

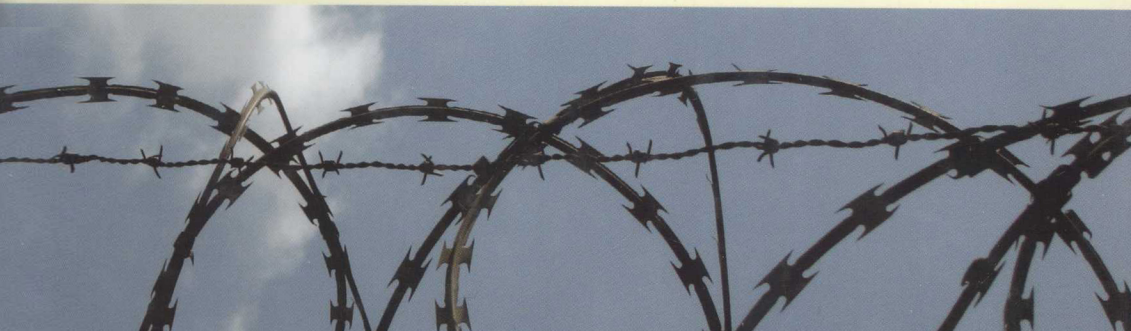


TERRORISM AND GLOBAL JUSTICE SERIES

ANICÉE VAN ENGELAND

Civilian or Combatant?

A Challenge for the 21st Century



CIVILIAN OR COMBATANT? A CHALLENGE FOR THE TWENTY- FIRST CENTURY

Anicée Van Engeland



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Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016
www.oup.com

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Library of Congress Cataloging-in-Publication Data

Engeland, Anisseh van.

Civilian or combatant? : a challenge for the 21st century / Anicée M. Van Engeland.

p. cm. — (Terrorism and global justice series)

Includes bibliographical references and index.

ISBN 978-0-19-974324-7 (hardback : alk. paper)

I. Combatants and noncombatants (International law) I. Title.

KZ6515.E54 2011

341.6'7—dc22

2010045119

1 2 3 4 5 6 7 8 9

Printed in the United States of America on acid-free paper

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Introduction

*Sometimes I think it should be a rule of war that you have to see somebody up close and get to know him before you can shoot him. ~ Colonel Potter, M*A*S*H¹*

AN OLD PHENOMENON

Not a week passes by without its share of massacres of civilians making the headlines: In Somalia, civilians are caught between the fires of local war lords, Islamists, and foreign armies. Civilians are literally trapped in cities or live in camps on the main roads leading to these cities.² In the Democratic Republic of Congo, the area of Kivu has been the theater of violence against civilians including looting, raping, and killings, with a sharp increase since May 2009.³ The same spring was deadly in Sri Lanka: the government decided to put an end to the Tigers' domination in the

¹ Colonel Sherman Tecumseh Potter (portrayed by Harry Morgan) was a fictional character from the *M*A*S*H* television show.

² Jeffrey Gettleman, *The Most Dangerous Place in the World*, FOREIGN POLICY (March/April 2009), http://www.foreignpolicy.com/story/cms.php?story_id=4682.

³ Press Release, International Committee of the Red Cross, Democratic Republic of Congo: Mounting Concern as Civilians' Plight Worsens (July 8, 2009), <http://www.icrc.org/Web/eng/siteeng0.nsf/html/congo-kinshasa-update-080609>. This is because the ICRC has renewed its website. Here is the update link <http://www.icrc.org/eng/resources/documents/update/congo-kinshasa-update-080709.htm>

Tamil area. Some speak of 20,000 deaths resulting from the eradication of the movement.⁴ In Iraq, there were as of November 2010 between 98,872 and 107,934 civilian deaths accounted as a result of the ongoing war.⁵ Armed conflicts, whether international or non international, cause many deaths among civilians either because they are directly targeted by Parties to the hostilities or because of the ongoing battles violating humanitarian principles.

