

# Precautions under the law governing the conduct of hostilities

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## Abstract

*This article presents a descriptive analysis of the precautions that are required of all belligerents in order to ensure the protection of civilian populations and objects against the effects of hostilities. The author argues that both the attacker and the defender must take precautions to avoid, or at least minimize, collateral casualties and damage. The rules imposing such precautionary measures represent clear standards of conduct. This is true even though they are worded in flexible terms to take into account the reality that mistakes or misjudgements are inevitable, and that the balance between military and humanitarian interests is not always easy to reach.*

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Respect for civilian persons and objects and protecting them against the effects of hostilities is an important *raison d'être* of international humanitarian law (IHL). The basic rule – enshrined in Article 48 of Additional Protocol I to the Geneva Conventions – requires that parties to a conflict distinguish between civilian persons and objects on the one hand, and combatants and military objectives on the other, and that they direct their operations against military objectives (persons or objects) only.

A number of concrete obligations can be derived from this general principle of distinction, such as the prohibition of direct attacks against civilian

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persons and objects<sup>1</sup> and the prohibition of acts or threats of violence the primary purpose of which is to spread terror among the civilian population.<sup>2</sup> Similarly, indiscriminate attacks are also prohibited. These are attacks that are not or cannot be directed at a specific military objective, as well as those whose intended effects cannot be limited as required by IHL.<sup>3</sup>

However, it remains legally accepted that, in the harsh reality of war, civilian persons and objects may be incidentally affected by an attack directed at a legitimate military objective. Euphemistically referred to as “collateral casualties” or “collateral damage”,<sup>4</sup> civilians may be victims of mistaken target identification or of unintended but inevitable side effects of an attack on a legitimate target in their vicinity. According to the principle of proportionality, these collateral casualties and damages are lawful under treaty and customary law only if they are not excessive in relation to the concrete and direct military advantage anticipated.<sup>5</sup>

In addition, even when a lawful attack is launched, precautionary measures are required of both the attacking party and the party being attacked, in order to avoid (or at least to minimize) the collateral effects of hostilities on civilian persons, the civilian population and civilian objects. The present contribution will focus on the substance of the precautionary obligations required of all belligerents – both in attack and against the effects of attack – as codified in Additional Protocol I.<sup>6</sup> This article will seek to demonstrate that these rules are not simply hortatory norms encouraging good practice. They constitute obligatory standards of conduct whose violation would entail international responsibility.

1 The fact that, in principle, civilian and other protected persons or objects may not be attacked does not preclude this legal protection from ceasing under exceptional circumstances.

2 See, in particular, Articles 51(2) and 52(2) of Additional Protocol I to the Geneva Conventions.

3 Article 51(4) Additional Protocol I.

4 “Collateral casualties” and “collateral damage” are defined in Rule 13(c) of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea as “*the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives*”.

5 Codified in Article 51(5)(b) of Additional Protocol I, the principle of proportionality encompasses more than the duty to take precautions in attack. It is, however, relevant in this context, as illustrated by Article 57(2)(a)(iii). Since the difficulties in applying this principle are discussed at length in a separate contribution to this volume (see Enzo Cannizzaro, “Contextualising proportionality: *ius ad bellum* and *ius in bello* in the Lebanese war”, pp. 779–792), a detailed analysis of this precautionary measure will not be made here.

6 In accordance with the scope of application of Additional Protocol I set forth in Article 49(3), the present contribution will focus only on the protection of civilian persons and objects on land, excluding precautions required in naval or air warfare. In this respect, Article 57(4) of Additional Protocol I simply indicates that “In the conduct of military operations at sea or in the air, each Party to the conflict shall ... take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.” Customary international humanitarian law certainly prescribes more detailed precautionary measures to be adopted, but an analysis of these measures exceeds the scope of this contribution.

## Precautions in attack

While the duty to give warning of an impending attack (in order to allow the civilian population to evacuate) was stipulated in the earliest treaties on the law of armed conflict, the general obligation to take precautions in attack was codified rather late.<sup>7</sup> In fact, before Additional Protocol I was adopted, the doctrine stating that the obligation to take precautions was binding on all attacking commanders was based on a broad interpretation of the 1899 and 1907 Hague Conventions and 1949 Geneva Conventions, and on customary rules. Thus when the delegates who attended the 1974–7 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts prepared a written list of the required precautions, they made an undeniably valuable contribution to the law governing the conduct of hostilities.

The legal regime governing precautions in attack during an international armed conflict is set out in Article 57 of Additional Protocol I. This article is not the only treaty provision setting out the precautions required of an attacker. A number of treaties governing the use of specific weapons also cover the duty to take precautionary measures, although these instruments merely apply pre-existing Additional Protocol I obligations to specific means of warfare. In drawing up a (non-exhaustive) list of the precautions required during an attack, it is therefore reasonable to rely on Article 57 of Additional Protocol I as a primary source. Below is a descriptive review of these precautions, with brief concluding remarks on how these are limited to what is “feasible”.

### Inventory of the precautionary obligations incumbent on the attacker

Article 57 reads as follows:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
  - (a) those who plan or decide upon an attack shall:
    - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
    - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing,

7 In the report prepared for the 1971 Conference of Government Experts, the ICRC noted that the obligation to take precautions in attack “*has been affirmed by publicists for a long time, but without being expressed in a very precise manner in the provisions of international law in force*”.

- incidental loss or civilian life, injury to civilians and damage to civilian objects;
- (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
- (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
  - (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

*The obligation to take constant care to spare the civilian population, civilians, and civilian objects in the conduct of military operations*

The obligation, in the conduct of military operations, to take constant care to spare the civilian population, individual civilians and civilian objects is a direct consequence of the fundamental rule of distinction. Yet this duty remains relatively abstract, which explains why it is found in the opening paragraph of Article 57. The paragraphs that follow are, according to the ICRC Commentary to Additional Protocol I, devoted only to “the practical application of this principle”.<sup>8</sup> This first duty therefore constitutes the legal link between the general obligation of distinction and the operational practicalities of taking precautions in attack.

The fact that this obligation forms a sort of preamble to Article 57 often leads to the perception that it is merely inspirational, particularly in the light of its very general wording. It is often believed that this obligation must be read in conjunction with one of the more concrete rules listed in subsequent paragraphs in order to carry legal weight. Nevertheless, the direct connection that exists between the first paragraph of Article 57 and the obligations covered in the paragraphs that follow does not suffice to deprive paragraph 1 of its independent

<sup>8</sup> Commentary on Additional Protocol I (p. 680, para. 2191). The ICRC study on customary international humanitarian law reaffirms this obligation in Rule 15 (the first rule in Chapter 5 devoted to precautions in attack), the commentary stating: “This is a basic rule to which more content is given by the specific obligations contained in Rules 16–21” (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, Cambridge, 2005, Vol. I (Rules), p. 51).

legal effect. Kinship does not mean identity, and paragraph 1 of Article 57 must not merely be understood as a standard clause reflecting a general objective of an “inspirational” nature.

Close examination of the wording of Article 57 reveals that the scope of the obligation set out in paragraph 1 is broader than the scope of the obligations that follow. As it explicitly states in its first sentence, paragraph 2 applies exclusively in the event of an “attack”,<sup>9</sup> that is, an act of violence against the enemy. The first paragraph applies more broadly to “military operations”, which also include troop movements, manoeuvres and other deployment or retreat activities carried out by armed forces before actual combat.<sup>10</sup> This broader field of application logically implies that the provision can, on its own, give rise to concrete legal obligations.

### *The obligation to verify the military nature of the objective to be attacked and to assess collateral damage*

The obligation set out in Article 57(2)(a)(i) finds itself at the intersection of military effectiveness and humanitarian imperatives. By requiring that those planning or deciding upon an attack do everything feasible to verify the nature of the objective, this provision aims to ensure that operations will target strictly military objectives and thus contributes to preserving the immunity of both civilian populations and objects. Therefore the duty to verify the nature of a target is a vital ramification of the principle of distinction. In the light of this, and contrary to what was stated during negotiations of Additional Protocol I, it is incorrect to assert that this is an innovative provision<sup>11</sup> or that it results from the gradual development of a new rule. Instead, this provision is clearly a codification of existing law.

The obligation to verify the nature of the objective to be attacked obviously requires that close attention be paid to the gathering, assessment and rapid circulation of information on potential targets.<sup>12</sup> These activities are naturally dependent on the availability and quality of the belligerents’ technical resources. Indeed, the obligation imposed by paragraph 2(a)(i) of Article 57

9 This reasoning is applicable by analogy to the third paragraph, which can be understood only in the context of an attack.

10 “The term “military operations” should be understood to mean any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat”; Commentary on Additional Protocol I (p. 680, para. 2191). Such a view could be contradicted by the fact that it would liberate Article 57 from the strict context of precautions in attack, which, as explicitly stated in the title, is its only object. But this criticism in no way detracts from the fact that the first paragraph is precisely intended to establish a link between distinction and precautions.

11 See in this regard the ICRC Commentary on Additional Protocol I, which supports the view that this requirement of identification is “new” (p. 680, para. 2194).

