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Warning Civilians Prior to Attack under International Law: Theory and Practice

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A primary goal of the modern law of armed conflict (also known as international humanitarian law) is to protect civilians as much as possible from the violent consequences of hostilities. Accordingly, the law of armed conflict requires that the parties to a conflict apply certain precautionary measures in order to minimize incidental injury to civilians resulting from military attacks. One of these precautionary measures is the provision of warnings to civilians prior to an attack. This article will deal with this measure, and examine both theoretical and practical aspects of providing advance warnings of attacks.

During World War II there were instances when civilians were warned prior to an attack. Advance warnings were also provided during other armed conflicts throughout the second half of the twentieth century; however, the amount, scope and specificity of warnings issued to civilians have dramatically increased in the conflicts fought since the beginning of this century. Probably the most elaborate and systematic warnings were issued by Israel in its conflict in Lebanon in 2006 and

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especially in its operation in the Gaza Strip in 2009. This article explores the legal boundaries of the obligation to issue warnings to civilians prior to attack. Does the recent practice of Israel and other States result from legal obligations or is it a reflection of self-imposed restrictions? What are the elements a warning should fulfill in order to meet the legal requirements?

Section I briefly reviews the legal framework of the obligation to give warnings prior to an attack, its historical development and the manner with which it is dealt in military manuals. In section II, State practice will be examined, with a focus on Israeli practice. Based on these two sections, section III will analyze the different legal aspects of the obligation. Finally, the article will end with our conclusion as to both the legal and practical issues associated with advance warnings.

This article is written from the viewpoint of practitioners faced with the practical aspects of the issue at hand and is based on personal experience. Hopefully, it will serve as a useful tool to those facing similar dilemmas, as well as to those evaluating the performance of others.

I. The Duty to Give Prior Warning: The Legal Basis

A. Historical Development

The requirement to give, in certain circumstances, advance warning prior to an attack that may affect the civilian population appears in the earliest codifications of the law governing the conduct of hostilities. Thus, we find the following instruction in Article 19 of the Lieber Code of 1862:

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.¹

Article 19 acknowledges that there may be situations when it is justified not to give a warning, as when it is necessary to enable surprising the enemy.

The Lieber Code influenced the language of the Brussels Declaration of 1874, which stated in Article 16 that “if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities.”² Unlike the Lieber Code, the Brussels Declaration is directed to the officer in command of an attacking force and not to commanders in general. It also specifies that the warning must be given to the “authorities.” Similar language

appears in the *Laws of War on Land* published by the Institute of International Law in 1880 (known also as the *Oxford Manual*).³

Article 26 of the Regulations annexed to the 1907 Hague Convention IV contains wording that is almost identical to that of the Brussels Declaration: “The Officer in Command of an attacking force must, before commencing a bombardment, except in the case of an assault, do all in his power to warn the authorities.”⁴ The term “assault” refers to surprise attacks, regarding which there is no obligation to warn in advance.⁵

Article 6 of the 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War also refers to the duty to issue warnings prior to attacks.⁶ Conversely, the draft Air Warfare Rules of 1923 did not refer to warnings,⁷ which suggests that at that period of time no similar rule existed with regard to aerial bombardment.⁸

The implementation of the obligation to issue warnings prior to an attack created little difficulty in earlier eras when attacks likely to seriously affect the civilian population came from artillery, usually in a siege operation. In such a context, since the authorities of the besieged area had no practical means of protecting the military objectives being targeted, surprise was not required and attacking troops had little problem in giving an advance warning;⁹ however, when attacks through aerial bombardment commenced early in the twentieth century, surprise was considered a critical condition for success. As a consequence, as reflected by the absence of a warning provision in the 1923 Air Warfare Rules, apparently no rule existed at that time requiring warnings prior to aerial attacks. Rogers indicates that when the International Committee of the Red Cross (ICRC) was preparing its report to the Conference of Government Experts in 1971, a majority of experts felt that the rule regarding warning “had fallen into disuse.”¹⁰

B. Current Legal Framework

Today there is widespread acceptance that the rule laid down in the 1907 Hague Regulations reflects customary international law.¹¹

B.1. The 1977 Additional Protocols and the Duty to Give Warnings

The duty to give warnings prior to attack is addressed in Article 57(2)(c) of Additional Protocol I of 1977, dealing with precautions in attack. The article provides, “Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”¹² The article was adopted with ninety votes in favor, none against and four abstentions at the diplomatic conference that negotiated the Protocol.¹³ No relevant reservations were made regarding

it.¹⁴ This article reflects, in essence, a rule existing in customary international law.¹⁵ We will analyze the components of the customary norm below.

Article 57(2)(c) refers only to warning of “attacks” and, therefore, does not demand warnings prior to “military operations” that are not attacks.¹⁶ It does not, however, distinguish among land, naval and aerial attacks so long as they are carried out against objectives on land.¹⁷ As for warnings with regard to attacking vessels at sea and aircraft, there are special rules that will not be discussed in this article.¹⁸

Additional Protocol II of 1977, dealing with non-international armed conflict,¹⁹ does not include an obligation to issue warnings prior to an attack;²⁰ however, the ICRC study *Customary International Humanitarian Law (CIHL)* states that the obligation to issue a warning prior to attack also applies in non-international armed conflict.²¹ This article will address advance warnings only in the context of international armed conflict; the *de jure* applicability of the rule in non-international armed conflicts will not be analyzed.

The recently published manual on air and missile warfare (*AMW Manual*)²² deals with the duty to issue warnings when attacking ground targets by air or missile operations in rule 37:

When the attack of a lawful target by air or missile combat operations may result in death or injury to civilians, effective advance warnings must be issued to the civilian population, unless circumstances do not permit. This may be done, for instance, through dropping leaflets or broadcasting the warnings. Such warnings *ought to be as specific as circumstances permit*.²³

B.2. Other Obligations to Issue Warnings Prior to Attack

The law of armed conflict also includes an obligation to give specific advance warnings before attacking persons and objects entitled to specific protection.²⁴ These include civilian hospitals,²⁵ medical units,²⁶ hospital ships,²⁷ civilian medical units,²⁸ civil defense personnel and material,²⁹ and cultural property.³⁰ The purpose of the warning in these instances is to provide the enemy the opportunity to put an end to the misuse of such personnel and objects in order to avoid the need to attack them.³¹ Accordingly, the *AMW Manual* stipulates that such warnings should include a time limit within which to redress the situation to the extent that the circumstances permit.³²

Reference to warnings appears also in the amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Convention on Certain Conventional Weapons).³³ Additionally, as indicated above, there are also special rules about warning vessels and aircraft in the context

of surface warfare at sea and of aerial operations.³⁴ This article will not address these specific types of warning.

Finally, warnings usually constitute part of the rules of engagement issued to ground forces involved in law enforcement missions. For example, while trying to arrest a suspect, the arresting power might have a duty to warn the suspect before using lethal force through verbal warnings and warning shots. This article will focus, however, only on warnings during armed conflict.

C. Military Manuals

An obligation to give warnings prior to attacks appears in many military manuals, including the most recent.³⁵ Examples include the following.

- The US Army's *Operational Law Handbook*, published in 2010, provides:

The general requirement to warn before a bombardment only applies if civilians are present. Exception: if it is an *assault* (any attack where surprise is a key element), no warning need be given. Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc.³⁶

- Paragraph 8.9.2 of the US Navy's *The Commander's Handbook on the Law of Naval Operations*, which was issued in 2007, under the heading "Warning before Bombardment" states, "Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy."³⁷

- Article 5.32.8 of the United Kingdom's *The Manual of the Law of Armed Conflict* (2004) provides:

There is a duty to give advance warning of an attack that "may" affect the civilian population, unless circumstances do not permit. Obviously, the point does not arise as a matter of law if military operations are being conducted in an area where there is no civilian population or if the attack is not going to affect the civilian population at all. In other cases, the warning must be given in advance and it must be effective. The object of the warning is to enable civilians to take shelter or leave the area and to enable the civil defense authorities to take appropriate measures. To be effective the warning must be in time and sufficiently specific and comprehensive to enable them to do this . . .³⁸

- Article 551 of Australia's 1994 *Defense Force Manual* provides:

When a planned attack is likely to affect the civilian population, those making the attack are required to give, if practicable, effective advance warning of the attack to the authorities or civilian population. This requirement must obviously be applied in a commonsense manner in light of all other factors. If the proposed action is likely to be seriously compromised by a warning then there is no requirement to provide any warning.³⁹

- Article 420 of Canada's manual *Law of Armed Conflict at the Operational and Tactical Levels* (2001) states, "An effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit such a warning to be given. For tactical reasons, an attacking force may not give a warning in order to maintain the element of surprise."⁴⁰

- Article 1.4 of France's LOAC Summary Note of 1992 states, "If the military mission allows for it, appropriate warning must be given to the civilian population to give it time to seek shelter."⁴¹

Additional examples appear in volume II of the ICRC's customary international law study.⁴²

II. State Practice

This section includes under the heading "General Practice" several examples of State practice on warnings prior to attack.⁴³ It should be kept in mind that this is only a brief account of these examples and does not purport to be a comprehensive or exhaustive record of such practice. The second part, "Israeli Practice," is a more detailed description of Israeli practice with regard to warnings prior to attack, particularly in the Lebanon War of 2006 and in the operation in the Gaza Strip in 2008–9.

A. General Practice

A.1. World War II

During World War II, warnings generally were not given prior to aerial attacks conducted in enemy territory.⁴⁴ In a US Air Force pamphlet it is explained that practice was lax on warnings, "because of the heavily defended nature of the targets attacked as well as because of attempts to conceal targets."⁴⁵ The Air Force did give general warnings by dropping leaflets listing cities that would be bombed. The listed cities were indeed subsequently bombed.⁴⁶

There were, however, also examples of cases where specific warnings were given, to include the warning given in 1945 to the German commander of Münster that

the city was about to be bombarded if he did not surrender.⁴⁷ A warning was also given ninety minutes prior to a US attack on the Skoda armament works in Czechoslovakia.⁴⁸ Another example is the warning to the Japanese authorities before the use of the atomic bomb against Hiroshima.⁴⁹

In other cases, particularly when the objective was situated in occupied territory, warnings were made by radio or by means of pamphlets.⁵⁰ There were also cases in which aircraft flew at a very low altitude over the objective, giving civilians, workers or townspeople time to leave.⁵¹ It seems, however, that when warnings were given during World War II, especially with regard to aerial attacks, this was not necessarily done out of a sense of obligation, but rather in order to induce the opposing belligerent to surrender or to avoid further escalation that would result from large numbers of civilian casualties.

A.2. Korean War

During the Korean War of 1950 to 1953, warnings prior to aerial bombardments were sometimes issued by UN forces.⁵² For example, a warning was broadcast by the United Nations Command to the civilian population of North Korea asking residents to leave any areas where there were military targets. The warning listed the objects that were considered military targets, including railroads, bridges and power plants.⁵³ In addition, United Nations Command forces often dropped leaflets telling the enemy the towns it was about to bomb.⁵⁴ According to the report of the United States in the *CIHL*, the warnings given in the Korean War were general in their terms, such as advising civilians to avoid war-supporting industries, “in order not to alert the air defense forces of an impending attack on a specific target.”⁵⁵

A.3. The Conflict in the Federal Republic of Yugoslavia (FRY)

In some cases NATO issued warnings prior to attacks during Operation Allied Force’s bombing campaign over the territory of the FRY in 1999.⁵⁶ Notwithstanding this fact, in its report on the operation, Amnesty International claimed there was “a consistent failure to give effective warning to civilians.”⁵⁷

The incident which attracted the most attention concerning the issue of warnings was the bombing of the building housing the television and radio station in Belgrade on April 23. According to the final report to the prosecutor reviewing the NATO bombing campaign,⁵⁸ evidence concerning the warning given prior to this attack is somewhat contradictory. On one hand, NATO officials in Brussels are alleged to have told Amnesty International that they did not give a specific warning, because it would have endangered the pilots.⁵⁹ On the other hand, foreign media representatives were apparently forewarned of the attack. In addition, apparently a warning was received by Yugoslav authorities eleven days prior to the attack; as a

result some Yugoslav officials may have expected that the building was about to be struck. The report to the prosecutor concludes:

Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.⁶⁰

According to some critics, warning the foreign journalists to stay away from the site was not sufficient to meet the requirement of informing the Yugoslav authorities of an attack.⁶¹ In addition, it is argued that the warning to the Yugoslav authorities was not effective since the attack took place eleven days later and by that time the threat was no longer perceived as plausible, leading civilians to be present in the building at the time of the attack.⁶²

A.4. NATO in Afghanistan

During the military operations in Afghanistan that began in 2001 and have continued to the present, NATO forces have routinely issued general warnings to the civilian population prior to attack.⁶³ Additionally, according to different reports, such as those issued by Amnesty International, in some circumstances, NATO aircraft in Afghanistan fly close to targets or shoot warning rounds to move civilians away from a potential target.⁶⁴

A.5. Coalition Forces in Iraq

According to reports, during Operation Iraqi Freedom coalition forces routinely dropped leaflets from the air advising Iraqi civilians of pending attacks.⁶⁵ By the end of April 2003, 31,800,000 leaflets had been dropped, according to US Army figures.⁶⁶ It should be noted, however, that while some of the leaflets focused on warning civilians to stay away from military targets,⁶⁷ many were part of a psychological warfare campaign aimed at civilians and soldiers and were meant to turn them against Saddam Hussein and his regime.⁶⁸

A.6. Russia-Georgia Conflict (2008)

The Independent International Fact-Finding Mission on the Conflict in Georgia issued its report on the conflict in September 2009.⁶⁹ The report is comprehensive, but it is unclear if and when warnings were given prior to attacks. The report does refer to a few specific cases regarding warnings.

First, the report mentions positively the warnings given by the Republic of Abkhazia authorities to the civilian population of the upper Kodori Valley, who, immediately before the military operation began, received many warnings on the preparations and execution of the military operation planned in that area and were provided with a humanitarian corridor so that they could leave the area of hostilities.⁷⁰

The report is less content with the practice of the Georgian forces, which used smoke grenades to warn the population before artillery shelling. The report claims that this falls short of giving an effective advance warning, though no analysis is provided. The report finds the fact that Georgian authorities declared a three-hour unilateral ceasefire to allow the remaining civilians in Tskhinvali to leave the conflict area by moving in a southern direction does not fulfill their obligation to take all feasible measures. This contention seems linked to the finding that when the nighttime offensive on Tskhinvali was carried out, no general advance warning was provided to the remaining population.⁷¹

It is interesting to note that in that portion of the report where Russia's description of the precautions its forces took in the course of the conflict is quoted, warnings are not mentioned.⁷²

B. Israeli Practice

B.1. Lebanon

During the operations in Lebanon in 1982 and 1996, warnings were given by Israel to the civilian population of southern Lebanon prior to attacks through the distribution of leaflets and via radio and loudspeakers, as well as by telephone calls.⁷³

When the Second Lebanon War broke out in 2006, Israeli authorities stressed the importance of warning the civilian population to stay away from areas of combat in order to avoid as much as possible civilian casualties.⁷⁴ Different warnings were given in different phases of the attack, as will now be described.⁷⁵

The first aerial bombardment by Israel was a surprise attack carried out on the night of July 12, 2006. Its aim was to destroy the long-range rockets of Hezbollah. Israel had managed in the years before the war to acquire accurate intelligence as to the location of Hezbollah's long-range rockets (Fajar rockets), which were limited in number and had the capability of reaching the center of Israel's most populated areas. The opening strike in the war was directed at these storage places, which were, for the most part, residential buildings. Prior to these attacks no warning was given, as surprise was crucial in order to prevent the relocation of the weapons to new, unknown locations. The main deliberations prior to the attacks focused on the proportionality analysis, as many civilians were expected to be killed or

wounded in these attacks. This was weighed against the substantial military advantage anticipated from the attack.⁷⁶

During the next several weeks Israel continued with its aerial operations, as well as some naval operations, and also commenced a ground operation. At this stage, Israel gave general warnings to civilians in specific areas of southern Lebanon, advising them to evacuate the area to places north of the Litani River in order to protect themselves from impending attacks expected in those areas.⁷⁷ Additionally, similar warnings were given to villages from which missiles were actually being launched toward Israel and to villages and specific areas in which military objects, such as weapon depots and Hezbollah headquarters, were located (for example, the Dahiya district in Beirut).

