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Indeterminacy in the Law of Armed Conflict

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I. INTRODUCTION

If a “fog of law” has settled over contemporary armed conflict, how might we find our way through it?¹ It seems there is no rule of the law of armed conflict whose content or application is not disputed by distinguished scholars or experienced practitioners. These disputes may arise from the ambiguity or vagueness of some rules, the incompleteness of others, or inconsistencies between different rules. It does not help matters that general problems with the identification and application of customary international law are magnified with respect to the customary law of armed conflict.

Legal indeterminacy, in its different forms, might be reduced or resolved in light of the object and purpose of the law of armed conflict, or by taking into account other relevant rules of international law. Unfortunately, the purpose of the law of armed conflict is itself the subject of deep disagreement. So is the relationship between the law of armed conflict and other branches of international law, most notably the law of inter-State force and human rights law. Most corrosively of all, some are quick to denounce purposive interpretation of existing law as covertly proposing new law and systemic integration as conflation or corruption.² If this atmosphere persists, the fog of law may never lift.

One aim of this article is simply to map these forms of legal indeterminacy—ambiguity, vagueness, incompleteness, and inconsistency—and the different legal techniques available to address each of them, using concrete

1. This article grows out of a workshop on “The Fog of Law” held at the U.S. Naval War College from May 15–16, 2018.

2. See, e.g., Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795, 838 (2010) (“NGOs and others are even more unfettered in pushing the balance in the direction of humanity. After all, their *raison d’être* is to do so, and they pay no price for forfeiting a degree of military necessity. The result is . . . a frequent assertion of *lex ferenda* in the guise of purported *lex [lata]*.”) [hereinafter Schmitt, *Military Necessity and Humanity*]; Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5, 43 (2010) (“The *lex specialis* dynamic explains the Interpretive Guidance’s circuitous attempt to squeeze a plainly human rights norm into a restraint on attacks against direct participants under the guise of IHL.”) [hereinafter Schmitt, *The Interpretive Guidance*]; Geoffrey S. Corn, Laurie R. Blank, Chris Jenks & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INTERNATIONAL LAW STUDIES 536, 601 (2013) (“One explanation for the assertion of a least harmful means rule is that it is an explicit (or perhaps subtle) effort to extend human rights law’s proportionality protections applicable to peacetime law enforcement activities into the treatment of belligerents during armed conflict.”).

controversies to illustrate abstract ideas. A second aim is to defend one view of the purpose of the law of armed conflict, as well as its relationship with other rules of international law. The purpose of the law is not to balance a constraining principle of humanity against an authorizing principle of military necessity. Instead, the purpose of the law is simply to protect persons and objects to the greatest extent practically possible, that is, without depriving other rules of international law, which authorize certain uses of armed force, of practical effect. These clarifications may improve purposive interpretation of the law of armed conflict and, perhaps, make the field safe for systemic integration once more. A final aim is to suggest that the law of armed conflict contains a number of clues for its own interpretation, some of them hidden in plain sight, including a recurring pattern of general protections with limited exceptions.

II. VARIETIES OF INDETERMINACY

Legal indeterminacy arises from different sources and takes different forms. I will discuss four: ambiguity, vagueness, incompleteness, and inconsistency.³ Briefly, a rule may be expressed in *ambiguous* terms that carry multiple meanings in ordinary language. A rule may be expressed in *vague* terms that neither clearly apply nor clearly fail to apply to particular facts. A rule is *incomplete* if it lacks essential elements. Two rules are *inconsistent* if one contradicts the other. I will discuss these varieties of legal indeterminacy in the context of treaty interpretation, although much of what I will say applies, with appropriate modifications, to customary international law as well.

A. Ambiguity

Ambiguous terms carry multiple meanings in ordinary language. When such terms appear in legal texts, the single meaning they carry may be indicated by their context or illuminated by the object and purpose of the law. Other relevant rules of international law must be taken into account, and, where it exists, subsequent agreement by the parties or subsequent practice establish-

3. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM LAW REVIEW 453, 469 (2013).

ing the agreement of the parties must be considered. In some cases, the preparatory work leading to the adoption of a legal text may help to confirm or determine its meaning.⁴

The law of armed conflict begins with the conditions of its own application. Ambiguity begins there as well. Suppose that one State wishes to strike a non-State armed group on the territory of another State. The territorial State refuses to consent. The intervening State asserts that the territorial State is unwilling or unable to suppress the armed group. The territorial State rejects that characterization. The intervening State asserts a legal right to strike the group. The territorial State asserts a legal right against armed incursion. If the intervening State strikes the armed group without the consent of the territorial State, is the intervening State bound by the law of international armed conflict, the law of non-international armed conflict, both, or neither?

The law of international armed conflict applies to any armed conflict that may arise between two or more States. In the previous example, does an armed conflict arise between the intervening State and the territorial State? The question is difficult to answer because the term ‘conflict’ is ambiguous, meaning either ‘dispute or disagreement’ or ‘clash or collision’ in different contexts. Accordingly, on one view, an armed conflict arises between States whenever a conflict between States leads to armed violence, that is, whenever one State seeks to settle its international disputes, not by peaceful means, but through the use of force. On an opposing view, an armed conflict arises between States only if their armed forces clash, that is, upon the outbreak of hostilities between them.⁵

Which meaning the term ‘conflict’ carries in this context may depend on the purpose of the law of international armed conflict and its relationship with other rules of international law. On one view, the law of international armed conflict primarily aims to protect civilians of one State from dangers

4. See Vienna Convention on the Law of Treaties arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331.

5. Compare COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 32 (Jean Pictet ed., 1952) (concluding “any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict”), and *Prosecutor v. Tadić*, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (holding that an international armed conflict exists whenever there is “resort to armed force between States”), with COMMITTEE ON THE USE OF FORCE, INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010) (finding that State armed forces must be “engaged in fighting of some intensity”).

arising from the military operations of other States. By contrast, the law of non-international armed conflict primarily aims to protect civilians from the military operations of their own State as well as those of organized armed groups who fight where these civilians live. Accordingly, in the previous example, an armed conflict arises between the two States because the intervening State's military operations may endanger civilians in the territorial State even if no clash of forces occurs.

On a different view, the law of international armed conflict aims to regulate hostilities between the armed forces of opposing States. By contrast, the law of non-international armed conflict aims to regulate hostilities between State armed forces and organized armed groups, or between such groups. Accordingly, in the previous example, the intervening State's use of armed force does not give rise to an armed conflict between the two States, unless and until the armed forces of the territorial State respond in kind.

Let us now take into account other relevant rules of international law. On one view, the law of inter-State force and the law of armed conflict regulate different things, not different parts of the same thing. They arise from different legal texts, written by different drafters, adopted at different times, animated by different concerns. Perhaps to avoid confusion, we should contrast the *jus in bello* with the *jus ad vim*, rather than the *jus ad bellum*, to underscore that the law of inter-State force and the law of international armed conflict have distinct subject matters that only partially overlap.⁶ Accordingly, international armed conflict arises not from the use of inter-State force as such, but from bilateral hostilities, attacks on State institutions, or some combination of factors.⁷

On a different view, the modern *jus ad bellum* regulates the resort to inter-State force, while the modern *jus in bello* regulates the conduct of inter-State force. Like a hand in a glove, these two bodies of law are distinct, yet move as one. The modern *jus belli* arose, in part, to close the gap left by the previous regime between war, which was generally renounced and increasingly constrained, and measures short of war, which seemed to fall into a legal black

6. The *jus ad vim* governs the use of force short of war. See MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS, at xv (4th ed. 2006). Strictly speaking, since the legal institution of war no longer exists, all uses of force fall short of war and under the *jus ad vim*. See Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 283 (1987).

7. See, e.g., Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations against Armed Groups*, 93 INTERNATIONAL LAW STUDIES 215 (2017); Terry D. Gill, *Classifying the Conflict in Syria*, 92 INTERNATIONAL LAW STUDIES 353 (2016).

hole. It did not arise to create a new gap between armed conflict constrained far more than war ever was, and armed force short of armed conflict, which would remain in a legal black hole. Accordingly, every use of inter-State force gives rise to an international armed conflict to which the law of international armed conflict applies.

Predictably, the latter view invites the tiresome charge of conflation.⁸ By the terms of the indictment, the independence of the *jus ad bellum* from the *jus in bello* does not mean simply that an act may violate one, the other, both, or neither. Instead, the independence of these two branches of international law is supposed to preclude taking one branch into account while interpreting the other. We should reject this inflation of conflation.

Notably, Protocol I begins by recalling that “every State has the duty,” in conformity with the UN Charter, “to refrain . . . from the threat or use of force.”⁹ This alone indicates that the modern law of international armed conflict must be read against the background of the modern law of inter-State force, not in isolation from it. The preamble continues by supposing it “necessary nevertheless” to reaffirm and develop legal protections for victims of armed conflicts. Reading these two opening sentences together, it seems that, if any State uses force against another—either in breach of the UN Charter or in conformity with it—then an armed conflict will thereby arise whose victims will require legal protection. While it is possible to maintain that armed conflicts *typically* arise from inter-State force, the more natural reading is that armed conflicts *automatically* arise from inter-State force. The preamble’s next sentence expresses the conviction that nothing in the Protocol can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the UN Charter. Since acts of aggression and other unlawful uses of force typically involve first strikes,¹⁰ the sentence only makes sense if the Protocol applies to such strikes. Only on that assumption would it seem necessary to clarify that the Protocol does not legitimize or authorize the first strikes to which it applies.

The preamble concludes by reaffirming that the law of armed conflict must be fully applied in all circumstances to all persons whom it protects, without any adverse distinction based on, among other things, which party

8. See, e.g., Lubell, *supra* note 7, at 237; Gill, *supra* note 7, at 369.

9. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts pmb., June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

10. In this context, a first strike is simply the first use of military force between two States.

is violating the law of inter-State force and which party is in conformity with it. While the *equal application* of the law of armed conflict is a sound legal principle, the *independence* of the law of armed conflict from the law of inter-State force is not. As we have seen, these two bodies of law are *interdependent*, sharing a division of labor, one seeking to constrain and limit what the other seeks but often fails to prevent. While the law of armed conflict equally constrains aggressors and defenders, we must never forget that it is aggression and defense—not the fact of hostilities and certainly not the legal institution of war—that we are constraining.

Similar problems arise with respect to the law of non-international armed conflict. In the previous example, does an armed conflict arise with the first use of military force by the intervening State against the armed group, or by the armed group against the intervening State? Or does an armed conflict only arise with intense or protracted armed violence between them? Here too, the answer may depend on the purpose of the law of non-international armed conflict. If the purpose is to protect civilians from military operations, then armed conflict arises with the first military operation undertaken by either party. In contrast, if the purpose is to regulate hostilities, then armed conflict arises when the battle is joined by both parties.

