringement of individual rights may be justified when the good consequences *significantly* outweigh the violation. *See* Samantha Brennan, *Moderate Deontology and Moral Gaps*, PHILOSOPHICAL PERSPECTIVES, 23 ETHICS 23, 26 (2009) (noting that under moderate deontological theories "constraints or rights can, under certain conditions, be overridden on the basis of some threshold-surpassing amount of good that will come about by doing so"). This would require a far higher threshold for causing foreseeable harm to innocent civilians than what the principle of proportionality provides. I remain open to such a theory, which likely corresponds with most peoples' moral intuitions that killing one person may be justified if necessary to save a much larger number of innocent people.

civilian deaths become mathematical equations without regard to the moral responsibility of the potential victims. The only limit to the number of civilians that can be killed incidentally is an amorphous assessment of expected military advantage, undertaken by those who plan the attack. The principle of proportionality can authorize attacks that are morally prohibited to the extent that they cause foreseen harm to innocent bystanders.

This moral flaw in the proportionality principle is problematic in IACs, but the codification of the principle in the 1977 Additional Protocol still represented an improvement over the total war paradigm that prevailed throughout much of the twentieth century.[60] As discussed below, the moral risks created by the principle, however, are heightened in NIACs. In these conflicts, the civilian population is often a bystander to the conflict. Civilians are not responsible for initiating conflicts with NSAGs, they may not contribute to the conflict, and they generally do not benefit from it.

III.COLLATERAL DAMAGE IN NON-INTERNATIONAL ARMED CONFLICTS

The nineteenth and twentieth centuries were dominated by cataclysmic international armed conflicts, resulting in the deaths of millions of persons, the dissolution of empires and nations, and the re-drawing of national borders. Since the adoption of the United Nations Charter in 1945, and the prohibition of aggressive war enshrined in Article 2(4) of the Charter, the number of IACs has declined significantly, although Russia's unlawful invasion of Ukraine is a troubling exception to this trend. War, of course, has not disappeared. As Hathaway and Shapiro note, "we have traded a world of *inter*state war for one of *intra*state war."[61]

Modern NIACs often involve one or more states fighting a NSAG, such as the recent conflict between Ethiopia and the Tigrayan People's Liberation Front. While NIACs were traditionally understood to be

60. *See* Trumbull, *supra* note 3, at 69–71.

61. OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 368–69 (2017). *See also* Adil Ahmad Haque, *Whose Armed Conflict? Which Law of Armed Conflict?*, 45 GA. J. INT'L & COMP. L. 475, 476 (2017) (noting "most contemporary armed conflicts are fought between States and organized armed groups").

civil wars,[62] they increasingly take the form of counter-terrorism operations, often outside a State's own territory.[63] For example, with the exception of the September 11 attacks, the United States' conflict against Al Qaeda, the Taliban, and associated forces occurred outside U.S. territory. According to the International Committee of the Red Cross (ICRC), the number of NIACs has significantly increased since 2000 as NSAGs proliferated and split into different factions.[64] In 2024, the ICRC determined that there were approximately 100 NIACs around the world, involving 120 NSAGs.[65]

Transnational NIACs may be fought in a state that consents to operations in its territory, such as in Iraq where a coalition of states fought the Islamic State of Iraq and Syria (ISIS). Transnational NIACs are also fought in failed states—such as Syria—that are "unwilling or unable" to mitigate the threat posed by the NSAG outside of their borders.[66] A defining feature of transnational NIACs is that the extra-territorial State engages in conflict solely against the NSAG(s) and not against the territorial State in which the NSAG is located.

This fundamental shift from wars between states to conflicts against NSAGs requires us to reassess traditional understandings of civilian liability and civilian harm. As I explained in previous articles, throughout much of the nineteenth and twentieth centuries civilians

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62. See generally David A. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 CASE WESTERN RES. J. INT'L L. 37 (1979).

63. Oona A. Hathaway et al., *Consent is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PA. L. REV. 1, 6 (2016) ("[C]onflicts between non-state actors and extraterritorial states have become so common that they now have their own label: 'Transnational Non-International Armed Conflicts.'").

64. ICRC, *ICRC Engagement with Non-State Armed Groups: Why, How, for What Purpose and Other Salient Issues*, 102 INT'L REV. RED CROSS 1087, 1090 (Mar. 2021) [hereinafter *ICRC Position Paper*].

65. *ICRC 2024 Opinion Paper – How is the term "Armed Conflict" defined in international humanitarian law, April 16, 2024*. *https://www.icrc.org/en/document/icrc-opinion-paper-how-term-armed-conflict-defined-international-humanitarian-law#:~:text=The%20ICRC%20classifies%20armed%20conflicts,of%20them%20have%20lasted%20decades*. [https://perma.cc/72A3-HYLC].

66. *See generally* Ashley S. Deeks, *"Unwilling or Unable:" Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483 (2012). According to *The Economist*, "Of the 400m people in the Arab world, more than a quarter live in countries where the state is too weak to rein in armed groups." *The Middle East Has a Militia Problem*, ECONOMIST (Apr. 25, 2024), https://www.economist.com/middle-east-and-africa/2024/04/25/the-middle-east-has-a-militia-problem? [https://perma.cc/AQ3W-H669].

were seen as legitimate targets due to their responsibility for and contributions to the enemy's war effort.[67] They were thus afforded only nominal protections against attack, primarily in circumstances in which such attacks would confer no military advantage. It was only in the aftermath of the destruction caused in the Vietnam War that states agreed to accept treaty limitations on collateral damage in IACs, resulting in the codification of the principle of proportionality. Even with these limitations, however, civilians continue to bear the brunt of war.[68]

I argue that the principle of proportionality's more recent application to NIACs has undermined, rather than advanced, humanitarian objectives. This Part explains that the principle's recent emergence as a rule of customary international law (CIL) applicable in NIACs was driven by a confluence of factors, including states' desire to avoid human rights obligations in NIACs, a fear of gaps in the legal framework governing NIACs, and an unreflective desire to make the laws of NIAC mirror the laws in IACs. This desire for legal symmetry ignores three critical factors about the rules governing IACs: (1) they were designed to regulate a particular type of conflict; (2) they were developed prior to the rise of human rights law; and (3) they can facilitate violence that increases risks to civilians.

Part IV argues that the proportionality principle is morally problematic as it can authorize attacks that cause foreseeable harm to innocent civilians who have done nothing to forfeit their moral immunity from attack. This risk is heightened in NIACs where the civilian population is often neutral in the conflict.

A. Treaty Law

There is no basis in treaty law for applying the proportionality principle in NIACs. The principle is codified in Additional Protocol I, which applies only to IACs. By contrast, there is very little treaty law applicable to NIACs. Rules regarding the protection of civilians in NIACs are generally limited to a single article in the 1949 Geneva Conventions ("Common Article 3") and the abbreviated Additional

67. *See* Trumbull, *supra* note 14, at 546–48; Trumbull, *supra* note 3, at 63–65.
68. *ICRC Position Paper*, *supra* note 64, at 5.

Protocol II to the Geneva Conventions.[69] Although Additional Protocols I and II were negotiated at the same time, the drafters intentionally omitted many of API's rules regarding the conduct of hostilities, including the proportionality principle, from Additional Protocol II.[70] As states have taken different approaches to developing the rules in IACs and NIACs, "treaty provisions applicable to international armed conflict have been presumed not to apply to non-international armed conflict unless explicitly made applicable."[71]

B. Customary International Law

The purported legal rationale for the application of the proportionality principle in NIACs is CIL. The U.S. Department of Defense Law of War Manual, for example, states "The foundational principles of the law of war are common to both international armed conflict and non-international armed conflict."[72] The Danish Military Manual similarly states, "it is assumed that, by virtue of its customary law nature, the principle [of proportionality] also applies in NIAC."[73] Yoram Dinstein concludes, "The customary nature of proportionality cannot be rebutted, despite its perplexing absence from [Additional Protocol II]."[74]

The customary status of the proportionality principle in NIACs is largely settled today, but its status was much less certain when the transnational NIACs against Al Qaeda and the Taliban commenced.

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69. The Geneva Conventions and the 1977 protocols contain over five hundred articles applicable to IACs. By contrast, these treaties contain fewer than thirty articles applicable to NIACs. Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflicts*, 88 INT'L L. STUD. 145, 146 (2012).

70. This was primarily because many states at the time did not view international law as appropriately regulating the relationship between the State and its citizens within its own territory. States thus only agreed to minimal international law protections regulating NIACs, which were historically understood to mean internal conflicts.

71. OFF. OF GEN. COUNSEL, U.S. DEP'T DEF., LAW OF WAR MANUAL § 17.2, at 1045–46 (June 2015, updated July 2023).

72. *Id.* § 17.1.2.2, at 1043.

73. DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 75 (2016).

74. DINSTEIN, *supra* note 16, at 217; *see also* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 349 (2012) ("[T]here is much support for the application of the rule to non-international armed conflict, and it is considered a norm of customary international law.").

Customary international law develops from the general and consistent practice of states acting out of a sense of legal obligation, or *opinio juris*. The International Court of Justice (ICJ) has clarified that state practice must be "both extensive and virtually uniform . . . [and] have occurred in such a way as to show general recognition that a rule of law or legal obligation is involved."[75]

The principle of proportionality's status as a rule of CIL in IACs was debatable at the time of API's adoption in 1977.[76] There is very little basis, however, to conclude that it was a principle of CIL applicable in NIACs.[77] To the contrary, the drafters of APII (which applied to NIACs) eliminated references to the principle of proportionality from earlier versions of the text, indicating it was not deemed a customary rule applicable to NIACs.[78] Similarly, drafters of the Rome Statute, which established the International Criminal Court, only criminalized disproportionate attacks in the context of IACs, which suggests the principle of proportionality was not considered a norm of CIL in NIACs when the statute was adopted in 1998.[79] Fellmeth and Sylvester note the "application [of the principle of proportionality] to non-international conflicts is of more recent, and in

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75. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20) (emphasis added).

76. Even after the first Gulf War, Judith Gardam wrote that the "extent to which the requirements of Article 51, paragraph 5(b) . . . represent the customary position is controversial." Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 407 (1993).

77. Aaron X. Fellmeth & Douglas J. Sylvester, *Targeting Decisions and Consequences for Civilians in the Colombian Civil Strife*, 26 MINN. J. INT'L L. 501, 510 (2017) ("[T]here is little reason to believe that proportionality enjoyed a similar customary basis for noninternational conflicts.").