Targeting civilians demonstrates a lack of ethics but also disrespect for the law: massacres as acts of revenge, as a means to control a population, or merely in order to spread terror and increase power. The deaths of civilians, the deliberate targeting, and the violations of international humanitarian law are not new phenomena, and history is full of war events during which civilians got caught in hostilities and paid a high price. It is, for example, very complex to control troops when armies are on the move and enter populated areas. It is then difficult to prevent killings, looting, rapes, and abuses when an army ransacks a city, as demonstrated during the fall of Kabul on November 13, 2001: while Kabuli cheered upon the arrival of the Northern Alliance, doom befell villages once the Taliban ran away from the capital. An historical example is the massacre of Melos: Athens besieged the island of Melos during the Peloponnesian War; when the army eventually arrived on the island in 416 BC, the belligerents killed all the men, while women and children were enslaved. The atrocities were later regretted by Athenians. Thucydides wrote an eloquent piece on the Melos massacre, reflecting the responsibility of power, morality, and violence.⁶ Attila and his Huns became legendary by “ground[ing] almost the whole of Europe into the dust”⁷ in the fifth century. The sack of Jerusalem, which occurred after the Crusaders captured the city from the Fatimid Egypt in 1099, claimed the lives of 40,000 civilians during the siege, the final assault, and the fall of the city.⁸

There was an improvement in the Middle Ages: the war field was delimited and two armies faced one another with limited involvement of the civilian population. That said, this improvement was limited to Christian Europe as the Church attempted to regulate wars and to avoid bloodshed. In other places, it was generally accepted that the civilian population was a target for attack as part of a strategy or was part of war’s booty.⁹ For example, the armies of Tamerlane starved besieged cities, entered them on the promise that no harm would be done to the population,

⁴ Catherine Philp, *The Hidden Massacre: Sri Lanka’s Final Offensive against Tamil Tigers*, TIMES ONLINE, May 29, 2009, <http://www.timesonline.co.uk/tol/news/world/asia/article6383449.ece>.

⁵ See for regular updates, the website <http://www.iraqbodycount.org>.

⁶ THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, Chapter XVII (Benjamin Jowett trans., Oxford: Clarendon Press 1990); see also Paul Cartledge, *Might and Right: Thucydides and the Melos Massacre*, 36:5 HISTORY TODAY 11, 11–15 (May 1986).

⁷ AMMIANUS MARCELLINUS, ROMAN HISTORY, book 31, 575–623 (London: Bohn 1862).

⁸ John & Laurita Hill, *The Jerusalem Massacre of July 1099 in the Western Historiography of the Crusades*, in 3 THE CRUSADES 65 (Benjamin Z. Kedar & Jonathan S.C. Riley-Smith eds., Ashgate Publishing Limited 2004).

⁹ PHILIPPE CONTAMINE, WAR IN THE MIDDLE AGES 262 (Oxford; New York: B. Blackwell 1984).

then looted the cities, raped women, and exterminated civilians. Tamerlane's calling card was to build pyramids of skulls; his army would then release survivors to run to the next city in order to spread the news of terror and warn them that Tamerlane's troops were coming.¹⁰ In 1387, Isfahan's officials took Tamerlane's ambassadors hostage. When Tamerlane arrived, the officials panicked and opened the gates for rendition. Tamerlane was irritated by the behavior of the Isfahani, and it was a bloodbath: 70,000 people were killed, constituting 35 minarets of 2000 human skulls each.¹¹ It is worth noting that with all this cruelty, Tamerlane kept craftsmen alive (in Shiraz, Esfahan, and Herat, but also Delhi and Damascus) and sent them to Samarkand and Bukhara, which explains why these two cities of Uzbekistan are so beautiful and why they remind one so vividly of Isfahan, Iran. Tamerlane never shied away from the use of violence and once declared:

I am the scourge of God chosen
To chastise you, since no one
Knows the remedy of your
Iniquity except me. You are
Wicked but I am more wicked
Than you, so be silent.¹²

Despite the attempts of the Christian Church to limit the war field and casualties, there were major atrocities: during the Thirty Years War, which began as a religious conflict between Protestants and Catholics, eight million civilians were either killed or displaced. These historical examples demonstrate that the distinction between civilians and combatants has always been difficult to respect and that civilians had a role to play in military strategies. This crucial role civilians endorse unwillingly has not evolved much: civilians are often deliberately targeted during wars, with no military purpose, for the sake of violence by terrorist groups, or as a demonstration of strength, as illustrated by the horrors committed during the wars in the Former Yugoslavia, on all sides. Consequently, civilians still bear the brunt of war. The situation is quite alarming nowadays as civilians constitute the largest bulk of war victims. This is partly the result of the fast-paced evolution of technology that has allowed for more protection of the military versus the forever-increasing exposure of civilians; aerial bombardment and drone attacks illustrate the phenomenon.