The warnings were given through four main methods: leaflets dropped by aircraft, recorded Arabic messages to telephones, messages on an Arabic-speaking radio station broadcasting from Israel, and telephone conversations with *mukhtars* (local leaders), mayors and community leaders.⁷⁸ The warnings were intended to provide civilians with a reasonable period of time for evacuation, during the course of which travel would be relatively safe and strikes in the evacuation routes would be avoided (unless the target was time sensitive, such as, for example, when rockets were fired toward Israel and there was a need to prevent such fire from continuing). In addition, the Israel Defense Forces (IDF) gave general warnings advising civilians to avoid places in which Hezbollah operated. One such leaflet, out of 510,000 dropped on the afternoon of July 16 over Sidon, Tyre and Beirut, read as follows (originally in Arabic):⁷⁹

To the residents of Lebanon

To protect the citizens of the State of Israel, the IDF will continue its operations in Lebanon against Hezbollah's unbridled and continuing terrorist attacks.

For your own safety, and because of our desire to prevent harm from coming to uninvolved civilians, you should avoid places where Hezbollah is located and from which it operates against the State of Israel.

Such places are:

- Locations from which rockets are launched at Israeli territory
- Storehouses of ammunition and military equipment belonging to Hezbollah

- Hezbollah centers in south Beirut and regions in south Lebanon under Hezbollah control
- Beirut's southern suburb [Dahiya] which is the terror center

The IDF calls upon the residents of Lebanon and the Lebanese army to avoid extending direct or indirect aid to Hezbollah elements. Anyone who does so endangers his own life.

You should know that the continuation of terrorism against Israel will prevent you from having a better life in the future

The State of Israel

Warnings to civilians in specific villages were repeated several times in order to make sure that civilians were aware of the need to evacuate the area.⁸⁰ Following the comprehensive warning campaign a vast majority of the civilian residents of south Lebanon left and headed north, although some civilians did stay behind.⁸¹

The Israeli operation in Lebanon was subject to critical review in two reports prepared by missions sent by UN human rights bodies (hereinafter the UN Reports on Lebanon or the Reports).⁸² One of the reports admitted that the warnings "certainly saved many lives, both in south Beirut and south of the Litani River."⁸³ Nevertheless, the Reports also included criticism of the warnings given by Israel during the military operation. An analysis of the legal standards applied by the Reports is made in section III.

B.2. Israeli Practice in the Gaza Strip (2000 to the Present)

In the autumn of 2000 there was an outbreak of hostilities between Israel and Palestinian armed groups in the West Bank and the Gaza Strip. In the years that followed, the IDF carried out aerial operations against targets located in these areas, such as weapon depots, military headquarters and tunnels used for smuggling of weapons.⁸⁴

Prior to aerial operations against such targets, Israel developed a practice of giving a general warning by pamphlets to residents of buildings housing such military infrastructure to stay away. In addition, specific and precise warnings by phone were provided to the inhabitants of the location immediately prior to the attack.⁸⁵ The aim was to enable the civilians to leave before the planned attack; however, in a few cases civilians being warned chose not to heed these warnings and instead were even joined by others coming to shield the house from attack. This led to the addition of further steps of giving further warning by phone calls and eventually of

firing warning shots using small munitions aimed at the roofs of the designated targets used in such cases.⁸⁶

When the operation in Gaza commenced in December 2008, Israel was faced with the difficult task of carrying out extensive military operations in a small area—one of the most densely populated in the world—where there was widespread intermingling of hostile forces with the civilian population.⁸⁷ Accordingly, in order to minimize civilian casualties as much as possible, Israel employed substantial efforts and various means to warn civilians of impending operations. This extensive system of operations is described in an Israeli official publication as follows:⁸⁸

First, general warnings were used, calling on civilians to stay away from sites where Hamas was conducting combat activities. In addition, regional warnings were distributed in certain areas, calling on civilians to leave those areas before IDF forces operated in them. Efforts were made to include in these warnings sufficient information to the residents, including a timeframe for the evacuation and designated specific routes for this purpose leading to safe areas. Far from having no place to flee, residents could—and the vast majority did—move to safe locations. Finally, specific warnings were issued to residents of particular buildings before attack.

Throughout the Gaza Operation, the IDF employed a variety of methods to communicate warnings effectively. The warning techniques included:

- *Radio Broadcasts and Phone Calls:* The IDF conveyed instructions and advance warnings to residents by local radio broadcasts with IDF announcements and by about 165,000 phone calls. This involved specific notices as well as a daily news broadcast (the latter from 31 December onwards).
- *Dropping of Leaflets:* During the Gaza operation, the IDF dropped a total of some 2,500,000 leaflets of various kinds in the Gaza Strip. Some of the leaflets warned civilians to distance themselves from military targets, including buildings containing weapons, ammunitions or tunnels, or areas where terrorist activity was being conducted. Other leaflets directed residents to leave a particular location and move to a safe zone by a certain route and within a defined period of time. Such leaflets were distributed, for instance, in the northern Gaza neighbourhood of Sajaiya.^[89] While warnings were a significant tool to reduce the likelihood of civilian casualties, IDF forces did not consider the distribution of leaflets alone as sufficient to presume the absence of civilians at the relevant locations.
- *Specific Warnings Before Attacks:* In addition to the above, the IDF made specific telephone calls just before an attack was about to take place, informing residents at risk about the upcoming strike and urging them to leave the place. In certain instances, although such warnings were made, the civilians chose to stay. In such cases, the IDF

made even greater efforts to avoid civilian casualties and minimise collateral damage by firing *warning shots from light weapons that hit the roofs* of the designated targets, before proceeding with the strike. These warnings were accompanied by real-time surveillance in order to assess the presence of civilians in the designated military target, despite the advance warnings. Accordingly, the commander in charge assessed whether the collateral damage anticipated, including to those who chose to stay at the premises, was not excessive in relation to the military advantage anticipated. The specific warnings were generally effective. Several such incidents are discussed in Section V.D(2), including one in which all residents of a four-story apartment building safely evacuated following a series of warnings, and another in which surveillance confirmed the evacuation of a group of residents, although apparently one family remained despite the extensive warnings.

The Israeli report concludes that

[w]hile the warning systems implemented by the IDF did not provide a 100 percent guarantee against civilian casualties, they were, in fact, highly effective. Aerial video surveillance by IDF forces confirmed the departure of civilians from targeted areas prior to the attack as a direct result of the warnings.⁹⁰

One example referred to in the report is an incident in which specific warnings were given of the attack on the house of Nazar Ri'an on January 1, 2009.⁹¹ Since this is a good illustration of the manner in which warnings were used, it is worth describing in detail.

Ri'an and members of his family were killed in an aerial strike that hit their home. Ri'an was a senior Hamas operative, but he was not the target of the attack . . . Instead, the operational goal of the strike was to destroy Hamas' central compound in the Jabaliya refugee camp. The compound included several buildings that served as storage sites for large quantity of sophisticated weapons. . . . [T]he IDF issued several warnings before the attack. These included not only general leaflets and telephone calls, alerting civilians to avoid facilities serving Hamas and other terrorist groups, but specific phone calls to the residents of the targeted buildings, notifying them of the planned strike and warning them to evacuate the premises. The IDF also fired two separate rounds of preliminary warning shots with light weapons, 13 minutes and 9 minutes before the strike, providing sufficient time for residents to evacuate. The residents evidently understood these early warnings, as a group of them did leave the building, a fact confirmed by IDF surveillance before proceeding with the strike. The IDF observed this group evacuation and drew the reasonable conclusion that the buildings (including Ri'an's house) were empty. Only then did the IDF launch the strike.

Following the strike, secondary explosions were visible. This confirmed that Hamas used the buildings for weapons storage, and therefore it was a legitimate military objective according to the Law of Armed Conflict. Only later was it discovered that Ri'an

and his family chose to remain in the building after others had evacuated, leading to their death.⁹²

The measures taken by Israel to warn the civilian population during the operation have been described by some as “probably the most extensive, and most specific, warnings of offensive operations over such a short period in the history of warfare.”⁹³ However, the warnings given by Israel were criticized and found insufficient in the report prepared by the Fact Finding Mission headed by Richard Goldstone on behalf of the UN Human Rights Council (Goldstone Report).⁹⁴

The Goldstone Report has been strongly criticized, mainly with regard to its methodology, the reliability of the factual findings and the ensuing questionable conclusions.⁹⁵ These deficiencies are also evident with regard to its analysis of the warnings given during the operation.⁹⁶ In addition, doubts have been raised concerning different aspects of the legal analysis in the report, including in relation to the standards it has set regarding the scope of the duty to issue warnings prior to attack.⁹⁷ These standards will be examined in the course of the legal analysis of the different components of the obligation to warn in section III.

III. Analysis of the Obligation to Issue Warnings

After setting the legal framework and reviewing State practice with regard to warnings given to civilians prior to attack, we will now turn to an analysis of the scope and content of this obligation.

We will start with some general observations on the essence of the obligation to issue warnings prior to attacks and its relationship with the other rules and principles of the law of armed conflict. This will be followed by an analysis of the aim of the obligation to give advance warning. In this context we will discuss also the difference between a lawful warning and an unlawful threat. We will then examine the different aspects of warnings that influence their effectiveness: the temporal aspect, the recipient of the warning, the content of the warning and the method by which the warning is issued. Next we will explore the exception to this obligation, namely, when are circumstances such that an attacker need not issue a warning. Finally, we will conclude this section with a short reference to the ramifications of the warnings on civilians left behind.

A. The Essence of the Obligation

The obligation to give warnings prior to attack is one of the precautionary measures military forces are required to take under the law of armed conflict. The aim

of precautionary measures is to avoid (or at least to minimize) the collateral effects of hostilities on civilian persons, the civilian population and civilian objects.⁹⁸

Article 57(1) of API, which lays down the general rationale of precautions in attack, states that “constant care shall be taken to spare the civilian population, civilians and civilian objects.” In the *Commentary* to API it is explained that this article “appropriately supplements the basic rule of Article 48 . . . , which urges Parties to the conflict to always distinguish between the civilian population and combatants, as well as between civilian objects and military objectives.” The *Commentary* goes on to explain that “[e]ven though this is only an enunciation of a general principle which is already recognized in customary law, it is good that it is included at the beginning of this article in black and white, as the other paragraphs are devoted to the practical application of this principle.”⁹⁹ In other words, precautions in attack are meant to be practical means of enabling the application of the principles of distinction and proportionality. The precautions are meant to ensure, as much as possible, that civilians and civilian objects are spared. This is achieved by setting duties on commanders to do everything feasible to verify that the objectives to be attacked are military objectives and to choose means and methods of attack with a view to minimizing incidental injury to civilians and civilian objects by refraining from launching attacks expected to be in breach of the principle of proportionality¹⁰⁰ and by issuing warnings prior to attacks.

Beyond the legal aspects, there is also a practical connection between the issuance of warnings and the implementation of the principle of proportionality. Warning civilians prior to an attack enables them to evacuate the area before the attack takes place or to seek shelter at the time of the attack. This contributes to minimizing civilian casualties and to enhancing their protection. At the same time, the fact that civilians have evacuated an area or found shelter leads to a lower number of anticipated civilian casualties from the attack—namely, to less anticipated collateral damage—and hence increases the ability to carry out a proportionate attack.

This connection between giving a warning and fulfilling the proportionality standard leads to warnings being, on one hand, a valuable measure in reducing harm to civilians and, on the other hand, a useful tool in the hands of commanders for gaining more freedom of action. This does not mean that warnings are counterproductive in terms of enhancing the protection of civilians in armed conflict situations; on the contrary, this only reflects one of the realities of such situations, namely, that they are not necessarily zero-sum games.

B. Aim of the Warning

As discussed above, as one of the precautionary measures prescribed by the law of armed conflict, providing a warning prior to attack is aimed to enhance the

protection of civilians from the harmful consequences of hostilities. The way in which warnings contribute to this protection of the civilians is by providing them an opportunity to protect themselves from impending attacks. Based on this aim of the warnings, two main questions require analysis: (1) prior to which kinds of attack is a warning required and (2) what is a genuine warning and when is a warning actually a measure used to threaten or mislead the civilian population? We will now examine each of these questions.

B.1. Prior to What Kinds of Attack Is a Warning Required

B.1.1. Attacks Endangering Civilians. Again, the purpose of imposing a duty to give warnings prior to attack is to enable civilians to protect themselves from the consequences of the attack. Accordingly, all the legal instruments dealing with the obligation to issue warnings focus on attacks which might affect *civilians*. This is the case also in the military manuals. Therefore, there is no legal obligation to issue warnings in an area where there are no civilians or when there are no civilians likely to be affected by the attack.¹⁰¹

There are, of course, many examples of cases where members of armed forces have been warned of an impending attack.¹⁰² This does not mean that the warning was given as the result of a legal obligation, since other non-legal considerations also exist, such as getting the other side to surrender, thus avoiding unnecessary casualties to both parties to the conflict or when the aim of the operation is to capture prisoners, in order, for example, to promote a prisoner exchange. Calls to surrender may also be part of a psychological warfare campaign.¹⁰³

B.1.2. What Degree of Impact on Civilians Requires a Warning. Since the duty to give warnings prior to attacks refers only to attacks having an impact on civilians, the question arises as to what degree of impact raises this duty. Does the obligation to warn civilians apply only prior to attacks that might endanger the lives or physical safety of civilians or also when the expected results of the attack may affect them in other ways?

The standard set in this regard in Article 57(2)(c) of API is that the duty to warn applies to attacks “which *may affect the civilian population.*” (Emphasis added.) The term “may affect” is a very broad term that arguably could also encompass damage to property or even non-physical harm. However, according to the *Commentary* to Protocol I, the function of warnings is “to give civilians the chance to protect themselves.”¹⁰⁴ Similarly, the object of warnings specified in the *UK Manual* is “to enable civilians to take shelter or leave the area and to enable the civil defense authorities to take appropriate measures.”¹⁰⁵ Likewise, France’s LOAC Summary Note states that

warning must be given to the civilian population in order “to give it time to seek shelter.”¹⁰⁶

The emphasis on limiting the scope of the obligation to physical harm is explicitly stated in rule 37 of the *AMW Manual*, which stipulates that the obligation to issue a warning is limited to attacks that “*may result in death or injury to civilians.*” (Emphasis added.) In the *AMW Commentary* it is explained:

Rule 37 does not come into play when a particular air or missile combat operation may result only in damage to, or destruction of, civilian objects. Neither does it come into play in case the attack results in mere inconveniences to civilians caused by, e.g., electrical blackouts or reduced mobility due to broken lines of communications.¹⁰⁷

The formulation of rule 37 seems an accurate reflection of the State practice described above, which does not include examples of warnings given prior to attacks that were aimed at targets located near empty civilian objects or that caused only inconvenience to the civilian population.¹⁰⁸

Evaluating whether an attack may affect civilians also raises factual questions. In some cases there might be uncertainty as to whether civilians would be affected by the attack. The evaluation of whether an attack should be considered as one that “may” affect civilians is based on the information available to the person making the decision at the time of the attack.¹⁰⁹ In a case of reasonable doubt, however, warnings should be given (unless circumstances do not permit).¹¹⁰

B.2. Genuine Warnings versus Threats and Deception

Genuine warnings are an important measure to minimize the harmful effect of an attack on civilians by enabling them to protect themselves from the expected attack. There are cases, however, in which the warnings are not made with a genuine objective of protecting civilians, but rather are intended to terrorize civilians or to mislead them. This is an unlawful use of warnings. We will first address unlawful threats and then discuss when warnings become unlawful ruses of war.