78. *See* MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 770 (2013). The drafters also omitted any reference to "principles of international law" in the preamble to APII, as they did not believe that there was "any effective body of customary international law applicable to non-international armed conflict." *Id.* at 773.

79. A provision criminalizing disproportionate attacks committed during NIACs was proposed in the Preparatory Committee draft, but it was omitted in subsequent texts of the Rome Statute. *See* WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 230 (2010). Contemporary scholarship reinforces the conclusion that the principle of proportionality had not attained CIL status at the time. Judith Gardam commented in 2004 that the principle of proportionality was an *emerging* norm of CIL that "will soon have a role to play in some non-international armed conflicts." JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 126 (2004).

some respects, controversial origin."[80] Criddle is more skeptical that proportionality is a rule of CIL in NIACs, writing "this conclusion is by no means universally accepted and remains empirically underdeveloped."[81]

States are not the only actors to assert the CIL status of proportionality with respect to NIACs.[82] The ICRC's Customary International Law study, published in 2005, asserts the principle of proportionality is a customary rule in all armed conflicts.[83] With respect to NIACs, the ICRC observes: "While Additional Protocol II does not contain an explicit reference to the principle of proportionality in attack, it has been argued that it is inherent in the principle of humanity which was explicitly made applicable to the Protocol in its preamble and that, as a result, the principle of proportionality cannot be ignored in the application of the Protocol." The ICRC study also noted that jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) provides "further evidence" of the customary nature of the principle of proportionality in NIACs.[84]

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80. Fellmeth & Sylvester, *supra* note 77, at 507.

81. Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. 1073, 1081 (2012).

82. Fellmeth & Sylvester, *supra* note 77, at 511 ("Decisions of international criminal and human rights tribunals, as well as important studies by the ICRC, argued forcefully that customary international law now fully incorporates the laws of war normally applicable in conflicts between states into purely internal conflicts." (internal citations omitted)).

83. *See* Int'l Comm. Red Cross (ICRC), *Rule 14. Proportionality in Attack*, IHL DATABASES, [hereinafter *Rule 14*], https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14#refFn_BA32BB92_00018 [https://perma.cc/4R6S-S4NW]. David Kretzmer writes that the "assumption of the Study is, it would seem, that this principle *protects* potential victims of armed conflict. That assumption is not necessarily valid." David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8, 28 (2009) (emphasis in original). The ICRC, however, was likely also motivated by the fact that IHL is the only international framework that applies to non-state actors. Human rights law applies only to states. This asymmetry has prompted concerns about the application of HRL in NIACs. As one commentator notes, "The limited ability to hold non-State actors accountable, or even to articulate normative expectations from them under IHRL, might result in a tendency to assign to the belligerent State party legal responsibility for all harms caused to IHRL victims." Yuval Shany, *Co-Application of IHL and IHRL: Some Takeaways from the Ukraine and Gaza Wars*, ARTICLES OF WAR (Apr. 29, 2024), https://lieber.westpoint.edu/co-application-ihl-ihrl-some-takeaways-ukraine-gaza-wars/ [https://perma.cc/8XGJ-2GN9].

84. *Rule 14*, *supra* note 83.

1. International Tribunals

A careful review of the ICTY's case law, however, reveals only scant evidence that the principle of proportionality was considered a rule of CIL applicable in NIACs when the Tribunal was established. No defendant was convicted for committing disproportionate attacks, and the tribunals' few statements about the principle are dicta, as discussed below. At most, the ICTY's jurisprudence reflects a general desire to harmonize the prohibitions in IACs and NIACs, particularly in light of the minimal treaty law applicable in NIACs. It is important, however, to understand the context in which the ICTY pronounced the customary status of IAC rules in NIACs and their motivations for doing so. The judges of the ICTY sought to close loopholes within international criminal law that might otherwise allow perpetrators of mass atrocities to go unpunished.[85]

The ICTY's statute, adopted by the UN Security Council in 1993, included two provisions regarding war crimes.[86] Article 2 penalized "grave breaches" of the 1949 Geneva Conventions, a war crime that by the terms of the Conventions can only be committed in IACs. Given that many of the atrocities committed in the former Yugoslavia took place in the context of a NIAC, charges under Article 2 were often unavailable. Article 3 of the statute, by contrast, criminalized violations of the "laws or customs of war." The ICTY determined that Article 3 "functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal."[87] For this residual clause to be effective, however, the ICTY had to determine the existence of customary laws applicable in NIACs.

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85. *See* Michael J. Adams & Ryan Goodman, *De Facto and De Jure Non-International Armed Conflicts: Is it Time to Topple Tadic*, JUSTSECURITY Oct. 13, 2016, https://www.justsecurity.org/33533/de-facto-de-jure-non-internation
al-armed-conflicts-time-topple-tadic/ [https://perma.cc/27JG-WBKD].

86. *See* Statute of the International Tribunal for the Prosecution for Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. annex, U.N. Doc. S/827 (1993).

87. Prosecutor v. Tadic, Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 91 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

The *Galic* opinion has frequently been cited as evidence of the customary status of proportionality in NIACs, even though Galic was convicted of the war crime of committing attacks against the civilian population rather than committing excessive or disproportionate attacks. A close reading of this opinion, however, shows that the Chamber did not go as far as many suggest. The Trial Chamber in *Galic* wrote, "the Trial Chamber agrees with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians."[88] This prohibition, it wrote, "reflects a well-established rule of customary law applicable in all armed conflicts."[89] The court then turned to the principle of proportionality, writing, "One type of indiscriminate attack violates the principle of proportionality."[90] After quoting the principle as codified in Article 51 of API, the court concluded, "certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack."[91] The court thus implies that a violation of the principle of proportionality is not necessarily a crime in itself, but rather a form of indiscriminate attack that can be considered a direct or intentional attack against civilians.[92] By embedding the principle of proportionality in the long-standing CIL prohibition on directly attacking civilians,[93] the Trial Chamber sidestepped the trickier issue of the status of the proportionality principle as an independent rule of CIL in NIACs.

The ICTY is often credited with merging many of the customary rules applicable to IACs and NIACs.[94] Yet, in its understandable desire

88. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 5, 2003).

89. *Id.*

90. *Id.* ¶ 58.

91. *Id.* ¶ 60.

92. *See* Aaron Fellmeth, *The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency*, 45 ISR. L. REV. 125, 129 (2012) (noting that the "Trial Chamber found the disproportionate effects of the attacks to merely constitute evidence that the defendant was intentionally targeting civilians").

93. *See* Additional Protocol II, *supra* note 8, art. 13 (which applies in NIACs, prohibits attacks against civilians unless they directly participate in hostilities).

94. *See* Geoffrey S. Corn, *Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide between Tadic Aspiration and Conflict Realities*, 91 INT'L L.

to close legal loopholes the ICTY departed from the accepted methodology of identifying CIL, i.e., a survey of state practice and *opinio juris*. In *Tadic*, for example, the Appeals Chamber wrote,

> elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.[95]

Similarly, the Trial Chamber in *Kupreskic* opined, "The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law."[96] This teleological and deductive reasoning suggests the tribunal's conclusions were based on a desire for accountability and coherence in the law rather than the existence of extensive and virtually uniform state practice and *opinio juris*.[97]

The ICTY's desire to promote accountability is laudatory, but the more enduring impact of the tribunal's holdings may undermine its humanitarian motivations. The ICTY had to assess the application of IHL rules retrospectively in a conflict that had already ended. Because war crimes can only be committed in the context of an armed conflict,

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STUD. 281, 284-85 (2015) (noting that the Tadic judgment "was the first time this extension [of IAC rules to NIACs] was characterized as a matter of law").

95. *Tadic*, Case No. IT-94-1-AR-72, ¶ 119.

96. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 521 (Int'l Crim. Trib for the Former Yugoslavia, Jan. 14, 2000).

97. *See* Yahli Shereshevsky, *Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts*, 49 VAND. J. TRANSNAT'L L. 455, 473 (2016) (noting that the ICTY's approach to identifying rules of CIL in NIACs "suffers from a less than convincing methodology"); *see also* Gabriella Blum, *The Shadow of Success: How International Criminal Law Has Come to Shape the Battlefield*, 100 INT'L L. STUD. 133, 152 (2023) (noting that some states believed that the ICTY and ICTR "had engaged more in legal innovation than the application of existing law"). The ICTY's failure to exhaustively review relevant state practice is not unique to that tribunal. As Goldsmith and Posner observe, "Increasingly courts and scholars ignore the state practice requirement altogether"). Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1117 (1999).

the ICTY had an incentive to establish a "low threshold"[98] for the initiation of armed conflict, a broad geographic scope of conflict once commenced, and a high threshold for ending the conflict. By doing so, it could ensure that the atrocities committed fell within its jurisdiction and thus promote accountability, and potentially deterrence, for those crimes.[99]

These tests for determining the existence and scope of NIACs have since been used by scholars and states to prospectively expand the application of IHL and its implicit authorizations to use lethal force.[100] This expansive application of IHL can place civilians at risk because the "laws of war expose civilians and their property to more risk and more violence than do the laws of peace in any society."[101] As one commentator notes, the ICTY's decisions "may enable a State to justify an otherwise unlawful use of military force by arguing that an armed conflict within the State exists even in the absence of active hostilities, instead of relying on ordinary policing under the stricter constraints of domestic law enforcement and international human rights."[102] Ecuador's declaration on January 9, 2024 of an "internal armed

98. T.D. Gill, *Some Reflections on the Threshold for International Armed Conflict and on the Application of Law of Armed Conflict in any Armed Conflict*, 99 INT'L L. STUD. 698, 700 (2022).

99. *See Tadic*, Case No. IT-94-1-AR-72, ¶ 67. The conclusion of the Appeals Chamber in *Tadic* that the armed conflict extended throughout the borders of the State was likely motivated by a desire to rebut the Defendant's arguments that crimes committed outside the "exact time and place of hostilities" were beyond the jurisdiction of the Court. *Id.*

100. *See* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165, 1189 (2013) (describing the *Tadic* holding "as a way to expand, not restrict, the scope of the conflict"); Shereshevsky, *supra* note 97, at 489 (noting that states are now more willing to recognize the existence of a NIAC because they "have started to recognize the legitimizing role of IHL regarding the ability to use lethal force in comparison to the limiting effect of IHRL and domestic law enforcement regulation"); *see also* Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 13 (2010) ("In *Tadic*, the ICTY stated that [the law of armed conflict] mandates a broad geographic and temporal scope for armed conflict.").