12 According to Article 57(2)(a)(i), this verification has to be performed at the stage of planning or deciding to attack. Nevertheless, if a period of time has passed between these stages and the actual attack, then there is an obligation to update the information at hand in order to verify that no change of circumstances has led to a change in the nature of the target (Jorge J. Urbina, *Derecho internacional humanitario*, La Coruña, 2000, p. 241).

cannot be interpreted as obliging the parties to a conflict to possess modern and highly sophisticated means of reconnaissance. It does, however, require that the most effective and reasonably available means be used systematically in order to obtain the most reliable information possible before an attack. Therefore an attack may only be launched once a commander is convinced, on the basis of all the information at his disposal, that the target is military in nature.

In other words, while this provision in no way imposes an obligation of result,<sup>13</sup> it does require that, in case of doubt, additional information must be obtained before an attack is launched.<sup>14</sup> Above all, this standard means that a bombing raid that is carried out on the basis of mere suspicion as to the military nature of the target amounts *ipso facto* to a violation of the principle of distinction.<sup>15</sup> To give an example, it has been reported that in 2003, in the context of the war in Iraq, the United States admitted to launching attacks against high-ranking enemy figures without having firm knowledge of the targets' identity. It appears that US armed forces justified their decision to attack on the basis of evidence that established, with relative certainty, that a high-ranking political or military leader was located in a given building. Such an approach seems difficult to reconcile with the fundamental requirement of distinction: if an attack is aimed at a specific individual, then identification of this individual as a legitimate military objective can reasonably be established only with definite knowledge of the name and function of the person being targeted.<sup>16</sup>

Furthermore, the information that must be gathered before an attack must relate to more than just the nature of the objective. Many other details must be collected, in particular on the immediate surroundings of the target, in order to gain a clear picture of the conditions that will trigger the obligation to apply the principle of proportionality. The main difficulty in this respect is indisputably due to “emerging targets”, for which no advance planning has been possible, and

13 As noted by Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, “Palpably, no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith” (p. 126).

14 Commentary on Additional Protocol I (p. 680, para. 2195). It might be useful to point out that the obligation must be interpreted together with the provisions relating to the presumption of civilian character in case of doubt, which are contained in Articles 50(1) and 52(3) of Additional Protocol I.

15 It has even been asserted that such conduct could amount to a war crime, since lack of information in such cases cannot be regarded as an exonerating circumstance (Stefan Oeter, “Methods and means of combat”, in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 457).

16 Human Rights Watch, “Off Target: The Conduct of the War and Civilian Casualties in Iraq”, New York, 2003, pp. 23 and 38. Furthermore, to locate enemy leaders the United States relied on satellite telephone intercept technology. Doubts have been expressed as to the reliability of such identification procedures: tracing a mobile phone does not necessarily lead to the location of its owner, who might have changed phones before the attack. These doubts were also fuelled by the US military's silence with respect to the methods used to verify that the person using the phone was indeed the desired target. It is plausible, however, that a database had been set up to verify that the voice of the user matched that of the target. Moreover, human informants were reportedly used to confirm or invalidate the electronic data. Had they been reliable, these techniques might certainly have met verification requirements; however, it would appear that this was not the case (*ibid.*, p. 25).

which, by their sudden appearance, make it necessary to strike within a very short time, leaving no opportunity to follow complicated procedures. In such circumstances, determining the military nature of a target and potential collateral casualties and damage will require an accelerated analysis on the basis of predetermined criteria.<sup>17</sup> The fact remains, however, that these expeditious procedures must leave room for practical precautionary measures. In the context of the conflict in Iraq in 2003, it was asserted that the process of assessing collateral damage usually worked rather well in relation to pre-planned targets, although the same could not be said when the process was applied to emerging targets. In the latter case there was no time to carry out sufficiently precise assessments, this often resulting in disproportionate bombing.<sup>18</sup>

These various examples demonstrate that identifying the objective – especially when it is distant – and estimating collateral damage are both complex operations that demand a vast network of complementary skills. In the very large majority of cases, those who plan or decide on an attack will base their decisions on indirect information provided by intelligence or reconnaissance (human, aerial, satellite or other) services. This chain of decision-making involves as many levels of liability as there are links in the chain. For example, the intelligence services will be held responsible if the information provided is unreliable or leads to mistakes. While the planning and decision-making authorities cannot be expected to have personal knowledge of the objective to be attacked, they will nevertheless be held responsible if, on the basis of reliable intelligence, they make the wrong decision through incompetence, negligence or bad faith.

Finally, it should be noted that the attacking commander's efforts to obtain credible information will be hampered by the ruses employed by the enemy to direct fire to false targets or to mislead the adverse party's intelligence services. One famous example of such ruses was the use by the Federal Republic of Yugoslavia (FRY) of decoys during the 1999 NATO bombings. Such methods of deception as to the nature of a target are lawful as long as they do not lead the attacking commander to direct military operations against civilian persons or property in the genuine belief that these are military objectives.<sup>19</sup>

17 According to Human Rights Watch (*ibid.*, p. 20), US practice during operations in Iraq (2003) reveals the existence of two approaches depending on the circumstances: when the armed forces have time to conduct a study of the target, a careful procedure is set in motion. On the other hand, when the strike has to be executed very rapidly, special procedures are applied.

18 *Ibid.*, p. 20.

19 For example, during the Second World War, British forces – who exercised complete control over the German espionage system deployed on their territory – sent false reports that led the German air force to bomb English city areas populated by civilians on the conviction that these were actually military objectives. See Burrus Carnahan, “The law of air bombardment in its historical context”, *Air Force Law Review*, Vol. 17 (2) (1975), p. 60. For some, this would now be in violation of Article 51(7) of Additional Protocol I (Michael Bothe et al., *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 363, para. 2.5).

*The obligation to choose means and methods of attack designed to avoid, or at least limit, loss or damage to the civilian population or civilian objects*

The obligation to choose means and methods of attack designed to avoid, or at least limit, loss or damage to the civilian population or civilian objects also receives broad support in diplomatic practice.<sup>20</sup> Here again, the main difficulty lies in identifying the practical consequences of this obligation. One commentary on Additional Protocol I reduced this obligation to the mere duty to promote, as far as possible, the accuracy of bombing raids conducted against military objectives situated in densely populated areas.<sup>21</sup> Such an interpretation would appear to be much too restrictive. First of all, the idea that the *ratione loci* scope of the obligation is limited to densely populated areas finds no support in either the text of the Additional Protocol or the preparatory work leading up to its adoption. Second, only a minimum amount of imagination is required to give this provision a scope that is far broader than the mere duty to improve the accuracy of bombing raids. This can be illustrated with specific examples of methods of attack.

First, this provision can serve to impose restrictions on the timing of an attack. In this regard, the ICRC Commentary on Additional Protocol I refers to the precautionary measures taken by the Allies in the Second World War during the bombing of factories located in territories occupied by German troops. These bombing raids were carried out on days and at times when the factories were unoccupied, the aim being to destroy the factories and not kill the people working in them.<sup>22</sup> While it is a matter of record that these measures were motivated more by the wish to prevent loss or damage to compatriots than to ensure general protection of the civilian population,<sup>23</sup> this example nevertheless offers a perfect illustration of the type of precautionary conduct required by Article 57(2)(a)(ii). In other words, the obligation to use methods of attack designed to spare the civilian population and civilian objects – in any zone of attack, that is, even in enemy territory – requires that the timing of the attack be chosen with a view to limiting collateral damage. As a more recent example, the US forces who, in 2003, repeatedly bombed urban areas during operations against Iraq, decided to minimize civilian losses by trying, where possible, to conduct their attacks at night when the population had left the streets.<sup>24</sup>

This obligation can also serve to impose restrictions on the location of an attack by requiring, where circumstances permit, that parties avoid attacking a densely populated area if the attack is likely to cause heavy civilian losses. This is

20 For an analysis of this practice, see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 1, pp. 374–84.

21 “The obligation under subpara. 2 (a)(ii) to take all feasible precautions in the choice of means and methods of attack to avoid or minimize incidental civilian casualties and damage to civilian property is an injunction to promote the maximum feasible accuracy in the conduct of bombardments of military objectives situated in populated places” (Bothe et al., above note 19, p. 364, para. 2.6).

22 Commentary on Additional Protocol I (p. 682, para. 2200).

23 It is significant that no such precautions were taken outside the occupied zones.

24 Human Rights Watch, above note 16, p. 17.



one of the reasons why the Coalition forces gave up the idea of an amphibian attack on Kuwait City during the Gulf war in 1991. The Department of Defense Report to Congress explained that such an attack would have forced the Coalition to fight in an urban environment, thereby constituting “a form of fighting that is costly to attacker, defender, innocent civilians and civilian objects”.<sup>25</sup> Instead, Coalition forces decided to give the Iraqi armed forces the option of leaving Kuwait City in order to fight in the desert areas north of the capital. This precautionary measure becomes relevant when deciding on which sites should be attacked and which zones should be used to advance or station armed forces.

Moreover, the obligation to choose methods of attack designed to avoid or minimize loss or damage to the civilian population or civilian objects also imposes caution in choosing the angle of attack.<sup>26</sup> As a very concrete example, during the Gulf war in 1991, pilots were advised to attack bridges in urban areas along a longitudinal axis. This measure was taken so that bombs that missed their targets – because they were dropped either too early or too late – would hopefully fall in the river and not on civilian housing.<sup>27</sup> This last example is one of many cases in which the rule has been applied.