B.2.1. Unlawful Threats. There is sometimes a thin line between lawful warnings and unlawful threats that are intended to terrorize the civilian population. Article 51(2) of API prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”;¹¹¹ therefore warnings must not be used as a means of spreading such terror.¹¹² The defining element in differentiating between lawful warnings and unlawful threats is the intention. Article 51(2)’s prohibition on terrorizing civilians refers to threats “the *primary purpose* of which is to spread terror.”¹¹³ (Emphasis added.) In the *Galić* case, the International Criminal Tribunal for the former Yugoslavia emphasized that the prohibition on terrorizing

a civilian population applies only when there is a “specific intent to spread terror among the civilian population” and that this “was principal among the aims” of the act.¹¹⁴ Therefore, it does not include genuine warnings, even when worded in a frightening way, since their “primary purpose” is to get civilians out of the area for their protection and the principal aim of the action is not to cause terror.¹¹⁵

According to the *CIHL*, threats that all civilians would be considered liable to attack have been condemned and withdrawn.¹¹⁶ By contrast, warning civilians that anyone staying in a combat zone is endangering his or her life should not be considered a threat, but rather a mere reflection of the real danger facing those who remain behind. Warnings must be effective and, therefore, should be worded in a way that clarifies the danger in a forceful manner.¹¹⁷

A related issue regards situations of unlawful internal displacement of civilians. According to the UN Reports on Lebanon, unlawful arbitrary displacement includes “displacement in situations of armed conflict which is not warranted by the need to ensure the security of the civilians involved or imperative military reasons.”¹¹⁸ The UN Reports insinuate that the Israeli warnings in Lebanon were used as a means to achieve such internal displacement.

The conclusion of the two Reports that warning civilians during battle might be regarded as internal displacement of civilians that constitutes a violation of the law of war is legally unsound since the rules forbidding deportation or forcible transfers in times of armed conflict refer mainly to occupied territories and require a degree of control over the population that does not exist merely by issuing warnings.¹¹⁹ Moreover, as for the Israeli warnings in Lebanon, while they did lead to a massive evacuation of areas in south Lebanon and parts of Beirut, they were, according to Israel, intended to spare civilian lives. Since these warnings were followed by aerial and ground operations in those areas that did indeed pose a risk to the civilians residing there, the evacuation did protect civilians’ lives.¹²⁰ It is therefore not clear on what basis the UN Reports conclude that the Israeli intentions were not genuine.¹²¹

B.2.2. Unacceptable Ruses of War. The *API Commentary* states that since the aim of the warnings is to give civilians the chance to protect themselves from the consequences of the attack, ruses of war regarding warnings that would deceive the population and nullify the proper function of warnings are unacceptable.¹²² This concerns messages conveyed to civilians cloaked as warnings about an impending attack when there is no real intention to carry out such an attack. The rationale for this limitation is that once false warnings are given, civilians will not trust genuine warnings and, as a consequence, will ignore them. This would lead to defeating the purpose of the warnings, that of giving civilians the possibility of protecting themselves from the consequences of the attack.

Henderson contends that from the wording of the *API Commentary*, which uses the term “unacceptable” and not “illegal” or “unlawful,” “a distinction can be drawn between a ruse that causes an unnecessary evacuation, and thereby limits the effectiveness of future warnings, which is unacceptable but not unlawful, and a ruse that actually contributes to collateral damage, which is unlawful.”¹²³ Clearly, using warnings in order to purposefully endanger civilians is unlawful; however, any use which is counterproductive to the aim of the warnings, that is, to enable civilians to protect themselves, should be avoided.

The limitation on ruses of war with regard to warnings does not mean, of course, that every warning must be followed by an attack, since there are cases where decisions change for different reasons, including operational, policy and humanitarian considerations.¹²⁴ The focus is on the intention at the time the warning was issued.

C. What Is Considered to Be an “Effective” Warning

In order to achieve the aim of the warnings, warnings must be effective. We will now turn to an analysis of this requirement.

At the outset it must be emphasized that the effectiveness of a warning must be viewed in light of its evaluated effect at the time of its issuance based on the assessment of the available information at the time, and not in light of the results of the warning. Therefore, even if a warning was unsuccessful in causing civilians to protect themselves, this does not necessarily mean that the warning should be determined to not have fulfilled the requirement to be effective.¹²⁵ Furthermore, there is no precise formula of what is considered an “effective warning.” As Rogers puts it, what is “effective” must be a matter of common sense.¹²⁶ Similarly, the Australian manual states that the requirement to give effective warnings must be “applied in a commonsense manner in light of all other factors.”¹²⁷

It is also important to acknowledge the inherent uncertainty of armed conflict situations, in which circumstances are unpredictable and constantly changing.¹²⁸ This reality has implications on what is considered an effective warning. Thus, for example, in some cases there may be uncertainty with regard to the manner in which military operations and attacks are going to proceed. Accordingly, it is not always clear where the fighting will take place, what targets will be attacked and which areas will be safer than others. Much depends, of course, on the actions of the enemy forces.

This might pose a dilemma as to whether it is preferable to issue warnings sooner, despite the vagueness of the situation, or to wait until the situation is clearer. In some cases, giving warnings could actually reduce the protection of civilians. As an example, civilians are requested to evacuate an area and proceed

toward a certain location; however, the fighting does not reach the places from which they have evacuated or, even worse, reaches the destination to which they have been directed. On the other hand, postponing the warning might lead to it being given at a time when it has become impossible for civilians to evacuate in an orderly manner. Similar dilemmas might exist with regard to the level of specificity of the warnings; hence the choice is many times in favor of the lesser of two evils.

In analyzing the effectiveness of a warning, different factors must be considered. These are (1) the temporal aspect—when should the warning be given, (2) the recipient of the warning—to whom is it addressed, (3) the content of the warning and (4) the method by which the warning is issued. We will analyze each of these factors separately; however, there is an interrelationship among them. Therefore, the assessment as to whether a warning is indeed effective must be made on the basis of the accumulation of all these factors, taking into account the factual circumstances.

C.1. The Temporal Aspect—When Should the Warning Be Given

As the *UK Manual* succinctly states it, in order to be effective a warning must “be in time.”¹²⁹ The decision as to when is the right time to issue a warning depends on the circumstances and is related to the content of the warning. This is also pointed out in the *AMW Commentary*.¹³⁰ In analyzing the issue of the correct time to give a warning, a distinction may be made between two different types of warnings—warnings given prior to an attack on a specific target and general warnings to the residents of a certain area. We will examine each of these types.

C.1.1. Warnings Given Prior to an Attack on a Specific Target. In order to be effective, warnings that a specific target is about to be attacked must be issued within a reasonable time before the attack is actually launched. If a warning is issued too close to the time of the attack, it might not allow sufficient time for the civilian population to evacuate.¹³¹ Conversely, there may be well-founded military considerations that favor not giving a warning well in advance, if, for example, to do so would give the enemy the opportunity to remove weapons or other movable military equipment held inside the designated target.¹³² But a warning must not be issued too early either, as this might lead people to believe that the threat is no longer valid. For example, in the case of the attack on the Belgrade television and radio station, eleven days passed between the warning received by Yugoslav authorities and the execution of the attack. By the time of the attack, civilian employees, who had emptied the building at an earlier point in time, had returned to the building believing the threat had passed.¹³³

C.1.2. General Warnings. When warnings call upon civilians to evacuate a certain area, in order to be considered effective the population must be given enough time and opportunity to evacuate safely (unless circumstances do not permit).¹³⁴ Obviously, the amount of time needed for residents of a region or village to leave the area is much greater than the time required for residents of a certain street to leave, and significantly more than what residents of a particular building need in order to vacate it. In other words, the time that must be given for evacuation is dependent on the scope of the area from which the evacuation is sought, the number of those required to evacuate, the destination to which they are to evacuate, the state of the roads leading thereto and so forth. All these considerations must be taken into account.

On the other hand, the commander also has to weigh military concerns, such as the manner in which enemy forces might utilize the period given for evacuation in order to reinforce targets within the designated area, to initiate attacks from within it or to operate in proximity to civilian convoys, using such civilians as human shields against forceful responses.

As an alternative to evacuation, when circumstances do not permit civilians enough time to evacuate safely, it might be preferable to just warn them to stay indoors and take shelter.

C.2. The Recipient of the Warning—to Whom It Is Addressed

In order for a warning to be considered effective, it must be addressed to the appropriate recipients, namely, those who can utilize the warning in order to protect civilians from the approaching attack. In this context two aspects will be analyzed: when can or should the warning be addressed to the authorities of the other side and who should receive the warning.

C.2.1. Warning the Authorities. In the historical instruments dealing with warnings, beginning with the 1874 Brussels Declaration and including the 1907 Hague Regulations, the duty is to provide a warning to the authorities of the other side.¹³⁵ By contrast, Article 57(2)(c) of API does not indicate to whom the warning is given, simply stating that “effective advance notice shall be given.” Most military manuals do not limit giving of notice only to authorities of the other side, and either refrain from mentioning the recipient of the warnings or explicitly refer to warning the civilian population directly.¹³⁶ This is also the requirement in the *AMW Manual*.¹³⁷ Direct warnings to the civilian population seems to also reflect the current actual practice of States.

One explanation of this shift is that in the past there was usually no direct connection between the armed forces of one party to the conflict and the civilians of

the other party; thus the means of spreading the warning directly to civilians were limited—such is often not the case today. The change might also represent another reflection of the shift in the law of armed conflict from its focus on inter-State relations to protection of civilians.¹³⁸

Notwithstanding this shift in the law, even today warnings to the authorities would sometimes suffice if they are effective.¹³⁹ This is demonstrated by the conclusion of the prosecutor reviewing NATO's bombing campaign in the former Yugoslavia, who seems to accept that notifying the Yugoslav authorities of the impending attack on the Belgrade television and radio station may have been sufficient to fulfill the warning requirement.¹⁴⁰ The determination as to whether warning the authorities would suffice relies on their ability to reach the relevant civilian population in an effective manner.¹⁴¹ Accordingly, as Rogers explains, a warning to the authorities hundreds of miles away and cut off from the proposed attack would not be considered effective.¹⁴²

C.2.2. Who Should Receive the Warning. When a warning is given directly to the civilian population, the question arises to what part of the population it must be addressed. According to the *AMW Commentary*, there was disagreement among the Group of Experts that drafted it over the question of whether the duty to issue warnings is limited to warning civilians located in close proximity to the target.¹⁴³ In some of the military manuals there is reference to such a limitation,¹⁴⁴ though in others there is not.

In our view, limiting the duty to give warning to only warning those in “close proximity” to the target is too restrictive. Rather, the determination of who ought to be warned should rest on the anticipated harm under the circumstances of the attack. In this regard, we think the *AMW Commentary* provides a good standard, namely, that the warning must reach the civilians likely to suffer death or injury from the attack.¹⁴⁵ Thus, if accurate smaller munitions are used, civilians in the next street need not be warned, while if widespread heavy bombing is anticipated, civilians located in a larger area who might be killed or injured as a result of the attack should receive warning. This does not mean that any civilian who might be somehow affected by an attack must be warned, as discussed above when the aim of the warnings was addressed.

As with the determination about the right time to give the warning, the decision on who should be the recipient of the warning depends on the circumstances and is related to the content of the warning. Thus in the Gaza operation a general warning was issued in the first phase to almost all the civilians in the Gaza Strip, calling on them to stay away from sites where Hamas was conducting combat activities. Later, regional warnings were given to civilians living in certain areas, calling on them to

leave these areas, and specific warnings were given prior to attacks on individual buildings to the residents of those buildings, warning them to leave the location before the attack.¹⁴⁶ Another example of the connection between the content and the recipient of the warnings is the warning given by coalition forces in southern Iraq during Operation Iraqi Freedom to repair workers that communications links being repaired would be attacked.¹⁴⁷

This exemplifies how the proper recipients of the warning are determined based on the circumstances of the attack against which they are being warned. When it is a specific planned attack on a defined location, the warning is addressed to those who might be directly affected by the attack. When it is an attack on certain objects or infrastructure, it is directed toward those in close proximity to such objects, and when it is a wide-scale operation, such as an anticipated ground operation or massive air raid, it is given to residents of large areas, even though some of them might not eventually be affected by the ensuing attack.¹⁴⁸

C.3. The Content of the Warning

In discussing the content of the warning several aspects deserve analysis. These are the clarity of the warning, the specificity of the warning, the need to repeat warnings and the inclusion of instructions to civilians.

C.3.1. The Clarity of the Warning. In order to be considered “effective,” a warning must be sufficiently specific and comprehensive so as to enable civilians to protect themselves from the impending attack.¹⁴⁹ An obvious example is that a warning in a language the population does not understand will not be considered effective.¹⁵⁰

It must be acknowledged, however, that there may be objective difficulties in issuing very clear and definite warnings and that sometimes warnings will inevitably be vague as a result of the inherent uncertainty of situations that occur during armed conflict. Understanding the uncertainty of the situation is also important when assessing after the fact the clarity of the warnings. Some of the criticism of Israeli practices and those of other States seems to overlook this reality. Assessing the clarity of a warning must be done without the benefit of hindsight and in light of the information available to the commanders at the time of the decision to give the warning. For example, with regard to the operation in Gaza, Israel has been criticized for what some described as unclear and confusing warnings.¹⁵¹ The Goldstone Report stresses that “[t]he effectiveness of the warnings has to be assessed in the light of the overall circumstances that prevailed and the subjective view of conditions that the civilians concerned would take in deciding upon their response to the warning.”¹⁵² In other words, the report implies that since civilians

face an uncertain situation, the warnings ought to be more accurate and clear.¹⁵³ Shany sees this as yet another example of the report's "human rights-dominated approach to an armed conflict situation," which focuses on the rights of the individual civilian—and on his or her viewpoint—without giving due weight to the military concerns of those involved in the conflict.¹⁵⁴

Ultimately, although the underlying aim of warnings is to enable civilians to protect themselves, the determination of the extent of clarity and accuracy they must fulfill in order to be considered effective cannot disregard the realities of the situation and the concerns and constraints of the military forces involved.

C.3.2. The Specificity of the Warning. Rule 37 of the *AMW Manual* states that warnings ought to be "as specific as circumstances permit."¹⁵⁵ According to the *AMW Commentary*, this means that they should not be vague, but "be as specific as circumstances permit to enable the civilian population to take relevant protective measures."¹⁵⁶ The *UK Manual* requires warnings to be "sufficiently specific" in order to enable civilians to take shelter or leave the area.¹⁵⁷ It is not easy, however, to determine how specific and direct warnings ought to be.¹⁵⁸ One question in this regard is whether a general warning is enough or is there a legal obligation to provide specific warnings to the particular civilians who may be harmed by the attack.

General warnings may consist, for example, of a blanket alert delivered by leaflets or by broadcasts advising the civilian population to stay away from certain military objectives.¹⁵⁹ Sometimes a warning can contain a list of the objectives that will be attacked.¹⁶⁰ General warnings would usually not include any specific information regarding the attack.

Specific warnings aimed at civilians present in a more concrete target (such as a certain building) would usually involve providing more details regarding the geographical boundaries of the area to be affected and a description of the time of the expected attack in order to enable the civilians to leave or seek shelter. In addition, they might also include precise details of the impending attack.

According to the US manuals warnings might be general and do not have to include specific details regarding the attack. The *Operational Law Handbook* states, "Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc."¹⁶¹ In the *CIHL*, US officials are quoted as stating that a "blanket warning" may suffice.¹⁶²

In his article on precautions in attack, Quéguiner acknowledges that the question of whether an abstract warning is enough, or whether a particular warning must be given before a specific attack that may affect the civilian population, does not have a clear-cut answer. He goes on to submit, however, that "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.”¹⁶³ It seems, however, that this standard exceeds what is required by the current rules of the laws of armed conflict. There is no obligation to “*ensure the immunity of the civilian population*” nor is there usually any practical way of fulfilling such a high standard.

On the other hand, warnings must be effective, namely, they must give relevant information to civilians who might be affected by the attack, thus enabling them to protect themselves as much as possible from the impending attack.¹⁶⁴ Therefore, specific warnings might be required if not providing them would mean that civilians have not received the information necessary to take protective actions. This seems to be the meaning of the standard set by the *AMW Manual* and by the *UK Manual*, as discussed above.