101. Luban, *supra* note 39, at 435; *see also* Gill, *supra* note 98, at 703 (noting that the determination of armed conflict allows status-based targeting, collateral damage, and other measures that are not permitted in peace time).

102. Blum, *supra* note 97, at 151–52.

conflict" against various criminal gangs reinforced this concern.[103] We should thus be cautious in untethering international tribunals' legal interpretations of IHL from the specific case and context they were intended to address.[104]

2. The Dubious and Recent Rise of Proportionality

The point of this Section is not to argue that the principle of proportionality lacks customary status in NIACs. This would be a dubious argument today, given widespread State practice to the contrary. Rather, the intent is to show that the principle of proportionality is not firmly embedded in the legal framework applicable to NIACs. Its extension to NIACs is a recent development. The principle's crystallization as a norm of CIL in NIACs likely occurred only after the US-led invasion of Afghanistan in 2001. Until then, many states did not have a reason to take a position on the CIL status of proportionality in NIACs. Such conflicts were historically understood to refer to domestic conflicts or civil wars, and therefore did not implicate most states.[105] The wars in Afghanistan and Iraq created a new type of transnational NIAC, which motivated the coalition of intervening states to identify the rules they deemed applicable.

The emergence of the principle of proportionality as a rule of CIL applicable in NIACs has received surprisingly little attention.[106] The rush to fill the gaps in the legal framework applicable to NIACs, and the lack of international appetite to negotiate new treaties, led states and commentators to claim, without much basis, that many IAC rules

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103. Arturo Torres et al., *Once-Peaceful Ecuador Enters a New Era: 'We Are in a State of War,'* WASH. POST. (Jan. 10, 2024), https://www.washingtonpost.com/world/2024/01/10/ecuador-armed-internal-conflict-gangs/ [https://perma.cc/HJT4-ATRW].

104. *See Tadic*, Case No. IT-94-1-AR-72, ¶ 68. The Appeals Chamber in *Tadic*, for example, was focused primarily on the geographic scope of IHL rules related to the protection of prisoners and civilians, who are often located outside areas of active hostilities. *Id.* It noted, however, that "some of the [IHL] provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited." *Id.*

105. *See* Watts, *supra* note 69, at 149 (noting that governments involved in NIACs traditionally did not look to international law for the rules governing their actions, as those conflicts were "internal or non-international in character").

106. *See id.* By contrast, the rules governing the targeting and detention of enemy combatants in NIACs have received extensive debate. See Bellinger & Padmanabhan, infra note 108.

apply in NIACs as a matter of CIL.[107] This is problematic for several reasons.[108] For one, there are significant differences between IACs and NIACs; rules developed to regulate the former do not necessarily make sense in the latter. As Professor Hakimi notes, "[r]egulating noninternational conflicts by analogy to international conflicts makes some intuitive sense . . . [b]ut the analogy is deeply imperfect."[109] Second, the principle of proportionality was developed at a time when international law primarily concerned relationships between states rather than the rights of individuals. Applying the principle of proportionality to NIACs (and the collateral damage it permits) thus ignores significant developments in international law, particularly the rise of human rights law. Finally, we should be cautious to extend IAC rules to different contexts unless such extension advances the purported objectives of those rules. As discussed below, states' assertions that proportionality is a rule of CIL in NIACs promoted their military interests more than humanitarian objectives.[110]

C. IHL Facilitates Violence

Humanitarian actors who seek to expand the scope and application of IHL or make the law uniform in both IACs and NIACs undoubtedly view IHL primarily as a framework of prohibitive laws that limit the scope and suffering of war.[111] This is formalistically true.

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107. Shereshevsky, *supra* note 97, at 468.

108. *See* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 208 (2011) ("The conclusion that many or all rules applicable to international armed conflict are customary law in noninternational armed conflict is suspect, however, given the paucity of state practice and *opinio juris* to establish this proposition.").

109. Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1378 (2012). This is due, in part, because "the nature and scale of violence in interstate conflict has had a distinct impact on how force is controlled under international humanitarian law"; *see also* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 2 (2004). NIACs fought against non-state armed groups generally do not entail existential threats against the state, as many IACs historically did.

110. *See* Goldsmith & Posner, *supra* note 97, at 1115 ("CIL emerges from the states' pursuit of self-interested policies at the international stage.").

111. *See generally* Shereshevsky, *supra* note 97 (noting the humanitarian motivations that caused many actors to push for more expansive interpretations of IHL in NIACs); *see also* ICRC, *Commentary on the First Geneva Convention*, ¶¶ 237 (2016) (stating that an armed conflict is triggered by non-consensual presence of armed forces in another state's territory).

IHL prohibits torture, the targeting of civilians and civilian objects, disproportionate attacks, and weapons that are indiscriminate or designed to cause unnecessary suffering.[112] A rich body of scholarship has emerged, however, that shows how IHL functionally legitimizes or facilitates violence. As one commentator notes, "an alternative account of IHL is that it has facilitated rather than restrained military operations by conferring undue legitimacy on violence in war."[113]

IHL can facilitate violence in several ways. First and foremost, it authorizes (or at least renders lawful) states and combatants to engage in hostilities during armed conflict.[114] Aggressive wars are prohibited, but combatants on both sides of the conflict are subject to the same "laws, rights, and duties" once hostilities commence.[115] One of these rights, as set forth in Additional Protocol I, is the "right to participate directly in hostilities."[116] This right applies equally to combatants of all parties to the conflict, including those who fight for the aggressor State. Combatants thus have a right to "engage in conduct that would in any other context be criminal."[117] This legal privilege, often called the "combatants privilege", grants immunity from the domestic law of the enemy state for conduct undertaken consistent with IHL.[118] Lawful combatants have a right to inflict violence against the enemy (and incidentally against civilians) so long as they do not violate IHL. In

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108. *See* Additional Protocol 1, *supra* note 8, at arts. 75, 51, 35, 48.

113. *See* Tinkler, *supra* note 22, at 607; *see also* Eliav Lieblich, *The Facilitative Functions of Jus in Bello*, 30 EUR. J. INT'L L. 321, 339 (2019) (stating that IHL rules framed as prohibitions are "in fact facilitative" of violence).

114. *See, e.g.*, Criddle, *supra* note 81, at 1075 ("IHL authorizes states to target enemy fighters freely in support of military objectives, provided that collateral damage is not manifestly 'excessive.'"). This view is not shared by others. *Contra* Anthony Dworkin, *Individual, Not Collective: Justifying the Resort to Force Against Members of Non-State Armed Groups*, 93 INT'L L. STUD. 476, 481 (2017) ("IHL does not provide positive authorization for any act of violence, because it does not take a position on whether the overall use of force is lawful.").

115. *See* Regulations Respecting the Laws and Customs of War on Land, Art. 1, annexed to Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

116. Additional Protocol I, *supra* note 8, art. 43(2).

117. *See* Geoffrey S. Corn, *The Distinction Dilemma: Why It Is Time for the U.S. to Embrace a More Logical Approach to Combatant Qualification*, 58 TEX. INT'L L.J. 49, 51 (2023).

118. Jens David Ohlin, *The Combatant's Privilege in Asymmetric and Covert Conflicts*, 40 Yale J. Int'l. L. 337, 342 (2015).

other words, IHL makes lawful acts of violence that would generally be unlawful in times of peace.

Second, IHL allows states to justify as lawful whatever acts of violence are not specifically prohibited. Even though IHL does not explicitly authorize collateral damage, it does say when collateral damage is prohibited (i.e., when it is expected to be excessive compared to the military advantage anticipated). Military operations that do not violate IHL are thus considered lawful.[119] In this sense, IHL implicitly authorizes, or at least makes lawful, collateral damage under certain circumstances.[120]

This implicit authorization gives states a "powerful rhetorical tool"[121] in justifying civilian harm.[122] As legal compliance is generally understood to be a virtue, and laws generally proscribe immoral conduct, attacks that are consistent with IHL may often be presumed justified. As two commentators note, "acts sanctioned by law enjoy a humanitarian cover that helps shield them from criticism."[123] IHL is thus "a strategic partner for military commanders" as it can "increase the perception of outsiders that what the military is doing is legitimate."[124] States thus make concerted efforts to justify civilian casualties in war by reference to compliance with IHL rather than to military or political aims.[125]

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119. This legitimizing feature of IHL has recurred throughout history. *See, e.g.*, Wilke & Doutaghi, *supra* note 34, at 91 (noting the "drafters and commentators understood the 1923 *Hague Rules* [on Air Warfare] as 'facilitating' rather than simply restricting aerial bombing . . . [T]heir regulatory techniques provided space for legitimizing aerial bombardment"); *see also id.* at 106 ("The Hague Rules would supply the legal concepts to debate, justify and legitimize harm to civilians.").

120. *See* Kretzmer, *supra* note 83, at 28 (noting that while the IHL principle of proportionality "appears as a principle geared toward protection of civilians . . . in fact the principle allows what amounts to intentional killing and wounding of civilians").

121. Jochnick & Normand, *supra* note 14, at 58.

122. *See* Cordula Droege, *War and What We Make of the Law*, JUST SECURITY (July 10, 2024), https://www.justsecurity.org/97582/war-law/ [https://perma.cc/D22S-SHC7] ("[P]arties to armed conflicts have used IHL to justify their actions when they depart from the expectations that would ordinarily apply in peacetime, especially those concerning human rights.").

123. *See* Jochnick & Normand, *supra* note 14, at 56.