Concerning means of combat more specifically, the main issue raised by Article 57(2)(a)(ii) relates to belligerent parties’ obligation to use the most precise weapons available (precision-guided munitions in particular) when carrying out attacks that may cause collateral casualties or damage. Most legal doctrine tends to support the absence of this obligation, as it is generally considered that the choice of weapons is left to the discretion of the belligerent party, according to its particular military interests and the circumstances of each operation. For example, Danielle Infeld notes,

While the law of war defines legitimate targets, nothing in the law of war regulates the type of weapon that must be used in attacking particular targets. When attacking particular targets, there is no law of war concept requiring that the most discriminatory means be used. The applicable law only mandates a balancing of military necessity and unnecessary suffering so that the concept of proportionality is followed.<sup>28</sup>

25 See “Department of Defense Report to Congress on the Conduct of the Persian Gulf War”, ILM, 1992 (3), p. 622.

26 Human Rights Watch, above note 16, p. 17. This example appears explicitly in the Australian military manual, *Australian Defence Force Manual on the Law of Armed Conflict*, ADFP 37 (1994), para. 552.

27 This example is particularly interesting because such an angle of attack also means that damage would tend to be in the middle of the bridge and thus easier to repair (Michael W. Lewis, “The law of aerial bombardment in the 1991 Gulf War”, *AJIL*, Vol. 97 (2003), p. 501).

28 Danielle L. Infeld, “Precision-guided munitions demonstrated their pinpoint accuracy in desert storm; but is a country obligated to use precision technology to minimize collateral civilian injury and damage?”, *George Washington Journal of International Law and Economics*, Vol. 26 (1) (1992), pp. 134–5. This reasoning is also found – although in a more nuanced way – in the Australian military manual, above note 26: “The existence of precision guided weapons ... in a military inventory does not mean that they must necessarily be used in preference to conventional weapons even though the latter may cause collateral damage. In many cases, conventional weapons may be used to bomb legitimate military targets without violating LOAC [law of armed conflict] requirements. It is a command decision as to which weapon to use; this decision will be guided by the basic principles of LOAC; military necessity, unnecessary suffering and proportionality” (para. 834).

However, it seems limiting to subject the rules on the choice of weapon to a simple analysis of proportionality. In certain circumstances Article 57(2)(a)(ii) plays a significant role by requiring that the attacking party take all practically possible precautions in its choice of means of attack in order to avoid, or at least to minimize, civilian losses.

Several arguments have been put forward to contradict this conclusion. First, an obligation to use the most precise means of attack would entail different standards of protection depending on the technological sophistication of each party's weaponry. This, in turn, would run counter to the classic IHL principle of equality of belligerents.<sup>29</sup> This argument is not entirely convincing: as already noted, one of the ultimate objectives of IHL is to protect civilian populations and objects, as far as possible, against the effects of hostilities. And "[s]uggesting that a party with the technological ability to exercise great care in attack need not do so because its opponent is not similarly equipped runs counter to such purposes".<sup>30</sup> In any event, the obligation to take precautions in attack "when feasible" already acknowledges that the lawfulness of an attack will be judged according to relative standards of measurement, which will namely depend on the economic and technological development of each party to the conflict.<sup>31</sup>

It has also been argued that imposing an obligation to use the most precise weaponry possible would have the perverse effect of slowing the development of sophisticated and expensive weapon systems. By avoiding the development of advanced systems, a party could lawfully use weapons that are less precise and much cheaper, thereby lowering its precision standards when applying the proportionality principle. This argument, which lacks any legal dimension, is not well supported. The advantages of using weapons of higher precision are not strictly humanitarian – in fact, the benefits are first and foremost military. Thus no obligation to use the most precise means of attack will ever eliminate the military interests that lie behind research and development programmes on precision munitions.

In conclusion, under IHL as it stands today, states have no legal obligation to acquire the most precise weapons available on the market, even when they have the financial resources to do so.<sup>32</sup> Nevertheless, the law of armed conflict does

29 "[I]t seems illogical to presume that the handful of states with precision weapons – such as the United States, Britain and, to a lesser degree, Russia – should be held to a higher standard of law"; Nathan A. Canestaro, "Legal and Policy Constraints on the Conduct of Aerial Precision Warfare", *Vanderbilt Journal of Transnational Law*, Vol. 37 (2004), p. 465. For Yoram Dinstein, "Such claims would introduce an inadmissible discriminatory bias either in favour of, or against, more developed belligerent States equipped with expensive ordnance at the cutting edge of modern technology" (above note 13, p. 126).

30 Michael N. Schmitt, "The Impact of High and Low-Tech Warfare on the Principle of Distinction", Briefing Paper, November 2003, Program on Humanitarian Policy and Conflict Research at Harvard University, p. 10.

31 Eric Jaworski, "'Military Necessity' and 'Civilian Immunity': Where is the Balance?", *Chinese Journal of International Law*, (1) (2003), p. 201. This author notes that the application of relative standards is not limited to the field of international humanitarian law; other areas of international law (namely environmental law) also apply different standards according to the contracting parties' respective means.

32 Schmitt, above note 30, p. 10. This author contemplates a manner of determining a state's obligation to own precision-guided weapons according to a percentage of GNP or defence credits. The author adds that states would probably not readily accept a legal obligation that would limit their discretion in setting their own budgets.

require that such systems be used as soon as they form part of a state's arsenal and their use is practically possible.

*The obligation to cancel or suspend an attack if it becomes apparent that it would violate the principle of proportionality, that the objective is not a military one or that the objective is subject to special protection*

This provision may, understandably, appear to be completely redundant: both the prohibition of direct attacks on civilian persons and objects and the obligation to take constant care, in the conduct of military operations, to spare civilian persons and objects are expressly provided for elsewhere. In the light of this, it seems perfectly obvious to state that an attack must be cancelled or suspended if the initially selected target cannot be regarded as a military objective or if the attack is likely to violate the principle of proportionality. Nevertheless, expressly formulating this obligation does bear some value, especially in the context of modern warfare, which is often marred by the fact that the authorities who decide or plan attacks are not the same as those who carry them out. This rule confirms, in case any doubt should arise, that the required standard of conduct applies at all operational levels.<sup>33</sup>

In some cases, this provision will apply to the planners of the attack if it is revealed that an error was made in the initial plans, as illustrated by NATO's Operation "Allied Force" against the FRY. On 14 April 1999, after carrying out a series of attacks on a convoy of vehicles believed to be military, NATO planners began to form doubts as to the military nature of the convoys, since it was unusual for the Yugoslav armed forces to travel in such large convoys. As a result, NATO forces chose to send in a slower, more stable aircraft to verify the nature of the targets. The military operation was suspended for more than 20 minutes and, on reports that the convoy consisted of both military and civilian vehicles, all attacks were cancelled and NATO withdrew its aircraft.<sup>34</sup>

First and foremost this provision must be interpreted as imposing a special and personal obligation on all members of the armed forces to cancel or suspend an attack when they acquire, in the course of an operation, information that was not available at the planning stage. Where aircrew are following an order to destroy what is believed to be a command and control centre, but at a later stage discover that the designated target is displaying a protective emblem,<sup>35</sup> the aircrew

33 The ICRC Commentary on this provision begins by affirming the rule's applicability to those planning or deciding upon attacks, but also – and primarily – to those executing them (Commentary on Additional Protocol I, p. 686, para. 2220). See also the manual *Fight it Right* (ICRC, Geneva, 1999), which appears to single out this particular precaution in attack because it applies not only to the authorities who plan an attack, but also to those who actually carry it out (p. 71, para. 1103.1c).

34 Anthony P. V. Rogers, "Zero-casualty warfare", *IRRC*, No. 837 (March 2000), pp. 174–5. In the present context, we should stress that the planners who harboured doubts as to the exact nature of the target acted appropriately. However, this in no way precludes their liability for the fact that these doubts should have surfaced before the first wave of attacks took place.

35 For example a red cross or red crescent, or an emblem designating cultural property, works or installations containing dangerous forces, etc.

will be under an obligation to suspend operations, report their observations to their superiors and request confirmation of the nature of the target before proceeding with the bombing raid. If the aircrew receive no additional information confirming the military nature of the objective, then the attack must be suspended.<sup>36</sup>

Of course, an attack will usually be cancelled or suspended before the first bombs have been dropped. However, in modern warfare, and especially when precision laser-guided weapons are being used, there are situations in which this rule can be applied even after munitions have been launched. For example, at a NATO press briefing held on 18 April 1999, the following story emerged. A pilot who was in charge of carrying out an aerial operation against an enemy radar noticed, after the attack had been launched, that the targeted site was near a church. In order to avoid damaging the church, the pilot decided to remove his weapon from the target, letting it harmlessly explode in the woods instead.<sup>37</sup>

Thus, in order to uphold the principle of distinction, combatants who are conducting operations in the field and who, by the nature of their activities, have first-hand information must exercise such cautious behaviour. The precision with which the obligation is worded implies that instructions that are issued in advance of an attack can never be definite: a soldier cannot avoid responsibility for acts committed in violation of the law simply by saying that he was following orders.

This rule is much more difficult to apply when assessing the proportionality of an attack. It has been pointed out that, in a concerted or co-ordinated operation, it is not possible to ask every individual tank driver or pilot to measure the concrete and direct military advantage expected from the attack against the collateral casualties and damage that is likely to result. First, a military operation of this scale demands discipline and swift action, and cannot allow a tank or air squadron to operate in a disorganized manner or temporarily to suspend the attack in order to discuss the practical application of the rule. Moreover, in such circumstances the proportionality must be assessed in the light of the attack as a whole. If, in order to prevent the enemy's army from advancing, planners decide to destroy all the bridges that span a river, it is obvious that a significant military advantage can only be gained by achieving a total destruction of the infrastructure. Thus, while each driver or pilot may judge that his own action is disproportionate, the operation as a whole may meet the proportionality requirement. It has been argued that, on the basis of Article 85(3) of Additional Protocol I, criminal responsibility in this type of situation would rest solely on those persons issuing the orders and not on those carrying them out.<sup>38</sup> In other words, the existence of superior orders would exonerate the person who most directly caused the damage.