In this regard, the degree to which a warning must be specific and detailed is dependent on the context and circumstances of the situation. Relevant factors include the timing of the warning in relation to the attack, the available modes of issuing the warning,¹⁶⁵ the objective of the warning, the amount of control the forces have in the area, the severity of the situation, the urgency of the attack and so forth. In addition, in determining what details to include in a warning, consideration must also be given to the risk posed to mission accomplishment and to the security of the forces.¹⁶⁶

As previously discussed, during the Gaza operation, general warnings were issued in the first phase of the operation calling on civilians to stay away from sites used by the Hamas forces. Next, regional warnings were provided in certain areas, calling on civilians to evacuate those places prior to IDF operations therein, and then specific warnings were given a short time prior to attacks on individual buildings, giving their residents time to leave the buildings.¹⁶⁷ Interestingly, in spite of these comprehensive warning procedures, the Goldstone Report finds these warnings to be insufficient.¹⁶⁸ Schmitt criticizes this conclusion and stresses that these warnings were extensive and specific in an unprecedented manner.¹⁶⁹

A question arises whether the extensive nature and specificity of the warnings issued by Israel in Lebanon and particularly in the Gaza operation reflect a legal obligation with regard to the scope of the obligation. As addressed in section III.A, issuing warnings might have an effect on the proportionality of an attack and, as a consequence, on the freedom of operation of forces. Therefore there might be an incentive to give specific warnings even when to do so is not derived from a legal obligation. Moreover, for moral or policy considerations¹⁷⁰ even a proportionate outcome of an attack might not be sufficient, leading to stricter limitations on the

use of force¹⁷¹ and also, possibly, to the issuance of more extensive warnings. These kinds of extralegal considerations played an important role in the Israeli conduct during its military operations.¹⁷² They led to a decision to give extensive warnings beyond what may be considered as legally required under the laws of armed conflict in order to minimize civilian casualties. One must also bear in mind that Israel had close contact with, and relatively good intelligence regarding, the Gaza Strip, which enabled it to give such specific warnings as telephone calls to the inhabitants of houses planned to be attacked.¹⁷³ It was these unique circumstances that enabled Israel to carry out such extensive methods of warnings.

It would seem wrong, therefore, to deduce from the Israeli practice in Gaza that the various methods of providing warnings and their specificity represent an implementation of a legal obligation. This conclusion is reinforced when the elements necessary for the formation of a rule of customary law are considered. Since there is no known previous practice of such extensive warnings, there was clearly no existing customary rule requiring them. Israel's practice alone cannot create a new legal norm, since widespread practice is necessary. Moreover, as has been indicated, Israel was also driven by moral and policy considerations; therefore the element of *opinio juris* is also missing.¹⁷⁴

C.3.3. Repetition of Warnings. Another question that arises is whether, after a warning has been given, there might still be a duty to issue further warnings in order to minimize civilian casualties.

An illustrative example appears in the European Union report on the conflict in Georgia with regard to the Georgian attack on Tskhinvali. Georgia is criticized because, following a general warning and a three-hour unilateral ceasefire to allow the remaining civilians of Tskhinvali to leave the conflict area, there was no additional general advance warning given to the remaining population when the offensive on Tskhinvali was carried out that night.¹⁷⁵ The authors of the report do not specify what the content of a second warning should have been, but it may be assumed they meant this would be a warning aimed at enabling those left behind to seek shelter at the time of the attack.

In his article on precautions, Quéguiner also refers to this question. He acknowledges that States usually fulfill the duty to warn “by issuing a general warning to the civilian population” and 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.”¹⁷⁶ He contends, however, this “does not exempt the attacking commander from giving further, more precise warning whenever possible or necessary.”¹⁷⁷ Quéguiner gives an example of a target which is “an infrastructure that is essential for public service

and is staffed almost permanently by civilians.”¹⁷⁸ In such a case, he concludes that the warning will, depending on the circumstances, have to be more specific. He explains:

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.¹⁷⁹

In order to determine whether a warning should be repeated we must return to the aim of the requirement to provide warnings, that is, to give civilians an opportunity to protect themselves from the ensuing attack. Therefore, if a general warning is sufficient to achieve this aim, there would be no legal requirement to issue further warnings. However, in cases where the general warning has left the civilian population without a reasonable understanding of how to protect itself, or when the content of the warning has changed, an additional warning might be required, subject to military considerations.

The case of the attack on Tskhinvali seems to represent an example of such a case. In that case a general warning to evacuate was given, but since that warning did not indicate when the attack was to take place, an additional warning addressed to those civilians left behind might have been required, if circumstances permitted, in the period immediately prior to the attack. The rationale of each warning is different: the first is general and aimed at getting civilians to evacuate the area; the second is more specific and is given closer in time to the attack in order to allow those remaining behind to take shelter against the approaching attack.

In Quéguiner’s example, the first warning is a general warning to stay away from certain locations. An additional, more specific warning would not necessarily be required with regard to such locations unless the target has a special nature that attracts civilians, such as a public service facility or a place that civilians regard as a possible shelter (schools, etc.); then an additional warning might be necessary. Moreover, it is worth noting that in both examples there is still a need to fulfill the distinction and proportionality requirements. Even if an additional warning would not be considered as being required by the law, its absence might lead the attack to be deemed disproportionate.

C.3.4. Instructing Civilians. A further question with regard to the content of the warnings is whether they must include specific instructions explaining to affected civilians what they should do in order to protect themselves from attack.

When civilians are warned to evacuate a certain area they might be advised of the direction they should take or the routes they should follow. The question still remains whether there is a legal obligation to provide such and other guidance. According to one of the UN Reports on Lebanon, military forces issuing a warning “should take into account how they expect the civilian population to carry out the instruction and not just drop paper messages from an aircraft.” The report asserts that warnings must be very elaborate and give civilians “clear time slots for the evacuation linked to guaranteed safe humanitarian exit corridors that they should use.”¹⁸⁰ The Goldstone Report finds that in order for a warning to civilians to be considered effective, “it must clearly explain what they should do to avoid harm and . . . [a]s far as possible . . . state the location to be affected and where the civilians should seek safety.”¹⁸¹

Determining that a warning must be that specific does not seem to reflect existing legal requirements¹⁸² nor represent current State practice. Moreover, none of the military manuals includes such a duty and the US manuals actually emphasize that warnings may be general.¹⁸³ Furthermore, according to the law of armed conflict the party subject to attack bears the responsibility for taking precautions against the effects of the attack.¹⁸⁴ This is reflected in Article 58 of Additional Protocol I, which provides, “The Parties to the conflict shall, to the maximum extent feasible . . . take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”¹⁸⁵

The purpose of Article 58 is to place on the defending party the main responsibility of taking the defensive measures necessary to protect its civilians against attacks. The law of armed conflict does not impose an obligation on the attacking side to deal with this aspect of the safety of civilians of the opposing party.¹⁸⁶ This also comports with practical considerations—the attacking party usually does not have adequate knowledge of the relevant services and infrastructure to issue detailed instructions to the civilians of the opposing party.

It is not surprising that the claim that warnings should include instructions to civilians of the other side is raised by human rights bodies. Such a requirement is a clear reflection of human rights standards which put the emphasis on the rights of civilians vis-à-vis the armed forces of the parties to the conflict and which have a different rationale than that of the law of armed conflict.¹⁸⁷ The proper relationship between human rights law and the law of armed conflict is one of the most contentious topics in the field of international law today and is not addressed in this article.¹⁸⁸

Having said that, we recognize that in order to fulfill the aim of enabling civilians to protect themselves from attack, there might be situations in which warnings need to include some guidance and instruction as to how civilians should act

following receipt of the warnings. Such circumstances may exist when, without such information, the warnings would not give the civilians sufficient understanding of what they need to do in order to protect themselves and the attacking side has the ability of clarifying the situation without compromising its military concerns.

C.4. The Method by Which the Warning Is Issued

Warnings can be given by radio and television broadcasts, by telephone calls and even by Internet announcements,¹⁸⁹ or by dropping or distributing leaflets (and, of course, by a combination of all these methods).¹⁹⁰ Sometimes they can be given by word of mouth, when ground forces are operating¹⁹¹ or where territory is occupied by the enemy.¹⁹² In some cases, warnings may be given by aircraft flying low over the objective.¹⁹³ The possibility of giving warnings from the air depends on which party has control of the airspace and what air defenses are in place.¹⁹⁴ The *AMW Commentary* states that “[w]arnings need not be formal in nature. They may be issued either verbally or in writing, or through any other means that can reasonably be expected to be effective under the circumstances.”¹⁹⁵

A question arises whether warnings can be made by using warning shots. As above examples illustrate, there have been instances when this method has been used.¹⁹⁶ In the *AMW Commentary* it is acknowledged that “[i]n some situations the only feasible method of warning may be to fire warning shots using tracer ammunition, thus inducing people to take cover before the attack.”¹⁹⁷ We agree with this assertion though we do not believe it is necessarily limited to tracer ammunition since inducing civilians to take shelter might also be achieved with regular ammunition and tracer ammunition might not always be available.

Warning shots are commonly used in law enforcement situations, such as in instances where they are necessary in order to get a suspect to surrender to arrest after verbal warnings have been disregarded.¹⁹⁸ Though this is a different kind of warning than that discussed in this article, it does share a similar rationale of giving a clear warning prior to the use of force in order to avoid, if possible, physical harm. Therefore, in our view, the widespread use of warning shots in law enforcement situations reinforces the lawfulness of using warning shots from the air or from equivalent platforms as a method of warning civilians prior to attack.

Israeli practice, as previously discussed, included the use of warning shots as part of the specific warnings given to the occupants of a particular target. This was done in cases where prior warnings, through phone calls and other means, were not heeded. These warning shots were fired using small munitions that hit the roofs of the designated targets.¹⁹⁹

In the Goldstone Report this method, termed “roof-knocking,” is criticized. The report argues that roof-knocking “constitutes a form of attack against the

civilians inhabiting the building” and that “an attack, however limited in itself, cannot be understood as an effective warning in the meaning of article 57(2)(c).”²⁰⁰ The correctness of this claim requires further analysis.

First, as has been illustrated, State practice and military legal manuals include warning shots as a legitimate method of issuing warnings. Moreover, even if warning shots are considered “an attack,” it is incorrect to view them as an attack “against civilians,” because they are not fired at civilians, since the objective of their use is to avoid harm to civilians. In this regard, as Schmitt notes, it is important to bear in mind that since the object of the warning shots is a military objective²⁰¹ (otherwise the whole attack fails the distinction principle), the “attack” performed by the warning shots is aimed at a lawful target and the presence of non-combatants therein is at most a matter of proportionality, not one of directly attacking civilians.²⁰²

D. The Exception—When Not Issuing a Warning Is Justified

As specified in Article 57(2)(c) of API, as well as in rule 37 of the *AMW Manual* and most military manuals, warnings are not required if “circumstances do not permit.”²⁰³ It should be noted, however, that some manuals use different formulations and provide that warnings should be given “if the military mission allows”²⁰⁴ or “when the tactical situation permits.”²⁰⁵ This exception reflects the understanding that sometimes the existing circumstances preclude giving a warning prior to attack. The analysis of the exception will be divided into two parts as follows: the situations covered by the exception and general considerations in applying the exception.

D.1. The Situations Covered by the Exception

The exception does not comprise a *numerus clausus* of situations, but depends on the particular prevailing circumstances at the time of the decision. However, the presence of circumstances that justify not issuing an advance warning would usually be determined based on one of the following rationales: mission accomplishment, force protection, speed of response or practical impossibility. We will now briefly examine each of these considerations.

D.1.1. Mission Accomplishment. The fact that warnings are not required with regard to surprise attacks was recognized in the earliest articulations of the rules addressing warnings.²⁰⁶ The 1907 Hague Regulations provide that no warning need be given in cases of “assault,” with “assault” being understood as referring to surprise attacks. The rationale of not imposing a duty to warn in such attacks is that these attacks require surprise in order to accomplish the mission. Dinstein comments

that “surprise is one of the main staples of warfare, not only when an assault is contemplated.”²⁰⁷ He finds that “[t]he practice of states shows that the desire to achieve surprise may frequently preclude warnings in non-assault situations.”²⁰⁸

Article 57(2)(c) of API has less restrictive wording, not limiting the exception to cases of “assault.” Hays Parks remarks that the article relaxed the warning requirement that appeared in the Hague Regulations, while simultaneously aligning it with the customary practice of nations in the twentieth century.²⁰⁹

The exception covers cases where the success of the military operation is contingent on the element of surprise,²¹⁰ such as in instances when the target is transportable and might move or be moved away if a warning is issued in advance.²¹¹ An illustrative example of an attack requiring surprise was the Israeli attack on the long-range rockets carried out in the first stages of the war in Lebanon in 2006.²¹² Warning in advance of these attacks would have enabled moving the rockets to different, unknown locations, thus preventing the achievement of the operational end.

The focus of this exception is on the effect giving an advance warning will have on the chances of success of the military operation. A question may arise whether the exception applies only when surprise is essential for the success of the operation or whether it also applies when surprise only contributes to fulfillment of the mission. The API *Commentary* refers to cases in which giving advance warning prior to an attack is inconvenient²¹³ since the element of surprise “*is a condition of its success.*”²¹⁴ The ICRC’s *CIHL* uses the term “*essential to the success of an operation.*”²¹⁵ The *AMW Commentary* talks of an operation “*predicated on the element of surprise.*”²¹⁶ The *UK Manual* refers to cases “*where the element of surprise is crucial to the success of the military operation.*”²¹⁷ The *US Operational Law Handbook* uses the phrase “*where surprise is a key element.*”²¹⁸ The Australian manual refers to an action that “*is likely to be seriously compromised by a warning.*” The opinion of a US legal advisor in 1995 quoted in the *CIHL* refers to use of the element of surprise in an attack on enemy military forces in order “*to increase its chance for successful accomplishment of the mission.*”²¹⁹ Quéguiner, when analyzing the exception, indicates that it includes cases where giving a warning prior to attack would result “*in annihilating—or at least seriously compromising—the military operation’s chances of success.*”²²⁰

It is difficult to deduce an exact legal standard that justifies not giving a warning for reasons of mission accomplishment. It seems safe to say that lack of surprise does not have to lead to a total unquestionable failure of the mission and that it would suffice if the prospect of success was “seriously compromised.” It would seem insufficient, however, for surprise just to be convenient for the attacking forces, and the formulation of “increase the chances of success” seems too broad.

As in other cases, there is no clear-cut formula and the evaluation as to whether there is sufficient justification for not providing a warning in order to retain the element of surprise would have to rely on reasonableness, taking into account the circumstances of the situation.

D.1.2. Force Protection Considerations. This exception, which provides warnings need not be issued when “circumstances do not permit,” allows the taking into account of the safety of attacking forces,²²¹ such as in circumstances when issuing a warning will enable enhancement of the target area’s defenses in a way that will increase the risk to the attacking forces.²²² An example of when warnings were not provided due to force protection considerations is the explanation given by NATO authorities, according to Amnesty International, with regard to NATO operations over Kosovo, in which warnings were not given, due to the risk to the aircrews.²²³ In this regard, warnings are more feasible when one side has air or tactical supremacy—hence giving advance warning creates less risk to the attacking aircrews.²²⁴

Admittedly, there is a close relationship between mission accomplishment and force protection and sometimes a warning would compromise both, such as when it could enable the opposing side to shoot down the attacking aircraft prior to the attack, however, these are separate considerations. Thus, for example, in a case when a warning might lead to removal of military equipment from the target, the warning would compromise mission accomplishment but does not necessarily affect force protection. On the other hand, if it is a fixed target warning in advance might lead to a threat to attacking forces on the way back from the attack, but might not affect the success of the mission.