124. DAVID KENNEDY, OF WAR AND LAW 41 (2006).

125. *See* Tinkler, *supra* note 22, at 626 ("States implicitly acknowledge the potency of IHL as a legitimating force by seeking to explain the actions almost exclusively by reference to law."); *see e.g.*, DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2021, at 5 (Aug. 12, 2022), https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNU

The legitimating function of law has been a long-standing source of tension for humanitarians who fear that placing limits on war will render acts of violence not explicitly prohibited more acceptable.[126] Some states objected to the codification of the proportionality principle in API for this reason, arguing that it would put the civilian population at greater risk by offering a justification for something that cannot be justified, i.e., the killing of civilians as collateral damage.[127]

Third, IHL can be used to enhance states' domestic legal authorities in waging war. States have invoked IHL "for the purpose of permitting executive action to the limits of what international law might permit."[128] In the United States, for example, the Executive Branch consistently invoked IHL in arguing for sweeping interpretations of the 2001 Authorization for Use of Military Force (AUMF) against Al Qaeda and the Taliban.[129] Government attorneys referenced IHL in arguing that the AUMF provided domestic authority to detain a broad scope of individuals for an unlimited period of time, and the courts generally obliged.[130] The requirement in the Third Geneva Convention to repatriate POWs at the end of a conflict morphed into a positive domestic authority for indefinite detention,

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AL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNIT ED-STATES-MILITARY-OPERATIONS-IN-2021.PDF [https://perma.cc/RRY6-GHHU] (the US Department of Defense's annual reports on civilian casualties emphasize that the "DoD conducts its operations in accordance with law of war requirements, including law of war protections for civilians, such as the fundamental principles of distinction and proportionality . . .").

126. *See generally* SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR (2021) (discussing the long-standing tension between war abolitionists and those who sought to make war more humane).

127. *See* MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 351 (2013) (noting Romania's objection that there could not be any justification for civilian losses in attacks against military objectives).

128. *See* Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L.J. 49, 62 (2016).

129. *Id.* at 65.

130. *See, e.g.*, Respondents' Memorandum Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay at 8n.3, *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 312 (D.D.C. 2009) (No. 08-442).

flipping the Convention's underlying humanitarian purpose on its head.[131]

This broad assertion of legal authority in turn made it politically more difficult to release detainees who were deemed not to pose a threat. Administration officials did not want to appear weak on terrorism or be blamed for not doing everything within their authority to defeat Al Qaeda. A similar dynamic may incentivize unwarranted or unethical force on the battlefield.[132] Attacks that seem immoral may be difficult to oppose if they are deemed lawful. Commanders may not want to be blamed for failing to use all legally available measures to achieve their military objectives.

D. Human Rights Law

Before extending an IAC rule to a new context, it is important to first assess the default rule (if any) that it would displace or modify. If no law beyond IHL otherwise applied in armed conflict, one would likely conclude that the modest prohibition on disproportionate attacks was better than no prohibition. When the proportionality principle was first codified in 1977 in Additional Protocol I,[133] there was no other meaningful rule protecting civilians from collateral damage in IACs. To the extent a State had human rights obligations, they "were not applicable in its relationship with nationals of the enemy, whether on the battlefield, in detention camps or in occupied territory."[134] IHL was the sole legal framework that applied in IACs, and states had refused for decades to place restrictions on aerial bombardments. The amorphous principle of military necessity and the prohibition on

131. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

132. *See* Michael N. Schmitt, *Year Ahead–International Humanitarian Law at Risk*, ARTICLES OF WAR (Jan. 11, 2024), https://lieber.westpoint.edu/international-humanitarian-law-risk/[https://perma.cc/4SM5-J83H] (noting the concern that parties to a conflict sometimes believe that "military operations should take full advantage of all that IHL permits" rather than treating IHL as the "floor for lawful conduct").

133. Additional Protocol I, *supra* note 8, at art. 51(5)(b).

134. Kretzmer, *supra* note 83, at 14. At the time, international law was primarily focused on protecting states' interests rather than individual rights. *See id.* International law "accorded nations the status of collective agents and treated the citizen as a cell in the body politic." *See* DRAPER, *supra* note 19, at 5. Thus, when a state had a right to wage war against another state, it necessarily had the right to harm persons and property that constituted the enemy state. *See id.*

wanton destruction provided the only limitations against harm to civilians. The principle of proportionality thus emerged in IACs as a protection against total war by providing some limitation on attacks against military objectives.[135] This is not the case in NIACs.

1. The Right to Life

The rise of human rights law (HRL) has altered the legal playing field, at least in modern NIACs. States are no longer the sole subjects of international law. International law now seeks to protect individuals from state abuses, and thus "international human rights law applies to all persons at all times, regardless of nationality, status, or location."[136] Under HRL, the right to life is "the supreme right from which no derogation is permitted."[137] Article 6 of the International Covenant on Civil and Political Rights states, "No one shall be arbitrarily deprived of his life."[138] As the Human Rights Committee has observed, "Deprivation of life involves intentional or otherwise *foreseeable* and preventable life terminating harm or injury, caused by an act or omission."[139] The Committee makes clear that both IHL and HRL apply in situations of armed conflict, and that the two legal frameworks are "complementary, not mutually exclusive."[140]

While certain HRL obligations do not apply to states outside of their territory and jurisdiction—or in areas outside of their effective

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135. *See* MOYN, *supra* note 126, at 201 (stating that Additional Protocol I "not only clearly formalized the immunity of civilians from targeting for the first time but also imposed the newfangled prohibition against . . . excessive civilian harm, even when the targets were fair game").

136. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 747 (2005). Some states, such as the United States, take the position that the ICCPR does not impose obligations outside its "territory and jurisdiction." *See, e.g.*, Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 313 (2011). Nevertheless, the right to life is widely considered a rule of customary international law that applies extraterritorially. *See id.* ("The right to life has long been acknowledged as part of custom.").

137. Human Rights Committee, General Comment No. 36, U.N. Doc. CCPR/C/GC/36 ¶ 2 (Sept. 3, 2019).

138. *See id.* ¶ 4; *see also* Hathaway et al., *supra* note 63, at 24 ("The right not to be arbitrarily deprived of life is a *jus cogens* norm—a peremptory, non-derogable norm binding on all states.").

139. Human Rights Committee, General Comment No. 36, U.N. Doc. CCPR/C/GC/36 ¶ 6 (Sept. 3, 2019) (emphasis added).

140. *Id.* ¶ 64.

control[141]—it is generally accepted that states have *some* human rights obligations when acting extraterritorially.[142] This is particularly the case with states' negative obligations to "respect" human rights. Whereas certain positive obligations are infeasible outside a state's territory (such as the right to education), refraining from actions that would otherwise violate a right is "always within the control of the state, even when it acts extraterritorially."[143] The right to life, and the corresponding prohibition on arbitrary killing, is one such right that states must respect at all times and in all places.[144]

2. IHL as *Lex Specialis*

International humanitarian law undermines the substantive protections of the HRL right to life through the doctrine of *lex specialis*. This doctrine provides that when two sets of rules purport to govern the same situation, the set of rules designed for the specific subject matter

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141. *See* Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligations on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 10 (2004). Human rights treaty bodies have generally embraced the "effective control" test for determining the extra-territorial scope of states' human rights obligations. *See id.* The European Court of Human Rights has interpreted this phrase broadly, stating that states' human rights obligations may apply where it exercises control over an area or over individuals. In the *Al-Skeini v. United Kingdom* decision, the Court stated that the Convention applies when a Contracting State, "through the consent, invitation or acquiescence of the Government of that territory, [] exercises all or some of the public powers normally to be exercised by that Government." *Al-Skeini v. United Kingdom*, Eur. Ct. H.R. at 58 (2011).

142. *See* Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20, 52 (2014) (noting jurisprudence of human rights treaty bodies has "coalesced into a generalized doctrine of extraterritorial application"); *see also* Jordan Paust, *Human Rights on the Battlefield*, 47 GEO. WASH. INT'L L. REV. 509, 527 (2015) ("Although relevant human rights law generally has a universal reach, not every individual outside the territory of the United States has protection from an allegedly impermissible infringement of a human right.").

143. *See* Van Schaack, *supra* note 142, at 51. ("[h]uman rights bodies are increasingly comfortable with the idea of a sliding scale of rights and obligations that hinges on the particular circumstances of the foreign state's presence and actions within the territorial state.").

144. *See* Human Rights Committee, General Comment No. 36, U.N. Doc. CCPR/C/G/36 ¶ 63 (Sept. 3, 2019). (stating states' obligations to respect the right to life under the ICCPR extend to "persons located outside any territory effectively controlled by the state whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner."); *see also* William J. Aceves, *When Death Becomes Murder: A Primer on Extrajudicial Killing*, 50 COLUM. HUM. RTS. L. REV. 116, 118–19 (2018) ("The right to life and the corollary right to be free from the arbitrary deprivation of life . . . has attained *jus cogens* status as a non-derogable norm that binds all states.").

take priority over more general rules.[145] In situations of armed conflict, IHL is considered the *lex specialis* and HRL is the *lex generalis*. The International Court of Justice (ICJ) affirmed this doctrine in its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*. While the ICJ stated that both IHL and HRL apply during armed conflict, including the right to life under HRL, it noted that HRL and IHL provide different standards for the use of lethal force. In light of these competing standards, the ICJ concluded "the test of what is an arbitrary deprivation of life . . . falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict."[146]

IHL can only serve as *lex specialis* if there is a specific rule that conflicts with a rule of HRL. As noted above, there is very little IHL treaty law applicable to NIACs. In the absence of an IHL rule to serve as the *lex specialis* in NIACs, HRL would continue to determine what constitutes an arbitrary deprivation of life under the ICJ's analysis. Under HRL, lethal force can be employed only when "strictly unavoidable in order to protect life."[147] Most, if not all, attacks expected to result in collateral damage would thus be prohibited under this more demanding standard.

The recent emergence of the principle of proportionality as a rule of CIL in NIACs has thus decreased civilian protection. It displaces HRL and strips civilians of its robust protections, even if they do nothing to warrant the forfeiture of their rights. It affords states the ability to incidentally kill civilians without, at least arguably, running afoul of the HRL prohibition on arbitrary deprivation of life.[148] This helps explain why states in recent years readily acknowledged

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145. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, Apr. 13, 2006.

146. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8). Some commentators disagree with this deference to IHL. *See, e.g.*, Haque, *supra* note 61, at 481 (arguing "[o]ur best interpretation of human rights law, informed but not determined by looking to IHL, should prevail").