Notably, if one applies the narrower meaning of ‘armed conflict’ in both contexts, then a first strike by the intervening State against the armed group will remain unconstrained by either the law of international armed conflict or the law of non-international armed conflict. Hostilities between State armed forces have not yet broken out, and armed violence between State armed forces and organized armed groups is not yet intense or protracted.

Let us again take other relevant rules of international law into account. On one view, the law of non-international armed conflict displaces international human rights law, modifies its content, or alters its application such that the latter offers no greater protection than the former. Presumably, on this view, the narrower meaning of ‘armed conflict’ should be preferred, so that the ordinary protections of human rights law operate as long as practically possible. One possible implication of this view is that first strikes by the intervening State against the armed group may be constrained by human rights law, unmodified by the law of non-international armed conflict.¹¹

On a different view, these two branches of international law operate in parallel, each offering their own protections against violence and abuse.

11. See Eliav Lieblich, *Internal Jus Ad Bellum*, 67 HASTINGS LAW JOURNAL 687 (2016); Anthony Dworkin, *Individual, Not Collective: Justifying the Resort to Force against Members of Non-State Armed Groups*, 93 INTERNATIONAL LAW STUDIES 476 (2017).

Measures that comply with the law of armed conflict will nevertheless violate human rights law if they are not strictly required by the exigencies of the situation.¹² Most importantly, deprivations of life may be arbitrary under human rights law even if they fully comply with the law of armed conflict.¹³ On this view, the broader meaning of ‘armed conflict’ poses no threat to human rights law, and should not be disfavored on that basis.¹⁴

Here, too, the charge of conflation—this time of the *lex generalis* and the *lex specialis*—is easier to issue than to prove. Notably, Protocol II begins by recalling that “international instruments relating to human rights offer a basic protection to the human person.”¹⁵ This statement clearly suggests that the modern law of non-international armed conflict should be read alongside the modern law of human rights, not in opposition to it. The next sentence emphasizes the need “to ensure a better protection for the victims of those armed conflicts”¹⁶ not of an international character.¹⁷ There is no suggestion that in such conflicts the basic protection offered by human rights law is displaced or modified by the better protections of the law of non-international armed conflict. So far as the text of Protocol II is concerned, these protections may apply in parallel. This reading leaves the application of human rights law in armed conflict to human rights law itself.

12. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. Note that under Article 15(2) measures derogating from the right to life “in respect of deaths resulting from lawful acts of war” are permitted, but under Article 15(1) only to the extent strictly required by the exigencies of the situation.

13. *See, e.g.*, African Commission on Human and Peoples’ Rights, General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4) ¶ 34 (2015).

Where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option.

14. For my own version of this view, see ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* 35–37 (2017).

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts pmbl., June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

16. *Id.*

17. It is not entirely clear whether “better protection” means “better protection than the basic protection offered by human rights law” or “better protection than the humanitarian principles enshrined in Common Article 3,” which is referred to in the first sentence of the preamble. That question need not detain us here.

For its part, Protocol I explicitly recognizes “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict” and clarifies that its provisions are “additional to” these human rights protections.¹⁸ The fact that this statement appears in a section regarding treatment of persons in the power of a party to the conflict may reflect an assumption that a State’s human rights obligations extend beyond its borders only to persons and objects in the State’s control. If that assumption no longer holds, then it would seem that human rights law applies alongside Protocol I’s rules governing the conduct of hostilities.

B. *Vagueness*

Ambiguity is one source of legal indeterminacy, vagueness is another. While an ambiguous term carries multiple meanings, a vague term may carry a single meaning in its context yet admit of borderline cases. Accordingly, even those who agree on the meaning of a vague term may reasonably disagree about its application to particular facts.

Some vague terms—such as ‘effective,’ ‘definite,’ ‘concrete,’ and ‘direct’—are descriptive. In borderline cases, it may be unclear whether or not such terms accurately describe the facts. Other vague terms—such as ‘humanely,’ ‘cruel,’ ‘degrading,’ ‘appropriate,’ ‘excessive,’ and ‘reasonable’—are evaluative. In borderline cases, it may be unclear whether or not such terms express a sound value judgment.

When confronted with truly vague terms, we necessarily shift from the interpretation of legal texts to the construction of mediating doctrines to give determinate effect to a legal rule whose correct application is indeterminate over some range of cases. Some mediating doctrines sharpen the edges of a vague legal rule, offering more precise standards that admit of fewer borderline cases. The International Committee of the Red Cross (ICRC) seems to take this approach to the term ‘take a direct part in hostilities,’ proposing, roughly, that civilians retain their general protection unless and for such time as they perform specific acts likely to directly cause harm to one party to a conflict in support of another.¹⁹ Other mediating doctrines list multiple factors, not contained in the rule itself, to consider or weigh when applying the

18. AP I, *supra* note 9, art. 72.

19. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (Nils Melzer ed., 2009). Naturally, I have condensed the ICRC’s view.

rule to a particular set of facts. The U.S. Department of Defense (DoD) seems to take this approach to a number of vague terms, including ‘take a direct part in hostilities’ and ‘feasible.’²⁰

If the notion of a mediating doctrine sounds strange, recall that typically we do not expect soldiers to directly apply legal rules on the battlefield. Instead, we expect them to apply rules of engagement, which we construct precisely because applicable legal rules seem too complex, ambiguous, vague, and so on. We think soldiers will better conform to their legal obligations indirectly, by directly following rules that we construct. Mediating doctrines work in much the same way, serving soldiers by helping them conform to their legal obligations.

The faithful construction of mediating doctrines requires great care and invites close scrutiny, but there is no alternative. Borderline cases are not simply a theoretical problem. Borderline cases are a practical problem that combatants confront on the battlefield where the stakes of both action and inaction are high, and the need to decide is unavoidable. When we contemplate a particular borderline case as an academic exercise, we need not conclude that a person is taking a direct part in hostilities, or that they are not. We may simply reserve judgment. But when soldiers confront borderline cases, they must decide to attack, or to refrain from attack. They have no third option. They must choose, and if the legal rule does not provide clear guidance, we must construct a mediating doctrine that will serve them better.

While mediating doctrines are not legal rules, strictly speaking, we may be legally obligated to construct and apply them. After all, States are legally obligated to respect and to ensure respect for the law of armed conflict in all circumstances, clear cases and borderline cases alike.²¹ If States cannot ensure respect for the law by instructing soldiers to apply vague terms to borderline cases, then they are obliged to adopt mediating doctrines that will help soldiers avoid violating their legal obligations. So long as a mediating doctrine is consistent with the relevant text—neither prohibiting what the

Notably, preparation, deployment, and withdrawal are considered integral parts of such specific acts, and that specific act may directly cause harm as an integral part of a coordinated military operation.

20. *See* OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL §§ 5.2.3.2, 5.8.3 (rev. ed., 2016) [hereinafter DOD LAW OF WAR MANUAL].

21. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 495 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC CUSTOMARY IHL]. *See also* AP I, *supra* note 9, art. 80(2) (stating “the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution”).

rule clearly allows nor allowing what the rule clearly prohibits—and faithful to its purpose—reducing, rather than increasing the risk of error, arbitrariness, and abuse—then its construction serves the law’s most basic aim: to guide conduct.

The simplest mediating doctrine one might construct is a *default* or *closure* rule that directs decision in borderline cases arising under a primary rule. With respect to the proportionality rule, the ICRC takes the view that “the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations [of doubt] the interests of the civilian population should prevail.”²² Notice that this passage does not seek to clarify the meaning of ‘excessive,’ but instead accepts the vagueness of that term and simply directs combatants to refrain from attack when its correct application is unclear. In simple terms: *in case of doubt whether the civilian harm expected would be excessive in relation to the military advantage anticipated, refrain from attack.*

Since the proportionality rule prohibits actions on one side of the borderline of ‘excessive,’ and no opposing rule of international law requires actions on the other side of the borderline, this default rule serves combatants by helping them avoid violating their legal obligations. The default rule simply requires them to err on the legally safe side. It also seems plausible that combatants are more likely to overvalue than undervalue anticipated military advantage, and more likely to undervalue than overvalue expected harm to civilians (particularly foreign civilians). If so, then this default rule will more often avoid violations of the proportionality rule than preclude military action consistent with the proportionality rule. In these ways, the default rule helps parties to respect and ensure respect for the proportionality rule in all circumstances.

Needless to say, this default rule is not costless. In borderline cases, this default rule requires attacking forces to forsake military advantages that the proportionality rule does not clearly foreclose. The costs of the default rule therefore depend on the size of the grey area between clear excessiveness and clear non-excessiveness. If the grey area is fairly small, then the default rule will not impede military action much more than the proportionality rule

22. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1979 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter ICRC COMMENTARY]. See also Adil Ahmad Haque, *Proportionality and Doubt*, JUST SECURITY (Jan. 29, 2019), <https://www.justsecurity.org/62375/proportionality-doubt/>.

itself. The proportionality rule, in turn, presupposes that most military advantages are not truly “indispensable for securing the ends of the war,” and may be forsaken, at least temporarily, without crippling the overall war effort.²³ If the proportionality rule’s grey area is fairly small, then the default rule should not cripple the overall war effort either. In tactical terms, if a commander determines that the proportionality rule would clearly require forsaking an advantage were the expected civilian harm only somewhat greater, then that commander should be prepared to forsake the same advantage in the borderline case that he or she actually confronts.

Now suppose that the proportionality rule’s grey area is quite large, such that for any anticipated military advantage, very different amounts of expected civilian harm are neither clearly excessive nor clearly non-excessive. On that assumption, the default rule we are considering would foreclose many military advantages that the proportionality rule does not clearly exclude. Whether that result would be consistent with the object and purpose of the law depends on how we understand that object and purpose, as we shall see.

How large is the proportionality rule’s grey area? Certainly, military practitioners and international lawyers may disagree over how much expected civilian harm would be excessive in relation to some fixed military advantage. However, in my view, most disagreements over the application of the proportionality rule do not result from its vagueness but instead from its *contestability*, a distinct problem so closely correlated with vagueness that it seems appropriate to contrast them here.²⁴

To correctly apply evaluative terms such as ‘cruel’ or ‘excessive,’ we must make sound value judgments, typically by applying normative standards to the facts before us. In some cases, we may endorse the same standard but arrive at different value judgments because the standard we share is imprecise. In such contexts, the corresponding evaluative term will be vague, admitting of borderline cases. Alternatively, we may arrive at different value judgments because we endorse different standards. In such contexts, the corresponding evaluative term will be contested.

Suppose that we disagree over whether the civilian harm expected from an attack would be excessive in relation to the military advantage anticipated.

23. 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 [hereinafter General Orders No. 100].