36 This example is cited by the Australian military manual as a perfect illustration of situations of aerial warfare in which this provision might be applied, above note 26, para. 832.

37 This example is taken from Rogers, above note 34, p. 172 (n. 25).

38 Bothe et al., above note 19, pp. 366–7, para. 2.8.1.3.

While these observations might appear to follow the strictest logic, they can nevertheless lead to a mistaken understanding of the law. It is not sufficient to assert that those who carry out the attack must assume that the planners and deciders have correctly assessed the situation and that all that is required of them is faithfully to follow the instructions they have received. Article 57(2)(b) is based on the premise that a mistake might have been made as to the nature of the target, or that new information could become available and radically change one's assessment of the nature of the target. In such a case, imposing a strict obligation on a driver or pilot to obey orders would be contrary to the letter and spirit of this provision. Referring back to the example cited above, if, before launching a first salvo against a bridge, a tank driver notices that a crowd of fleeing civilians have taken refuge under the targeted bridge, the driver cannot assume that the planners have correctly considered the principle of proportionality and continue his mission in wilful blindness and impunity. He must, at the very least, suspend his attack in order to allow the civilians to evacuate, or to request that his orders be confirmed in the light of these new circumstances.

*The obligation to choose the military objective that involves the least danger to civilian lives and civilian objects*

Article 8(a)(2) of the 1956 New Delhi Draft Rules already required that, when the military advantage to be gained allowed for a choice between several objectives, the person responsible for ordering or launching an attack choose the objective that involved the least danger to the civilian population. It would appear that the authors of the Draft Rules gave this provision less importance, as it was seen more as a recommendation than as a strict obligation. It is true that these alternative targets for attack are all military objectives whose destruction is *a priori* lawful, and that the possibility of gaining an identical military advantage by destroying any of these targets might not be realistic in practice.<sup>39</sup> Nevertheless, a similarly worded obligation was introduced in Article 57(3) of Additional Protocol I, extending the scope of the 1956 provision to civilian objects. As a result this rule, which also appears in a number of military manuals,<sup>40</sup> constitutes a binding legal obligation.

Most frequently, the choice to be made relates to the enemy's infrastructure and lines of communication. For instance, in choosing between directly attacking a telephone exchange and attacking transmission lines at vital points located far from population centres, the attacking party would be bound to choose the latter if a similar military advantage could be gained in either instance. As modern communication systems progressively avoid transmitting from a central point and begin to reduce their vulnerability by decentralizing their networks, the obligation to choose between military targets will most likely become more important in the future. As a result, it will become less pertinent to

39 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, ICRC, Geneva, 2001, p. 109.

40 For a list of military manuals featuring this obligation (and other elements of practice), see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 1, pp. 413–18.

invoke military necessity to justify bombing an urban nerve centre whose destruction would paralyse the entire system.<sup>41</sup>

### *The obligation to give advance warning of an attack that may affect the civilian population*

The obligation to give advance warning of an attack that may affect the civilian population is an age-old requirement that may be found in the earliest codifications of the law governing the conduct of hostilities. Article 19 of the Lieber Code requires that military commanders inform the enemy “of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences”. The instruments adopted after the Lieber Code and up to the beginning of the twentieth century have systematically referred to this precaution.<sup>42</sup> Admittedly, its implementation created little difficulty in earlier days, as the only bombardment that was likely to have a serious effect on the civilian population came from artillery, usually in a siege operation. In such a context, it was easy to imagine the attacking troops giving advance warning, as the element of surprise played no part in the attack. The authorities of the besieged area had no practical means of protecting the military objectives being targeted, therefore the attacking party lost no military advantage by issuing a warning.

Some authors argue that the emergence of aerial bombardment has changed the situation, and that the obligation to give advance warning belongs in warfare of another age.<sup>43</sup> Indeed, surprise has become a primordial condition for success, particularly in view of the effectiveness of modern anti-aircraft defences. Nevertheless, state practice refutes the theory that this precaution has become outdated. Not only has the obligation been taken up in all modern codifications, both normative and academic,<sup>44</sup> but it is also referred to in many military manuals,

41 Eric David follows similar reasoning when he contends that the Serb radio and television tower could not be considered to be indispensable to the FRY's communication network because there were several hundred relay stations in the country (“Respect for the principle of distinction in the Kosovo war”, *YIHL*, Vol. 3 (2000), pp. 90–1).

42 The Brussels Declaration reiterated the requirement that a party give prior warning of an attack on a defended place, specifying both the giver and the receiver of the warning (at Article 16). In fact, while the Lieber Code referred to commanders in general, the Brussels Declaration imposed this obligation more specifically on the officer in command of an attacking force – he alone bore responsibility in the event of a violation. Furthermore, this instrument specified that the warning had to be given to the authorities of the defended place. It was then up to them to take appropriate measures in response. Both the Oxford Manual (at Article 33) and the Regulations annexed to 1899 Hague Convention II (at Article 26) contained wording that was almost identical to that of the Brussels Declaration. Article 27 of the Regulations annexed to the 1907 Hague Convention IV reiterated this obligation, although its wording seemed to limit the field of application to towns under siege.

43 Peter Rowe, “Kosovo 1999: ‘The air campaign – Have the provisions of Additional Protocol I withstood the test?’”, *IRRC*, No. 837 (March 2000), p. 154, who quotes in this respect Theodor Meron, *War Crimes Law Comes of Age*, Clarendon Press, Oxford, 1998.

44 See, for example, Article 8(c) of the New Delhi Draft Rules (1956). Furthermore, a reiteration of this obligation under Article 57 of Additional Protocol I was accepted without a debate.

including the most recent ones.<sup>45</sup> Moreover, even military practice subsequent to the emergence of airborne operations reveals many instances in which the rule has been applied in practice. For example, NATO issued warnings during its “Allied Force” operation over the territory of the FRY (1999). The argument that surprise was the key to victory made little sense in the context of a dissymmetrical war waged by a military alliance which enjoyed total air supremacy, was more or less immune from any defensive action on the part of the FRY and wished – mainly for political reasons – to prevent civilian losses.<sup>46</sup>

While practice confirms that the obligation to warn remains a fundamental precaution in attack, it also draws attention to the fact that this rule is not phrased in absolute terms. As already explained, military necessity sometimes requires that the rule be flouted if compliance would result in annihilating – or at least seriously compromising – the military operation’s chances of success. The relevant texts have therefore systematically included a phrase to attenuate the effect of the obligation. Additional Protocol I stipulates that a warning must be given “unless circumstances do not permit”, thereby emphasizing that the duty to warn remains the rule unless the belligerent can invoke special circumstances that would justify its non-compliance.<sup>47</sup>

Apart from the difficulty of identifying exceptional situations envisaged in this provision, there is also the challenge of determining which form the warning should take, and the degree of specificity to which it should be made. Article 57(2)(c) of Additional Protocol I, which stipulates that “effective advance” warning must be given, provides no precise answer to the crucial question of how much detail is required for the warning to comply with IHL.<sup>48</sup> In this respect, the Commission of Inquiry on Lebanon established pursuant to Human Rights Council Resolution S-2/1 noted in its report dated 10 November 2006 that “If a military force is really serious in its attempts to warn civilians to evacuate because of impending danger, it should take into account how they expect the civilian population to carry out the instruction and not just drop paper messages from an aircraft.”<sup>49</sup>

45 For a list of pertinent military manuals and other elements of state diplomatic and military practice, see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 1, pp. 400–13.

46 Rowe, above note 43, p. 154.

47 The phrase used in Additional Protocol I was taken up in Article 5(2) of Protocol II to the 1980 Conventional Weapons Convention, as well as in this Protocol’s new, amended text of 3 May 1996 (see Article 3(11), concerning general restrictions on the use of mines, booby-traps and other devices, and Article 6(4), relating more specifically to remotely delivered mines).

48 “It is not easy to determine what kind of advance warning would constitute an effective warning, nor is it clear how specific and direct the warning has to be” (Dinstein, above note 13, p. 128). The armed forces nevertheless have to show a minimum of common sense (or good faith); as noted in the manual *Fight it Right*, above note 33, p. 76, para. 1110.2: “A broadcast in a language which the population does not understand would not be effective, nor would a warning to authorities hundreds of miles away from a place that was cut off or one whose terms were so vague as to be useless.”

49 Report of the Commission of Inquiry on Lebanon established pursuant to Human Rights Council Resolution S-2/1, A/HRC/3/2, 23 November 2006, para. 156, available at <http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf>.

One essential question is whether the requirement can be met by merely providing an “abstract” warning consisting of a list of the various types of infrastructure considered to be military objectives. Or must a party give warning before any specific attack that may affect the civilian population? It is difficult to provide a clear-cut answer here. The level of precision required will depend on the general objective pursued; the attacking party will have to ensure the immunity of the civilian population and civilian property, while also taking into account its own military interests in each strategic context.