147. U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1 (Sept. 7, 1990).

148. *See* Kretzmer, *supra* note 83, at 29 ("Thus, it would seem that rather than providing enhanced protection in non-international armed conflicts for civilians, introduction of the proportionality principle might well weaken the protection that they would enjoy under a human rights regime.").

proportionality as a rule of CIL appliable in NIACs.[149] States' attempt to expand the application of IHL is not limited to the proportionality principle. One commentator notes, "it is precisely because IHL is perceived as being less constraining than IHRL that some states have attempted, in recent years, to lower the threshold for IHL's application and to argue for the unlimited geographical and temporal boundaries of armed conflicts."[150]

The idea that civilians' human rights, such as the right to life, can be switched off wherever a state targets members of a terrorist group is particularly problematic because it undermines the very premise of HRL: the "inherent dignity" of every human being. "Human rights theory provides that humans, not states, ought to be the central animating figures of international law."[151] Human rights law affirms that individual rights may trump collective or societal interests, and that basic human rights are possessed universally without regard to ethnicity, race, gender, nationality, or similar criteria,[152] and that protection of human rights is a matter of international concern.[153]

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149. *See id.* at 22. Kretzmer, for example, notes when violence broke out in Gaza and the West Bank in 2000, "Israeli authorities were eager to stress that the general laws and customs of war . . . would now apply in the Occupied Territories." *See id.* Additionally, "[t]he impetus behind this policy was not to strengthen protections offered to potential victims of armed conflict, but exactly the opposite—to free the authorities of some of the constraints of a law-enforcement model of law." *Id.*

150. Lieblich, *supra* note 113, at 331.

151. Vijay M. Padmanabhan, *The Human Rights Justification for Consent*, 35 U. PA. J. INT'L L. 1, 9 (2013).

152. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 Section I, ¶ 5 (June 25, 1993) ("All human rights are universal, individual, interdependent and interrelated.").

153. *See* Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269, 271–72 (2015) (describing that Western states "routinely employ countermeasures to promote human rights abroad."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703(2) (AM. L. INST. 1987) ("Any state may pursue international remedies against any other state for a violation of the customary international law of human rights."). The ICJ has also indicated that respect for the "basic rights of the human person" is an obligation *erga omnes*, meaning that "all States can be held to have a legal interest in their protection." Case Concerning the Barcelona Traction, Light & Power Co. Ltd., (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5). Criddle argues that the *erga omnes* theory is inapt because it rests on "dubious notions of 'state interests' and 'collective interests.'" Criddle, *supra* note 145, at 274. Rather, he argues "states' standing to protect the human rights of foreign national abroad rests ultimately upon the legally protected interests of human rights holders." *Id.*

States' claims that civilians in NIACs can be killed as collateral damage undermines these premises. The claim undermines the individual nature of human rights by prioritizing the sovereign rights of the State and its citizens' collective security interest over the individual rights of those in the conflict affected area.[154] It undermines the universality of human rights, prioritizing the rights of people of the belligerent state over the civilians in areas of conflict. It undermines the notion that human rights can only be waived by the bearers of those rights.[155] In short, human rights protections "should not be switched off simply by their geographic proximity to enemy belligerents."[156]

IHL must evolve consistent with modern understandings of human rights, particularly if the "humanitarian" aspect of IHL is to be credible. Michael Reisman wrote in 1990 that international human rights law "is more than a piecemeal addition to the traditional corpus of international law. . . . By shifting the fulcrum of the system from the protection of sovereign to the protection of people, it works qualitative changes in virtually every component [of international law]."[157] IHL has thus far proven immune to these changes. As NIACs have become more common than IACs, states continue to apply IHL rules that developed in a pre-human rights era and that were designed primarily to protect military interests.

IV.ETHICAL CONCERNS WITH THE PRINCIPLE OF PROPORTIONALITY IN NIACS

This Article argued in Part II that the principle of proportionality is morally flawed because it does not distinguish between innocent and non-innocent civilians. It may thus permit attacks that cause forseeable harm to innocent persons, which are morally prohibited. This risk exists in IACs, as I argued previously, although in IACs the civilian

154. *See* WELSH ET AL., *supra* note 4, at 1. The rise of human rights has contributed to a more general process of "individualization" in international law, which "challenges the primacy of the sovereign state" and "elevate[s] human-centric (vs state-centric) conceptions of security." *Id.*

155. *See* Criddle, *supra* note 154, at 299.

156. *See* Trumbull, *supra* note 14, at 551.

157. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990).

population will often play a significant role in the state's war effort.[158] Civilians can thus become non-innocent to the extent they are responsible for or meaningfully contribute to an unjust war. (Again, this does not mean IHL protections for non-innocent civilians in IACs should be weakened. Rather it means that there is potentially greater overlap in what law and morality permit in IACs). In NIACs, the risk that attacks will incidentally kill innocent civilians is heightened. Civilians in NIACs are not nationals of an "enemy" state.[159] The civilian population does not have the same relationship with non-state armed groups (NSAGs) as it does with the state. Unlike in IACs, civilians living in areas affected by transnational NIACs may have no connection to the NSAG or the conflict. There often will be no basis to consider civilians in these areas as non-innocent.

A. Civilian Population in NIACs

Civilians in transnational NIACs are differently situated, in morally relevant ways, from civilians in IACs. In particular, the political, legal, and economic bonds that unite a state and its citizens often do not exist between NSAGs and the surrounding population.[160] While civilian support to NSAGs may vary across different conflicts, we cannot assume that the civilian population supports or bears responsibility for NSAG actions as it does, at least to a certain extent, for states.[161]

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158. *See* Trumbull, *supra* note 3, at 63–65. In Russia, the Kremlin has instituted sweeping changes to militarize Russian society and generate public support for its war of aggression against Ukraine. *See* Robyn Dixon, *Under Putin, A Militarized New Russia Rises to Challenge U.S. and the West*, WASH. POST (May 6, 2024), https://www.washingtonpost.com/world/interactive/2024/putin-values-russian-society-conservatism/ [https://perma.cc/XQ84-YSUC].

159. *See e.g.*, General Order No. 100, Instructions for the Armies of the United States in the Field, art. 21 (Apr. 24, 1863). International law has traditionally afforded fewer protections to citizens of an enemy state in war. *See id.* The Lieber Code, one of the first codifications of the laws of war, provides: "The citizen of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war." *Id.*

160. *See* Trumbull, *supra* note 14, at 550.

161. I do not argue here that all civilians support the war efforts of their state or that all civilians of a state fighting an unjust war are non-innocent and thus liable to attack. As I previously argued, however, the idea that civilians bear at least some responsibility for the actions of their government is fundamental to international law. *See* Trumbull, *supra* note 3, at 65–68.

Unlike states, NSAGs generally do not represent the surrounding population. NSAGs are not elected, they do not exercise sovereign authority, and they have no authority under international law to speak on behalf of the local population. Civilians living in areas where NSAGs operate remain citizens of the state and are legally bound to that state rather than the NSAG. While certain NSAGs purport to act in the interest of the surrounding population, the interests of NSAGs and the civilian population may not converge, particularly where NSAGs fight to promote extremist religious views, criminal enterprises, other financial gain, or their own survival.[162] In some cases, NSAGs may choose to operate in territory where they have few ties to the civilian population, due to the lack of effective government control in that area. Al Qaeda, for example, moved its headquarters from Saudi Arabia to Sudan before eventually relocating to Afghanistan in 1996 where it was tacitly welcomed by the Taliban.[163] Al Qaeda was primarily comprised of Arab fighters and had little connection with the local Afghan population.

Civilians' support and approval of NSAGs in their territory can also vary significantly. Some NSAGs seek to generate good-will among the civilian population by providing social and security services, particularly in areas where government services are lacking.[164] Providing such services is costly, however, and NSAGs may not have the resources or will to do so. In other cases, NSAGs terrorize the local population or coerce their tacit cooperation through extreme violence.[165] Civilian support for NSAGs can also fluctuate over the

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162. *See, e.g.*, Anthony Vinci, *The Strategic Use of Fear by the Lord's Resistance Army*, 16 SMALL WARS & INSURGENCIES 360, 363 (2005) (noting that the LRA's political objectives, apart from its own survival, are generally unclear).

163. Clayton Thomas, *Al Qaeda: Background, Current Status, and U.S. Policy*, CONG. RES. SERV. (May 6, 2024).

164. Ana Arjona, *Civilian Cooperation and Non-Cooperation with Non-State Armed Groups: The Centrality of Obedience and Resistance*, 28 SMALL WARS & INSURGENCIES 755, 767 (2017).

165. *See* Vinci, *supra* note 163, at 364.The Lord's Resistance Army in Uganda is one example. It was founded in 1987 by Joseph Kony to fight against Yoweri Mosevini, who took control of Uganda in 1986. Kony initially enjoyed local support from the Acholi people, but that support soon waned as Kony committed atrocities against the civilian population. In the early 1990s, Sudan started to provide financial and military support to the LRA. As it no longer required voluntary support from the local populations in Uganda to perpetuate its campaign, the LRA resorted to child abductions to supply new fighters. These abducted children are brainwashed, through trauma and drugs, to make them unafraid of death and willing to carry out

course of a conflict, especially as NSAGs resort to terrorism to advance their interests.[166] Civilians who initially welcomed NSAGs as liberators may later work to undermine them at great personal risk.[167] The militias that have come to control and destabilize significant portions of the Middle East are "increasingly hated—yet devilishly hard to uproot."[168]

Civilians' economic contributions to NSAGs can also vary widely. While some NSAGs, particularly insurgent groups seeking to overthrow their government, may depend significantly on the local economy, NSAGs can finance their operations in other ways. Some NSAGs employ extractive or parasitic measures, including by stealing natural resources or precious stones, taxing local commerce, or engaging in organized criminal activities like kidnappings and drug trafficking.[169] NSAGs may also receive funding, arms, and recruits from foreign states or communities. NSAGs that have an independent or foreign source of financing are more likely to engage in acts of terrorism that harm locals as they are "less concerned about the cost of fighting to the local population than those who rely on local sources of

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mass atrocities. The LRA also relies on terror to control the civilian population. It routinely uses public mutilations, amputations, and rape as means to instill fear in the local populations of Northern Uganda and to prevent them from cooperating with government authorities. *See id*.at 364-73.

166. *See, e.g.*, Virginia Page Fortna et al., *Don't Bite the Hand that Feeds: Rebel Funding Sources and the Use of Terrorism in Civil Wars*, 62 INT'L STUD. Q. 782, 782 (2018) (noting that acts of terrorism undermine NSAG's domestic legitimacy).