Here again it may be asked what level of threat to the forces justifies not giving advance warnings. According to the *UK Manual* it is permitted not to issue a warning “where the safety of attacking forces *would be compromised*.”²²⁵ The US naval handbook refers to preventing forces from being “*placed in jeopardy*.”²²⁶ The opinion of the US legal advisor in 1995 quoted in the *CIHL* refers to use of the element of surprise in order to “*reduce risk to the attacking force*.”²²⁷ Without entering into the intricate discussion of the appropriate weight force protection considerations should have in the proportionality analysis in general,²²⁸ for the purpose of warnings it seems that this is undoubtedly a central consideration. As with mission accomplishment, it would seem correct to conclude that not every remote risk to forces would justify not giving a warning. However, the level of risk to the safety of forces that would justify not giving a warning might arguably be less than the level of risk to mission accomplishment required in order to refrain from giving a warning. This can be exemplified in the wording of the *UK Manual* dealing with the applicability of the exception, which uses the term “crucial” with regard to the effect a

warning might have on the success of the mission, and the much more lenient standard of “be compromised” with regard to safety of the forces.²²⁹

D.1.3. Speed of Response. Another instance where circumstances would permit not giving warnings is when the situation does not allow time to give warnings, due to the necessary speed of response.²³⁰ One such situation is when troops are attacked and are required to respond to the attack.²³¹ In such circumstances, they obviously do not have time to issue an advance warning.

Another kind of case is that involving time-sensitive targets (TSTs)—a TST is “[a] target requiring immediate response because it is a highly lucrative, fleeting target of opportunity or it poses (or will soon pose) a danger to friendly forces.”²³² An obvious example of such a target is a rocket about to be launched.²³³ Such cases should be differentiated from the earlier-discussed surprise and force protection considerations. Those categories deal with preplanned attacks in which the justification not to give a warning can be contemplated in advance at the planning stages. In cases of TSTs or counterfire situations, the fact that an advance warning is not given is inherent in the situation since there is no time to give such a warning prior to the attack.²³⁴

D.1.4. Practical Impossibility of Giving a Warning. Another category of cases falling within the exception is when there is no reasonable possibility of issuing an effective warning, such as when there is no way to convey the warning due to a lack of means of communication. This seems to be a straightforward justification for not issuing a warning; it simply cannot be done.

D.2. General Considerations in Applying the Exception

A few general considerations deserve mention with regard to the implementation of the exception to the obligation to provide warnings.

First, in some cases circumstances prevent giving specific warnings but it might still be possible to give a more general warning.²³⁵ This brings us back to the discussion on the extent warnings must be specific and acknowledges that this depends, among other factors, on military considerations. For example, if there is an intention to attack places being used to house weapons, specific warnings might lead to the removal of the weapons and hence to compromising the success of the mission. However, general warnings may still be possible, informing in general terms to stay away from places used to store military equipment.

Second, it must be stressed once again that the determination as to whether the exception applies is made by the commander in light of the relevant circumstances and based on the information available to him or her at the time of the decision.²³⁶

Third, the decision not to issue a warning, even when falling within the exception, might have an impact on the possibility of carrying out the attack. As has been discussed, the fact that a warning has not been given prior to an attack, even if justifiably, may affect the proportionality analysis due to the fact that civilians who may have left had a warning been issued remain in the area, thus leading to increased collateral damage. In these circumstances, while not issuing a warning is justified, the absence of a warning would lead to the attack failing the proportionality test, therefore being deemed unlawful.

As an example, beneath a civilian residence there is a large weapons depot that is a legitimate target, but giving a warning prior to attack could lead to the weapons being removed; therefore it would be justified not to give such warning. If, however, the number of civilian casualties anticipated from such a surprise attack is viewed as excessive in relation to the military advantage expected from destroying the weapons, the attack would be considered disproportionate. In such a case, commanders may decide to issue a warning, taking into account that some weapons would be removed, but assessing that the advantage of destroying the weapons left behind (albeit smaller than the advantage gained from destroying all the weapons) would then be proportionate because of the much lower number of civilian casualties since civilians would have had the opportunity to leave the building prior to attack.

In this context, the suggestion made in the Goldstone Report that when evaluating whether circumstances permit not issuing a warning, a balancing process is required in order to determine “whether the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation”²³⁷ deserves comment. In other words, the report suggests a proportionality analysis that weighs the potential incremental military advantage gained from not providing a warning against the potential increased damage to civilians or civilian objects that may occur in the absence of a warning. Schmitt explains that this does not represent the existing legal requirements of the law of armed conflict, and that the report is confusing the warning requirement with the principle of proportionality.²³⁸ Schmitt clarifies “that an attacker is already required to assess the proportionality of a mission as planned; the issuance of warnings would be a factor in that analysis, as would other factors such as timing of the attack, weapons used, tactics, life patterns of the civilian population, reliability of intelligence, and weather. A subsequent proportionality analysis would consequently be superfluous.”²³⁹

E. The Ramifications—How to Regard Those Not Heeding the Warning

It is incontrovertible that following warnings civilians remaining in the zone of operation retain their civilian status.²⁴⁰ The *AMW Commentary* emphasizes that

“[a]n effective warning does not make an unlawful attack lawful, nor does it divest the attacker from its other obligations to take feasible precautionary measures.”²⁴¹ Accordingly, civilians not heeding warnings to evacuate an area must be taken into account in the proportionality analysis. Nevertheless, on a practical level, if following warnings civilians evacuate a given area, then most of those remaining are fighting elements. This allows the attacker more freedom of action since, as discussed in III.A, this influences the implementation of the principle of proportionality, namely, the balance between the military advantage to be gained and the collateral damage anticipated from the attack.

Another aspect is the risk that the warning would lead, not to civilians evacuating the area, but to civilians gathering on, or in proximity to, the intended target in order to shield it. This raises controversial questions on the issue of voluntary human shields²⁴² and as to whether a commander might refrain from giving a warning when it is reasonably believed that such a warning would lead to civilians gathering in the planned target and hence would increase the danger to civilians instead of mitigating such peril. This article addresses neither of those questions.

IV. Conclusion

The duty to give civilians warning prior to attack is not new; however, its implementation has become more widespread and the scope and level of warnings given have increased in recent years. This is yet another reflection of the growing emphasis on protection for civilians and the avoidance, as much as possible, of civilian casualties. This emphasis is driven by legal, moral and policy considerations.

When State practice is viewed in this regard, Israeli practice, especially during the Lebanon conflict in 2006 and the Gaza operation of 2008–9, stands out. The scope and specificity of warnings given in these conflicts were unprecedented. Nevertheless, human rights institutions have found these warnings to be insufficient.

In order to analyze the components of the duty to give warnings one must first identify the aim of the obligation. Warnings are aimed at enabling civilians to protect themselves from the impending attack; hence no warning is needed when no civilians are anticipated to be physically harmed by the attack. The factual determination of when an attack may affect civilians in a way that requires a prior warning is based on the circumstances of the situation. In this context, understanding the uncertainties of armed conflict situations is important in order to appreciate and address the dilemmas faced by commanders. This understanding is also important for anyone wanting to make a fair after-the-fact evaluation of the fulfillment of the duty to issue a warning.

Warnings as a lawful measure to enhance the protection of civilians during armed conflict must be differentiated from unlawful threats aimed at terrorizing the civilian population and from unlawful ruses of war. The defining factor is the intention of the act. Even if warnings might indeed cause fear and apprehension, this does not make them unlawful unless their primary intention is to terrorize or mislead the population.

In order to achieve the aim of enabling civilians to protect themselves from attack, warnings must be effective. To be effective, warnings must fulfill various requirements.

First, from the temporal aspect, warnings must be given in a timely manner, not too close in time to the attack nor too early. When civilians are advised to evacuate a certain area, warnings must give them enough time to evacuate safely. If this is not possible, civilians should be cautioned to stay in place and take shelter instead of attempting to evacuate the area.

Second, with regard to recipients of warnings, in the past authorities of the other side were those to be warned. Although this is still a possibility, today warnings usually should be given directly to those civilians who might be affected by the attack.

Third, in order to be considered effective the content of the warning must be clear and sufficiently specific, although the required level of specificity is not easily determined. There could be cases when it would be necessary to repeat a warning more than once. In this context the Israeli practice of often providing multiple warnings of increasing specificity should not be regarded as setting a legal standard, due to the special circumstances of its operations and the significant policy considerations that were the basis of this practice. There is neither enough State practice nor *opinio juris* on which to base a customary rule with regard to specificity and number of warnings required. It is also highly doubtful that a legal obligation exists to notify civilians of the actions—evacuation, route to take, staying in place, etc.—they are to take upon receiving a warning. This seems, however, to be the expectation of human rights bodies, as exemplified in the reports prepared by those bodies on Israeli operations in the Gaza Strip and Lebanon.

Fourth, as to the method of the warning, there are different options available, ranging from leaflets and radio broadcasts to specific telephone calls. Warning shots may also be an option in certain cases, though there are those who disagree this is an appropriate method of giving warnings.

Once the components of the rule on warnings have been identified, the question of exceptions to the rule arises. Such exceptions include cases when surprise is necessary to achieve the goal of the mission, as well as cases where warnings would endanger the forces. In addition, warnings are not required prior to attack in

circumstances when there is no time to give such warnings, as a result of the nature of the attack, or for reasons making it impossible to provide warnings, such as in instances when no means of communication is available.

One of the concerns raised with regard to warnings is that after advising civilians to evacuate a certain area, military forces might consider anyone who did not evacuate as forfeiting civilian status and becoming a lawful attack objective. This, of course, is not the case and civilians who have not left the area must be taken into account in the proportionality analysis. Nevertheless, successful warnings that lead to most civilians leaving a combat area do allow military forces more freedom of action in the knowledge that less civilian collateral damage is expected. In today's asymmetrical battlefield, when fighters intermix with civilians and civilian localities are used as bases of operation, causing civilians to evacuate an area is one of the useful means available of minimizing civilian casualties. In that regard, warnings have become an important tool in promoting the protection of civilians on the one hand, while enhancing military freedom of action on the other. This demonstrates that the rules of the law of armed conflict are not necessarily a zero-sum game and warnings, as well as other precautionary measures, can be beneficial for all sides involved.

Notes

1. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004), *available at* <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>. It is interesting to note that the code, known as the Lieber Code, was not necessarily followed during the Civil War. Thus, for example, Atlanta was attacked in August 1864 by General Sherman's army without warning even though it was full of non-combatants fleeing south before Sherman's final onslaught. General Hood later protested the action, asserting that notification was "usual in war among civilized nations." Sherman denied such an obligation existed. L. Lynn Hogue, *Lieber's Military Code and Its Legacy*, in FRANCIS LIEBER AND THE CULTURE OF THE MIND 57–58 C. C. Mack & H. H. Lesesne eds., 2004).

2. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 65 B.F.S.P. 1005, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 22, *available at* <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>.

3. Article 33: "The commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make every due effort to give notice thereof to the local authorities." INSTITUTE OF INTERNATIONAL LAW, THE LAWS OF WAR ON LAND (1880), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 29, *available at* <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument>.

4. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 66 [hereinafter Hague Regulations]. This

rule appeared originally in Article 26 of the Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429, *reprinted in id.* at 60.

5. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 88 (2d ed. 2004); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT* 144 (2d ed. 2010).

6. “If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.” Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681, *reprinted in* *THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 1080. The words “except in the case of an assault,” as it appears in Article 26 of the 1907 Hague Regulations, might be regarded as more restrictive than “if the military situation permits.”

7. ROGERS, *supra* note 5, at 95 n.63.

8. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 156 (2d ed. 2000). This is also the conclusion of Hays Parks and is reflected in the instructions given by the British Air Ministry in 1940 during World War II, which limited the scope of the obligation to give warnings so as not to include aerial bombardments. Hays Parks, *Air War and the Law of War*, *AIR FORCE LAW REVIEW* 32, 46 n.181 (1990).

9. Jean-François Quéguiner, *Precautions under the Law Governing the Conduct of Hostilities*, 88 *INTERNATIONAL REVIEW OF THE RED CROSS* 793, 806 (2006), available at http://www.icrc.org/eng/assets/files/other/irrc_864_queguiner.pdf. See also Waldemar A. Solf, *Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I*, 1 *AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY* 117, 126 (1986).

10. ROGERS, *supra* note 5, at 95–96.

11. See, e.g., PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE art. 37 commentary ¶ 2 (2010), available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf> [hereinafter AMW COMMENTARY]. See also the discussion with regard to military manuals, *infra* pp. 363–64.

12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* *THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 776 [hereinafter API]. According to the *Commentary* on API, during the negotiating process there were two proposals regarding the text. The one now in subparagraph (c) was adopted by the majority of delegations, but other delegations would have preferred the expression “whenever circumstances permit,” or even no derogation. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 2223 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter API COMMENTARY]. It should be noted that API has not been ratified by such significant States as the United States and Israel; therefore they are only bound by the articles of the Protocol that represent customary international law.

13. 2 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 400 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHLS II].

14. 1 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 62 (Rule 20) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHLS I].

15. Hays Parks contends that this article relaxed the warning requirement that appeared in the Hague Regulations, while simultaneously aligning it with the customary practice of nations in the twentieth century. Parks, *supra* note 8, at 46 n.181. According to the ICRC

study on customary international humanitarian law, this article reflects customary law. *Id.* It should be noted, however, that while this study is a useful indication of the law, it has been subject to substantial criticism and therefore cannot serve as the sole determining factor in assessing the law. *See, e.g.*, PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmschurst & Susan Breau eds., 2007) and the criticism expressed in the letter from John B. Bellinger III, Legal Adviser, US Department of State, and William J. Haynes, General Counsel, US Department of Defense, to Dr. Jacob Kellenberger, President, International Committee of the Red Cross (Nov. 3, 2006), 46 INTERNATIONAL LEGAL MATERIALS 514 (2007) [hereinafter Bellinger & Haynes letter].

16. According to the API COMMENTARY, *supra* note 12, ¶ 2191, the term “military operations” means any movements, maneuvers and other activities whatsoever carried out by the armed forces with a view to combat.

17. API, *supra* note 12, art. 49(3).

18. For the special rules on sea warfare, see INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (L. Doswald-Beck ed., 1995), *reprinted in* DOCUMENTS ON THE LAWS OF WAR 573 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter SAN REMO MANUAL]. *See also* US Navy, US Marine Corps & US Coast Guard, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, The Commander’s Handbook on the Law of Naval Operations ¶¶ 8.6.2, 8.9 (2007), *available at* <http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M> [hereinafter Commander’s Handbook]. As for the rules on warnings prior to attacking aircraft, see PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE rules 40, 57, 70, 156, 174 (2009) [hereinafter AMW MANUAL].

19. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 776.

20. Such an obligation is also absent, for example, in the *Manual on the Law of Non-International Armed Conflict* prepared by the International Institute of Humanitarian Law (except with regard to special cases such as hospitals). It does, however, refer to the other precautions included in API even though they are also not included in Additional Protocol II. MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT rule 2.1.2 (2006), *reprinted in* 36 ISRAEL YEARBOOK ON HUMAN RIGHTS (2006) (Special Supplement), *available at* <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf>.

21. CIHLS I, *supra* note 14, at 63–64. The ICRC relies, *inter alia*, on the International Criminal Tribunal for the former Yugoslavia decision in *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 524 (Jan. 14, 2000). That decision, however, only refers in a general way to the applicability of Article 57 of API to non-international armed conflicts without any specific reference to the obligation to give warnings prior to attack.

22. The AMW Manual is an international manual that was written by a series of experts with a view to developing a manual similar to the *San Remo Manual* in order to seek to clarify the law applicable to air or missile operations in international armed conflict. *See* AMW COMMENTARY, *supra* note 11, at 1–7. *See also, e.g.*, Charles Garraway, *The Use and Abuse of Military Manuals*, 7 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 425, 430 (2004).

23. AMW MANUAL, *supra* note 18, at 18 (emphasis added).

24. *Id.*, art. 38.

25. Convention Relative to the Protection of Civilian Persons in Time of War art. 19, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 580 (“The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. *Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.*” (emphasis added)). A similar rule appears in most military manuals.

26. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 21, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in id.* at 461.

27. Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 34, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in id.* at 487. *See also* SAN REMO MANUAL, *supra* note 18, art. 49.

28. API, *supra* note 12, art. 13; AMW MANUAL, *supra* note 18, rule 74.

29. API, *supra* note 12, art. 65; AMW MANUAL, *supra* note 18, rule 92.

30. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 11(1), May 14, 1954, 249 U.N.T.S. 240, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 999; AMW MANUAL, *supra* note 18, rule 96.