It seems clear, however, that the attacking commander does not have to issue multiple warnings of the danger incurred by a civilian population that is located near a clearly defined military objective that has been declared as such. A warning made in general terms at the start of the hostilities, and then repeated during the conflict, will satisfy both the letter and spirit of the obligation.<sup>50</sup> Indeed, practice shows that states usually fulfil this duty by issuing a general warning to the civilian population by broadcasting radio messages or distributing leaflets. This, however, does not exempt the attacking commander from giving further, more precise warning whenever possible or necessary. For example, when the target is an infrastructure that is essential for public service and is staffed almost permanently by civilians, the warning will, depending on the circumstances, have to be more specific. It is obviously impossible for a party to the conflict to accept an interruption in public services just because an enemy has designated these services as a legitimate military objective. In order to spare the civilian population working at the site, a more precise warning must be issued as early as possible.

Whether general or specific, a warning must be clearly expressed. When NATO attacked the Serbian radio and television tower in Belgrade, they asserted that foreign journalists had been warned to stay away from the site. This warning was not sufficient to meet the requirement of informing the Yugoslav authorities of an attack. Furthermore, a party must issue its warning within a reasonable time before the attack is actually launched. If a warning is issued too late, then it will not allow sufficient time for the civilian population to evacuate.<sup>51</sup> Of course, a warning must not be issued too early either, as this might lead people to believe that the threat is no longer real. Returning to the example of NATO’s attack on the Serbian radio and television tower, a warning was issued to the Yugoslav

50 This is expressly recognized by the Commentary on Additional Protocol I (pp. 686–7, paras. 2224 and 2225): “Warnings may also have a general character. A belligerent could, for example, give notice by radio that he will attack certain types of installations or factories. A warning could also contain a list of the objectives that will be attacked.” However, other, more precise warnings might be considered, as in the case of pilots during the Second World War who flew very low over their targets before launching an attack in order to give civilians the time to take cover. Such measures naturally depend on being in control of the airspace and on the defensive measures that have been put in place.

51 The Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1 stated that: “The timing of the warning is of importance. In some cases, the IDF [Israeli Defense Forces] are reported to have dropped leaflets or given loudspeaker warnings only two hours before a threatened attack. Having given a warning, the actual physical possibility to react to it must be considered” (Report, above note 49, § 153). However, judging when is the right moment is admittedly difficult, as the time allowed must not give the enemy the opportunity also to remove military equipment held inside the designated target. See Rowe, above note 43, p. 154.



authorities on 12 April 1999. However, when the attack was carried out eleven days later, on 23 April, the threat was no longer perceived as plausible.<sup>52</sup>

One final difficulty arises from a party's duty to give advance warning of an attack. Some authors have written about the possibility of pernicious effects. Sloutzky, for example, wonders whether issuing a warning and granting civilians enough time to evacuate might result in allowing the attacker greater freedom of action. More specifically, the warning might have the effect of transforming a populated zone into a veritable fortress predominated by military personnel. This would imply that the precautions to spare civilians who have – or should have – been evacuated might be less punctilious than in an inhabited zone. This same author even considers whether the issuance of a warning might, in turn, tempt the attacking commander to regard the entire zone as a military objective so as to justify the launch of a highly concentrated attack similar to an area attack.<sup>53</sup> Unfortunately, this scenario is not limited to academic hypothesis. For example, during the conflict in Lebanon in 2006, the Israeli Justice Minister reportedly declared that anyone still remaining in southern Lebanon could be considered a “Hezbollah supporter”, given that civilians had been given ample time to leave the area.<sup>54</sup> Such an assertion is legally untenable. A warning is solely meant to ensure that the civilian population is protected, and it can in no way free the attacking party of its obligation to comply with additional precautionary measures. To reason otherwise would be inconsistent with the general principle of distinction. The Commission of Inquiry on Lebanon confirmed this unequivocally:

Obligations with respect to the principle of distinction and the conduct of hostilities remain applicable even if civilians remain in the zone of operations after a warning has been given .... A warning to evacuate does not relieve the military of their ongoing obligation to take all feasible precautions to protect civilians who remain behind, and this includes their property.<sup>55</sup>

### The notion of “feasible” precaution

The expressions “everything feasible” or “all feasible” are used in Article 57 as a clear reminder of the obvious fact that, when taking precautions in attack, armed forces cannot be required to do the objectively impossible, nor can they be content

52 In this regard it might be useful to point out – as does Yoram Dinstein – that, as the sole aim of the warning was to allow evacuation of the civilian population, “warnings must not be misleading or deceptive; no ruses of war are acceptable in this context” (above note 13, p. 128).

53 N. Sloutzky, “Le bombardement aérien des objectifs militaires”, *RGDIP*, Vol. 61, 1957 (3), p. 372.

54 The IDF had already used this type of reasoning in the past: on 11 April 1996, immediately before carrying out a bombing raid on southern Lebanon, Israeli Defense Forces issued a warning to the civilian population, stating that anyone who remained in the designated area past a certain deadline would be considered a legitimate target. It should be noted that when the Israeli forces saw that a large proportion of the population had not evacuated, they refrained from considering the entire zone as a military objective, and limited their fire to carefully selected targets. This would have been the only legally correct procedure, even if the entire civilian population had been evacuated.

55 Report of the Commission of inquiry on Lebanon, above note 49, §§ 151 and 158.

with merely doing what is possible. While this basic idea sounds like a truism, its wording and its practical implications for the conduct of hostilities have prompted some debate. At the time when Additional Protocol I was being signed, the British delegation put forward an especially broad interpretation of the expression, maintaining that it covered everything that was feasible or practically feasible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations. It was this last part that gave rise to the greatest difficulty: this interpretation seemed to grant licence to belligerents to give their military interests precedence over humanitarian imperatives.<sup>56</sup> It is interesting to note that, at the time of ratification, the United Kingdom amended its declaration to include humanitarian interests among the military considerations to be taken into account when aiming to do “everything feasible”.<sup>57</sup>

The basic challenge raised by the expression “feasible” is in determining whether, and to what extent, it can be interpreted as legitimizing mistakes. For example, information sought and gathered in good faith may lead a party to believe that an object is a military objective, while in fact it is entirely civilian in nature. Or a weapon-delivering carrier could experience a failure leading it to divert from its programmed trajectory and to strike objects that the attacking party did not intend to target. The position of principle on this issue may be summarized as follows:

The duty to take precautionary measures is not absolute. It is a duty to act in good faith to take practicable measures, and persons acting in good faith may make mistakes.<sup>58</sup>

Thus a legal assessment of a given situation will allow a clear line to be drawn between a negligent act that is unlawful under international law and a mistake that was made despite the taking of all feasible precautions. The former type of act will engage a state’s responsibility (to be distinguished from individual criminal responsibility), while the latter type will not.

In that respect, the report prepared by the Committee appointed by the International Criminal Tribunal for the former Yugoslavia (ICTY) Prosecutor to review the NATO bombing campaign against the FRY stressed that

a determination that inadequate efforts have been made to distinguish between military objectives and civilian objects should not necessarily focus exclusively on one incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact that they have

56 Commentary on Additional Protocol I (pp. 681–2, para. 2198).

57 This interpretation was also adopted by other states (such as Belgium, Spain and Italy) at the time of ratification, and, more significantly, was incorporated into Article 3(10) of amended Protocol II to the 1980 Convention on Conventional Weapons.

58 William J. Fenrick, “Targeting and proportionality during the NATO bombing campaign against Yugoslavia”, *EJIL*, Vol. 12 (3) (2001), p. 501.

not worked well in a small number of cases does not necessarily mean they are generally inadequate.<sup>59</sup>

This excerpt does not mean, however, that it is impossible to identify a violation if a precautionary measure has generally worked adequately. While any unsuccessful precautionary measure should be examined in the light of its broader application, the specific incident must also be the subject of review. This excerpt implies that, where a number of precautionary measures have led to loss or damage to the civilian population or civilian objects, this must necessarily lead to a readjustment of precautionary measures in order to prevent such loss or damage from recurring.<sup>60</sup>

## Precautions to be taken by the party subject to an attack

Any party subject to an attack is prohibited from abusing the obligations of the attacker by trying to shield military objectives and operations. Although “technically” it could be contested that such prohibition belongs to precautions (it is entailed in Article 51(7) Additional Protocol I and not in the provisions dealing with precautions) – it remains logical to envisage its content in this context since it is one of the main obligations addressed to the defender in order to protect the civilian population. In addition to this absolute prohibition of human shield, feasible precautions against the effect of attacks are enshrined in Article 58.

### The absolute prohibition of human shield

#### *The prohibition of the use of the civilian population, individual civilians or civilian objects to render a point or an area immune from military operations*

While the prohibition of using human shields can be traced back to ancient times,<sup>61</sup> the treaty codification of this rule did not make its appearance until much later. Admittedly, Article 19 of the Third Geneva Convention of 1949 requires belligerents to evacuate prisoners of war as soon as possible after their capture to camps situated in an area far enough from the combat zone for them to be out of danger from hostilities.<sup>62</sup> Article 23 of the same instrument is even more explicit,

59 See the report of the Committee appointed by the ICTY Prosecutor to determine whether an inquiry should be made into NATO’s bombing campaign against the FRY from 24 March to 10 May 1999, ILM, Vol. 39 (5) (2000), para. 29.