167. A 2018 survey of Mosul residents living under ISIS control, for example, showed that ISIS was unpopular and resented among the civilian population, despite being initially welcomed. Despite the risks of defiance, many civilians in Mosul "worked to undermine, refused to fully cooperate with, or engaged in defiance against the Islamic State's occupation in a multifaceted way." *See* Isak Svensson et al., *How Ordinary Iraqis Resisted the Islamic State*, WASH. POST (Mar. 22, 2019), https://www.washingtonpost.com/politics/2019/03/22/civil-resistance-against-islamic-statestate-was-much-more-common-than-many-think/ [https://perma.cc/N24M-HPF7].

168. *The Middle East has a Militia Problem*, *supra* note 66. As *The Economist* notes, "[m]ilitias murder and intimidate their countrymen, loot billions of dollars from treasuries and scare off foreign investors." *Id.*

169. *See* Achim Wennmann, *Economic Dimensions of Armed Groups: Profiling the Financing, Costs, and Agendas and Their Implications for Mediated Engagements*, 93 INT'L REV. RED CROSS 333, 345 (2011). The Fuerzas Armadas Revolucionarias Colombianas (FARC), for example, funded its decades-long insurgency "through kidnapping, extortion, and beginning in the early 1980s, cocaine." J. Seston Phippen, *Who Will Control Colombia's Cocaine Without FARC?*, ATLANTIC (July 1, 2016), https://www.theatlantic.com/news/archive/2016/07/farc-cocaine-colombia/489551/ [https://perma.cc/TH77-PSSY].

support."[170] For example, one study found that Al Qaeda in Iraq (AQI), a particularly violent NSAG, relied primarily on "stolen goods and spoils of war for revenue."[171] AQI could accept the legitimacy costs of its terrorist tactics because only five percent of its revenue came from "uncoerced support from the population."[172]

B. The Islamic State

The rise to power of the Islamic State of Iraq and al-Sham (ISIS) illustrates the complicated relationship between NSAGs and the civilian population, as well as the degree of coercion that NSAGs often exercise over the latter. In 2014, ISIS (an off-shoot of AQI) shocked the world when it took control of Fallujah and then captured Iraq's second largest city, Mosul, with little opposition from Iraqi forces. Abu Bakr al-Baghdadi, announced the creation of an Islamic caliphate in vast portions of Syria and Iraq, and declared himself the leader of all Muslims.[173] ISIS proceeded to commit mass atrocities, executing foreign hostages, and slaughtering and enslaving members of the Yazidi minority in an act of genocide.[174]

ISIS's control over the civilian population was maintained through acts of oppression and brutality. The Independent International Commission of Inquiry on the Syrian Arab Republic (Syria COI) found that ISIS "made calculated use of public brutality and indoctrination to ensure the submission of communities under its control."[175] Its tactics included "constant surveillance within local communities," "lashings and amputations" for minor offenses, public executions of accused traitors and heretics, and "systematically target[ing] sources of

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170. Fortna et al., *supra* note 167, at 783.

171. *Id.* at 785.

172. *See id.*

173. Nick Paton Walsh, *How ISIS leader Abu Bakr al-Baghdadi became a feared preacher of hate*, CNN (Oct. 27, 2019) https://www.cnn.com/2019/10/27/middleeast/isis-leader-baghdadi-preacher-of-hate-intl-hnk/index.html [https://perma.cc/8LNK-B4FS].

174. John Kerry, Secretary of State, Remarks on Daesh and Genocide (Mar. 17, 2016), https://2009-2017.statestate.gov/secretary/remarks/2016/03/254782.htm [https://perma.cc/BN8K-CJ9B].

175. U.N. Hum. Rts. Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living Under ISIS in Syria*, ¶ 1, U.N. Doc. A/HRC/27/CRP.3 (Nov. 19, 2014), https://documents.un.org/doc/undoc/gen/g14/223/56/pdf/g1422356.pdf?token=1HXi1DgOZ3U20zs904&fe=true [https://perma.cc/M484-MDMT].

dissent."[176] ISIS also blocked humanitarian assistance, making the civilian population dependent on services ISIS controlled.[177] The Syria COI concluded that "the brutal nature and overall scale of abuses is intended to reinforce the group's absolute monopoly on political and social life to enforce compliance and conformity among communities under their control."[178]

ISIS similarly relied on coercion and fear to carry out basic services. At its height, ISIS controlled "much of eastern Syria and northern Iraq."[179]. It employed 22,000 civilians as it "had to rely on local Iraqis and Syrians that it governed over to fulfill these functions as teachers, doctors, engineers, nurses, bureaucrats and civil servants."[180] Employees were required to attend "atonement and education courses in Sharia" and were often coerced into swearing allegiance to ISIS.[181] Employees who tried to quit "risked lethal reprisals against their family, confiscation of their property, and the danger of reprisals from Islamic State supporters in their new location."[182]

Civilians trapped in ISIS controlled territory were also placed at risk by the bombing of ISIS targets. US and coalition forces relied heavily on airpower, including drones, to combat ISIS and dropped approximately 112,00 bombs and missiles over five years.[183] As the campaign against ISIS intensified, civilian casualties increased.

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176. *Id.* ¶ ¶ 19–34.

177. *Id.* ¶ 22.

178. *Id.* ¶ 30.

179. Jim Garamone, *Defeat-ISIS Group Adapts to Continue Pressure on Islamic State*, DOD NEWS, (Oct. 11, 2024) https://www.defense.gov/News/News-Stories/Article/Article/3934087/defeat-isis-group-adapts-to-continue-pressure-on-islamic-state/ [https://perma.cc/MME7-6TQX].

180. Matthew Bamber, *"Without Us, There Would Be No Islamic State": The Role of Civilian Employees in the Caliphate*, 14 CTC SENTINEL 31, 34 (Nov. 2021), https://ctc.westpoint.edu/without-us-there-would-be-no-islamic-state-the-role-of-civilian-employees-in-the-caliphate/. Civilian employees were separated into two categories. *Id.* The *muba'yain* included both foreign and locals that pledged allegiance to ISIS. *Id.* The *munasirin*, by contrast, were employed by ISIS but did not pledge allegiance. *Id.*

181. *Id.* at 35.

182. *Id.* at 36.

183. *See* Dave Davies, *Journalist Says U.S. Air War Against ISIS Killed Countless Civilians in Syria*, NAT'L PUB. RADIO (Jan. 13, 2022), https://www.npr.org/2022/01/13/1072735380/journalist-says-u-s-air-war-against-isis-killed-countless-civilians-in-syria [https://perma.cc/D97E-P6J7].

A New York Times investigation revealed the existence of an American strike cell, Talon Anvil, that was responsible for a disproportionate number of these civilian casualties.[184] The cell "circumvented rules imposed to protect noncombatants, and alarmed partners in the military and the CIA by killing people who had no role in the conflict: farmers trying to harvest, children in the street, families fleeing fighting, and villagers sheltering in buildings."[185] In one operation, the strike cell targeted a reported ISIS training center in the middle of the town of Karama, Syria with a five hundred pound bomb. Immediately after the blast, infrared cameras showed "women and children staggering out of the partly collapsed building, some missing limbs, some dragging the dead."[186] According to Dr. Larry Lewis, a former Pentagon adviser, "Every year that the strike cell operated, the civilian casualty rate in Syria increased significantly."[187] Lewis noted that operations in Raqqa were particularly devastating for civilians and left "the city in ruins and caused human suffering and tragedy that will last far longer than the conflict itself."[188]

ISIS's brutality created political pressure on the coalition to win the conflict as soon as possible. Yet, the victims of ISIS should not be re-victimized through reckless targeting or be written off as "acceptable" collateral damage. As Paulo Sergio Pinheiro, head of the UN Commission of Inquiry on Syria, stated, "The imperative to fight terrorism must not . . . be undertaken at the expense of civilians who unwillingly find themselves living in areas where ISIL is present."[189]

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184. Dave Philipps et al., *Civilian Deaths Mounted as Secret Unit Pounded ISIS*, N.Y. TIMES (Dec. 12, 2021), https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html [https://perma.cc/5AFA-U5VQ].

185. *Id.*

186. *Id.*

187. *Id.*

188. Larry Lewis, *Why We Haven't Made Progress on Civilian Protection*, JUSTSECURITY (Feb. 3, 2021), https://www.justsecurity.org/74377/why-we-havent-made-progress-on-civilian-protection/ [https://perma.cc/LQ8Y-3XRL].

189. Petra Cahill, *In Battle Against ISIS in Syria and Iraq, Civilians Suffer Most*, NBC NEWS (July 8, 2017), https://www.nbcnews.com/storyline/isis-terror/battle-against-isis-syria-iraq-civilians-suffer-most-n779656 [https://perma.cc/WY79-53CX].

C. No Moral Justification for Collateral Damage in NIACs

Law and morality provide different answers to the question of who can be killed in war. IHL prohibits intentional attacks against civilians, but it permits attacks against military objectives that are expected to incidentally kill a non-disproportionate number of civilians.[190] From the moral standpoint, however, the foreseeable killing of individuals in war can only be justified if the victim is non-innocent, meaning that he or she has done something to forfeit their right to life. Civilians in NIACs should have a rebuttable presumption of innocence given their tenuous connection to NSAGs. They often do not contribute to the unjust threat posed by NSAGs, nor are they responsible for a NSAG's actions. Applying the principle of proportionality in NIACs, and the collateral damage it permits, thus cannot be morally justified to the extent it authorizes harm to innocent persons.

1. Risk of Harm to Innocent Civilians

As stated above, rather than contributing to the war fighting effort (as many civilians in IACs do) civilians in territories controlled by NSAGs are themselves victimized. This means that persons harmed as collateral damage may often be innocent bystanders. This is especially the case in attacks targeting economic or "war-sustaining" objects, a controversial practice under IHL undertaken by the United States in the conflict against ISIS.[191] These objects may include facilities, such as oil refineries or banks, that are primarily civilian in character and staffed by civilian workers who have little knowledge or control over how the proceeds of these facilities are used by the NSAG.

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190. *See supra* Section II.A.

191. *See, e.g.*, Marty Lederman, *Is it Legal to Target ISIL's Oil Facilities and Cash Stockpiles?*, JUSTSECURITY (May 27, 2016), https://www.justsecurity.org/31281/legality-striking-isils-oil-facilities-cash-stockpiles/ [https://perma.cc/87KW-B5NJ]. Kenneth Watkin describes targeting war-sustaining objects as "an issue that stands at the edge of a very steep and slippery slope that has led directly to considerable humanitarian suffering." Kenneth Watkin, *Sustaining the War Effort: Targeting Islamic Statestate Oil Facilities*, JUSTSECURITY (Oct. 3, 2014), https://www.justsecurity.org/15890/sustaining-war-effort-targeting-islamic-state-oil-facilities/ [https://perma.cc/K8XL-YN67].