There are concomitant efforts to curb the violence against civilians and to distinguish civilians from soldiers during armed conflicts. In the medieval period, it was seen as an act of chivalry to protect civilians.¹³ There were "articles of war" released

¹⁰ MAJOR DAVY, *POLITICAL AND MILITARY INSTRUMENTS OF TAMERLANE* (Cambridge: Cambridge University Press 1972).

¹¹ RUY GONZALEZ DE CLAVIJO, *LA ROUTE DE SAMARKAND AU TEMPS DE TAMERLAN* (Paris: Imprimer Nationale, Collection voyages et Découverts 2006).

¹² WILFRID BLUNT, *THE GOLDEN ROAD TO SAMARKAND* 144 (London: Hamish Hamilton 1973).

¹³ Hugo Slim, *Why Protect Civilians? Innocence, Immunity and Enmity in War*, 79:3 INT'L AFF. 481, 481–501.

by European rulers to avoid massive casualties: the *jus armorum*, the professional code for knights, included prohibitions against civilian attacks.¹⁴ Another instance is the “just war doctrine”¹⁵ elaborated by Christians, according to which there are philosophical, religious, ethical, or political conditions for going to war and rules to respect during war. These rules include the protection of civilians. In Islam, there is a distinction between combatants and non combatants that dates back to the Prophet Mohammed’s time: it is prohibited to target civilians, and there is an ethic of saving lives,¹⁶ an ethic that has been tampered with by Classicist and Neo-Classical authors, later reinterpreted by extremist groups such as al Qaeda to justify the killings of civilians.¹⁷ This effort to distinguish civilians and protect them from the effects of war has evolved through history as explained in Chapter One. The principle of distinction became a cornerstone of international humanitarian law in the twentieth century: the 1949 Geneva Conventions (GC) and the 1977 Additional Protocols (AP) legalized the distinction. However, the distinction between civilians and combatants has proven difficult to uphold in practice, as illustrated in this book.

CHALLENGES FOR INTERNATIONAL HUMANITARIAN LAW REGARDING THE DISTINCTION

The most recent efforts to establish the distinction have been legal and are embodied in international humanitarian law: the discrimination between civilians and combatants is indeed a cornerstone of the modern law of armed conflict. The 1949 Geneva Conventions, later completed by the 1977 Additional Protocols, clearly distinguish combatants from civilians.

In the twentieth century, 43 million to 54 million civilians died from war-related causes, which amounts to 50 to 62 percent of all deaths.¹⁸ Numbers are on the rise due to various factors, including the spread of new far-reaching and deadly technologies, with the extreme illustration of the atomic bomb launched on Hiroshima on August 6, 1945. The challenges international humanitarian law faces today regarding the distinction between civilians and combatants and the protection of civilians are numerous and deal with asymmetric wars, terrorism, a lack of ethics, and the development of new technologies. Indeed there are massive casualties in the

¹⁴ MAURICE KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 17–22 (London, Routledge & K. Paul 1965).

¹⁵ FREDERICK RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* (Cambridge; New York: Cambridge University Press 1975).

¹⁶ Sohail H. Hashmi, *Saving and Taking Life in War: Three Modern Muslim Views*, 89: 2 *THE MUSLIM WORLD* 158, 158–80 (April 1999).

¹⁷ Anicée Van Engeland, *Islam and the Protection of Civilians in the Conduct of Hostilities: The Asymmetrical War from the Transnational Terrorist Groups’ Viewpoints and from the Muslim Modernists’ Viewpoints*, in *JIHAD AND THE CHALLENGES OF INTERNATIONAL AND DOMESTIC LAW* (The Hague: Asser Press & Cambridge University Press forthcoming 2009). It was published in 2010

¹⁸ William Eckhardt, *Civilian Deaths in Wartime*, 20:1 *BULLETIN OF PEACE PROPOSALS* 90 (1989).