31. AMW COMMENTARY, *supra* note 11, rule 38, ¶ 4.

32. *Id.*, ¶ 5.

33. *See* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices arts. 4(2), 5(2), Oct. 10, 1980, 1342 U.N.T.S. 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on May 3, 1996 arts. 3(10), 3(11), 6(4), May 3, 1996, 2048 U.N.T.S. 133. Taken together, these require that effective advance warning be given of any emplacement of mines, booby-traps and other devices that may affect the civilian population, unless circumstances do not permit.

34. *See supra* note 18. With regard to naval warfare, it is interesting to note that the *San Remo Manual* includes a duty to issue prior warnings before attacking a neutral merchant vessel or a neutral civilian aircraft in certain circumstances (Articles 67 and 70, respectively), but no such obligation is mentioned with regard to an attack on enemy merchant vessels or enemy civilian aircraft.

35. As Garraway notes, the word “manual” had been used to cover a multitude of different types of publications: those of an international nature (such as the *San Remo Manual*), national manuals and internal manuals (also referred to as “handbooks”). *See* Garraway, *supra* note 22, at 425–40. In this section we will, however, address only the last two types of manuals.

It should also be noted that manuals, as such, do not necessarily represent legal obligations. *See, e.g.*, Bellinger & Haynes letter, *supra* note 15. *See also* the discussion in NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT (Nobuo Hayashi ed., 2d ed. 2010), *available at* http://www.fichl.org/fileadmin/fichl/documents/FICHL_2_Second_Edition_web.pdf.

36. INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 21 (2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf.

37. Commander’s Handbook, *supra* note 18. *See also* U.S. Department of the Air Force, AFP 110-31, International Law—The Conduct of Armed Conflict and Air Operations 5-11 (1976, designated obsolete Dec. 20, 1995) [hereinafter USAF Pamphlet].

38. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.32.8 n.209 (2004) [hereinafter UK MANUAL].

39. Quoted in CIHLS II, *supra* note 13, at 401, ¶ 431.

40. Office of the Judge Advocate General, Law of Armed Conflict at the Operational and Tactical Levels (2001), available at http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf [hereinafter Canadian LOAC Manual].

41. Quoted in CIHLS II, *supra* note 13, at 402, ¶ 438.

42. *Id.* at 401–5, ¶¶ 427–63.

43. Additional examples appear in *id.* at 405–10, ¶¶ 465–88. It should be noted, however, that some of the examples included therein do not seem to be relevant to the issue at hand; for example, the reference to the warning of ships and aircraft by French armed forces (*id.* at 406, ¶ 467) or to warnings given by Iraq to ships approaching zones of operation in the Persian Gulf (*id.* at 406, ¶ 470).

44. ROGERS, *supra* note 5, at 88 nn.17, 18; Parks, *supra* note 8, at 157 n.467. Warnings were required in the instructions given by the British Air Ministry prior to naval bombardments, but not with regard to aerial attacks. *Id.* at 46 n.181.

45. USAF Pamphlet, *supra* note 37, at 5–11. See also Parks, *supra* note 8, at 157 n.467.

46. Parks, *supra* note 8, at 157 n.467.

47. Upon his refusal, the threat was carried out. GREEN, *supra* note 8, at 157 n.239; UK MANUAL, *supra* note 38, ¶ 5.32.8 n.209.

48. Parks, *supra* note 8, at 157 n.467.

49. GREEN, *supra* note 8, at 156.

50. API COMMENTARY, *supra* note 12, ¶ 2224. Parks notes, though, that such warnings were usually for the area to be raided rather than for the target per se. Parks, *supra* note 8, at 157 n.467.

51. API COMMENTARY, *supra* note 12, ¶ 2224.

52. ROGERS, *supra* note 5, at 94.

53. Parks, *supra* note 8, at 157 n.467.

54. Herbert A. Friedman, *The American PSYOP Organization during the Korean War* (2006), <http://www.psywarrior.com/KoreaPSYOPHist2.html>. In this article Stephen Pease explains that during the war

leaflets warning civilians to evacuate were dropped on Pyongyang, Chinnampo, Wonsan and Kanggye before major bombing strikes against fuel and ammo depots and railway yards. This was a “Plan Blast” mission, an attempt to reduce civilian casualties. It was also intended to lower morale and disrupt industrial production. In addition, the fleeing civilians would clog roads and delay the North Korean army.

55. CIHLS II, *supra* note 13, at 409, ¶ 485. See also *id.* at 408, ¶ 481.

56. Peter Rowe, *Kosovo 1999: The Air Campaign – Have the Provisions of Additional Protocol I Withstood the Test?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 147, 154 (2000).

57. AMNESTY INTERNATIONAL, “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE 15 (2000), available at <http://www.amnesty.org/en/library/asset/EUR70/018/2000/en/e7037dbb-df56-11dd-89a6-e712e728ac9e/eur700182000en.pdf> [hereinafter Amnesty International Report]. The report contends that NATO officials told Amnesty International in Brussels that as a general policy they chose not to issue warnings for fear that this might endanger the crew of attacking aircraft. *Id.* at 17. Schmitt notes that the criticism can only apply to strikes against fixed targets, since warnings in the case of movable targets or combatants would result in a failed mission as the targets would simply leave the area as soon as they received word of an impending attack. He claims that Amnesty International’s report ignored this military reality. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 796, 824 (2010).

58. International Criminal Tribunal for the former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), *reprinted in* 39 INTERNATIONAL LEGAL MATERIALS 1257 (2000), available at <http://www.icty.org/x/file/Press/nato061300.pdf> [hereinafter Report to the Prosecutor on NATO Bombings].

59. Amnesty International Report, *supra* note 57, at 17, 45.

60. Report to the Prosecutor on NATO Bombings, *supra* note 58, ¶ 77.

61. Quéguiner, *supra* note 9, at 808. Amnesty International Report, *supra* note 57, at 45.

62. HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 30 (2000), available at <http://www.hrw.org/legacy/reports/2000/nato/>; Amnesty International Report, *supra* note 57, at 40, 45; Ove Bring, *International Law after Kosovo: Is Lex Lata Sufficient?*, 71 NORDIC JOURNAL OF INTERNATIONAL LAW 39, 46–47 (2002); Quéguiner, *supra* note 9, at 808–9. The Human Rights Watch report also refers to another case of an attack without prior warning—an airstrike on the New Belgrade Heating Plant on April 4, 1999. *Supra* at 24.

63. See, e.g., reports of the Marja area being “heavily leafleted” in order to warn civilians that an offensive is coming. Rod Nordland, *Military Officials Say Afghan Fight Is Coming*, NYTIMES.COM (Feb. 3, 2010), <http://www.nytimes.com/2010/02/04/world/asia/04taliban.html>. See also reports on dropping leaflets in the Arghanadab district. *Forces Ready to Push Back Taliban*, MILITARY.COM (June 17, 2008), <http://www.military.com/news/article/forces-readying-to-push-back-taliban.html#jivepostlink#community>.

64. See, e.g., Amnesty International, *Afghanistan: German government must investigate deadly Kunduz airstrikes* (Oct. 30, 2009), <http://www.amnesty.org/en/news-and-updates/news/afghanistan-german-government-must-investigate-deadly-kunduz-airstrikes-20091030>.

65. For example, in a report in *USA Today*, it was indicated that US planes dropped about two hundred thousand leaflets warning civilians to stay in their homes and assuring them that the campaign was not against them, but against Saddam. Gregg Zoroya & Vivienne Walt, *From the Battered Streets of Baghdad It’s Clear: ‘The Battle Has Reached Us,’* USA TODAY, Apr. 7, 2003, at 1A, available at http://www.usatoday.com/news/world/iraq/2003-04-06-baghdad-usat_x.htm. See also Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of War and the Struggle for a Moral High Ground*, 56 AIR FORCE LAW REVIEW 1, 52 & n.232 (2005).

66. Assessment and Analysis Division, U.S. Air Force Central, Operation IRAQI FREEDOM – By the Numbers (2003), available at http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf.

67. See Jim Garamone, *Coalition Aircraft ‘Paper’ Iraq with Leaflets*, MILITARYINFO.COM (Mar. 19, 2003), http://www.militaryinfo.com/news_story.cfm?textnewsid=210. The article indicates that the two million leaflets dropped on March 19, 2003

warned Iraqis to stay away from military targets. They informed the Iraqi people that coalition forces do not wish to harm them. Leaflets also pointed to frequencies for Commando Solo broadcasts. Other leaflets stress that if Saddam Hussein uses chemical or biological weapons against the coalition, the main casualties will be Iraqi civilians. . . . DoD officials said they believe the leaflets are having an effect on the Iraqi population. News reports indicate that residents of Baghdad are taking the warnings seriously. Reporters are saying many Iraqis are sealing rooms in anticipation of a chemical or biological attack.

68. Descriptions and examples of such leaflets are available in Herbert A. Friedman, *No-Fly Zone Warning Leaflets to Iraq*, <http://www.psywarrior.com/IraqNoFlyZonecont.html> (last visited May 16, 2011) and Philip Shenon, *Attack on Iraq: The Overview; U.S. Reports Mixed Results*

on 89 Targets in Iraq, NYTIMES.COM (Dec. 19, 1998), <http://query.nytimes.com/gst/fullpage.html?res=9507E6DA163CF93AA25751C1A96E958260&pagewanted=1>.

69. 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT (2009), available at http://www.ceig.ch/pdf/IIIFMCG_Volume_II.pdf [hereinafter Report on Georgia Conflict].

70. *Id.* at 197.

71. *Id.* at 347–48.

72. *Id.* at 349.

73. CIHLS II, *supra* note 13, at 406–7 ¶¶ 471, 473, 410 ¶ 489; Parks, *supra* note 8, at 166 & n.494.

74. See, e.g., Israel Ministry of Foreign Affairs, FAQ: The Second Lebanon War - One year later questions 16 & 17 (July 12, 2007), available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/The%20Second%20Lebanon%20War%20-%20One%20year%20later%20-%20July%202007#protectlebanese> (then follow questions 16 and 17 hyperlink). For an overview of the Israeli position on the humanitarian aspects of the operation, see ISRAEL MINISTRY OF FOREIGN AFFAIRS, ISRAEL'S WAR WITH HIZBULLAH: PRESERVING HUMANITARIAN PRINCIPLES WHILE COMBATING TERRORISM (2007), available at <http://www.mfa.gov.il/NR/rdonlyres/74D04C9D-FA73-4A54-8CBA-DBC1152C82E/0/DiplomaticNotes01.pdf>.

75. For a review of the early warnings, which included flyers, radio broadcasts and telephone communications utilized in Lebanon, see REUVEN ERLICH, HEZBOLLAH'S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS: THE EXTENSIVE MILITARY INFRASTRUCTURE POSITIONED AND HIDDEN IN POPULATED AREAS 53, 272–78 (2006), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/human_shields_efs.pdf. For examples of leaflets, see Israel Ministry of Foreign Affairs, IDF warns Lebanese civilians to leave danger zones (July 25, 2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/IDF+warns+Lebanese+civilians+to+leave+danger+zones+3-Aug-2006.htm>. See also the description in Commission of Inquiry, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, at 39–41, ¶¶ 149–58, 97–99, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006), available at <http://www.cggl.org/publicdocs/20061205HRC.pdf> [hereinafter UN Commission of Inquiry on Lebanon].

76. See Israel Ministry of Foreign Affairs, Summary of IDF operations against Hizbullah in Lebanon (July 13, 2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/IDF+operations+against+Hizbullah+in+Lebanon+13-Jul-2006.htm>. For an analysis of the attacks see, e.g., AMOS HAREL & AVI ISSACHAROFF, 34 DAYS: ISRAEL, HEZBOLLAH, AND THE WAR IN LEBANON 86 (2008); AMIR RAPPAPORT, FRIENDLY FIRE 15–16, 22, 28–30, 39, 113–15 (in Hebrew). The attacks were successful in eliminating the risk from the long-range missiles. In addition, the number of civilians killed in the attack was substantially lower than expected. See, e.g., HAREL & ISSACHAROFF, *supra*, at 79–81, 91–92.

77. An explanation of the rationale of the warning can be found in Israel Ministry of Foreign Affairs, Summary of IDF operations against Hizbullah in Lebanon (July 22, 2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/Summary+of+IDF+operations+against+Hizbullah+in+Lebanon+22-Jul-2006.htm> (“The objective of this warning is to try and avoid casualties among the civilian population of south Lebanon, an area used by Hizbullah terrorists who exploit the local population as human shields”). See also ERLICH, *supra* note 75, at 272, ¶¶ 2–3.

78. See ERLICH, *supra* note 75, at 273–74; UN Commission of Inquiry on Lebanon, *supra* note 75, at 39–42.

79. ERLICH, *supra* note 75, at 275–76.

80. For example, on July 22 the IDF spokesman stated:

In order to avoid unintentional harm to civilians during the operations, the IDF has called upon the Lebanese population in the villages detailed below to vacate the area and move north of the Litani River today. People who ignore this warning are endangering themselves and their families. The villages are: Tulla, Tallousse. . . . The aforementioned warning is still valid to the following villages: El Kutzer, Shakra. . . . This warning follows many previous warnings to the population in southern Lebanon, via leaflets, local officials and the Lebanese media, urging them to travel northward. The IDF's operations are directed solely at the terrorists, and not against the civilian population.

Israel Ministry of Foreign Affairs, Summary of IDF operations against Hizbullah in Lebanon (July 23, 2006), <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terrorism+from+Lebanon+Hizbullah/Summary+of+IDF+operations+against+Hizbullah+in+Lebanon+23-Jul-2006.htm>.

81. ERLICH, *supra* note 75, at 54. Similarly, as a result of the warnings, the vast majority of the civilians of the Dahiya neighborhood in Beirut left that neighborhood before the attacks.

82. The first report was prepared by a special mission composed of special rapporteurs. Special Rapporteurs, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* U.N. Doc. A/HRC/2/7 (Oct. 2, 2006) (prepared by Philip Alston et al.), available at <http://www.mineaction.org/downloads/Emine%20Policy%20Pages/Human%20Rights%20Council%20Docs/Israel%20Lebanon%20Special%20Rapporteurs%20Report%20on%20Res.%2060%20251.pdf> [hereinafter UN Mission to Lebanon and Israel]. The second, by a commission of inquiry established by the Human Rights Council, was published on November 23, 2006. See UN Commission of Inquiry on Lebanon, *supra* note 75. Human Rights Watch also published a report critical of Israel, including with regard to warnings. See HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR 63–69 (2007), available at <http://www.hrw.org/en/reports/2007/09/05/why-they-died-0> (then Read the Report hyperlink). Most of its claims also appear in the UN reports and will be discussed in reference to those reports.

83. UN Mission to Lebanon and Israel, *supra* note 82, ¶ 36.

84. Most such operations were carried out in the Gaza Strip. In 2005 Israel disengaged from the Gaza Strip and its forces left this area. Later Hamas took over control of the Gaza Strip, driving out the more moderate Fatah government. Under Hamas' control, the Gaza Strip became a constant source of rocket attacks against Israeli localities. ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS (Part V.C) ¶¶ 36–66 (2009) [hereinafter Operation in Gaza: Conduct of the Operation], available at http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_factual_and_legal_aspects_use_of_force_IDF_conduct_5_Aug_2009.htm#C4b.

85. Warnings were also given during ground operations. One controversial measure was to request Palestinian residents to warn the inhabitants of a neighboring house prior to entry by Israeli forces. This procedure, which was called "the early warning procedure," was struck down by the Israeli High Court of Justice in HCJ 5100/94 Public Committee against Torture in Israel v. Israel [1999] IsrSC 53(4), reprinted in 38 INTERNATIONAL LEGAL MATERIALS 1471 (1999), available at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf. For an analysis of the decision, see Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 YALE JOURNAL OF INTERNATIONAL LAW 1, 15–19 (2010). Warnings made under "the early warning procedure" will not be dealt with in this article.