60 Robert Cryer, “The fine art of friendship”, *Journal of Conflict and Security Law*, Vol. 7 (1) (2002), pp. 51–2.

61 The first modern attempts to establish international criminal liability did set out to criminalize such practices. The prohibition on using human shields is mentioned in the 29 March 1919 report drafted by the Commission that was responsible, *inter alia*, for identifying violations committed by the forces of the German Empire and its allies (Miguel A. Marin, “The evolution and present status of the laws of war”, RCADI (1957-II), p. 678).

62 The obligation to evacuate knows one exception, when the prisoner concerned cannot be moved, due to, for example, the seriousness of his wounds. It should be noted that the protection afforded to prisoners of war also covers the period of time between capture and evacuation. During this interval, they must not be unnecessarily exposed to danger.

stipulating that prisoners of war may not be sent to, or detained in, areas in which they may be exposed to fire from the combat zone. Nor, *a fortiori*, may they be used to render certain points or areas immune from military operations. Along the same lines, Article 28 of the Fourth Geneva Convention of 1949 provides that the presence of a protected person may not be used to render certain points or areas immune from military operations. However, the scope of each of these very important provisions is necessarily limited in view of the two instruments' respective fields of application. It was only with the adoption of Article 51(7) of Additional Protocol I that the ban on using human shields was finally extended to protect the entire civilian population, and all individual civilians, in the following terms:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.<sup>63</sup>

This provision is skilfully worded. It goes to the heart of the prohibition by covering both the forcible movement of civilians to shield military objectives from attack as well as more “subtle” practices. For instance, Article 51(7) clearly contemplates the scenario of moving civilians to a military site, but it also envisages the possibility of deliberately placing a military objective in the middle of, or close to, a civilian area, for example by positioning a piece of artillery in a school yard or a residential area. Depending on the circumstances, the latter scenario may also amount to a violation of the obligation – examined later in this paper – to refrain from placing military objectives in or near densely populated areas. This violation will be aggravated by the *intention* of using the civilian population as a shield. Article 51(7) also prohibits moving a civilian population or individual civilians in an attempt to shield military operations. In short, this provision has extended the personal scope of the prohibition to benefit all civilians, and has broadened the material scope of the prohibition to cover a maximum of situations.<sup>64</sup> The wide support for this rule, particularly in diplomatic practice, suggests – with little risk of contradiction – that the prohibition enjoys customary status in both international and non-international armed conflicts.<sup>65</sup>

63 Additional Protocol II contains no similar provision; Article 5(2) only mentions that places of internment and detention must not be located close to the combat zone.

64 As quite aptly noted in the manual *Fight it Right*, above note 33, p. 58, para. 1003.2, this prohibition on using human shields must nevertheless be interpreted in the context of a given military operation. For example, a defending commander may not be deemed to be using civilians as human shields when the area being defended is a town or residential area that is under siege and allows little opportunity for persons to move.

65 A very large number of military manuals contain provisions similar to that of Additional Protocol I; see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 2, pp. 2285–302. In addition, the Rome Statute includes the use of human shields in its list of war crimes set out in Article 8(2)(b)(xxiii).

Determining how to react to such unlawful conduct poses a legal challenge. What should an attacking commander do when the adverse party decides to use human shields to protect its military objectives? It should first be pointed out that an attack on such shielded military objectives would remain lawful in these circumstances. Holding a contrary legal position would mean allowing a violation of the law to result in the immunity of military objectives. This would be tantamount to rewarding the violation, and could also encourage further violations. It is highly understandable that states would never tolerate such a result.<sup>66</sup> Furthermore, this legal position appears to be in perfect harmony with diplomatic and military practice. The Australian military manual, for example, explicitly allows for the possibility of attacking an objective despite the presence of civilians being used as shields.<sup>67</sup> Similarly, during the Gulf war in 1991, the president of the United States declared that the Iraqi president's decision to place civilians at strategic sites in order to protect those sites from allied strikes would not prevent US armed forces from launching an attack.<sup>68</sup>

In order lawfully to attack an object shielded by civilians, a number of conditions must be met. This is stressed in unambiguous terms in Article 51(8) of Additional Protocol I, which states that no violation shall release the parties to the conflict from their legal obligations with respect to the civilian population. More precisely, the attacking commander must continue to take all necessary precautionary measures to limit loss or damage to civilian persons and objects.<sup>69</sup> This is a clear reference to Article 57 of the Protocol whose application is not

Unfortunately, the Statute does not contain a parallel provision that is applicable in non-international armed conflicts. While this in no way precludes the prohibition from being applicable in non-international armed conflicts, it does leave open the question of criminalizing the use of human shields in such contexts.

66 Contrary opinions – some of them very ancient – have nevertheless been expressed. For example, Ibn Khalil, a twelfth-century North African jurist, maintained that “if the enemy makes a rampart of women and children, it should be left unless it is too dangerous” (quoted by Marcel Boisard, “De certaines règles islamiques concernant la conduite des hostilités et la protection des victimes de conflits armés”, *Annales d'études internationales*, Vol. 8 (1977), p. 152). Much more recently, another author challenged the legality of such an attack on the basis that any individual could one day find himself in the position of a human shield, and that, in such circumstances, the last thing he would want to do is encourage an attack of which he would certainly be an innocent victim. This author further asserts that “in this type of situation, no amount of military necessity will convince [the innocent civilian] of the necessity to lose his life. So when one cannot support the application of a rule of which one is the object, consistency requires that one not support its application when one is not physically affected” (Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 1994, p. 242 (our translation)). This argument is of little value, as no average civilian would be keen to act as a human shield in order to protect a military site from possible attack! The ultimate aim of international humanitarian law, which is to ensure the protection of civilians against the effects of hostilities, requires reaching a well-balanced compromise between the legitimate interests of civilians and those of the state. This author's argument can only result in giving unreasonable priority to the former to the detriment of the latter.

67 The *Australian Defence Force Manual*, above note 26, para. 550, states: “The presence of civilians on or near the proposed military objective (either in a voluntary capacity or as a shield) is merely one of the factors that must be considered when planning an attack.”

68 “Department of Defense Report to Congress on the Conduct of the Persian Gulf War”, above note 20, p. 618.

69 Very ancient historical references to this type of obligation can be found. For example, the *Shaybani's Siyyar*, an Arab antiquity text, considers the hypothesis of a city protecting itself by using Muslim children as human shields. It supports the lawfulness of an attack (even by using arrows) on condition

suspended when civilians have been used to shield military objects. This provision imposes a duty to adopt methods and means of warfare that are designed to avoid or minimize civilian losses among the human shields. It also entails that the attacking forces have a duty to look into alternative military objectives that are not shielded by civilians and whose destruction would allow them to gain a similar military advantage. The commander would also have the duty to consider alternative methods of attack that would spare civilians situated close to the military objective. The presence of human shields complicates armed forces' tasks considerably, and raises the degree of precaution required because the fundamental rights of civilians are clearly at stake. This heightened duty nevertheless remains tolerable in a military context – it is one of the many risks that troops accept taking in armed conflicts.<sup>70</sup>

*A priori*, when applying the rules on precautions in attack one should also take into account the principle of proportionality. However, this is a topic of some legal controversy. Insofar as the principle of proportionality requires striking a balance between collateral damage to civilian persons and objects on the one hand and the direct, concrete military advantage expected from an attack on the other, applying the principle of proportionality in this context will tilt the scale in favour of the party using human shields, to the detriment of the party launching its attack in compliance with the law. This difficulty is not insurmountable, nor can it allow any party to set aside a principle so fundamental as proportionality. In order to overcome this difficulty authors have submitted that the enemy party's fraudulent conduct may be taken into account in the attacking commander's assessment of collateral damage versus military advantage. This approach, which can indeed be considered appropriate, stems from the UK *Manual of Law of Armed Conflict*, which states,

Any violation by the enemy of this rule would not relieve an attacker of his responsibility to take precautions to protect the civilians affected, but the enemy's unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected.<sup>71</sup>

that only the territory's inhabitants are targeted, and not the children. Therefore it is important to take into account the attacking party's intention when assessing the lawfulness of an attack. See *Shaybani's Siyar*, trans. Majid Khadduri, Johns Hopkins Press, Baltimore, 1966, p. 102, paras. 118–119, 120–121.

70 See, in particular, Frits Kalshoven ("Reaffirmation and development of international humanitarian law", *Netherlands Yearbook of International Law*, 1978, p. 121), who remarks in this regard, "The above precautions against the effects of attacks have not been introduced to facilitate military operations."

71 UK Ministry of Defence, *The Manual of Law of Armed Conflict*, Oxford University Press, Oxford, 2005, p. 68, para. 5.22.1. See also the manual *Fight it Right*, above note 33, p. 58, para. 1003.4) indicating that "The attacking commander is required to do his best to protect these civilians but he is entitled to take the defending commander's actions into account when considering the rule of proportionality." One of the authors of this manual reaffirms this position by stating that "in considering the rule of proportionality, any tribunal dealing with the matter would be obliged to weigh in the balance in favour of the attackers any such illegal activity by the defenders": Rogers, above note 34, pp. 178–9. See also Dinstein, above note 13, p. 131: "[T]he principle of proportionality remains prevalent. However... the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that – if an attempt is made to shield military objectives with civilians – civilian casualties will be higher than usual."