field; terrorism takes hostage scores of civilians; the lack of ethics leads to the justification of civilians' deaths in the name of a greater good; and the development of new technologies allows for bombs that suppress all human life without affecting buildings for chemical agents that incapacitate, injure, or kill by attacking the nervous system.¹⁹ The latter were used in Iraq by Saddam Hussein against the Shias and the Kurds, and against Iranian civilians during the 1980–88 war.²⁰ There is an increasing pressure from the military to lead comprehensive wars including so-called new parameters, which is clearly at the cost of civilians' lives. In a way, it has become acceptable to have collateral damage among civilians in the name of an extended interpretation and understanding of the principle of military necessity.²¹ The outcome is that rather than striving for respect of the distinction at all costs, some people try to find cracks in the system and argue on the basis of military logic, justifying therefore, for example, the potential targeting of human shields. It is a rhetoric Saddam Hussein used during the war with Iran in the 1980s: he invoked international humanitarian law while violating it.²² Iraq bombed civilians' sites on a huge scale in blunt violation of Article 51-5 (b) API, which deals with protection of civilians and states that "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" is considered indiscriminate. In 1985, the Secretary General of the United Nations tried to encourage a ceasefire and respect for the Geneva Conventions. The government of Iraq replied that "the application of specific conventions and Additional Protocols cannot be conditional upon a cease-fire: they have been adopted precisely to mitigate the effects of the war";²³ As General William T. Sherman

¹⁹ Radiological and chemical weapons can contaminate a territory or poison human beings without affecting structures. See, e.g., U.S. CONGRESS/OFFICE OF TECHNOLOGY ASSESSMENT, *PROLIFERATION OF WEAPONS OF MASS DESTRUCTION: ASSESSING THE RISKS 3* (Washington DC: US Government Printing Office 1993).

²⁰ JOOST HILTERMANN, *A POISONOUS AFFAIR: AMERICA, IRAQ AND THE GASSING OF HALABJA* 150 (New York: Cambridge University Press 2007).

²¹ Military necessity is a principle of humanitarian law, along with the principle of distinction and the principle of proportionality. It is a fundamental notion according to which an attack or action must be intended to help in the military defeat of the enemy. It must be an attack on a military objective, and the harm caused to civilians or civilian property must be proportional and not excessive in relation to the concrete and direct military advantage anticipated. There is a debate regarding the manipulations of the concept: there is a trend that tries to extend the concept to cover other situations, in particular collateral damage. The Military Necessity Project at PRIO in Norway works on these attempts of manipulation: <http://www.prio.no/Research-and-Publications/Project/?oid=19239363>. Questions arise in all fields of humanitarian protection, as demonstrated by the following article dealing with the protection afforded in the medical field: Hans-Ulrich Baer & Jean-Michel Baillat, *Military Necessity versus the Protection of the Wounded and Sick: A Critical Balance*, 167:8 *MILITARY MEDICINE* 17–19 (2002).

²² *THE GULF WAR OF 1980–88: THE IRAN–IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE* (Ike Dekker & Harry H. G. Post eds., Dordrecht: Martinus Nijhoff 1992).

²³ Report of Secretary General, Field Trip in Iran and in Iraq, UN Doc. S/17097, at 8–9 (Apr. 12, 1985).

put it: "The crueler it [war] is, the sooner it will be over."²⁴ Michael Walzer explains the rationale for such approaches by writing: "the greater the justice of my cause, the more rules I can violate for the sake of the cause—though some rules are always inviolable. The same argument can be put in terms of outcomes: the greater the injustice likely to result from my defeat, the more rules I can violate in order to avoid defeat."²⁵ It was clear in the case of Saddam Hussein during the war with Iran that he approached war that way which is why he turned to total war targeting civilians (and so did Iran, but for other reasons²⁶). This reasoning is based upon raw military necessity and sets aside the humanitarian part of the Geneva Conventions and the Additional Protocols. The outcome was the gassing of the Iraqi Kurds and Shias in Iraq as well as the draining of the Marshland, and the massive bombing of Iranian villages, towns and cities.