The risk to innocent civilians is further exacerbated by the fact that NSAGs generally disregard IHL obligations to separate, to the extent feasible, military objectives within their territory from the civilian population.[192] In IACs, these defensive precautionary obligations can reduce the risk that civilians will be near military objectives and incidentally killed as collateral damage. In NIACs, on the other hand, NSAGs often conceal themselves and their means of warfare among civilians and civilian objects. This puts civilians at greater risk of being killed in attacks against military objectives. Innocent civilians, however, should not suffer the costs of NSAG non-compliance with IHL.

2. No Alternative Justification

The legitimacy of law is at its strongest when it tracks moral principles, condemning what is morally wrong and rewarding what is morally virtuous. Jeff McMahan writes, "Ideally we should establish laws of war best suited to get combatants on both sides to conform their action as closely as possible to the constraints imposed by the deep morality of war."[193] We should thus aim to model legal rules on moral principles unless there is a reason for divergence.[194]

While I have previously argued that the principle of proportionality may be justified in IACs despite its moral shortcomings,[195] this is not the case in NIACs. The principle does not facilitate moral decision-making in such conflicts. To the contrary, given the large numbers of innocent civilians in NIACs, it may often lead to morally unjustified attacks.

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192. *See* Additional Protocol I, *supra* note 8, at art. 58.

193. McMahan, *supra* note 43, at 731.

194. We can posit three reasons for such a divergence. First, morally sound laws that are likely to be ignored by states and combatants serve little utility. With respect to IHL, rules that disadvantage one side to the conflict or that unduly impede pursuit of legitimate military goals are likely to be ignored. Second, laws that infringe on individual rights may be morally justified if they promote societal benefits that *significantly* outweigh any infringement on individual rights. Third, law may deviate from moral norms if compliance with the law will in practice facilitate more ethical decision-making due to lack of information or clarity in the moral norm. *See* Adil Ahmad Haque, *Law and Morality at War*, 8 CRIM. L. & PHIL. 79, 85 (2014) ("[L]aw should track morality unless soldiers who attempt to directly follow morality-tracking norms will often fail and thereby commit more serious moral wrongs than they would commit by attempting to directly follow some alternative, morality-deviating norms.").

195. *See* Trumbull, *supra* note 3, at 69–72.

One justification for the proportionality principle in IACs is that it is difficult for combatants to distinguish between innocent and non-innocent persons in enemy territory. Civilians' contributions to a state's war effort in IACs may vary in scope and degree, and combatants do not have the means to make individualized assessments in enemy territory. This creates a risk that combatants will view entire populations as non-innocent and therefore subject to attack. The principle of proportionality, combined with the principle of distinction, thus offers a bright line rule that can be readily implemented to limit the scope of warfare.

In NIACs, however, states routinely make these individualized and contextualized assessments in determining who can be targeted. As members of NSAGs do not wear uniforms or otherwise distinguish themselves from civilians, there is no bright line rule for who constitutes an enemy combatant.[196] States have had to develop new rules and practices to enable them to comply with the principle of distinction.[197] The United States employs both a formal and functional test for determining combatant status in NIACs. Persons who are not formally part of NSAGs can nevertheless be considered functional members if they provide substantial support to the armed group.[198] According to the U.S. government,

> "[d]etermining that someone is a 'functional' member of an armed group may include looking to, among other things, the extent to which that person performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country's armed forces; whether that person is carrying out or giving orders to others within the group; and whether that person

196. *See, e.g.*, NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27 (2009).

197. *See id.* The ICRC has proposed, for example, that only members of armed groups who have a "continuous combat function" can be deemed combatants in NIAC and thus targetable at any time consistent with the IHL principle of distinction. *See id.*

198. *See e.g.*, Respondents' Memorandum Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 312 (D.D.C. 2009) (No. 08-442). The Obama Administration laid out its theory of who constituted an enemy combatant and was thus subject to law of war detention. It stated, "The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida or associated forces." *Id.* at 2.

> has undertaken certain acts that reliably connote meaningful integration into the group."[199]

This formal/functional test for determining combatant status in NIACs is broader than the status-based test that applies in IACs, sweeping in persons who would be deemed civilians in IACs.[200] It is also the type of test that one would employ to distinguish innocent persons from non-innocent ones. Persons who are part of or "substantially support" NSAGs can be deemed non-innocent given their contributions to an unjust threat. Those who provide less than substantial support (or no support) are generally innocent. Thus, to the extent states can make individualized assessments to determine who is considered a combatant in NIACs, they can also seek to determine who is innocent, at least in planned attacks.

V.IMPLICATIONS: STATES MUST REDUCE RISKS TO INNOCENT CIVILIANS

The moral risks created by collateral damage in NIACs has implications for states that are parties to a conflict as well as for states that consent to the use of force against NSAGs in their territory. States should understand that compliance with the principle of proportionality can lead to unethical outcomes. IHL may permit attacks that cannot be morally justified insofar as they cause foreseen harm to innocent civilians. Responsible states, militaries, and commanders must acknowledge the divergence between what law and morality permit. They should strive to ensure that the use of lethal force is both lawful and ethical.

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199. WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 20 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf [https://perma.cc/S4EX-DW2E].

200. *See* Charles Pendleton Trumbull IV, *Analogies in Detentions: Distorting the Balance Between Military Necessity and Humanity*, 58 VA. J. INT'L L. 97, 123–24 (2018) (noting that US federal courts expansively interpreted "substantial support" to authorize continued detention of individuals who had tenuous ties to Al Qaeda or made relatively minor contributions, such as facilitating the travel of Al Qaeda members or staying in an Al Qaeda guesthouse).

A. Efforts to Strengthen Civilian Protections

Ideally, states would negotiate new rules governing NIACs, or transnational NIACs, to replace the outdated and limited rules found in treaty law. These new rules would be informed by states' recent experiences fighting NSAGs and the unique circumstances and challenges presented by those conflicts, particularly in urban areas. They could take into account new means and methods of warfare, including drones and autonomous weapons. These rules could reflect the significant changes in international law since 1977, including the rise of human rights and the international community's growing concern with civilian casualties. These rules could reflect the modern and more nuanced understanding of state sovereignty and reinforce obligations to allow and protect humanitarian relief. In short, new rules for NIACs could strike a more optimal balance between protection of civilians and legitimate military needs in combatting NSAGs.

International consensus on new law applicable to NIACs, however, is unlikely to emerge in the near future. The world is becoming more polarized, the Security Council is paralyzed, traditional balances of power are shifting, and states are using NSAGs to wage proxy wars. This unstable world order makes multilateral IHL treaties more difficult to negotiate.

The dismal prospects for new treaty law in NIACs do not mean one should be resigned to the status quo. Multilateralism is not entirely dead; nor are efforts to increase protections for civilians in NIAC. States have adopted political declarations that can, if responsibly implemented, reduce risks for civilians in NIACs. The 2015 Safe Schools Declaration, endorsed by 121 states,[201] highlighted the long-lasting harm caused by attacks on education and committed states to, among other things, not use functioning schools and universities for military purposes during armed conflict.[202] The 2022 Irish-led political declaration on Explosive Weapons in Populated Areas, adopted by eighty-seven states, emphasized the risks that such weapons pose to

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201. The United States endorsed the declaration on January 16, 2025. https://geneva.usmission.gov/2025/01/16/u-s-endorsement-of-the-safe-schools-declaration/ [https://perma.cc/2BQS-8CYQ].

202. *Safe Schools Declaration and Guidelines on Military Use*, GLOB. COAL. TO PROTECT EDUC. FROM ATTACK (GCPEA) (2015), https://ssd.protectingeducation.org/safe-schools-declaration-and-guidelines-on-military-use/ [https://perma.cc/R4S4-2M3F].

civilians and civilian infrastructure in urban areas. It committed states to take a number of measures to reduce these risks, including to "adopt and implement a range of policies and practices to help avoid civilian harm, including by restricting or refraining, as appropriate, from the use of explosive weapons in populated areas, when their use may be expected to cause harm to civilians or civilian objects."[203] States Parties to the Convention on Certain Conventional Weapons also agreed in 2023 to negotiate an "instrument . . . and other possible measures to address emerging technologies in the area of lethal autonomous weapons systems" by 2025.[204]

Responsible states must also take unilateral measures to better protect innocent civilians. They can, for example, impose stricter Rules of Engagement to mitigate risks that soldiers will engage in unjustifiable killings.[205] The US Department of Defense Instruction 3000.17 on Civilian Harm Mitigation and Response, issued in 2023, is a promising start although it is premature to assess its effectiveness in armed conflict.[206] This Instruction requires DoD personnel to take various measures to mitigate civilian harm, develop standardized procedures for reporting civilian casualties, and incorporate training for DoD personnel and in security cooperation with foreign partners.[207]

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203. Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the Use of Explosive Weapons in Populated Areas § 3.3 (Nov. 18, 2022), https://www.gov.ie/en/publication/585c8-protecting-civilians-in-urban-warfare/#political-declaration-on-ewipa [https://perma.cc/4U7Q-EYCJ].

204. Final Report of the Meeting of the High Contracting Parties to the Convention on Certain Conventional Weapons ¶ 20, CCW/MSP/2023/7 (Nov. 23, 2023).

205. *See* Haque, *supra* note 195, at 90 ("[S]tates should also follow rules of war that are more restrictive than the laws of war if their forces would better avoid serious moral wrongs by following those rules than by following existing law.").

206. *See* Dep't of Def., DoD Instruction 3000.17, Civilian Harm Mitigation and Response (Dec. 21, 2023) [hereinafter DoDI 3000.17], https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/300017p.pdf [https://perma.cc/F6UK-7P2A]. This Instruction implements, in part, the Civilian Harm Mitigation Risk Action Plan, issued by the Secretary of Defense in 2022. *See* Press Release, U.S. Dep't of Def., Civilian Harm Mitigation and Response Action Plan Fact Sheet (Aug. 25, 2022), https://www.defense.gov/News/Releases/Release/Article/3140007/civilian-harm-mitigation-and-response-action-plan-fact-sheet/ [https://perma.cc/CC9U-97WL].