24. See Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIFORNIA LAW REVIEW 509, 513 (1994).

We may disagree because we share a somewhat imprecise normative standard and happen to confront a borderline case in which its correct application is unclear. As between us, the term ‘excessive’ is somewhat vague, neither clearly applicable nor clearly inapplicable. Alternatively, we may disagree because we endorse different normative standards. Under one standard, the expected harm may be clearly excessive. Under the other standard, the expected harm may be clearly not excessive. As between us, the term ‘excessive’ is contested.

The normative standard underlying the proportionality rule may be contested on several grounds. First, we may disagree over what gives a military advantage, such as ground gained or weakening enemy armed forces, its legally cognizable weight.²⁵ In my view, the legal weight of a military advantage derives from its contribution to “the complete [or partial] submission of the enemy with the least possible expenditure of time, life, and money.”²⁶

As noted above, most military advantages are not truly indispensable for securing the ends of the war. It is just that obtaining a given military advantage may allow us to secure the ends of the war—that is, the complete or partial submission of the enemy—with *less* expenditure of time, life, and money than we would expend if we pursue the ends of the war without obtaining that military advantage. So the legal weight of a military advantage typically lies in the marginal expenditure of time, life, and money that we would avoid by obtaining it.

Second, we may disagree over what forms of military advantage may render civilian harm proportionate, that is, not excessive. In my view, we may not kill or maim civilians simply to avoid marginal expenditures of time or money. We may not take lives or inflict injury except to save lives or prevent injury. So we should judge the excessiveness of the civilian harm we expect to inflict in relation to the harm to friendly forces or civilians that we expect to prevent or avoid in current or future military operations as we continue to pursue the ends of the war.

Finally, we may disagree over whether harm to foreign civilians, friendly forces, and our own civilians carries the same weight. In my view, there is no

25. ICRC COMMENTARY, *supra* note 22, ¶ 2218.

26. *See* United States v. List et al. (The Hostage Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230, 1253 (1948). If you like, the value of a military advantage corresponds to the military necessity to obtain it, with the caveat that most military advantages are not strictly necessary to secure the ends of the war.

basis in law or morality to inflict greater harm on foreign civilians to avoid lesser harm to our own forces or our own civilians.²⁷

Accordingly, on my view, an attack may be expected to cause civilian harm that would be excessive in relation to the military advantage anticipated if the expected harm to civilians exceeds the harm to friendly forces or civilians that the attack is anticipated to prevent or avoid, in current or future military operations. Here, the term ‘excessive’ is not particularly vague.

Of course, on my view, the proportionality rule may remain difficult to apply, because the consequences of attacks will remain difficult to predict. How many friendly forces will be killed or injured, in future operations, if we refrain from striking an enemy commander at home with his family? How many of our own civilians will be killed or injured, in current operations, if we refrain from striking an enemy unit launching missiles from the roof of a residential building? These predictions are hard to make with confidence. At the same time, we cannot escape predictive uncertainty by adopting a different view of military advantage. For example, it is hardly easier to predict how much closer an attack will bring us to military victory. The problem of predictive uncertainty must be confronted head-on. But not here.²⁸

In any event, I have stated my view, not to defend it, but simply to illustrate that our deepest disagreements regarding the proportionality rule are substantive, not semantic, and rooted in its contestability, not its vagueness. Depending on how we resolve these substantive disagreements, we may find that neither the term ‘excessive’ nor the proportionality rule as a whole is particularly vague or imprecise. If we refrain from attack in the borderline cases that arise, we may find that the marginal cost to effective military action is not particularly great.

Before moving on, let us take this opportunity to clear up one misunderstanding of the proportionality rule. It is sometimes suggested that the term ‘excessive’ has a different and more permissive meaning than ‘disproportionate’, and that the use of the former rather than the latter gives rise to a different and more permissive rule. On this view, “an attack does not become unlawful when the expected collateral damage or incidental injury is slightly

27. *See, e.g.*, IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 218 (2009).

28. For an extended discussion of predictive uncertainty, as well as decision procedures and rules of engagement that may help combatants conform to the law, see HAQUE, *supra* note 14, ch. 8.

greater than the military advantage anticipated (as is suggested by the term ‘disproportionate’), but only when those effects are ‘excessive.’”²⁹

There is nothing to recommend this view. The ordinary meaning of ‘excessive’ is ‘too much,’ not ‘far too much.’³⁰ Expected collateral damage or incidental injury that is *slightly greater* than the military advantage anticipated is *slightly excessive* in relation to that military advantage and prohibited accordingly. Nothing in the ordinary meaning of ‘excessive’ or its context suggests any margin of appreciation for attacking forces.

This view seems even stranger in light of the law’s object and purpose. Among other things, this view cannot pretend to reflect a reasonable balance between military necessity and humanity. After all, on this view, military considerations prevail whether they outweigh *or are outweighed by* humanitarian considerations. Heads, attackers win; tails, civilians lose.

Finally, this view is disconfirmed by the relevant preparatory work. During the drafting of the Additional Protocols, some States opposed the term ‘disproportionate’ because they found it *too permissive* or, more precisely, too subjective and susceptible to abuse to effectively protect civilians.³¹ These

29. Corn, Blank, Jenks & Jensen, *supra* note 2, at 547; see also ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS 185 (2015) (“As long as there is no significant imbalance between the expected collateral damage and the anticipated military advantage, no excessiveness exists.”); Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello*, 88 INTERNATIONAL LAW STUDIES 57, 71 (2012) (“[T]he *jus in bello* proportionality principle . . . obligates the commander to cancel an attack only when the anticipated harm to civilians and/or civilian property is so beyond the realm of reason that inflicting that harm, even incidentally, reflects a total disregard for the innocent victims of hostilities.”); Michael N. Schmitt, *Faultlines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 293 (Susan Breau & Agnieszka Jachec-Neale, eds., 2006) (“In fact, the test is one of ‘excessiveness.’ The rule only bans attacks in which there is no proportionality at all between the ends sought and the expected harm to civilians and civilian objects”).

30. *Excessive*, CAMBRIDGE ENGLISH DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/excessive> (last visited Apr. 30, 2019); see also *Excessive*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/excessive> (last visited Apr. 30, 2019) (defining excessive as “exceeding what is usual, proper, necessary, or normal”). In this context, excessive clearly means “exceeding what is proper.” The precautions rule limits harm exceeding what is necessary. Since no two attacks are exactly alike, there is no “usual” or “normal” amount of incidental harm.

31. 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977), at 54 (Iraq), 56 (German Democratic Republic), 62 (Mauritania), 69 (Indonesia), 69 (Czechoslovakia), 305 (Romania) (1978) [hereinafter 14 OFFICIAL RECORDS]. Compare *id.* at 37 (ICRC) (“The Red Cross was conscious of the fact

States typically favored deleting the draft terms “to an extent disproportionate to the direct and substantial military advantage anticipated,” thereby prohibiting *all* expected incidental harm to civilians.³² No State opposed the term ‘disproportionate’ because it was too restrictive or disfavored attacking forces.

Other States opposed the use of ‘disproportionate’ because it seemed to condone any civilian harm that it did not condemn.³³ In other words, the term ‘disproportionate’ implied that both sides to a conflict may cause civilian harm that is proportionate, that is, justified or appropriate “on balance.” Yet, as one State representative astutely observed, the law of inter-State force condemns *all* civilian harm resulting from an act of aggression.³⁴ The law of armed conflict, applying as it must to aggressors and defenders alike, cannot endorse what another branch of international law condemns.³⁵ These States typically favored deleting the rule entirely, apparently on the grounds that international law should condemn civilian harm, or remain silent, but never condone civilian harm even impliedly. No State opposed the term ‘disproportionate’ because it condemned too much civilian harm.

According to the rapporteurs,

The so-called rule of proportionality . . . was found ultimately to be acceptable when it was preceded by paragraph 2(a)i and paragraph 2(a)ii which prescribe additional precautions and phrased in terms of losses “excessive in relation to the concrete and direct military advantage anticipated”, and was supplemented by paragraph 5 to make clear that it may not be construed as authorization for attacks against civilians.³⁶

that the rule of proportionality contained a subjective element, and was thus liable to abuse.”), *with id.* at 60 (Sweden) (“The rule on proportionality . . . should be tightened in order to avoid abuse.”).

32. *See, e.g., id.* at 52 (Ghana), 56 (Egypt), 61 (Democratic People’s Republic of Korea), 61 (Uganda), 70 (Albania), 189 (Mauritania).

33. *Id.* at 69 (Hungary), 93 and 168 (Mongolia), 194 (Czechoslovakia), 305 (Romania); *see also id.* at 162 (Vietnam).

34. *Id.* at 305 (Romania).

35. *Id.* (“Modern international law prohibited aggression and only wars of defense against aggression were permitted. The rule of proportionality was therefore against the principles of international law.”).

36. 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977), at 285 (1978). The rapporteurs, summarizing the debate to that point, wrote:

It seems that States opposed to the term ‘disproportionate’ because they found it too permissive were satisfied by the additional precautions. States opposed to including ‘disproportionate’ in the rule because they felt it impliedly condoned proportionate civilian harm were satisfied by the substitution of the term ‘excessive’ and by the supplemental paragraph making clear that non-excessive harm to civilians is not impliedly authorized or condoned. Presumably, these States felt that implying that some civilian harm is not excessive suggests no overall endorsement.

In sum, the term ‘excessive’ was preferred to ‘disproportionate’ because the former was seen as at least as protective as the latter and, in addition, did not imply that civilian harm not explicitly prohibited is impliedly authorized. It would pervert the intention of the parties to now conscript the term ‘excessive’ into efforts to diminish civilian protections.³⁷

Finally, it is sometimes suggested that we should modify the proportionality rule to exclude borderline cases. For example, some scholars argue that the proportionality rule applies only to cases of *clearly* excessive civilian harm.³⁸ Obviously, this is not a plausible interpretation of Protocol I, which uses the modifier “clearly” eight times but never to modify any of the five occurrences of “excessive.”³⁹ Nor does the preparatory work indicate that

The principle of proportionality . . . received a mixed reaction. Some delegations considered it a necessary means of regulating the conduct of warfare and of protecting the civilian population. Other delegations rejected that principle as a criterion and asserted that in humanitarian law there should be no condonation of casualties among civilians. Some who took the latter view considered that it would be desirable to delete [the rule] as a whole, while others of the latter view proposed the deletion of the words ‘to an extent disproportionate to the direct and substantial military advantage anticipated.’

Id. at 241.

37. Writing in his personal capacity, one of the rapporteurs later wrote:

This provision codifies the customary rule of proportionality, which [prohibits attacks] that would be likely to involve collateral civilian injury too great to be justified by the anticipated concrete and direct military advantage. While this is a difficult balance to assess, the mere requirement that a commander make the balance is an important safeguard.