One more condition has been introduced into the equation: Eric David suggests that, before attacking, a commander will have a duty to exhaust all lawful means of persuading the defending commander to withdraw his human shields.<sup>72</sup> This approach is highly laudable, and all relevant authorities must be encouraged to follow it. Nevertheless, it is not difficult to see that this is a moral condition rather than a legal one. To require that a commander warn the enemy of his intention to attack could place the attacking party in an unfavourable military position. As explained above, Additional Protocol I states that a warning must be given “unless circumstances do not permit”. After carrying out a detailed analysis of both national and international practice, it would appear that the condition put forward by Eric David does not stem from international treaties, military manuals or any unilateral act on the part of a state or an international organization. In the light of this, it is difficult to argue that the condition is legally binding.

### *The phenomenon of “voluntary human shields” and its legal implications*

In recent years, a new phenomenon has emerged. Referred to by the media as “voluntary human shields”, these are civilians who choose to demonstrate their opposition to war by physically placing themselves on sites that are clearly military in nature or purpose. These civilians, who are prepared to risk their lives for an ideal, will often be nationals of a belligerent state whose military objectives they wish to defend. For example, many Yugoslav citizens occupied bridges in Belgrade during the bombing campaign under NATO’s “Allied Force” operation in 1999. Voluntary human shields may also be civilians who are nationals of neutral, or even enemy, countries. As a classic example, in 2003, a group of individuals of various nationalities, acting under the auspices of non-governmental organizations, went to Iraq before armed operations began, in order to position themselves deliberately on the sites of military objectives designated as such by Iraq.

The applicability of Article 51(7) of Additional Protocol I to the situation of voluntary human shields may legitimately be regarded as debatable. At least in spirit, this provision implies that the civilian population or persons concerned have acted under duress or, at minimum, without knowledge of the way in which they are being manipulated to shield a military objective. It is therefore highly unlikely that drafters of this provision envisaged that the rule would also apply to the situation of individuals acting consciously and on their own initiative. Nevertheless, the prohibition on “using” the presence or movement of a civilian population is not limited to proscribing active violations by military authorities. The prohibition also applies to military authorities’ passive indifference towards

72 David, above note 53, p. 242.

civilians' voluntary presence or movements that would serve to shield military objectives.<sup>73</sup>

What is less clear is at what moment a belligerent's passive attitude towards the presence of voluntary human shields will become tantamount to the belligerent's using these civilians' presence or movements to shield military objectives or to shield, favour or impede military operations. Based on the work of the Preparatory Commission responsible for drawing up the elements of crimes contained in the Rome Statute, it may be argued, by analogy, that the criterion triggering the application of Article 51(7) is the intention of the party being favoured by the human shields.<sup>74</sup> Admittedly, it can be very difficult to identify the intention behind a belligerent's course of conduct. Nevertheless, intention can often be deduced from the circumstances of a particular case. For example, where civilians gather on a bridge of military value in order to protest against the enemy's earlier destruction of other similar bridges will probably not imply an intention on the part of the belligerent. However, if, on the same bridge, civilian demonstrators set up camp for a long period of time and the authorities take no action to remove them, then this inaction will lead to a clear presumption that the authorities intend to use the civilians' presence to shield the bridge from an enemy attack. An even clearer presumption of intention will arise where civilian volunteers are briefed by the armed forces on which military sites are to be "protected".

One might wonder what the advantage is of this subtle requirement of intention when the presence of voluntary human shields could be said to be already covered by Article 58 of Additional Protocol I, which requires that the civilian population, individual civilians and civilian objects be removed from the vicinity of military objectives. From a legal standpoint, it is important to specify in which cases Article 51(7) applies, first of all because the prohibition on using human shields is absolute whereas the precautions that must be taken against the effects of attacks are formulated in relative terms and, second, because a violation of Article 51(7) will entail individual criminal liability,<sup>75</sup> whereas a violation of Article 58 will not.

73 It is worth noting that the term "movement" was included in the text in order to cover cases in which the civilian population moves of its own accord. This does not, however, imply awareness on the part of the civilians that they are serving to protect a military objective (Commentary on Additional Protocol I, p. 627, para. 1988). This broad interpretation of the concept of use is confirmed by the wording of the first element of crime in Article 8(2)(b)(xxiii) of the Rome Statute, which reads as follows: "The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict" (emphasis added).

74 The second element of the crime in Article 8(2)(b)(xxiii) requires that "the perpetrator intended to shield a military objective from attack or shield, favour or impede military operations". In summarizing the discussions, Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, ICRC and Cambridge University Press, Cambridge, 2003, points out that, in the view of certain delegations, "the term "location" would not have any connotation as to how the civilians or other protected persons came to a certain place. They reiterated that what is important in this crime is not the type of movement or location being used, but the *intended use*" (pp. 344–5).

75 Pursuant to Article 8(2)(b)(xxiii) of the Rome Statute.



Turning to the attacking commander, will the voluntary character of a human shield be likely to influence his assessment of whether to attack the targeted object? Certain authors claim that civilians who act as voluntary human shields can be regarded as directly participating in hostilities, with the result that they are deprived of immunity against direct attack and have no effect whatsoever on a commander's assessment of proportionality.<sup>76</sup> If, however, it is accepted that direct participation in hostilities implies posing a direct and immediate threat to the adverse party, then it is doubtful whether merely passive voluntary human shields should really be regarded as directly participating in hostilities.<sup>77</sup> It is therefore reasonable to conclude that civilians acting as voluntary human shields will retain their immunity from direct attack. Moreover, the presence of voluntary human shields will in no way alter the attacking party's obligation to apply the proportionality principle when targeting its military objective. In applying the proportionality test, a military commander will take into account the deliberately imprudent behaviour of the voluntary human shields. As a result, these civilians will bear the risk of falling victim to a legitimate attack on the shielded object.

### The obligations arising from Article 58 of Additional Protocol I

The classic rule on precautions against the effects of attacks has gradually adapted to changes in modern warfare, although it perhaps still remains somewhat rudimentary. The first texts that codified the principle required that the besieged authorities display visible markings – usually flags – on certain buildings in order to make them easy to identify and thus protect them from enemy fire.<sup>78</sup> With technological progress – especially in aerial operations – and the resulting increase in loss and damage caused to the civilian population and civilian objects, the legal requirement to place markings on buildings subject to special protection has quickly proved to be insufficient. Therefore, in developing the law governing the conduct of hostilities, efforts have been made to strengthen the precautionary measures that a party under attack must take in order to protect the civilian persons and objects under its control. This bolstering also serves as a counterweight to the greater precautions required of an attacking party. In its

76 Dinstein, above note 13, p. 130. Without stating the argument in such clear terms, Schmitt, above note 30, also leans towards such a solution, according some merit to the theory that incidental loss or damage caused to voluntary human shields does not have to be taken into account (p. 12).

77 To equate such behaviour with direct participation in hostilities could also lead voluntary human shields to face criminal prosecution under the laws of their own country. In fact, proceedings were instituted against US nationals who went to Iraq in 2003, although the allegations against them were civil, not criminal, and were based only on their travelling to enemy territory in time of conflict.

78 The Lieber Code drew a distinction between hospitals, which had to display markings (Article 115), and other protected objects such as buildings dedicated to religion, art, science or charitable purposes and historical monuments, for which marking was merely recommended (Article 118). Later texts abandoned this dichotomy, considering that the marking of all these objects was a legal requirement; see in particular Article 17 of the Brussels Declaration, Article 34 of the Oxford Manual, and above all Article 27 of the Regulations annexed to the 1907 Hague Convention.

1956 Draft Rules the ICRC proposed that the content of such “passive” precautions be extended. In fact, Article 11 of the Draft Rules foreshadowed Article 58 of Additional Protocol I, which can be broken down into three separate but interconnected categories of precautions.

First, Article 58(a) requires that belligerents remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives. This provision’s express reference to Article 49 of the Fourth Geneva Convention, which prohibits forcible transfers and deportations of protected persons from occupied territory,<sup>79</sup> demonstrates that drafters were aware of the risk that this precaution could be used to pursue ends that are anything but humanitarian. It is obvious, however, that the obligation to remove civilian persons and objects must be carried out in the spirit of the Protocol, that is, with the sole aim of protecting civilian persons and objects threatened by the hostilities. Of course, such measures must also take into account the potentially traumatic effects of an evacuation.<sup>80</sup> In the light of this, the rule will apply only when it is materially impossible to guarantee the population’s safety by other means, and only until the danger has passed.

Article 58(b) requires that the parties to a conflict avoid positioning military objectives within or near densely populated areas. This obligation relates to the placement, in times of both peace and war, of fixed military objectives. For instance, setting up military barracks or a munitions depot in the middle of a residential complex could have disastrous consequences for the civilians living in the area. The obligation in Article 58(b) also covers mobile military objectives such as troops or weaponry supplies. In all their movements, it is preferable that military units avoid coming near densely populated areas. If they are unable to avoid this, then they must pass through the populated area as swiftly as possible and deploy in such a manner as to create the least possible risk to the civilian population and civilian objects.

Finally, Article 58(c) sets out an open-ended obligation to take “other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers arising from military operations”. This provision allows states to take additional precautionary measures according to circumstances such as the state’s available means and other considerations relating to the conflict. Both state practice and doctrinal writings offer useful examples of the types of measures that are likely to be taken in compliance with this obligation. The most common precautions include the

79 Article 49 nevertheless specifies that this prohibition of forcible transfers and deportations in no way affects the possibility of total or partial evacuation of a given area of the occupied zone if the security of the population or imperative military reasons so require.