This type of behavior highlights the need for a rehumanization of current international humanitarian law, too often construed as the law of armed conflict. The regulation of war through the lens of the law of armed conflict rather than through the eye of international humanitarian law amounts to more than a semantic issue: it results in an increasingly militarized reading of the Geneva Conventions and other documents at the expense of humanitarian principles. An instance of this change is the Blair doctrine, named after Britain's Prime Minister Tony Blair, which justified wars in Iraq and Afghanistan in the name of human rights interests, rather than military interests,²⁷ blurring therefore the lines between the laws of war and international humanitarian law. Yet, in the end, peace, development, democracy, and human rights were all to be imported through wars and caused the mass killing of civilians. Another illustration of the tendency to speak of the laws of the war as to give all the importance to the military, at the expense of the humanitarian aspect of the law, can be found in the Israeli Defense Forces (IDF)'s strategy of entering Palestinian Occupied Territories with tanks and of bombing the territories. Civilians have paid a high price for the so-called military necessity, with the Israeli army committing abuses when bombarding orphanages, hospitals, and humanitarian organizations' headquarters. The war rhetoric of these belligerents justifies the death of civilians for a greater cause, whether it is the creation of an Islamic world for al Qaeda or the strengthening of peace and security in the world for former Prime Minister Tony Blair and former President George W. Bush.

²⁴ Letter from General William T. Sherman to James Calhoun, September 12, 1864, in 2 WILLIAM TECUMSEH SHERMAN, *MEMOIRS OF GENERAL WILLIAM T. SHERMAN* 600–02 (New York, D. Appleton and Company 1875).

²⁵ MICHAEL WALZER, *JUST AND UNJUST WARS* 229 (New York: Basic Books 1992).

²⁶ Iran avoided targeting civilians at the beginning of the war. Yet when it saw that Iraqi citizens were not rebelling against Saddam Hussein as they were expected under Islamic standards (Muslims are expected to revolt against unjust rulers, and their oppression is one basis for a legitimate jihad), the country opted for total war on Iraq.

²⁷ C. Abbott & J. Sloboda, *The "Blair Doctrine" and After: Five Years of Humanitarian Intervention*, *Open Democracy* (Apr. 21, 2004), http://www.opendemocracy.net/globalization-institutions_government/article_1857.jsp.

Establishing a comparison between al Qaeda and the United States is certainly not right considering there is a difference of mind frame, approach and goals: al Qaeda seeks anarchy and never tries to adhere to humanitarian standards, Hussein sought dictatorial control, while Israel and the United States tried to find an appropriate response to violence, although both often act on the fringes on international law. However, in the end, civilians are hurt, maimed, or killed. Additionally, it is not because a war crime is committed by a wealthy nation in the name of ideals that it is more acceptable than the horrible deeds committed by others. The very philosophy of the Blair Doctrine is wrong: to justify a military intervention on humanitarian grounds is contradictory, as illustrated in Afghanistan, where the first victims of the conflict are the very women the coalition promised to free from human rights violations. Other instances of Western double standards include the creation of the International Criminal Tribunal for Former Yugoslavia: it did not emerge to prosecute war crimes committed by NATO; and yet some of NATO's actions in the region were undeniably war crimes. However, since the legal machinery was set up by the Security Council, there was little chance that NATO would ever be prosecuted.

The tragic events of 9/11 have not only cast a light on matters that have been lingering since World War II; they have brought them into broad daylight: civilians die more than combatants. This is the outcome of a shift: before, it was mainly countries from the southern hemisphere whose gross violations of international humanitarian law were publicized. After 9/11, the United States and its Allies could not hide their own violations. In a war like the War on Terror, all codes of ethics have faded in the name of a goal. This is how we have witnessed a slow but sure transition from international humanitarian law to the laws of war as the rubric for military decisions. The Geneva body of law is not so much used to protect civilians and to distinguish combatants from civilians; it is now perceived as laws setting up guidelines for the conduct of hostilities. The focus of these laws has transitioned from civilians to the army's tactics and strategies.