George H. Aldrich, *The Laws of War on Land*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 42, 52 (2000).

38. *See, e.g.*, MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 15, 23, 164 (2014).

39. *See especially* AP I, *supra* note 9, art. 41(2)(b) (“A person is *hors de combat* if . . . he [or she] clearly expresses an intention to surrender . . .”). Where Protocol I prohibits combatants from attacking only in clear cases, it says so.

such a restriction was intended. While several States expressed a desire for a clearer rule to guide junior officers, none favored a more permissive rule than the one adopted.⁴⁰ On the contrary, several States expressed concern that the rule was not sufficiently protective of civilians, that combatants would exploit its vagueness, resolving every borderline case in their own favor. These States clearly did not understand excessive to mean “clearly excessive.” As for customary international law, these scholars cite no State practice or legal opinion in support of their claims. Accordingly, it is best to view these scholars, not as describing existing law, but as proposing a regressive development of the law.

C. Incompleteness

Legal indeterminacy may arise, not from what a legal text says, but instead from what it leaves unsaid. Legal ambiguity and vagueness arise from semantic or conceptual indeterminacy, from the multiple meanings of words and the fuzzy boundaries of concepts. Yet a legal rule may be formulated in reasonably clear terms that, nevertheless, leave its legal content unclear. In some cases, the formulation may fail to identify an essential element of the rule. For example, a legal duty formulated in the passive voice may fail to identify who bears the duty.⁴¹ In other cases, the parties may have intended that a special meaning shall be given to a term, but failed to identify that special meaning.⁴² When legal texts are incomplete in these ways, the legal rules to which they give rise take their content, not from what these texts say, but from what these texts presuppose or leave implicit, which we hope to infer from their context and purpose.

Civilians enjoy general protection from dangers arising from military operations in both international and non-international armed conflicts. In international armed conflicts, a civilian is defined, roughly, as any person who is not a combatant, that is, not a member of the armed forces of a party to the conflict.⁴³ In non-international armed conflicts, no treaty defines who is

40. See 14 OFFICIAL RECORDS, *supra* note 31, at 65 (United Kingdom).

41. See, e.g., AP I, *supra* note 9, art. 70(1) (providing that “relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken” without identifying who must undertake them).

42. See Vienna Convention on the Law of Treaties, *supra* note 4, art. 31(4).

43. Infelicitously, participants in a *levée en masse* are not civilians under Article 50(1) of Protocol I. Arguably, such persons should have been considered civilians taking direct part in hostilities.

a civilian and who is not. This incompleteness leaves the scope of the rules protecting civilians in non-international armed conflicts unclear. Are members of organized armed groups civilians, enjoying general protection unless and for such time as they take a direct part in hostilities? Or, are they not civilians, enjoying relatively limited protection unless and for such time as they are wounded, sick, shipwrecked, detained, and the like?

One possibility is that in a non-international armed conflict, every person is a civilian. This seems unlikely. The explicit statement that ‘civilians enjoy general protection’ leaves implicit and unstated that non-civilians, whomever they are, do not. The very fact that Protocol II refers to both persons and civilians indicates that not all persons are civilians. On one hand, “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities” enjoy certain fundamental guarantees.⁴⁴ In contrast, “civilians shall enjoy general protection against the dangers arising from military operations.”⁴⁵ The different wording of these provisions suggests that some persons enjoy fundamental guarantees but not the general protection reserved for civilians.

A second possibility is that, in a non-international armed conflict, every person is a civilian except members of State armed forces. This seems even less likely. There is little evidence that members of State armed forces and members of organized armed groups enjoy different legal protections under the law of non-international armed conflict. When Common Article 3 extends minimum protections to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*,” it is generally agreed that these protections apply equally to members of the armed forces of both State parties and non-State parties to a conflict.⁴⁶ Similarly, the only substantive rule of Protocol II that refers to armed forces and groups applies the same restriction to both.⁴⁷

44. AP II, *supra* note 15, art. 4. Similarly, “[p]ersons taking no active part in the hostilities” receive certain minimum protections under Common Article 3 of the four Geneva Conventions of 1949. *See, e.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

45. AP II, *supra* note 15, art. 13.

46. *See, e.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 179 (2016).

47. AP II, *supra* note 15, art. 4(3) (noting that “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”).

This process of elimination leaves standing the third possibility that, in a non-international armed conflict, every person is a civilian except members of State armed forces and members of organized armed groups.⁴⁸ This appears quite plausible in light of the rule's context and purpose. The rule presupposes armed violence between two or more collectives. This presupposition entails a distinction between persons who join these collectives, persons who fight alongside these collectives without joining them, and persons who do not fight at all. The rule's purpose might then explain why persons who do not fight at all enjoy general protection, while persons who join or fight alongside these collectives do not. Of course, the purpose of the law is itself the object of disagreement, a topic to which we will return later.

There is also the important question of who, exactly, is a member of an organized armed group, as opposed to some broader political or social collective for which the group fights. In other words, who is a member of a non-State *party* to an armed conflict and who is a member of *its armed forces*? The question was vividly posed by Lieutenant General Sean MacFarland, Commander, Combined Joint Task Force—Operation Inherent Resolve, when he asked, “is an enemy banker a combatant or not, you know, just because he doesn't have an AK leaning up against his, you know, teller window, I mean, he's still a bad guy, right?”⁴⁹

In my view, the answer to General MacFarland's question depends on whether this enemy banker is, in legally relevant respects, *most like* a government employee, a private contractor, or a soldier currently assigned to perform financial services. This analogical judgment requires grasping the purpose or rationale of the law, which confers legal relevance on some factual similarities and differences, but not others.

Why, exactly, do members of armed forces currently performing non-combat functions lack the general protection enjoyed by civilians? Why are such members liable to attack and incidental harm despite taking no direct part in hostilities? In my view, the most plausible answer is that such members are trained to fight and subordinated to a military command structure that may order them to fight at a moment's notice. In contrast, government employees, private contractors, and ordinary civilians would first have to be

48. Obviously, the rules protecting civilians exclude the conceptual possibility that in a non-international armed conflict no person is a civilian.

49. Press Briefing, Lt. Gen. Sean MacFarland, Commander, Combined Joint Task Force-Operation Inherent Resolve, (Feb. 1, 2016), <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/647924/department-of-defense-press-briefing-by-gen-macfarland-via-teleconference-in-th/>.

conscripted into the armed forces and placed under command authority before being ordered to fight. Accordingly, if enemy bankers receive no combat training, and are not subject to a military command structure, then they remain civilians.

D. Inconsistency

Legal indeterminacy also may arise from *inconsistency* between different legal rules. Each rule may be formulated in clear, unambiguous, and complete terms. Yet their combined legal effects—the legal duties they impose, the legal rights they declare—remain uncertain. One rule may require what another forbids, or implicitly deny what another presupposes.

For example, Protocol I defines ‘attacks’ as acts of violence *against the adversary*, in offense or defense.⁵⁰ The term ‘adversary,’ in turn, consistently refers to the armed forces of the opposing Party, not to its civilian population.⁵¹ Accordingly, this provision seems to implicitly deny that acts of violence *against civilians* are attacks under Protocol I. Of course, Protocol I prohibits making civilians the object of attack, thereby presupposing that acts of violence against civilians are attacks. It is not obvious how to resolve this apparent inconsistency.

On one view, the provision defining attacks contains a clear mistake, such that it cannot be applied as written without defeating the intention of the parties. While there is a strong presumption that every term in a treaty must be given legal effect, perhaps this presumption may be rebutted when necessary to resolve apparent inconsistency. Accordingly, attacks are simply acts of violence, whether in offense or in defense.⁵² On an alternative view, or perhaps a variant of the first, the provision defining attacks is merely incomplete. Attacks are acts of violence against the adversary, in offense or defense, *as well as* acts of violence against civilians and civilian objects. On either view, acts of violence against civilians are attacks, and are prohibited as such.

Finally, on a distinct view, acts of violence that are (directly) against civilians are attacks if and only if they are also (indirectly) against the adversary.

50. AP I, *supra* note 9, art. 49(1).

51. *See id.* arts. 37, 40, 44.

52. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 27 (2010) [hereinafter COMMENTARY ON THE HPCR MANUAL].

For example, if one party targets civilians as a means to obtain military, psychological, political, or economic advantage over the adversary, then these acts of violence are attacks. In contrast, if one party targets civilians out of sheer malice, then these acts of violence are not attacks, though they may violate other fundamental guarantees of the law of armed conflict or other rules of international law.

One inconsistency begets another. Several modern militaries have the capability to “shift cold,” that is, to redirect missiles mid-flight away from their original targets toward other locations. Suppose that, after releasing a missile, it becomes apparent, in light of new information, that the original targets are civilians rather than combatants or that the attack may be expected to cause excessive harm to many civilians nearby. It is possible to redirect the missile toward an empty field or parking lot, resulting in far less damage to civilian objects and no loss of life or injury to civilians. The attackers seem obliged to cancel or suspend the attack on the original target. At the same time, they may not direct an attack at any civilian object, no matter its value or the exigencies of the situation. One rule seems to require what another forbids.⁵³

Under the first and second views described above, it seems hard to deny that redirecting the missile toward the parking lot unlawfully directs an attack at a civilian object. Avoiding such an absurd or unreasonable result may be one reason, though perhaps not a decisive reason, to favor the third view. On the third view, redirecting the missile would not constitute an attack at all, since it seeks no advantage over the adversary, but merely to avoid or minimize harm to civilians and civilian objects.⁵⁴

III. PROBLEMS OF CUSTOM

Legal indeterminacy regarding the customary law of armed conflict takes many forms, some related to those we have discussed, others quite distinct. State practice may be ambiguous or equivocal. Expressions of legal opinion may be vague. The resulting rules may be incomplete or inconsistent, due to their unsystematic and often reactive development. But even more fundamental problems await.

53. Compare AP I, *supra* note 9, art. 57(2)(b), with *id.* art. 52(1). Thanks to John Hursh for underscoring this point.

54. See Adil Ahmad Haque, *the “Shift Cold” Military Tactic: Finding Room under International Law*, JUST SECURITY (Feb. 20, 2018), <https://www.justsecurity.org/52713/shift-cold-military-tactic-finding-room-under-international-law/>.

Consider that, under Protocols I and II, civilians enjoy general protection from dangers arising from military operations unless and for such time as they take a direct part in hostilities.⁵⁵ According to the Israeli Supreme Court, “all of the parts of article 51(3) of The First Protocol express customary international law.”⁵⁶ In contrast, according to the United States Department of Defense, “as drafted, Article 51(3) of AP I does not reflect customary international law.”⁵⁷ How should we resolve such disputes?