80 The ICRC Commentary on Additional Protocol I (p. 693, para. 2248) notes: “In this field the Occupying Powers only have limited freedom and must comply with the provisions of Article 49 of the Fourth Convention: imperative military reasons, security of the population, proper accommodation to receive the persons concerned, satisfactory conditions of transfer (hygiene, health, safety, nutrition, members of the same family not separated, the Protecting Power be kept informed).”

construction of shelters, the establishment of civil defence organizations<sup>81</sup> and the installation of systems to alert and evacuate the civilian population. Other measures include programmes providing relief to the wounded, fire-fighting, decontamination, and identification and marking of high-risk areas.<sup>82</sup>

These precautions against the effects of hostilities are a logical extension of the principle of distinction. A large number of military manuals have used wording that is similar or even identical to Article 58,<sup>83</sup> which also constitutes a rule of customary international law.<sup>84</sup> The idea of imposing this duty to take precautions did, however, prompt sharp criticism before, during and after the 1974–7 Diplomatic Conference, since certain states considered that the obligation might be extremely difficult to meet. Where a densely populated country is rapidly undergoing urbanization, the idea of taking precautions may be easier said than done.<sup>85</sup> The strongest opposition to this duty was expressed by the Swiss Confederation: Switzerland’s mountainous topography means that the civilian population is heavily concentrated in valleys, which are areas of vital economic and military importance in which fighting would inevitably take place despite the density of civilian population and housing.<sup>86</sup> For these reasons, the requirement of removing the civilian population from the vicinity of military objectives, and of

81 There is an obvious link here with Chapter VI (entitled “Civil defence”) of Part IV, Section I of Additional Protocol I. (Precautionary measures appear in Chapter IV.)

82 For a list of such measures, see, in particular, *Fight it Right*, above note 33, p. 78, para. 1201.5 c). As this manual states, the obligations laid down in Article 58 depend as much on civilian authorities as on armed forces. Moreover, Article 58 is a classic example of a provision that requires the allocation of financial resources and the adoption of practical measures during peacetime, especially in terms of planning and location of military objectives. The fact that certain military objectives may lose their qualification as such because of changing contextual factors does not preclude a party from taking precautionary measures, which, should the need arise, will facilitate protection of the civilian population. One such precaution could be the establishment of protected or non-defended zones to which evacuees could be moved.

83 For examples of military practice, see Henckaerts and Doswald-Beck, above note 8, Vol. II (Practice), Part 1, pp. 419–50.

84 The ICTY unambiguously upheld the customary nature of the duty to take precautions in its January 14, 2000 judgment in the *Kupreskic* case (at para. 524). Some doctrinal authors also maintain that these obligations can be considered to have been customary for a very long time. See, in particular, Geoffrey Best, *War and Law since 1945*, Clarendon Press, Oxford, 1997, p. 330. The ICRC study on customary law also recognizes the customary status of these precautionary obligations in international armed conflicts. However, the study’s excessively prudent assessment of the customary nature of the rule in non-international armed conflicts is regrettable. It concludes that the only real customary obligation in non-international armed conflicts is to take all feasible precautions to protect the civilian population and civilian objects under its control against the effects of attacks (Henckaerts and Doswald-Beck, above note 8, Vol. I (Rules), pp. 68–76).

85 “At times, the intermingling of civilians (and civilian objects) with combatants (and military objectives) can scarcely be eliminated. For instance, sprawling metropolitan areas are only rarely bereft of military objectives”: Dinstein, above note 13, p. 129.

86 This special topography had reportedly led the Swiss army to envisage setting up command posts in the basements of private houses! This explains why Switzerland – and Austria, which is in a similar situation – filed an interpretive declaration subjecting the expression “to the maximum extent feasible” used in Article 58 to the requirements of defence of the national territory. On this reservation, see Maurice Aubert, “Les réserves formulées par la Suisse”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 139–40, 144.

refraining from placing such objectives within or in the vicinity of densely populated areas, has, on occasion, been described as difficult to achieve on a large scale.<sup>87</sup>

Yet it is precisely to address such realities that the duty to take these precautions is worded in relative terms. Additional Protocol I requires that these precautionary measures be applied only “to the maximum extent feasible”. This expression has already been examined earlier in this paper, in the context of precautions in attack. The words “to the maximum extent feasible” cannot be interpreted as referring to a mere recommendation rather than a legal obligation.<sup>88</sup>

It is also worth noting that the standards laid down in Article 58 are not limited to prohibiting the deliberate scattering of military elements in a civilian environment in order to impede enemy operations.<sup>89</sup> Article 58 has a much broader field of application: it requires the party under attack to adopt, in good faith, proactive measures that are designed to guarantee immunity of the civilian population and objects.

## Conclusion

Contrary to what is sometimes maintained, Additional Protocol I does not introduce a fundamental imbalance between the precautions required of the defender and those required of the attacker.<sup>90</sup> Responsibility for applying the principle of distinction rests equally on the defender, who alone controls the population and objects present on his territory, and on the attacker, who alone

87 Siege warfare is indisputably one of the most problematic situations in this respect. For example, it would be difficult to find a violation of Article 58 in the PLO’s practice of placing heavy weaponry next to civilian objects during the Israeli forces’ siege of West Beirut, since it was practically impossible for the organization to do anything else to defend itself.

88 This reminder is certainly useful because, as noted by Dinstein, above note 13, “Admittedly, considering that these obligations devolve on every belligerent only “to the maximum extent feasible”, they are often viewed by commentators as more in the nature of recommendations than strict duties” (p. 129).

89 Such conduct would indisputably be in violation of Article 58. More importantly, because of the element of intent, such acts could also amount to “use” of the civilian population or civilian objects to “shield, favour or impede military operations”, and thus fall within the scope of Article 51(7).

90 In his article entitled “Air war and the law of war”, *Air Force Law Review*, Vol. 32 (1) (1990), p. 112 (n. 351), W. Hays Parks asserts that, while the protection of civilian persons and property was traditionally the responsibility of the defenders, Additional Protocol I has shifted this responsibility to the attacker. Apart from the fact that, in our view, the protection of civilian persons and property has always been a shared responsibility, the basis for Parks’s position is not admissible under IHL. According to Parks, states acting in a defensive capacity are most often seen as acting in self-defence, and this perception would have rendered certain delegations hesitant, during Additional Protocol I negotiations, to impose any further restrictions on their military operations against an attacker. In other words, the natural law of self-defence took precedence over any other obligation, and authorized nations to place their civilian populations at risk if this was deemed necessary to protect their territory. While it cannot be denied that this argument led to some declarations during the Diplomatic Conference (see in particular the declaration made by France: CDDH/SR.42, paras. 54–55), it still does not justify challenging the basic structure of the law of armed conflict, which, in principle, excludes any consideration of *ius ad bellum* within the domain of *ius in bello*.

decides on the objects to be targeted and the methods and means of attack to be employed.<sup>91</sup> Consequently, only a combination of precautions taken by all belligerents will effectively ensure the protection of the civilian population and objects.

This does not, however, mean that respect for these obligations by one party depends on the conduct of the other party. This sharing of responsibility in no way implies that an attacker's refusal to fulfil its precautionary obligations would free the defender from its own obligations.<sup>92</sup> In the same way, a defending party who fails to meet its precautionary obligations will bear at least some legal responsibility for the loss or damage caused by an attack on a legitimate military objective, even when the attacking party has taken certain precautionary measures.<sup>93</sup>

The preceding comments bear a special significance in the context of modern strategic developments, which have a marked effect on belligerent parties' capacity to meet the obligations set out in Article 58. As a most striking example, recent technological advances, particularly in the areas of communication and information, have emerged in the form of a tightly interwoven network of civilian and military media.<sup>94</sup> Similarly, the rapid spread of asymmetrical strategies has inevitably led parties with lesser technological capacity both to increase and to conceal their strategic resources, the best hiding places – with some exceptions – being in densely populated urban areas. Regardless of whether belligerents have the ability to behave otherwise, such practices can only impair the efficacy of the principle of distinction in the future.

91 According to the 1976 *US Air Force Pamphlet* (pp. 5–8), “The requirement to distinguish between combatants and civilians, and between military objectives and civilian objects, imposes obligations on all the parties to the conflict to establish and maintain the distinctions. This is true whatever the legal status of the territory on or over which combatant activity occurs.” For a contrary opinion see Marco Sassoli, “Targeting: The scope and utility of the concept of military objectives for the protection of civilians in contemporary armed conflicts”, in David Wippman and Matthew Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st-Century Conflicts*, Transnational Publishers, Ardsley, New York, 2005, who states, “Customary law and treaties clearly do not impose obligations on the defender comparable to those of a belligerent launching an attack. The defender may simply not abuse the obligations of the attacker to render its military objectives immune from attack” (p. 209).

92 Having remarked that modern technological societies have made it much more difficult to apply the measures required by Article 58 of Additional Protocol I, the Committee appointed by the ICTY Prosecutor to determine whether an inquiry should be made into the NATO bombing campaign against the FRY (1999) stated, “Civilians present within or near military objectives must, however, be taken into account in the proportionality equation even if a party to the conflict has failed to exercise its obligation to remove them.” In the same vein, see Bothe et al., above note 19, p. 307, para. 2.5.3.1.

93 “A party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in the territory” (*US Air Force Pamphlet*, 1976, pp. 5–13).

94 In the words of Mark Shulman (“Discrimination in the laws of information warfare”, *Columbia Journal of Transnational Law*, Vol. 37 (1999), p. 963), “[W]here armed forces once communicated among themselves – via military media ... – they now share the info-share with civilians everywhere. In information warfare, segregation presents many new challenges.”