An alternative and dynamic reading of all international documents pertaining to the regulation of war exists; it is encompassed in international humanitarian law and the humanitarian legal philosophy. To switch back to this humanitarian philosophy that focuses on the "human" and the "humanitarian" rather than the army's needs, a strict and rigorous approach to protecting of civilians should be set forward. Additionally, the military approach should be turned on its head by mitigating the concept of military necessity, which pushed to its extreme creates dangerous precedents such as the bloodbath caused by the Sri Lankan army and the Tamil Tigers in 2009. Another approach to the distinction between civilians and combatants, far from the extended understanding of the concept of military necessity and collateral damages, should be advocated. As stressed by Antonio Cassese, the evolution of modern war has led to the increased killing of civilians

despite the concomitant emergence of laws to distinguish and protect, and an end should be put to this phenomenon.²⁸

Besides the targeting of civilians, there is another issue: there is a constant evolution of the status of civilians and combatants that cannot and should not be ignored as some people seem to fall on the line between the two categories because of their actions. There were for instance debates to know whether or not the status of combatants could apply to the Taliban and al Qaeda fighters in Afghanistan. Questions arise: if a peasant grows vegetables and sells them to the army, does that make him a combatant? What is the status of armed sentinels in Peru's villages ready to defend their people against various guerrilla movements and drug lords? Are the Palestinians living in the Occupied Territories and building new types of bombs without firing them civilians or combatants? What about those who travel underground through a labyrinth of tunnels to bring back medications, food, and weapons? Those who are armed to defend their families against factional struggles and Israeli patrols? What about the Palestinian woman who hides men belonging to the insurgency? Where and how to draw the line between a civilian and a combatant? The conditions under which someone is a civilian have been blurred because some non-combatants take part in the conflict. Indeed, the Conventions and the Additional Protocols give detailed rules regarding the distinction between civilians and combatants, and when the line is blurred, the Protocols provide extra protection via the Conventions and customary law.

FROM MY LAI AND SABRA AND SHATILA TO GUANTANAMO

The blurring between the two categories, combatants and non combatants, is prone to manipulation and the broadening of concepts like military necessity and collateral damage leads to major catastrophes and massacres. The principle of distinction should instead be seen as sacred. There are catastrophes when the principle is not respected either directly or indirectly—if twisted, for example, to answer a military agenda. Two major events illustrating the nonrespect of the distinction can be found in the history of the twentieth century: the massacres of My Lai, and Sabra and Shatila. On March 16, 1968, 347 unarmed civilians were brutally murdered by the U.S. army in South Vietnam. The massacres took place in two small hamlets, My Lai and My Khe, parts of the Son My Village. The U.S. army attacked the village thinking Vietcong were hiding there. Civilians often hid Vietcong among themselves because they supported the rebellion; there were also civilians who sometimes carried out acts of violence. These two elements were enough to blur all ethical lines. When the soldiers reached the two hamlets, orders given by U.S. army superiors to soldiers regarding civilians were vague. The combination of all these factors (and of course other factors such as physical exhaustion, fear, and other psychological factors) resulted in a ruthless, indiscriminate massacre that lasted

²⁸ Antonio Cassese, Fabio Mino e Giorgio Rochat, *Vittime civili il prezzo assurdo delle guerre*, LA REPUBBLICA, and General Fabio Mini, LA REPUBBLICA, Gennaio 20, 2009, at 1.

two days. Some of the victims were raped, tortured, or maimed.²⁹ The My Son Massacre demonstrates why it is crucial to respect the distinction, to have soldiers educated to understand, respect, and enforce it even under heavy stress, and to have a chain of command deeply committed to the respect and enforcement of international humanitarian law.

The second example is the Sabra and Shatila massacre: 3,500 people were butchered during two days of September 1982 by the Lebanese Forces militia group, with the support of the Israeli Defense Force. The two Palestinian refugee camps located in Lebanon were at the time full of women, children, and elderly people. During three days, the Israeli Defense Force blocked all entrances and exits, trapping refugees who were killed by the Phalangists³⁰ on the basis that Israel was looking for PLO fighters hiding among civilians.³¹ These two events are the very outcome of the rhetoric of the military abusing the very concept of military necessity and of the violation of the principle of distinction. These examples are disturbing because both massacres were committed or backed up by two democratic countries: the United States and Israel. This shows that no army is immune to violations of humanitarian law, and this is why the transition from humanitarian law to the laws of war must be fought with energy. The focus of the law must be on civilians and not on war.

Another consequence of the current main trend of thought and interpretation of the “laws of armed conflict” is the existence of the Guantanamo Bay detention center. The very fact that the detention camp at Guantanamo Bay exists shows that some countries do not mind twisting international humanitarian law to fit a political agenda. This leaves hollow the very purpose of international humanitarian law, which is to protect. The laws have been elaborated to protect civilians and combatants as well as people who would fall in between the two categories: it cannot and should not be used and abused, or referred to as being “quaint and obsolete³²”, to explain the existence of Guantanamo Bay and the practice of torture by the United States.