In particular, the U.S. DoD claims that, under customary international law, “[t]aking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts . . . that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”⁵⁸ This view departs from the ordinary meaning of ‘take a direct part in hostilities,’ which does not extend beyond engaging in combat.⁵⁹ Instead, this view collapses the distinction, clearly drawn in Protocol I, between civilian persons, who lose protection only when they take a direct part in hostilities, and civilian objects, which lose protection when they make an effective contribution to military action.⁶⁰

In addition, the U.S. DoD Manual claims that, under customary international law, civilians who have taken a direct part in hostilities in the past remain liable to targeting and incidental harm until they “permanently cease” their participation, that is, unless attacking forces make a good faith assessment that these civilians will not fight or contribute to the adversary’s ability to fight in the future.⁶¹ This view departs from the ordinary meaning of ‘for such time as.’

On the prevailing view, “[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there

55. AP I *supra* note 9, art. 51(3); AP II, *supra* note 15, art. 13(3).

56. HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 459, 492, ¶ 30 (2005) (Isr.).

57. DOD LAW OF WAR MANUAL, *supra* note 20, § 5.8.1.2.

58. *Id.* § 5.8.3.

59. For an extended critique of these provisions, see Adil Ahmad Haque, *Misdirected: Targeting and Attack Under the U.S. Department of Defense Law of War Manual*, in THE UNITED STATES DEPARTMENT OF DEFENSE LAW OF WAR MANUAL: COMMENTARY AND CRITIQUE 225 (Michael A. Newton ed., 2019).

60. Compare AP I, *supra* note 9, art. 51(3), with *id.* art. 52(2).

61. DOD LAW OF WAR MANUAL, *supra* note 20, § 5.8.4.1.

is a general practice that is accepted as law (*opinio juris*).⁶² Since the customary law of armed conflict consists of prohibitions, its rules primarily arise from “negative practice,” that is, from a general practice of States to refrain from certain conduct out of a sense of legal obligation.⁶³ Accordingly, to show that Article 51(3) of Protocol I expresses customary international law, we would need to show that States generally refrain from targeting civilians who are not currently engaged in combat out of a sense of customary legal obligation. In contrast, to show that Article 51(3) does not express customary international law, we would need to show either that there is no such general practice, or that any such general practice reflects treaty obligations or policy decisions rather than acceptance as customary law. Finally, to demonstrate that the U.S. DoD’s proposed rule expresses customary international law, we would need to show that States generally conform to the proposed rule because they accept it as customary law, while perhaps accepting additional treaty obligations and policy constraints as well.

Several problems with the prevailing view arise from the fact that international law requires States to settle their international disputes by peaceful means and to refrain in their international relations from the threat or use of force. First, if the vast majority of States comply with these requirements, then there may remain no general State practice with respect to the conduct of hostilities in international armed conflict, that is, no State practice sufficiently *widespread* and *consistent* to create or change customary law binding on all States.⁶⁴

Second, the State practice that persists may be *unrepresentative*. After all, this practice will exclude those law-abiding States that settle their international disputes by peaceful means. While “[t]he participating States should

62. Int’l Law Comm’n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10, at 119 (Draft Conclusion 2) (2018) [hereinafter ILC Seventieth Session Report].

63. *Id.* at 128 (finding that “where prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law”); *see also id.* at 133 (stating “inaction may count as practice . . . , however, . . . only deliberate abstention from acting may serve such a role”).

64. *Id.* at 135 (Draft Conclusion 8(1)) (“The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.”). While Draft Conclusion 8(1) requires *general State practice accepted as law*, the commentary seems to require only *some State practice generally accepted as law*. *See id.* at 136 n.715 (“A relatively small number of States engaging in a certain practice might thus suffice if indeed such practice, as well as other States’ inaction in response, is generally accepted as law (accompanied by *opinio juris*)”).

include those that had an opportunity or possibility of applying the alleged rule,⁶⁵ the participating States will necessarily exclude those that had no opportunity or possibility of applying the alleged rule because they refrained from the use of force in the first place.

At the same time, the State practice that persists will prominently feature the practice of States that unlawfully resort to force against other States.⁶⁶ After all, international armed conflicts typically arise because one side unlawfully resorts to force against the other. It is only a slight exaggeration to say that empowering those who violate the law of inter-State force to substantially shape the customary law of international armed conflict violates the general principle that law does not arise from illegality.

Similarly, on the prevailing view, the customary law of non-international armed conflict will exclude the views of well-ordered States that address sources of instability before they boil over. Instead, the formation and evolution of customary rules will be driven by States that allow internal disturbances and tensions to devolve into armed conflict.

A familiar problem arises from Baxter's "paradox."⁶⁷ On one hand, even if Protocol I's 174 States parties consistently adhere to its terms, this consistent practice alone would do nothing to bring customary international law into alignment with Protocol I. It would have to be shown that their practice reflects a sense of legal obligation under both treaty and custom.⁶⁸ On the other hand, if Protocol I States consistently adhere to its terms, then there will be no general State practice closely tracking the U.S. DoD's proposed rule. At a minimum, it would have to be shown that these Protocol I States accept the U.S. DoD's proposed rule as customary law but refrain from targeting civilians who contribute to the adversary's ability to fight due to their treaty obligations.

Ideally, Protocol I States would simply declare that their practice reflects a sense of treaty obligation, customary obligation, both, or neither. Regrettably, such clear statements are rare. By failing to reveal the legal basis of their practice, these States risk disqualifying themselves from the formation

65. *Id.* at 166.

66. See JANINA DILL, LEGITIMATE TARGETS?: SOCIAL CONSTRUCTION, INTERNATIONAL LAW AND US BOMBING 134 (2015).

67. See Richard R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 27, 64 (1970).

68. ILC Seventieth Session Report, *supra* note 62, at 139

Seeking to comply with a treaty obligation as a treaty obligation . . . is not acceptance as law for the purpose of identifying customary international law. . . . A State may well recognize that it is bound by a certain obligation by force of both customary international law and treaty, but this would need to be proved.

and evolution of customary law. At the same time, the practice of non-ratifying States may be insufficiently widespread or representative to create or change customary law binding on all States. Indeed, the very fact that these States are unwilling to ratify Protocol I suggests that their legal opinions are not representative of the international community as a whole.

A final problem arises from the fact that, on the prevailing view, only State practice motivated by a sense of legal obligation or entitlement contributes to the formation and evolution of customary international law.⁶⁹ State practice motivated by moral or strategic considerations does not, even if such practice is accepted as lawful by other states. Of course, the law of armed conflict depends for its practical effectiveness on State armed forces and organized armed groups accepting that the conduct it prohibits is morally wrong, as well as strategically useless or counterproductive. Paradoxically, this means that States that internalize the moral values and strategic rationale of the law of armed conflict will be less able to shape or preserve its customary rules.

In principle, these problems could be avoided by considering, as State practice, both how States conduct hostilities and how States react to the conduct of hostilities by other States.⁷⁰ In practice, States are seldom in a position to react to specific military operations by other States, since typically the relevant facts will be inaccessible, concealed, or denied.⁷¹ States may also have strong political or economic reasons not to publicly condemn the actions of militarily powerful states such as the United States, the Russian Federation, or Saudi Arabia, among others.

69. *Id.* at 138 (Draft Conclusion 9(1)) (noting “the practice in question must be undertaken with a sense of legal right or obligation”), *id.* at 139 (“Acceptance as law (*opinio juris*) is to be distinguished from other, extralegal motives for action, such as comity, political expediency or convenience . . .”).

70. By its terms, Draft Conclusion 9(1) indicates that only acceptance as law by participating States creates or changes customary international law. *Id.* at 146 (Draft Conclusion 9(1)) (“The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.”). In contrast, the commentary suggests that acceptance as law by non-participating States may be necessary as well. *Id.* at 139 (“[a]cceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the practice and those in a position to react to it”). Neither the draft conclusion nor the commentary suggests that acceptance as law by non-participating States may suffice to create or change customary law, a view to which we will turn shortly.

71. *See, e.g.*, Prosecutor v. Tadić; Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 99 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

An alternative approach would consider, not only State practice conforming to the rule in question, but also State practice involving training and preparing to conform to the rule should an armed conflict arise. Such an approach blunts the objection that “talk is cheap,” since such training indicates that the State is willing to back up its words with action if forced to do so. Notably, on this view, State military manuals are, as such, evidence of legal opinion, while their use in training constitute State practice. Crucially, on this approach, States need not engage in armed conflict to create or change the customary law of armed conflict.⁷²

A bolder approach would reduce the role of practice in the formation and evolution of the customary law of armed conflict, elevating the role of general statements of legal opinion.⁷³ On one version, State practice on the battlefield that is (descriptively) sparse or sporadic may be considered (normatively) *sufficiently* widespread, representative, and consistent provided that its acceptance as law is (descriptively) widespread, representative, and consistent.⁷⁴ On this view, the customary law of armed conflict arises, not only from general State practice accepted as law, but also from *limited* State practice *generally* accepted as law.

On a different version, refraining from the use of armed force *counts* as ‘negative practice’ with respect to the conduct of hostilities, that is, as deliberately abstaining from particular wartime conduct. After all, one way to refrain from conducting hostilities in a particular way is to refrain from conducting hostilities altogether. Put differently, if a State accepts a rule prohibiting certain battlefield conduct as law, and refrains from such conduct, its

72. See Michael Wood, *The Evolution and Identification of the Customary Law of Armed Conflict*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 727, 731 (2018) (arguing that “practice [States] may engage in outside the battlefield, such as training simulations and weapon acquisition, may also be of relevance”). Though welcome on its own terms, this statement by the ILC’s Special Rapporteur seems hard to reconcile with the ILC’s draft conclusions.

73. See, e.g., Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 146, 149 (1987) (“The more destabilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision makers will substitute one element [State practice] for the other [legal opinion], provided that the asserted restrictive rule seems reasonable.”); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 757 (2001); John Tasioulas, *Custom, Jus Cogens, and Human Rights, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 95 (Curtis Bradley ed., 2016).

74. Notably, such acceptance as law would mostly come from States *not* involved in the practice. As we have seen, the ILC’s commentary leaves room for such an approach, inconsistent as this might seem with its draft conclusions. See *supra* note 70.

practice and acceptance should not be disqualified on the grounds that it refrains from such conduct in part by refraining from the use of armed force in the first place.

Modifying the prevailing view in these ways would allow law-abiding, well-ordered States to create or change customary law by expressing their considered legal views without engaging in a practice that is often prohibited and always disfavored by international law. This approach would also allow the majority of States to create or change customary law by expressing disagreement with the legal views of outlier States without necessarily condemning specific military operations based on incomplete or contested facts.