86. This kind of warning was nicknamed “roof-knocking.” For a description, see Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶ 264. In practice this method was rarely used prior to the Gaza operation of December 2008.

87. See *id.*, ¶¶ 155–89. See also Barry A. Feinstein, *Proportionality and War Crimes in Gaza under the Laws of Armed Conflict*, 36 RUTGERS LAW RECORD 224, 235–38 (2009).

88. Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶¶ 263–64.

89. The text of these leaflets was as follows:

To the Residents of the Sajaiya Neighbourhood

The IDF continues to intensify its operations against Hamas terrorism and will attack any location in the Gaza Strip where terrorist operatives, tunnels or weapons are to be found. All residents of the Sajaiya Neighbourhood must leave their homes and move towards the Old City to the other side of Salah A'Din Road, with effect as of the distribution of this leaflet and by no later than 6 hours after the distribution of this leaflet.

These instructions are in force until further notice. Adherence to IDF instructions has prevented unnecessary casualties in the past.

Please continue to follow IDF instructions for your own safety.

IDF Command

Id. at 99 n.225.

90. *Id.*, ¶ 265.

91. 5 ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS (Part V.D) ¶¶ 388–91 (2009), available at [http://www.mfa.gov.il/MFA/Terrorism -+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_factual_and_legal_aspects_under_force_complaints_about_IDF_5_Aug_2009.htm](http://www.mfa.gov.il/MFA/Terrorism-%20Obstacle%20to%20Peace/Hamas%20war%20against%20Israel/Operation_Gaza_factual_and_legal_aspects_under_force_complaints_about_IDF_5_Aug_2009.htm).

92. *Id.*, ¶¶ 388–90.

93. Schmitt, *supra* note 57, at 828. See also Interview by BBC reporter with Colonel Richard Kemp, former commander of British forces in Afghanistan (Jan. 18, 2009), <http://www.youtube.com/watch?v=WssrKJ3Iqcw> (stating that he doesn't “think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza”); David Graham, *The Changing Character of Tactics: Lawfare in Asymmetric Conflicts*, which is Chapter XI in this volume at 301, 307.

94. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict* ¶¶ 498–540, U.N. Doc. A/HRC/12/48 (Sept. 29, 2009) (Richard Goldstone), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [hereinafter Goldstone Report]. Amnesty International also published a report criticizing, *inter alia*, Israeli warnings during the operation. AMNESTY INTERNATIONAL, ISRAEL/GAZA – OPERATION ‘CAST LEAD’: 22 DAYS OF DEATH AND DESTRUCTION 50–51 (2009), available at <http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083-9a74-4853-860f-0563725e633a/mde150152009en.pdf>. The main criticism in the report is that the general warnings received by people all over Gaza during the operation caused panic and were not effective since the civilians receiving them could neither leave Gaza nor find a place in Gaza where safety was guaranteed.

95. See, *inter alia*, Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW (forthcoming 2011); European Centre for Law and Justice, *Legal Memorandum Answering the UN Human Rights Council's Report on the Goldstone Fact-Finding Mission on the Gaza Conflict*, 40 ISRAEL YEARBOOK ON HUMAN RIGHTS (forthcoming 2011); Nicholas Rostow, *The Human*

Rights Council (Goldstone) Report and International Law, 40 ISRAEL YEARBOOK ON HUMAN RIGHTS (forthcoming 2011); Chatham House, Report of an Expert Meeting which Assessed Procedural Criticisms made of the UN Fact-Finding Mission on the Gaza Conflict (The Goldstone Report) (Nov. 27, 2009), available at http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf.

96. One interesting example is the allegation concerning the attack on the el-Bader flour mill. According to the Goldstone Report the mill received two recorded messages, but these were not acted upon. Five days later the mill was struck with no warning. Goldstone Report, *supra* note 94, ¶¶ 502, 913–19. The Israeli military investigation found that the area of the mill was warned in advance since a ground operation was planned in this area. When the ground operation commenced several days after the warning, IDF troops came under fire and when they returned fire the mill was hit by tank shells. No additional specific warning was given since this was not a preplanned target. STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: AN UPDATE ¶¶ 163–74 (2010), available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf> [hereinafter Gaza Investigations Report First Update]. Interestingly, no civilians were hurt during the attack and only property was damaged; yet the complaints are made about the lack of warning. Goldstone Report, *supra*, ¶ 923. Another interesting feature of this case is the fact that the UN found an unexploded IAF bomb inside the mill, while amazingly there was no entry hole in the roof of the mill. This might indicate that the ordnance was planted there in order to incriminate Israel. STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: SECOND UPDATE ¶¶ 141–45 (2010), available at <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>. This serves as yet another reminder of the caution required when making after-the-fact judgments.

97. For example, one commentator states: “In sum, on the issue of warning, the Goldstone Report badly distorts IHL’s [international humanitarian law’s] balance between military necessity and humanity. It imposes requirements that both have no basis in the law and which run counter to state practice and military common sense.” Schmitt, *supra* note 57, at 829.

98. Quéguiner, *supra* note 9, at 794.

99. API COMMENTARY, *supra* note 12, ¶ 2191.

100. DINSTEIN, *supra* note 5, at 138.

101. UK MANUAL, *supra* note 38, ¶ 5.32.8; USAF Pamphlet, *supra* note 37, at 5-11; CIHLS I, *supra* note 14, at 64; OPERATIONAL LAW HANDBOOK, *supra* note 36, at 21; CIHLS II, *supra* note 13, at 409, ¶ 484. Civilians do not include in this regard individuals who have lost their immunity from attack because they are directly participating in hostilities.

102. For example, in the Gulf conflict of 1991 Iraqi soldiers were warned in leaflets that their tanks were liable to be attacked, but that if the soldiers moved well clear of their tanks they would be safer. UK MANUAL, *supra* note 38, ¶ 5.32.8 n.207.

103. See reports regarding US psychological warfare in Iraq in note 68 *supra*.

104. API COMMENTARY, *supra* note 12, at 687, ¶ 2225. See also DINSTEIN, *supra* note 5, at 144, quoting Cassese: “Warnings are designed ‘to allow, as far as possible, civilians to leave a locality before it is attacked.’” Parks, *supra* note 8, at 158, states that “the reason behind the requirement for warning is to enable the Government controlling the civilian population to see to its evacuation from the vicinity of military objectives that might be subject to attack; it also permits individual civilians to remove themselves and their property from high-risk areas.”

105. UK MANUAL, *supra* note 38, ¶ 5.32.8.

106. CIHLS II, *supra* note 13, at 402, ¶ 438.

107. AMW COMMENTARY, *supra* note 11, at 133, ¶ 4.

108. Most reports of human rights organizations have also not suggested that warnings are required in such situations, although the Goldstone Report does link the obligation to issue a warning to the duty to minimize death or damage to civilians or “damage to civilian objects.” Goldstone Report, *supra* note 94, ¶ 527. The report does not elaborate what is meant by the reference to such damage in this context. See also IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK* 188 (2009), in which it is suggested that the term “affect” “should be interpreted narrowly to mean directly affected in the sense of injured or killed, as well as property damage.” The author does not explain this reference to property and stresses elsewhere that there is no obligation to issue warnings before attacking civilian objects. *Id.* at 185.

109. See, e.g., Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 58 (Int’l Crim. Trib. for the former Yugoslavia Dec. 5, 2003) (“In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected civilian casualties to result from the attack.”). This standard—namely, that of “the information available to the person making the decision”—is used with regard to the implementation of the principle of proportionality; it also seems appropriate with regard to the implementation of the requirement to give effective warnings when circumstances permit. See also FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 109 (3d ed. 2001); Parks, *supra* note 8, at 156; ROGERS, *supra* note 5, at 109–11.

110. A relevant example is the case in which a German officer ordered an airstrike against two fuel trucks which were stuck on a sandbank near the German camp in Kunduz, Afghanistan on September 4, 2009 during NATO operations. No advance warning was given prior to the attack by, for example, a low altitude flight over the trucks. Many civilians were killed in the attack. The German federal prosecutor investigated the case and decided that the officer was allowed to assume that there were no civilians present, and hence was not required to give a warning prior to the attack. Critics of this decision contend that the obligation to warn also exists in cases when there is doubt as to whether civilians are present; therefore refraining from giving a warning would have been justified only if the officer was absolutely sure that there were no civilians near the trucks. Constantin von der Groeben, *Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein*, 11 GERMAN LAW JOURNAL 469, 484 (2010).

111. This article represents customary international law. See, e.g., AMW MANUAL, *supra* note 18, rule 18; AMW COMMENTARY, *supra* note 11, at 102–3; CIHLS I, *supra* note 14, at 8 (rule 2). See also Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, ¶ 104 (Int’l Crim. Trib. for the former Yugoslavia Nov. 30, 2006).

112. AMW COMMENTARY, *supra* note 11, at 134, ¶ 14.

113. In the US Navy’s handbook, the prohibition is limited to situations where spreading terror is the “sole” purpose of the attack. Commander’s Handbook, *supra* note 18, ¶ 8.9.1.2. In the AMW Commentary on rule 18, it is indicated that the majority of the Group of Experts did not agree with this limitation and believed the prohibition referred to activities in which the “sole or primary” purpose of the attack is that of spreading terror among the civilian population. AMW COMMENTARY, *supra* note 11, at 102.

114. Galić, *supra* note 111, ¶ 104.

115. DINSTEIN, *supra* note 5, at 126, emphasizes that “it is the intention that counts, and not the actual outcome of the attack.” See also API COMMENTARY, *supra* note 12, at 618; William J. Fenrick, *Symposium: Justice in Cataclysm Criminal Trials in the Wake of Mass Violence: Attacking*

the Enemy Civilian as a Punishable Offense, DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 539 (1997); Schmitt, *supra* note 57, at 818.

116. CIHLS I, *supra* note 14, at 65. The examples referred to in the study are of cases where it is alleged that civilians were told that all those left behind would be regarded as legitimate targets.

117. Applying this standard, the criticism of the wording of the warnings given by Israel in Lebanon does not seem justified. As mentioned earlier, the report prepared on behalf of the UN itself admits that the warnings “certainly saved many lives, both in south Beirut and south of the Litani River.” UN Mission to Lebanon and Israel, *supra* note 82, ¶ 36.

118. UN Commission of Inquiry on Lebanon, *supra* note 75, ¶ 206; UN Mission to Lebanon and Israel, *supra* note 82, ¶ 66. The latter report refers to the Guiding Principles on Internal Displacement, principle 6, which restates ICCPR Article 12, and to customary international humanitarian law. *Id.*, ¶ 66 n.81.

119. James G. Stewart, *The U.N. Commission of Inquiry on Lebanon*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1039, 1054 (2007).

120. *Id.* The author notes that the commission “appears not to have considered whether portions of the displacement resulted from lawful evacuations or from civilians choosing to leave the region for fear of lawful hostilities.”

121. In this regard it may be noted that the UN reports admit that the warning saved many lives. See *supra* text accompanying note 83.

122. API COMMENTARY, *supra* note 12, at 687, ¶ 2225. See also DINSTEIN, *supra* note 5, at 144.

123. HENDERSON, *supra* note 108, at 188.

124. The Goldstone Report seems to set a questionable standard in asserting that “[a] credible warning means that civilians should be *in no doubt that it is intended to be acted upon*, as a false alarm or hoax may undermine future warnings, putting civilians at risk.” Goldstone Report, *supra* note 94, ¶ 528 (emphasis added). As Schmitt rightfully puts it: “For operational (or perhaps even humanitarian) reasons, some attacks are always canceled. No ground exists in international humanitarian law for charging the attacker with responsibility for countering the population’s reaction to the fact that warned attacks did not take place.” Schmitt, *supra* note 57, at 828.

125. This comports with the general understanding that those making decisions on precautions have to reach decisions on the basis of their assessment of the information that is available to them at the relevant time. See *supra* note 109.

126. ROGERS, *supra* note 5, at 100.

127. CIHLS II, *supra* note 13, at 401, ¶ 431. According to the Goldstone Report, the effectiveness of a warning depends on three considerations—the clarity of the message, the credibility of the threat and the possibility for those receiving the warning to take action to escape the threat. Goldstone Report, *supra* note 94, ¶ 511.

128. Parks, *supra* note 8, at 182–83, 201; ROGERS, *supra* note 5, at 117.

129. UK MANUAL, *supra* note 38, ¶ 5.32.8.

130. AMW COMMENTARY, *supra* note 11, at 133, ¶ 9, which states:

As for timing, an imprecise warning issued well in advance of the attack may be more effective than a precise warning immediately preceding it. Similarly, a warning issued well in advance of the attack—reaching only a certain part of the civilian population—may be more effective than one reaching the entire civilian population, which is issued just prior to the attack.

131. UK MANUAL, *supra* note 38, ¶ 5.32.8.

132. Quéguiner, *supra* note 9, at 808; Rowe, *supra* note 56, at 154. An example is the attack on the house of the Abu Askar family in the Gaza Strip. According to the Goldstone Report, Abu Askar received a telephone warning *only* seven minutes prior to the attack, though the report

acknowledges that all the residents of the building (around forty people) managed to evacuate on time and no one was hurt in the attack. Goldstone Report, *supra* note 94, ¶¶ 501, 656–57. The Israeli investigation showed that the house was used to store weapons and ammunition, including Grad rockets. Gaza Investigations Report First Update, *supra* note 96, ¶¶ 175–82. The warning given allowed enough time for all the residents of the building to safely evacuate on the one hand, without the weapons being moved out of the building on the other hand.

133. Bring, *supra* note 62, at 46–47; Quéguiner, *supra* note 9, at 808–9. See *supra* section II.A.3.

134. See discussion on the Lebanon War *supra* notes 77 and 78 and accompanying text. In its report on Sri Lanka, Human Rights Watch gives the example of an attack on Mutur on August 2, 2006. A Muslim community leader was warned that an attack would take place within an hour, but because electricity had been cut off he had no way of getting the notice to all the residents on time. HUMAN RIGHTS WATCH, IMPROVING CIVILIAN PROTECTION IN SRI LANKA 11 (2006), available at <http://www.hrw.org/en/reports/2006/09/19/improving-civilian-protection-sri-lanka>.

135. See *supra* section I.A.

136. The manuals which include specific reference to the civilian population as recipients of the warnings include, *inter alia*, those of Belgium, Croatia and France. The Australian manual specifies that warnings should be given to the “authorities or civilian population.” An exception is the Italian international humanitarian manual of 1991, which requires warning “the local authorities.” CIHLS II, *supra* note 13, at 401–2 ¶¶ 432, 436, 438, 431, 440, respectively.

137. AMW MANUAL, *supra* note 18, at 122 (rule 37).

138. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 245 (2000).

139. ROGERS, *supra* note 5, at 100.

140. See *supra* text accompanying note 60. Israel too issued warnings to local authorities in Lebanon, though this was done in addition to the warnings to civilians and not instead of such warnings. See *supra* text accompanying note 78.

141. An interesting question is what happens when the authorities are duly warned and have the ability to pass the warning to the civilians but do not, in fact, warn them. This raises the question of the scope of the responsibility of one side to the conflict to the civilians of the other side. That question will not be dealt with here.

142. ROGERS, *supra* note 5, at 100. HENDERSON, *supra* note 108, at 188, cites an example from Operation Desert Storm, explaining that since the coalition purposefully disrupted the ability of the Iraqi authorities to communicate with the civilians, a warning to the central authority would not amount to an effective warning to civilians, especially those in remote regions.

143. AMW COMMENTARY, *supra* note 11, at 133, ¶ 5. There was also disagreement on a related question of the geographic extent to which the warning must apply. *Id.*, ¶ 8.

144. See Commander’s Handbook, *supra* note 18, ¶ 8.9.2. Italy’s LOAC Elementary Rules Manual (1991) states: “When the mission permits, appropriate warning shall be given to civilian populations endangered by the direction of attack or by their proximity to military objectives.” CIHLS II, *supra* note 13, at 402, ¶ 441; Croatia’s Commanders’ Manual (1992) has an identical formulation, *id.*, ¶ 436; Ecuador’s Naval Manual (1989) states: “When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity . . .” *Id.*, ¶ 437.