The very philosophy of international humanitarian law seems to be forgotten under the pressure of military necessity. This shift actually illustrates an ongoing semantic debate between, on the one hand, the Hague law that deals mainly with the conduct of hostilities and combatants, and the Geneva law, dealing with civilians’

²⁹ *Murder in the Name of War—My Lai*, BBC News, July 20, 1998; MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* (London: Penguin 1993); for an analysis, see LAWRENCE A. TRITLE, *FROM MELOS TO MY LAI: WAR AND SURVIVAL* (London; New York: Routledge 2000).

³⁰ A Lebanese Christian Militia.

³¹ BAYAN NUWAYHED AL-HOUT, *SABRA AND CHATILA: SEPTEMBER 1982* (London; Ann Arbor, MI: Pluto Press 2004).

³² The White House’s chief legal adviser, Alberto Gonzales, declared the Geneva Conventions to be so in a memorandum: Alberto R. Gonzales, *MEMORENDUM TO THE PRESIDENT, RE: DECISION RE APPLICATION OF THE GENEVA CONVENTIONS ON PRISONERS OF WAR IN THE CONFLICT WITH AL QAEDA AND THE TALIBAN*, 25 January 2002.

protection. Yoram Dinstein rejects this division as being an effect of fashion.³³ There is certainly no difference between the two laws, both belonging to international humanitarian law and symbolizing an evolution, the Hague laws dating back as far as 1907, while the Geneva Conventions and the Additional Protocols are closer to us in time (1949 and 1977, respectively). There is however no doubt that the two sets of law spring from different philosophies: the Hague law is rather focused on the military aspect while the Geneva law is focused on the human aspect. There is also no denial that today armies and armed groups tend to approach the regulation of war through the regulation of the conduct of hostilities while humanitarian law focuses on human victims of war. Organizations that should fight this trend keep welcoming more advocates of the extended approach to military necessity in their ranks by awarding them humanitarian prizes for academic articles or hiring them as security consultants. If it is a normal trend to have the military interacting with organizations devoted to protect civilians, especially since members of the army bring in knowledge about the reality of war, it remains a symptom of a shift to accommodate the army's needs. The participation of the military in humanitarian studies is not a problem in itself: on the contrary, it brings a variety of thought to the field. The problem lies with the import of a new philosophy that violates the creed of international humanitarian law. An example of this influence can be seen in the International Committee of the Red Cross (ICRC) interpretative guidance as to how the concept of "direct participation to hostilities" should be understood. The series of expert meetings that produced the guidelines seems to have given in to a military viewpoint. Indeed, if the guidance brings a much-needed clarification to the concept of "direct participation in hostilities," it also creates some doubts. It is said that members of organized groups belonging to a non state party to the armed conflict cease to be civilians and lose their protection for as long as they assume a combat function. This rule raises several questions pertaining to the time factor: when does one become a fighter and cease to be a fighter? The ICRC seems to be going down the path that a farmer who cultivates during the day and turns into a fighter at night is a combatant even when he attends to crops. Does that mean that a Hamas leader not in arms and attending a wedding can be a legitimate target, despite the presence of all the civilian guests? Would the farmer-by-day/fighter-by-night working on his crops with his children be a legitimate target? Considering the behavior of Israel and the United States with regard to targeted killings, some clarifications are needed; otherwise, it seems like the ICRC guidance might pave the way to the membership-based argument that targets all members of an armed non state actor that belong to that movement. There are however clarifications in the document that indicate quite clearly the importance of the time factor: the civilian is a combatant for the time he is in arms, as clarified in chapter 4. The ICRC needs to provide more explanations as to what the time of being in arms means to avoid having the membership argument take over the field.

³³ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER INTERNATIONAL ARMED CONFLICT* 12 (Cambridge: Cambridge University Press 2004).

The need to protect civilians will be argued throughout the book, which will also analyze other challenges, issues, and threats, such as wars of self determination; the changing face of modern warfare with new technology and new weaponry; the expansion of guerrilla methods; the permanency of terrorism; asymmetric conflicts; and other issues affecting the distinction between civilians and combatants in the twenty-first century.

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