A final approach would allow the existence and content of customary rules to be identified through a combination of inductive and deductive methods, drawing logical inferences from empirically established rules and principles to fill gaps and resolve ambiguities in State practice and opinion.⁷⁵ Since States are, in the end, free to establish logically inconsistent rules, this process may follow a pattern of conjecture and refutation, assertion and rejection, as States respond to the hypotheses of judges and scholars. Arguably, this is how the formation, evolution, and identification of the customary international law of armed conflict actually operates in practice. Rather than deduce the nature of customary law and the criteria for its identification by interpreting various treaty provisions,⁷⁶ we might instead identify the customary practice of customary law identification.

IV. PURPOSIVE INDETERMINACY⁷⁷

As we have seen, legal ambiguity, vagueness, incompleteness, and inconsistency may recede in light of the object and purpose of the law. It might seem obvious that the purpose of the law of armed conflict is the protection of civilians and other persons not taking direct part in hostilities. Both Additional Protocols announce themselves as relating to the protection of victims of armed conflicts. Their preambles identify their reasons for existence, namely the necessity to reaffirm and develop legal provisions protecting the victims of international armed conflicts as well as the need to ensure a better

75. ILC Seventieth Session Report, *supra* note 62, at 126 (stating that the ILC's approach "does not in fact preclude a measure of deduction as an aid, to be employed with caution").

76. *See, e.g.*, Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 (providing that the Court shall apply, among other things, "international custom, as evidence of a general practice accepted as law").

77. I borrow this helpful phrase from Janina Dill. *See* DILL, *supra* note 66, at 95.

protection for the victims of non-international armed conflicts. Protocol I devotes two sections, containing thirty-three articles, to the general protection of the wounded, the sick, the shipwrecked, and civilians.⁷⁸ Nineteen articles of Protocol I⁷⁹ and eight articles of Protocol II⁸⁰ refer to protection of persons or objects in their headings, and a similar number of articles refer to protection of persons or objects in their operative provisions.⁸¹ Of course, various articles confer protections on persons or objects without using the term ‘protection.’⁸²

To say that the purpose of the law of armed conflict is to protect civilian persons and objects, among others, is not to suggest that the law pursues its purpose without limits, heedless of external constraints. The reason is simply that the law of armed conflict must remain consistent with other relevant rules of international law that may affirmatively authorize military action. The law of armed conflict may rule out some means and methods of warfare, no matter how effective they may be, but may not rule out all effective means and methods of warfare, leaving States with no lawful way to exercise their rights to use force in self-defense or with Security Council authorization.

The law of international armed conflict must leave room for effective military action by those lawfully resorting to armed force under the law of inter-State force. Otherwise, these two branches of international law would clash, one effectively prohibiting what the other affirmatively authorizes.⁸³ As we have seen, Protocol I begins by recalling that States have a duty to refrain from the use of force in conformity with the UN Charter, implicitly recognizing that some uses of force are in conformity with the UN Charter.⁸⁴ The preamble also states that nothing in the law of international armed conflict “can be construed as legitimizing or authorizing any act of aggression

78. AP I, *supra* note 9, Part II, Section I (arts. 8–20), Part IV, Section I (arts. 48–67).

79. *Id.* arts. 10–13, 15–16, 24, 45, 51–56, 62, 65, 76–77, 79.

80. AP II, *supra* note 15, arts. 7, 9–11, 13–16.

81. API, *supra* note 9, arts. 19–23, 25–27, 33, 44, 48–49, 58, 71, 73, 75; AP II, *supra* note 15, art. 8.

82. Most notably, the precautions rules protect persons and objects from avoidable harm. *See* AP I, *supra* note 9, art. 57.

83. *See* Int’l Law Comm’n, Rep. on the Work of its Fifty-Eighth Session, U.N. Doc. A/61/10, at 408 (2006) [hereinafter ILC Fifty-Eighth Session Report] (“The principle of harmonization. It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”).

84. AP I, *supra* note 9, pmb.

or any other use of force inconsistent with the Charter of the United Nations.”⁸⁵ Implicit, though admittedly unstated, is that nothing in the law of international armed conflict should be construed as delegitimizing every act of self-defense or every other use of force consistent with the Charter.

At the same time, the law of international armed conflict applies equally to all parties to an armed conflict, imposing the same constraints and affording the same protections, irrespective of the nature or origin of the conflict or the causes espoused by or attributed to the parties. It may seem that, as a result, the law of international armed conflict must leave room for effective warfighting by those *unlawfully* resorting to armed force. In a sense, this is true. Fortunately, the law of inter-State force leaves *no* room for *any* warfighting by those unlawfully resorting to armed force. In this respect, among others, these two branches of international law share a division of labor.

For its part, Protocol II explicitly recognizes “the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.”⁸⁶ It is not the purpose of the law of non-international armed conflict to make it legally impossible for States to discharge that responsibility. At the same time, the law of non-international armed conflict “shall be applied without any adverse distinction” by all parties to all persons affected by the conflict.⁸⁷ In this sense, it is not the purpose of the law of non-international armed conflict to make it legally impossible for organized armed groups to threaten law and order, national unity, or territorial integrity. Since the law of non-international armed conflict does not affect the legal status of the parties, the legal prohibition of all military action by organized armed groups may be left to national law.⁸⁸

It is often said that the law of armed conflict aims to strike a reasonable balance between humanitarian and military considerations or, more grandiosely, between the principle of humanity and the principle of military necessity.⁸⁹ This may seem surprising. Protocol I mentions (imperative) military necessity only four times, within limited exceptions to general protections.⁹⁰

85. *Id.*

86. AP II, *supra* note 15, art. 3(1).

87. *Id.* art. 2(1).

88. *See, e.g.*, GC IV, *supra* note 44, art. 3.

89. *See, e.g.*, Schmitt, *The Interpretive Guidance*, *supra* note 2, at 6 (“IHL represents a very delicate balance between two principles: military necessity and humanity.”).

90. AP I, *supra* note 9, art. 54(5) (stating that “derogation from the prohibitions [to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within [its national] territory . . . where

Other provisions invoke the necessity to treat wounded and sick combatants,⁹¹ overriding public necessity,⁹² including medical necessity and investigative necessity, the necessity to provide for the needs of the civilian population,⁹³ and urgent necessity in the interest of the civilian population.⁹⁴ No one argues that the latter four “necessities” should be elevated to the status of principles. For its part, Protocol II does not mention military necessity at all.

As for the principles of humanity, Protocol I invokes them early, though not often: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”⁹⁵ This version of the Martens Clause, like those before it, does not say, but perhaps implies, that the law of international armed conflict—both conventional and customary—also derives from the principles of humanity (among other things). For its part, Protocol II provides only that “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.”⁹⁶ Presumably, this provision reflects the prevailing view at the time of its adoption that there was no international law applicable in non-international armed conflicts, either derived from the principles of humanity or anything else, beyond Common Article 3, human rights law, and Protocol II itself.

It is true that earlier treaties avowed a purpose “to conciliate the necessities of war with the laws of humanity” or “to diminish the evils of war, as far as military requirements permit.”⁹⁷ Yet even these treaties did not treat

required by imperative military necessity”), art. 62(1) (“Civilian civil defense organizations . . . shall be entitled to perform their civil defense tasks except in case of imperative military necessity.”), art. 67(4) (stating that “*matériel* and buildings of military units permanently assigned to civil defense organizations . . . may not be diverted from their civil defense purpose . . . except in case of imperative military necessity”), art. 71(3) (“Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.”).

91. *Id.* art. 14(3).

92. *Id.* art. 34(4)(b).

93. *Id.* art. 64(5).

94. *Id.* art. 70(3).

95. *Id.* art. 1(2).

96. AP II, *supra* note 15, pmb1.

97. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight pmb1., Nov. 29/Dec. 11, 1868, 138 Consol. T.S. 297, 18 MARTENS

humanity and military necessity as co-equal *principles, values, or normative* considerations. The *laws* of humanity and the *evils* of war are transparently normative ideas. Laws obligate; evils repel. In contrast, the necessities of war are facts, not values. To say that war cannot be waged without intentionally killing or maiming enemy combatants and foreseeably killing and maiming civilians is simply to acknowledge a brute reality, not to endorse it. Similarly, military requirements are instrumental requirements, not moral requirements. If you like, military requirements are hypothetical imperatives: to achieve this military aim, perform this military action. The laws of humanity are categorical imperatives: do not perform this military action (in this way, at this time, and so on) regardless of your aims.

The view that military necessity is a legal principle, reflecting a value recognized by international law, might have made sense when, on the prevailing view, “[t]he law of nations allows every sovereign government to make war upon another sovereign state.”⁹⁸ If international law gives States the right to go to war, for any reason or for no reason at all, then presumably States must be free to exercise that right effectively. Since each side has the right to make war on the other, each side must be free to do what is militarily necessary to win. On this view, the ‘principle’ of military necessity is a necessary corollary or implication of the right to make war at will. Military necessity is a derivative principle, not a fundamental one, but a principle nonetheless.

Needless to say, any such derivative principle was extinguished with the right to war from which it derived. Today, international law generally prohibits the use of force, subject to narrow exceptions. States have no right to do effectively what they have no right to do at all. Accordingly, we must understand military necessity in a fundamentally different way, not as an authorizing principle entitling both sides to fight, but as a constraining principle prohibiting both sides from inflicting excessive harm. States that lawfully resort to force, and fight within these constraints, conform to the law. States that unlawfully resort to force, and violate these constraints, compound their illegality. Going forward, we might dispense with the concept of military necessity altogether.

Of course, several important legal rules refer to military advantage, including, as we have seen, the proportionality rule. Relatedly, the feasibility or reasonableness of a precaution depends on all circumstances ruling at the

NOUVEAU RECUEIL (ser. 1) 474; Convention No. IV Respecting the Laws and Customs of War on Land pmbl., Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

98. General Orders No. 100, *supra* note 23, art. 67.

time, including humanitarian and military considerations.⁹⁹ These rules may seem to call for a balancing or weighing of values, both recognized by the law of armed conflict. They do not; indeed, they cannot. As we have seen, the law of inter-State force prohibits the pursuit of military advantage by aggressor States. Accordingly, the law of armed conflict—applying, as it must, to aggressors and defenders alike—cannot endorse the pursuit of military advantage as such. International law cannot place value and disvalue on the same thing at the same time.¹⁰⁰

The challenge, then, is to interpret ‘military advantage,’ ‘military considerations,’ and similar terms in ways that both aggressors and defenders can apply, but that leave entirely open whether an attack that harms civilians is endorsed by international law as a system or, alternatively, condemned by one branch of international law and merely tolerated by another. Such an interpretation must not prohibit all effective military action by defenders, even if this means tolerating effective military action by aggressors and leaving the condemnation of the latter to the law of inter-State force. I have sketched such an interpretation above and fill in some details elsewhere.¹⁰¹ What is important here is simply that we ask the right questions.