145. AMW COMMENTARY, *supra* note 11, at 133, ¶ 8.

146. Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶ 263.

147. HENDERSON, *supra* note 108, at 187.

148. Such situations, which are not rare in armed conflict, must be differentiated from cases when warnings are given without any intention to attack. These might amount to unlawful ruses. See *supra* text accompanying notes 122 and 123.

149. UK MANUAL, *supra* note 38, ¶ 5.32.8.

150. ROGERS, *supra* note 5, at 100; AMW COMMENTARY, *supra* note 11, at 133, ¶ 12.

151. The Goldstone Report notes that Israel declared in the midst of the operation that it would attempt to improve the clarity of warnings. Goldstone Report, *supra* note 94, ¶¶ 524–25. The report indicates this proves that the “circumstances almost certainly permitted much better warnings to be given than was the case.” Arguably, the Israeli step could be viewed as a reflection of the uncertainty which existed in the initial stages of the operation.

152. *Id.*, ¶ 542.

153. In this context, Yuval Shany notes that “[t]he committee refers to the dangerous and confusing circumstances prevailing in Gaza during the operation, not to lighten the burden imposed on the Israeli military as the language of article 57(2) seems to suggest, but rather to underscore Israel’s duty to provide clearer warnings.” Yuval Shany, Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror (Hebrew University International Law Research Paper No. 23-09, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1504106 (then One-Click Download hyperlink).

154. *Id.* In this regard, see also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 32–33 (2004); Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, in *THE WAR IN IRAQ: A LEGAL ANALYSIS* 349, 362–67 (Raul A. “Pete” Pedrozo ed., 2010) (Vol. 86, US Naval War College International Law Studies); Françoise J. Hampson, *Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* (Michael N. Schmitt ed., 2009) (Vol. 85, US Naval War College International Law Studies).

155. AMW MANUAL, *supra* note 18, rule 37.

156. AMW COMMENTARY, *supra* note 11, at 133, ¶ 10.

157. UK MANUAL, *supra* note 38, ¶ 5.32.8.

158. DINSTEIN, *supra* note 5, at 144; Quéguiner, *supra* note 9, at 807.

159. CIHLS I, *supra* note 14, at 65; CIHLS II, *supra* note 13, at 409, ¶¶ 483, 485, for a statement on the US position.

160. API COMMENTARY, *supra* note 12, ¶ 2225.

161. OPERATIONAL LAW HANDBOOK, *supra* note 36, at 21. See also USAF Pamphlet, *supra* note 37, at 5-11; Commander’s Handbook, *supra* note 18, ¶ 8.9.2.

162. CIHLS II, *supra* note 13, at 409, ¶ 483.

163. Quéguiner, *supra* note 9, at 808.

164. UK MANUAL, *supra* note 38, ¶ 5.32.8.

165. These two factors appear in the *AMW Commentary*. AMW COMMENTARY, *supra* note 11, at 133, ¶ 7.

166. See *infra* section III.E.1.1–2.

167. Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶ 263.

168. Goldstone Report, *supra* note 94, ¶ 536.

169. Schmitt, *supra* note 57, at 828.

170. For an example of circumstances in which policy reasons may impact targeting decisions, see Commander’s Handbook, *supra* note 18, ¶ 8.3.2. As for moral considerations, we will not enter into a discussion of the complex relationship between moral and legal aspects that occur during armed conflict.

171. Such considerations led, for example, to the imposing of strict limitations on the use of force by coalition forces in Afghanistan. Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, *supra* note 154, at 307, 312–14. See also Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 *HARVARD NATIONAL SECURITY JOURNAL* 45, 67–68 (2010).

172. See, e.g., DANI HALOUTZ, *STRAIGHTFORWARD* 424–25 (2010) (in Hebrew). The author, who was the Israeli Chief of Staff during the Second Lebanon War, notes that during the conflict in Lebanon there was always a concern that attacks accidentally leading to significant civilian casualties might seriously affect the international response to Israeli actions and affect the continuance of the operation. This concern materialized in the case of the attack on the village of Qana, where the high number of casualties and the ensuing reactions against Israel led to a decision by the Israeli Prime Minister to limit Air Force attacks for the subsequent forty-eight hours. See also RAPPAPORT, *supra* note 76, at 203–4.

173. The Goldstone Report recognizes some unique characteristics possessed by Israel relevant to the evaluation of the effectiveness of the warnings, including the extensive preparations for the operation, intimate knowledge of Gaza, sophisticated intelligence, access to telephone networks and domination of the airspace. Goldstone Report, *supra* note 94, ¶ 509.

174. See also Schmitt, *supra* note 171, at 328–29.

175. Report on Georgia Conflict, *supra* note 69, ¶¶ 347–48.

176. Quéguiner, *supra* note 9, at 808.

177. *Id.*

178. *Id.*

179. *Id.*

180. UN Commission of Inquiry on Lebanon, *supra* note 75, ¶ 157.

181. Goldstone Report, *supra* note 94, ¶ 530.

182. Schmitt, *supra* note 57, at 827.

183. OPERATIONAL LAW HANDBOOK, *supra* note 36, at 21; USAF Pamphlet, *supra* note 37, at 5-11; Commander's Handbook, *supra* note 18, ¶ 8.9.2.

184. Parks, *supra* note 8, at 158; API, *supra* note 12, art. 58. API COMMENTARY, *supra* note 12, ¶¶ 2244, 2257.

185. See also Section H of the *AMW Manual* dealing with passive precautions. *AMW MANUAL*, *supra* note 18. See also the *CIHL* regarding precautions against attacks, where it is noted:

Practice has shown that the construction of shelters, digging of trenches, distribution of information and warnings, withdrawal of the civilian population to safe places, direction of traffic, guarding of civilian property and the mobilization of civil defence organizations are measures that can be taken to spare the civilian population and civilian objects under the control of a party to the conflict.

CIHLS I, *supra* note 14, rule 22.

186. The bombing of the Serbian television and radio station discussed in the report to the prosecutor with regard to the NATO bombings in Kosovo provides an example. In that case, Yugoslav authorities knew of the attack and could have warned the occupants of the station. The report concluded that because of that knowledge NATO authorities were not expected to issue more concrete warnings. Report to the Prosecutor on NATO Bombings, *supra* note 58, ¶ 78. See, in a similar context, Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 *ISRAEL LAW REVIEW* 81, 89–90 (2006).

187. In this regard, see, for example, the *Isayeva* case, in which the European Court of Human Rights criticized a Russian operation in Katyr-Yurt in Chechnya. The Court analyzed the attack using human rights law applicable to law enforcement situations and concluded that the Russian military in the planning stage did not make serious calculated arrangements for the evacuation of civilians “such as ensuring that they were informed of the attack beforehand, [determining] how long such an evacuation would take, [determining] what routes evacuees were supposed to take,” etc. The Court found this to be a violation of Article 2 (the right to life) of the European Convention on Human Rights. *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. Ct. H.R. Rep. ¶¶ 185, 187, 191 (2005). For an analysis, see William Abresch, *A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741 (2005).

188. See, e.g., articles cited *supra* in note 154. See also Modirzadeh, *supra* note 154, at 349.

189. AMW COMMENTARY, *supra* note 11, at 134, ¶ 13.

190. UK MANUAL, *supra* note 38, ¶ 5.32.8.

191. *Id.*

192. ROGERS, *supra* note 5, at 115.

193. API COMMENTARY, *supra* note 12, ¶ 2224.

194. *Id.*, ¶ 2224; AMW COMMENTARY, *supra* note 11, at 133, ¶ 9.

195. AMW COMMENTARY, *supra* note 11, at 134, ¶ 15.

196. See also the manuals of Kenya and of Nigeria in CIHLS II, *supra* note 13, at 403, ¶¶ 442, 447.

197. AMW COMMENTARY, *supra* note 11, at 133, ¶ 11.

198. See, e.g., CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, I LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 107–8 (2004), available at <http://www.fas.org/irp/doddir/army/clamo-v1.pdf>. With regard to warning shots used to enforce a maritime blockade, see the analysis in Public Commission to Examine the Maritime Incident of 31 May 2010, *Report of the Public Commission to Examine the Maritime Incident of 31 May 2010 – Part One* ¶ 179 (Jan. 2010 (*sic*)), available at <http://www.turkel-committee.gov.il/files/worddocs/8808report-eng.pdf>.

199. Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶ 264.

200. Goldstone Report, *supra* note 94, ¶ 533.

201. Military objectives also include civilian infrastructure and buildings which by their “nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” API, *supra* note 12, art. 52(2).

202. Schmitt, *supra* note 57, at 829. Schmitt also points out that, since prior to the warning shots civilians were usually warned by phone or by other means, “their failure to heed the warning cannot possibly be understood to create a continuing duty to warn.” Once warned effectively, the requirement has been met even if the warning shots themselves could not be regarded as lawful warnings.

203. See *supra* sections I.B.1 and I.C. Italy’s IHL Manual of 1991 includes an exception “in case of military necessity.” CIHLS II, *supra* note 13, at 402, ¶ 441.

204. France’s LOAC Summary Note of 1992, *id.* at 402, ¶ 438. See also the manuals of Italy, *id.*, ¶ 441, and Madagascar, *id.* at 403, ¶ 443.

205. Kenya LOAC Manual (1997), *id.* at 403, ¶ 442. See also the manuals of Nigeria, *id.*, ¶ 447, and Togo, *id.* at 404, ¶ 452.

206. Surprise, as conditioning the need to warn, appears as early as the 1862 Lieber Code, *supra* note 1, and then in all the following instruments. See *supra* texts in section I.A.1.

207. DINSTEIN, *supra* note 5, at 144.
208. *Id.*
209. Parks, *supra* note 8, at 46 n.181.
210. UK MANUAL, *supra* note 38, ¶ 5.32.8; API COMMENTARY, *supra* note 12, ¶ 2223; AMW COMMENTARY, *supra* note 11, at 133, ¶ 6; CIHLS I, *supra* note 14, at 64; OPERATIONAL LAW HANDBOOK, *supra* note 36; DINSTEIN, *supra* note 5, at 144; Quéguiner, *supra* note 9, at 807. The Goldstone Report also acknowledges that surprise in the initial strikes might justify not giving an advance warning. Goldstone Report, *supra* note 94, ¶ 510.
211. HENDERSON, *supra* note 108, at 186.
212. *See supra* text accompanying note 76.
213. Henderson suggests that a better term than “inconvenient” would be “disadvantageous.” HENDERSON, *supra* note 108, at 186.
214. API COMMENTARY, *supra* note 12, ¶ 2223 (emphasis added).
215. CIHLS I, *supra* note 14, at 64 (emphasis added).
216. AMW COMMENTARY, *supra* note 11, at 133, ¶ 6 (emphasis added).
217. UK MANUAL, *supra* note 38, ¶ 5.32.8; Belgium’s 1983 manual also uses the term “crucial element for the success of the attack.” CIHLS II, *supra* note 13, at 401, ¶ 432.
218. OPERATIONAL LAW HANDBOOK, *supra* note 36, at 21. South Africa’s manual of 1996 also uses the phrase “if surprise is a key element of attack.” CIHLS II, *supra* note 13, at 403, ¶ 448. The US naval handbook refers to cases where the success of the mission is “placed in jeopardy.” Commander’s Handbook, *supra* note 18, ¶ 8.9.2. Yugoslavia’s YPA Military Manual of 1988 uses similar wording: “jeopardize the military operation.” CIHLS II, *supra*, at 405, ¶ 458. In Ecuador’s Naval Manual of 1989 the wording is “if mission accomplishment requires the element of surprise.” *Id.* at 402, ¶ 437. Canada’s 1999 manual states that “[f]or tactical reasons, an attacking force may not give a warning in order to maintain the element of surprise.” Canadian LOAC Manual, *supra* note 40, ¶ 435.
219. CIHLS II, *supra* note 13, at 409, ¶ 484 (emphasis added).
220. Quéguiner, *supra* note 9, at 807 (emphasis added). Henderson quotes Oeter, who states that a warning need not be given where “the specific circumstances of the planned operation do not make it possible to inform the defender because the purpose of the operation could not then be achieved.” HENDERSON, *supra* note 108, at 187.
221. According to the ICRC’s IHL study, State practice considers that a warning is not required when surprise is essential to “the security of the attacking forces or that of friendly forces.” CIHLS I, *supra* note 14, at 64.
222. AMW COMMENTARY, *supra* note 11, at 133, ¶ 6.
223. Amnesty International criticizes this position and asserts that
- [g]iven all the other measures taken in order to avoid NATO casualties (including high-altitude bombing), one might question whether sparing civilians was given sufficient weight in the decision not to give warnings. Nor does the consideration of pilot safety explain why there was no warning to civilians when Cruise missiles were used in attacks.
- Amnesty International Report, *supra* note 57, at 17.
224. ROGERS, *supra* note 5, at 115. Henderson notes that it is not enough that the other side does not have a significant air force; there must also be a lack of surface-to-air threat. HENDERSON, *supra* note 108, at 187.
225. UK MANUAL, *supra* note 38, ¶ 5.32.8 (emphasis added); Ecuador’s Naval Manual of 1989 uses similar wording. CIHLS II, *supra* note 13, at 402, ¶ 437. *See also* Aide-Mémoire for IFOR Commanders (1995) of the Netherlands. *Id.* at 403, ¶ 445.

226. Commander's Handbook, *supra* note 18, ¶ 8.9.2 (emphasis added). The provision refers to issuing general warnings instead of specific warnings, but is also relevant in determining when no warning will be given.

227. CIHLS II, *supra* note 13, at 409, ¶ 484 (emphasis added).

228. See, e.g., Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 79 (2004); Benvenisti, *supra* note 186, at 89–90, 93–97; Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 296–98 (Susan Breau & Agnieszka Jachec-neale eds., 2006). See also the views of Walzer in MICHAEL WALZER, JUST AND UNJUST WARS 151, 155 (1977).

229. UK MANUAL, *supra* note 38, ¶ 5.32.8.

230. CIHLS I, *supra* note 14, at 64. In CIHLS II, *supra* note 13, at 407, ¶ 473, the report of the practice of Israel in 1997 refers to cases of counterfire, explaining that there is no possibility to issue advance warning in such cases. The UK MANUAL, *supra* note 38, ¶ 5.32.8, refers to cases where military forces unexpectedly come across a target. See also Schmitt, *supra* note 57, at 824.

231. UK MANUAL, *supra* note 38, ¶ 5.32.8.

232. Joint Chiefs of Staff, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms 374 (as amended through Dec. 31, 2010), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

233. Another example is enemy combatants identified by opposing military forces. See the analysis of von der Groeben, *supra* note 110, at 485, discussing the possibility of an attack aimed at Taliban fighters.

234. The example of the attack on the el-Bader flour mill demonstrates this difference between preplanned attacks and “immediate” targets. See *supra* note 96.

235. UK MANUAL, *supra* note 38, ¶ 5.32.8; Commander's Handbook, *supra* note 18, ¶ 8.9.2; USAF Pamphlet, *supra* note 37, at 5-11.

236. ROGERS, *supra* note 5, at 100, 110.

237. Goldstone Report, *supra* note 94, ¶ 527.

238. Schmitt, *supra* note 57, at 827–28.

239. *Id.* Schmitt also points out that warnings must be issued even if the collateral damage expected in the absence of a warning would not be excessive in relation to the anticipated military advantage and even if they are unlikely to minimize harm to civilians and civilian objects (as in the case of regularly unheeded warnings). Thus, the position proffered in the report paradoxically sets a lower humanity threshold than required by international humanitarian law.

240. CIHLS I, *supra* note 14, at 65. The UN Reports on Lebanon also emphasize that the responsibility to distinguish between combatants and civilians is not discharged by warning civilians that they will be targeted. Civilians are not obligated to comply with warnings given and “a decision to stay put, freely taken or due to limited options, in no way diminishes a civilian's legal protections.” UN Mission to Lebanon and Israel, *supra* note 82, ¶ 41. Conversely, see the position of Hays Parks in Parks, *supra* note 8, at 158 n.469.

241. AMW COMMENTARY, *supra* note 11, at 134, ¶ 16.

242. A good analysis is found in Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 292 (2009).