207. *See* DoDI 3000.17, *supra* note 206. This Instruction implements, in part, the Civilian Harm Mitigation Risk Action Plan, issued by the Secretary of Defense in 2022. *See* Press Release, *supra* note 206.

Finally, states that consent to military operations within their territory should do more to protect their civilian population from the risks of hostilities. Conflicts against NSAGs are often fought by foreign militaries with the consent of the territorial or "host state". This consent provides a legal basis for the intervening state to use force in the territory of the host state without violating the latter's sovereignty or the UN Charter. The United States, for example, relied (at least in part) on the consent of Iraq, Afghanistan, and other states to conduct military operations against the Taliban, Al Qaeda, and associated forces in their territories.[208] In many NIACs, the intervening state may seek host state consent even when it has another justification to use force, such as self-defense.[209] Similarly, the intervening state may act in the collective self-defense of the host state in addition to acting in its own self-defense.[210]

Host states have heightened obligations with respect to civilians within their territory. Like all states, a host state has a social contract with its population that it is bound to honor.[211] The state has a "fiduciary relationship" with its population and thus owes it "special duties of care."[212] It has a general obligation to protect the life, liberty, and property of persons within its territory.[213] It also remains bound by its human rights and domestic law obligations. Those duties and obligations are not diminished by the presence of a foreign military operating within the host state's territory. A host state must thus seek to protect its population, consistent with respect for their individual rights, against threats posed by NSAGs within its territory. It must also

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208. *See* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NAT'L SEC. OPERATIONS 11 (Dec. 2016) ("The United States has relied on state consent in various military operations.").

209. *See* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 41 (2013).

210. *Id.*

211. *See generally* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

212. Criddle, *supra* note 81, at 1076, 1088.

213. Ziv Bohrer & Mark Osiel, *Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers*, 46 VAND. J. TRANSNAT'L L. 747, 775 (2013); *see also* Hathaway et al., *supra* note 63, at 33 ("States are required to safeguard the human rights of individuals in their territory.").

limit, to the extent possible, harm inflicted by intervening states against the civilian population.[214]

The international law mechanisms by which a host state could impose restraints on intervening states' military operations are under-theorized and warrant greater scholarly attention. In theory, however, a host state could limit the scope of its consent for such operations in its territory so as to promote greater protections for its civilian population.

Limitations on consent could be applied at the strategic and tactical level. At the strategic level, a host state should not permit operational objectives by intervening states that are likely to impose disproportionate costs relative to the expected security gains. For example, the goal of eliminating a NSAG through military force may cease to be appropriate once the NSAG is sufficiently degraded and the remaining threat posed can be addressed through law enforcement measures. At that point, any marginal security gain achieved through continued military operations would be excessive relative to the risk posed to the civilian population by combat operations.

At the tactical level, the host state should refrain from and oppose military tactics by intervening states that "are not strictly necessary to restore legal order."[215] Targeting members of NSAGs may be acceptable, but attacks expected to cause collateral damage may rarely be. A host state should also oppose tactics by the intervening state that shift risks from combatants of the intervening state to the civilian population of the host state. High altitude aerial bombings, for example, are generally safer for combatants than alternative methods of attack, but they impose greater risks on civilians.[216] All else being equal, host states should not prioritize the safety of combatants of an intervening state over the safety of their own civilian population. Nor should they

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214. According to the Human Rights Committee, "States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating with their territory or in other areas subject to their jurisdiction." Hum. Rts. Comm., Gen. Comm. 36, ¶ 22, U.N. Doc. CCPR/C/G/36 (Sept. 3, 2019).

215. Criddle, *supra* note 81, at 1101.

216. *See* Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT'L L. REV. 1083, 1098-99 (2001) (noting that NATO's high altitude bombing over Kosovo resulted in zero NATO casualties but made it more difficult for pilots to avoid or minimize harm to civilians).

permit military operations by intervening states that would undermine their own moral and legal responsibilities.[217] This concept of qualified consent for foreign military operations is an issue I intend to address in greater depth in future work.

B. Protecting Innocent Persons is a Strategic Imperative

States should reflect on the lessons learned from fighting transnational NIACs over the past two decades. Killing innocent civilians in NIACs is almost always counter-productive to achieving strategic goals. The Taliban takeover of Afghanistan after twenty years of conflict with the United States is the most recent reminder of this lesson. Collateral damage may be necessary to carry out specific attacks that achieve specific military objectives, but those gains are fleeting when innocent civilians are killed.

Reducing civilian casualties is in states' long-term interests. The US Secretary of Defense stated, against the backdrop of rising civilian casualties in Gaza, that "you can *only* win in urban warfare by protecting civilians."[218] He stated further that "protecting Palestinian civilians in Gaza is both a moral responsibility and a strategic imperative."[219] DoDI 3000.17 similarly states, "The protection of civilians and civilian objects is fundamentally consistent with the effective, efficient, and decisive use of force."[220] Overwhelming military force cannot ensure peace. How the military fights and defeats the enemy matters.[221]

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217. Some commentators argue that an intervening state may owe special obligations of care to the population of the host State. *See* Criddle, *supra* note 81, at 1102–03 ("To the extent the coalition forces in Afghanistan conduct counterinsurgency at the behest of the Afghan government, they arguably succeed the host state's fiduciary obligations to respect the human rights of Afghan nationals . . .").

218. Lloyd J. Austin III, Sec'y of Def., A Time for American Leadership: Remarks by Secretary of Defense Lloyd J. Austin III at the Reagan National Defense Forum (as delivered) (Dec. 2, 2023).

219. *Id.*

220. DoDI 3000.17, *supra* note 206, ¶ 1.2(b).

221. *See, e.g.*, David Petraeus & Christopher D. Kolenda, *Obama Asked the Military For a Plan to Protect Civilians. Here's One*., DEFENSE ONE (July 7, 2016), https://www.defenseone.com/ideas/2016/07/obama-asked-military-plan-protect-civilians-heres-one/129681/ [https://perma.cc/7RKU-3S2G] ("[A]n approach that places insufficient emphasis on civilian protection can undermine achievement of our strategic objectives and increase the risk to our forces.").

One might counter that states should not expose their forces to greater risks to reduce the risks to civilians of foreign countries. The duty a state owes to its citizens, including its own soldiers, is greater than the duty it owes to foreign civilians. Militaries should thus not be expected to exceed what is required by IHL. There are different views in the academic literature on how risks to combatants and civilians should be distributed, and I will not seek to fully engage in that debate here.[222] Rather, I will make four brief points in response.

First, the ratio of civilian casualties to combatant casualties in many NIACs indicates that the balance is heavily skewed against civilians.[223] Second, combatants owe a professional duty of care to civilians, or at least to innocent civilians.[224] Soldiers (like policemen, firefighters, or bodyguards) assume a certain degree of risk inherent in the profession. Their vocation is the defense of others, and they have a professional duty to protect innocent persons by assuming greater risk to their own life.[225] The law enforcement officers that failed to confront the active shooter at an elementary school in Uvalde, Texas, were widely criticized (and some were fired) for their decision to wait for reinforcements before entering the building.[226] A report by the Texas House of Representatives concluded, "law enforcement responders failed to adhere to their active shooter training, and they failed to prioritize the lives of innocent victims over their own safety."[227] Soldiers do not have a duty to protect non-innocent civilians, but they should protect innocent ones. Third, there is a moral asymmetry between killing and letting die. Killing someone is worse than letting one die. Combatants must therefore assume some greater risk to themselves to avoid the incidental killing of innocent persons.[228]

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222. *See generally* Bohrer & Osiel, *supra* note 213 (providing an overview of three different theories on risk-transfer between combatants and civilians).

223. *See supra* note 6.

224. *See* Luban, *supra* note 44, at 27–28, 33–34.

225. *Id.* at 27–28.

226. Acacia Coronado, *Uvalde parents lash out after new report clears city police of wrongdoing during 2022 mass shooting*, PBS NEWS, (Mar. 7, 2024) https://www.pbs.org/newshour/nation/uvalde-parents-lash-out-after-new-report-clears-city-police-of-wrongdoing-during-2022-mass-shooting [https://perma.cc/B6AX-82UV].

227. House Investigative Comm. on the Robb Elementary Shooting, Interim Rep., H.R., 88th Tex. Leg., at 7 (Tex. 2022).

228. This also explains, in part, why it is morally prohibited to kill an innocent bystander even if necessary to save one own's life.

VI.CONCLUSION

Just War Revisionism and human rights law have highlighted the importance of protecting individual rights in armed conflict. IHL rightfully protects civilians from direct attacks, but civilians in conflict affected areas are under constant threat of being killed or injured as collateral damage. These risks are heightened in urban areas, as recent conflicts have tragically shown.

The permissibility under IHL of incidentally killing civilians as collateral damage is contrary to an individual rights-based legal and moral framework. It sweeps aside the notion that all humans have a right to life and the corresponding obligation on others to respect that right unless the bearer of the right acts in a manner to forfeit or waive it. IHL's principle of proportionality makes the legality of killing contingent on the interests of the State rather than the wrongdoing of the individual—a result that is antithetical to human rights law and deontological ethics. The extension of the principle of proportionality to NIACs has further normalized collateral damage and the civilian harm it entails.

As two decades of transnational NIACs have demonstrated, civilians living in areas in which NSAG operate bear the brunt of these conflicts. Yet the civilians placed at risk may have no connection to or involvement in the conflict. They are often innocent bystanders to a conflict that they did not start or support. These civilians' deaths are both tragic and difficult to justify.

Civilian death tolls are also straining IHL's legitimacy. For IHL to remain relevant, the laws governing collateral damage cannot remain cast in stone from 1977. The principle of proportionality must evolve consistent with modern understandings of individual moral and legal rights. In the meantime, states that care about the legitimacy of their military operations must do more than merely comply with IHL. They must strengthen protections for civilians in armed conflict, including by avoiding or significantly reducing collateral damage.

Civilian protection is not just a legal and moral imperative but also a strategic one. As Volker Turk, the UN High Commissioner for Human Rights stated, "it is clear that enduring peace and security

cannot be delivered by the exercise of fury and pain against people who have no responsibility for the crimes that were committed."[229]

229. Volker Türk, U.N. High Comm'r for Hum. Rts., Opening Remarks by U.N. High Commissioner for Human Rights Volker Türk on Israel and the OPT at a Press Conference in Amman, Jordan (Nov. 10, 2023).