Where does all of this leave us? Will we reach different interpretive conclusions if we begin by balancing military necessity and humanity or, as I have suggested, by protecting civilians without precluding military action authorized by the law of inter-State force? It is hard to say. If nothing else, resolving this purposive indeterminacy may change *how* we disagree.

Protective interpretations of legal rules are sometimes described as attempts to “skew,” “tip,” “tilt,” or “shift” the balance between military necessity and humanity.¹⁰² Rather than simply say that an interpretation is more

99. See, e.g., COMMENTARY ON THE HPCR MANUAL, *supra* note 52, at 38.

100. For extended arguments along these lines, see HAQUE, *supra* note 14, at 30–35 and Adil Ahmad Haque, *Necessity and Proportionality in International Law*, in THE CAMBRIDGE HANDBOOK OF THE JUST WAR 255 (Larry May ed., 2018).

101. See HAQUE, *supra* note 14, ch. 8.

102. See, e.g., Schmitt, *The Interpretive Guidance*, *supra* note 2, at 6 (claiming that “on repeated occasions [the ICRC’s] interpretations skew the balance towards humanity”); Schmitt, *Military Necessity and Humanity*, *supra* note 2, at 829 (concluding “that NGOs and the UN Human Rights Commission tend to tilt the balance in the direction of humanity should come as no surprise”), 833 (noting that the ICRC’s *Interpretive Guidance* “accords disproportionate weight to the humanity prong of the balance”); see also Sean Watts, *Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions*, 95 INTERNATIONAL LAW STUDIES 1, 45 (2019) (“But more than an exercise in *a priori* humanitarian interpretation, the *Guidance* should be appreciated as an alteration in the balance between humanity and military necessity.”).

protective than States intended or would accept, the invocation of balance and principle implies that one legal value is illegitimately privileged and another wrongfully disrespected, when instead each legal value should be given equal weight. As we have seen, this image of balance is distorted. Military necessity is a fact, not a value; a reality, not a principle; and a constraint on the pursuit of the law's purpose, not a purpose of the law in itself.

Similarly, protective interpretations of the law of armed conflict are occasionally described as illegitimately curtailing the *authority* of combatants, which, presumably, means infringing their rights under international law.¹⁰³ On this view, legal interpretation quickly becomes a zero-sum game, pitting the legal protections of civilians against the legal prerogatives of combatants. We should reject this view. It is enough to say that some protective interpretation is incorrect on textual, purposive, or systemic grounds. We need not pretend that it is therefore unjust to combatants. Combatants have a difficult job, and if they say that some protective interpretation is unrealistic, then we should listen. But we need not dress up the realities of warfighting in the vestments of legal entitlements or pretend that every limitation of their freedom of action is a limitation of their legal rights. Perhaps, if we remove this source of heat, we will see more clearly in the remaining light.

V. GENERAL PROTECTION, LIMITED EXCEPTIONS

So far, we have examined ambiguity, vagueness, incompleteness, and inconsistency in the law of armed conflict in light of general rules of treaty interpretation and custom identification. Importantly, some international agreements contain special rules for their own interpretation.¹⁰⁴ As we have seen, “nothing in this Protocol [I] can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter

103. See, e.g., Corn, Blank, Jenks & Jensen, *supra* note 2, at 562 (endorsing “the core LOAC authority inherent in the principle of military necessity”), 569 (concluding that “the principle of military necessity authorizes the use of deadly combat power as a first resort against legitimate targets”), 624 (endorsing “the fundamental nature of attack authority derived from the principle of military necessity”).

104. The Statute of the International Criminal Court, for example, provides that “[t]he definition of a crime [in the Statute] shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.” Rome Statute of the International Criminal Court art. 22(2), July 17, 1998, 2187 U.N.T.S. 90. This provision precludes the usual method of simply selecting the best interpretation of ambiguous terms in light of context, object and purpose, other relevant rules, and so forth.

of the United Nations.”¹⁰⁵ Similarly, none of Protocol I’s fundamental guarantees “may be construed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law.”¹⁰⁶ These rules preclude various inferences that might be drawn regarding Protocol I’s relationship with, or effect on, other rules of international law. In addition, none of Protocol I’s precautions rules “may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.”¹⁰⁷ Such attacks, which occur despite taking all feasible precautions to avoid them, may be excused, but they are not justified. Taken together, these three rules affirm that the law of armed conflict does not authorize the conduct that it fails to prohibit, or which may be prohibited by other rules of international law, most notably the law of inter-State force and human rights law.

Other rules of the law of armed conflict do not state interpretive rules but invite the application of traditional interpretive canons. Interpretive canons may assist ordinary textual, purposive, and systemic interpretation or, in some cases, serve as supplementary means of interpretation when textual, purposive, and systemic analysis leave the meaning of a provision ambiguous or obscure.¹⁰⁸ Naturally, interpretive canons may never override clear text, purpose, or systemic coherence. Typically, these canons simply name or describe recurring patterns of textual, purposive, and systemic argument, providing a convenient shorthand for practitioners. However, at the margins, they may support resolving interpretive doubts one way or another. Among other things, States may be aware of the relevant canons and draft treaty language accordingly.

Consider the interpretive canon that general rules should be interpreted broadly, while exceptions and limitations should be interpreted narrowly.¹⁰⁹ This canon may simply alert us to features of the law of armed conflict that might otherwise escape our notice, in this case the existence of general protections with specific exceptions and limitations. This textual structure may, in turn, reflect the law’s object and purpose, namely to protect persons and

105. AP I, *supra* note 9, pmb1.

106. *Id.* art. 75(8).

107. *Id.* art. 57(5).

108. *See, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 220–21 (3d ed. 2013).

109. *See, e.g.*, Alexia Solomou, *Exceptions to a Rule Must Be Narrowly Construed*, in BETWEEN THE LINES OF THE VIENNA CONVENTION?: CANONS AND OTHER PRINCIPLES OF INTERPRETATION IN PUBLIC INTERNATIONAL LAW 359 (Joseph Klingler, Yuri Parhomenko & Constantinos Salonidis eds., 2018).

objects to the greatest extent practically possible. Finally, this canon may support resolving residual doubts regarding the scope of an exception or limitation in favor of the general rule, even when the balance of textual, purposive, and systemic considerations remains subject to good faith dispute.

Under both Protocols I and II, “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.”¹¹⁰ As the canon suggests, the text reveals a purpose to establish broad protection for civilians, subject to limitations and exceptions. Importantly, the specific rules that follow give effect to the general protection. Accordingly, the broad interpretation appropriate to the general protection is equally appropriate to the specific rules that give it effect. Narrow interpretation of the specific rules would defeat their purpose, which is to give effect to the general protection. Importantly, the specific rules jointly give effect to the general protection. As such, a narrow interpretation of a specific rule, even if plausible in other respects, should be rejected if it would create gaps between rules, thereby undermining the general protection that civilians shall enjoy.

Consider that Protocol I prohibits, as indiscriminate attacks, both attacks “which are not directed at a specific military objective” and attacks “which employ a method or means of combat which cannot be directed at a specific military objective.”¹¹¹ Narrow interpretation of the term ‘cannot’ would render these rules redundant, creating a gap where some distinct protection was clearly intended. After all, attacks which employ weapons or tactics which *cannot* be directed at a specific military objective are necessarily attacks which *are not* directed at a specific military objective. At the same time, attacks which use highly inaccurate or imprecise weapons may not have civilians as their object. The attacker may hope the weapon strikes a military objective, and simply not care that the weapon will very likely strike civilians. Such attacks may not violate the proportionality rule either. The proportionality rule applies to attacks that are expected to *both* cause civilian harm *and* obtain military advantage. In contrast, the use of a highly inaccurate or imprecise

110. AP I, *supra* note 9, art. 51(1); AP II, *supra* note 15, art. 13(1) (omitting the terms “which are additional to other applicable rules of international law” and presumably reflecting the view that there were no other applicable rules of international law regarding the conduct of hostilities in non-international armed conflict at the time of its adoption).

111. AP I, *supra* note 9, art. 51(4).

weapon may be expected to *either* cause civilian harm *or* obtain military advantage, depending on what it happens to strike. To avoid such an inexplicable gap in general protection, the term ‘cannot’ should be interpreted loosely, such that the rule prohibits attacks which employ a weapon “that lacks the precision to ensure a reasonable probability that the [lawful] targets under attack will be hit.”¹¹²

To be clear, general protection is not absolute protection. Protection may be forfeited by taking direct part in hostilities or overridden to obtain anticipated military advantage proportionate to expected civilian harm. Dangers arising from military operations can be minimized but not eliminated. Even if all feasible precautions are taken, civilians may find themselves mistakenly targeted or suffer incidental harm that appears avoidable or excessive—though only in hindsight. Finally, general protection from military operations presupposes that military operations will take place. Again, it is not the purpose of the law of armed conflict to make any and all effective military action legally impossible.

At the same time, consider the canon that exceptions should be narrowly construed. It is sometimes supposed that the law of armed conflict creates distinct categories of persons and objects, some enjoying general protection and others enjoying only limited and specific protections. This is not quite correct. The law of armed conflict does not positively define civilians—say, as members of the civilian population—and, separately, positively define non-civilians—say, as members of armed forces and armed groups. Instead, the law of armed conflict lays down a general rule with limited exceptions. Under Protocol I, “[a] civilian is *any* person who does *not* belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.”¹¹³ Similarly, “[c]ivilian objects are *all* objects which are *not* military objectives.”¹¹⁴ In other words, *every* person and object is civilian *unless* they fall within a carefully defined exception.

The rule-exception structure of these definitional provisions both illuminates and is illuminated by related substantive protections. Consider the rule that *civilians* shall not be the object of attack.¹¹⁵ In light of the definitional provision, the legal content of this rule is that *persons* shall not be the object

112. UNITED KINGDOM MINISTRY OF DEFENCE, JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.23.2 (2004).

113. AP I, *supra* note 9, art. 50(1) (emphasis added).

114. *Id.* art. 52(1) (emphasis added).

115. *Id.* art. 51; AP II, *supra* note 15, art. 13.

of attack *unless* they belong to one of the categories of non-civilians. Similarly, consider the rule that *civilian objects* shall not be the object of attack or of reprisals.¹¹⁶ In light of the definitional provision, the legal content of this rule is that *objects* shall not be the object of attack or of reprisals *unless* they are military objectives. Other rules governing the conduct of hostilities inherit this rule-exception structure, generally protecting all persons and objects from avoidable and excessive harm, subject to limited exceptions for non-civilians and military objectives.

Similarly, the law of armed conflict does not create distinct categories of civilians protected from attack, positively defined in terms of the civilian activities they perform, and civilians liable to attack, positively defined in terms of taking a direct part in hostilities. Here too, the law of armed conflict lays down a general rule with one limited exception: civilians shall not be the object of attack *unless* and for such time as they take a direct part in hostilities.¹¹⁷

In my view, we should narrowly interpret the exceptional categories of non-civilian persons and military objectives, as well as the exceptional activity of taking direct part in hostilities. Accordingly, we should presume that the substantive rules protecting persons and objects apply to all persons and objects unless they clearly fall within an exceptional category or clearly engage in an exceptional activity. We should adopt this approach, not because an interpretive canon tells us to, but because the relevant canon illuminates the text and reflects the purpose of the law. At the same time, if textual, purposive, and structural considerations fail to resolve good faith disagreement, then we may invoke the canon to resolve residual doubts in favor of a protective interpretation. States presumably knew of the relevant canon when they adopted the rule-and-exception language, so it is not unfair to resolve indeterminacies in their language in accordance with the canon.

This approach, of narrowly construing exceptional categories and activities resulting in lack of protection, also logically coheres with two provisions typically applied to situations of factual indeterminacy. First, “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”¹¹⁸ At a minimum, this provides that in case of *factual* doubt as to whether a person falls into an exceptional *legal* category of non-civilian, that person shall be considered to be a civilian. Second, “[i]n case of doubt whether an object which is normally dedicated to civilian purposes . . . is

116. AP I, *supra* note 9, art. 52(1).

117. *Id.* art. 51; AP II, *supra* note 15, art. 13.

118. AP I, *supra* note 9, art. 50(1).

being used to make an effective contribution to military action, it shall be presumed not to be so used.”¹¹⁹ At a minimum, in case of *factual* doubt whether the current use of such an object places it into the exceptional *legal* category of military objective, it shall be presumed not to be so used.

In my view, purposive interpretation of the law of armed conflict requires a consistent approach to factual doubts and to legal doubts. Accordingly, in case of legal doubt whether a person or object falls into an exceptional legal category, such as combatant or military objective, that person or object should be equally considered or presumed to be civilian. Consider the following pairs of cases:

- (a) There is *factual doubt* that a person performs service or support functions for an armed group. There is *legal doubt* that a person performing service or support functions for an armed group is a non-civilian or takes direct part in hostilities.

- (b) There is *factual doubt* that an oil refinery is used to generate revenue to pay fighters. There is *legal doubt* that an oil refinery used to generate revenue to pay fighters is a military objective.

There is no reason to treat such factual doubts differently than their corresponding legal doubts. In blunt terms, a civilian killed due to a mistake of law and a civilian killed due to a mistake of fact are just as dead. The same is true of civilian objects mistakenly destroyed. The purpose of the law is defeated in equal measure in either case. The point of the law is to avoid attacks on persons and objects that are, in fact and in law, civilians. That point is lost if doubts about whether a person or object is *in fact* civilian preclude lawful attack, while doubts about whether a person or object is *in law* civilian do not. That point stands if, as I have suggested, we resolve legal doubts about the exceptional categories of non-civilians and military objectives, as well as the exceptional activity of taking direct part in hostilities, by construing these exceptions narrowly, in favor of the general rule that all persons and objects enjoy general protection under the law of armed conflict.

The general protection that civilians enjoy under international law should put to rest an alternative vision of the law of armed conflict and its interpretation. On this view, States are presumptively legally free to act, in armed

119. *Id.* art. 52(3).

conflict as elsewhere, unless a restrictive rule of international law demonstrably exists and clearly applies. Each specific restriction should be examined in relative isolation, as it reflects a discrete exercise of sovereign will, and any doubts as to its existence or content should be resolved in favor of State freedom. This view is often associated with the so-called “*Lotus* principle” regarding customary international law and with the restrictive interpretation of treaties.¹²⁰

Even on its own terms, the view that States enjoy a “presumption of freedom” with respect to armed conflict faces rather severe problems. The only “freedom principle” announced in the *Lotus* case concerned the presumptive freedom of States to exercise criminal jurisdiction *in their own courts and on their own territory*. In contrast, “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”¹²¹ Needless to say, this first and foremost restriction is now enshrined in the UN Charter, along with two limited exceptions.¹²² States enjoy no presumption of freedom to resort to armed force or to conduct hostilities against another State. Quite the contrary. Accordingly, no presumption in favor of the permissive interpretation of the law of inter-State force or the law of international armed conflict can rest on these unstable grounds.

Similarly, States enjoy no presumption of freedom to resort to lethal force on their own territory. Permissive interpretations of the law of non-international armed conflict cannot restore a default rule of State freedom

120. See, e.g., Michael J. Glennon, *The Road Ahead: Gaps, Leaks and Drips*, 89 INTERNATIONAL LAW STUDIES 362, 373 (2013)

[A]cknowledging ambiguity doesn’t open the door to a law-free zone, because international law applies a default rule in such circumstances. Its default rule is the famous freedom principle, from the *Lotus* case. The principle has it that in the absence of a rule a State is deemed free to act, and that a burden of persuasion falls upon the State that alleges some limitation or restriction on another State’s freedom of action.

Sean Watts, *Remarks by Lt. Col. Sean Watts*, 111 PROCEEDINGS OF THE ASIL ANNUAL MEETING 59, 62 (2017)

A competing baseline, of course, is that there is no law. In the absence of significant state practice and especially lacking clear expressions of *opinio juris*, one might conclude either that a *Lotus*-inspired rule of permissiveness operates or that there is simply no rule of conduct with respect to sovereignty in cyberspace at all.

121. S.S. *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

122. U.N. Charter art. 42 (invoking Security Council authorization), art. 51 (exercising “the inherent right of individual or collective self-defence”).

because no such rule exists. On the contrary, the first and foremost restriction imposed by international law upon a State is that—unless strictly required by the exigencies of the situation—it may not deprive any person within its jurisdiction of their life.¹²³

On one view, human rights law and the law of armed conflict apply simultaneously and in parallel. On this view, an interpretation of the law of armed conflict that permits deprivation of life to an extent not strictly required would be futile, since human rights law would prohibit what this interpretation permits. On a different view, the general law of human rights is modified by the special law of armed conflict, but only insofar as the latter is specially designed with the exigencies of armed conflict in mind. On this view, an interpretation of the law of armed conflict that permits deprivation of life to an extent not strictly required would be self-defeating, since it would undercut the rationale for modifying the general law to converge with the special law.¹²⁴

What about the supposed principle of restrictive interpretation, according to which treaty obligations should be narrowly construed and doubts resolved in favor of State sovereignty? Some scholars trace the principle of restrictive interpretation to Roman law principles of benign or humane interpretation, including resolving doubts in favor of individuals against the State.¹²⁵ Yet, in its modern form, the principle of restrictive interpretation would result in less benign and humane interpretation of the law of armed conflict, resolving doubts in favor of States against individuals. Others trace its origins to the Roman law principle that doubts regarding contractual terms should be resolved against the party who drafted the terms and in favor of the party who undertook the obligation, a principle that seems inapplicable to closely-negotiated multilateral treaties.¹²⁶ Moreover, as we have

123. See ECHR, *supra* note 12 art. 2. Cf. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

124. See ILC Fifty-Eighth Session Report, *supra* note 83, at 409 (“That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law.”).

125. See Panos Merkouris, In Dubio Mitius, in BETWEEN THE LINES OF THE VIENNA CONVENTION?: CANONS AND OTHER PRINCIPLES OF INTERPRETATION IN PUBLIC INTERNATIONAL LAW, *supra* note 109, at 259 (tracing *in dubio mitius* to *in dubiis benigniora*, *humanior interpretation*, and *in dubio pro reo*).

126. See Michael Waibel, *The Origins of Interpretive Canons in Domestic Legal Systems*, in BETWEEN THE LINES OF THE VIENNA CONVENTION?, *id.* at 25, 45 (tracing *in dubio mitius* to

seen, “[t]he purpose of the humanitarian rules which comprise the bulk of *ius in bello* is not to confer benefits upon the parties to a conflict but to protect individuals and to give expression to concepts of international public policy.”¹²⁷

Needless to say, all treaties manifest an intention of the parties to limit their own sovereignty, accepting certain burdens in return for expected benefits or in service of higher values. So restrictive interpretation of treaties always carries the risk of depriving a State of the benefit of its bargain, or otherwise defeating the intention of the parties. At the same time, restrictive interpretation of the law of armed conflict would not necessarily enhance State sovereignty. Since the law of armed conflict applies equally to all parties, its restrictive interpretation would narrow the obligations of aggressor States violating sovereignty, as well as victim States defending sovereignty, organized armed groups fighting to usurp sovereignty, and State armed forces fighting to preserve sovereignty.

In any event, whatever presumption of freedom States might have enjoyed before declaring that civilians shall enjoy general protection they have given up. In the conduct of hostilities, the presumption is not State freedom, but individual protection. Specific rules do not reflect discrete exercises of sovereign will, but instead reflect States willing the integrated means jointly necessary to achieve their broad end. We should not interpret specific rules in isolation, since only by observing all of them can we hope to give effect to the general protection that civilians shall enjoy. Nor should we restrictively interpret specific rules if doing so would create inexplicable gaps in general protection.

VI. CONCLUSION

Some years ago, another author wrote in these pages that “[c]ompared to domestic legal regimes, international law generally and even its legal sibling the *jus ad bellum*, the law governing the conduct of hostilities lacks a deliberate and well-defended interpretive theory.”¹²⁸ In this article, I have not offered

contra proferentem and *favor debitoris* and concluding that “[i]n *dubio mitius*, therefore, is an example of a canon in which the original domestic canon is not well suited to the needs of modern treaty interpretation”).

127. Christopher Greenwood, *The Relationship between ius ad bellum and ius in bello*, 9 REVIEW OF INTERNATIONAL STUDIES 221, 227 (1983).

128. Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, 88 INTERNATIONAL LAW STUDIES 145, 165 (2012).

such an interpretive theory. On the contrary, I have suggested that the law governing the conduct of hostilities cannot have an interpretive theory all its own but must share one with general international law, the law of inter-State force, and human rights law.

Instead, I have argued that textual, purposive, and systemic interpretation is both necessary and appropriate, here as elsewhere. I distinguished between distinct interpretive challenges—ambiguity, vagueness, incompleteness, and inconsistency—and illustrated how text, purpose, and other relevant rules of international law may help us overcome them. I showed that the prevailing view of customary international law raises serious concerns—both principled and practical—when applied to the law of armed conflict, and I sketched some alternatives. I argued that the purpose of the law of armed conflict is simply to protect, that it places no value on military necessity as such, and that limits to its protections reflect its relationship with other rules of international law, including the law of inter-State force. I explored the interpretive consequences of the general protection that civilians shall enjoy under the law of armed conflict. These include broad and integrated interpretation of specific protections that give effect to that general protection as well as narrow interpretation of limitations and exceptions. That is, I hope, enough for now.