Human Dignity in Combat: The Duty to Spare Enemy Civilians

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Abstract

An army attacks a neighborhood where the enemy is hiding among civilians. To what extent is the army required to expose its combatants to life-threatening risks in order to spare enemy civilians? This Article seeks to interpret the pertinent standards and rules of international law from the perspective of the principle of human dignity. The human dignity principle informs the interpretation of the law on the conduct of hostilities and provides a built-in mechanism for improving armies’ treatment of enemy civilians. It inspires additional remedial and institutional norms that could overcome armies’ distrust of each other during the height of battle. The principle of human dignity recognizes a general duty to strive to reduce harm to enemy civilians as well as specific rules against using them as human shields, hostages, or objects for retaliation. This Article concludes that in general there is no requirement to risk combatants to reduce the risk to enemy civilians, although a number of the specific rules do entail the assumption of such risks.
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I. Introduction

Professor Claude Klein, to whom this issue of the Israel Law Review is dedicated, has recently written on the principle of Raison d'Etat. This principle provided governments an excuse to limit individual rights and even to deviate from the law to avert national catastrophes. The regulation of international armed conflicts is especially prone to articulated or unarticulated invocations of this principle. Yet, as Klein emphasizes, recourse to this principle must be circumscribed and subjected to legal restraints. This is true in particular to questions relating to the interpretation and application of the laws of war, a body of laws that strives to balance between humanity and military necessity.

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2 The International Court of Justice [hereinafter the ICJ] may have hinted at that doctrine in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,
An army attacks a neighborhood where the enemy is hiding among civilians. According to international law, it must not attack “indiscriminately,” a term that includes “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” But what is the meaning of “excessive” damage? More concretely, is the army required to expose its combatants to life-threatening risks in order to spare enemy civilians? And finally, how should the law constrain commanders and combatants to ensure that they act in accordance with these duties? These are the questions explored in this Article.

I approach these questions not from a doctrinal perspective that elaborates on the evolving interpretations and applications of the laws on the conduct of hostilities, but from a moral perspective whose starting point is the universal right to life and the obligation to protect this right. This approach requires explanation. The evolving claims about the law on the conduct of hostilities betray an apparent cleavage between two visions of the law. The first vision, espoused by governments and armies and expressed in military manuals and as reactions to international legal instruments, views the laws of war primarily as a compact between rival armies to coordinate how they can “conciliate the necessities of war with the laws of humanity.” The second vision, reflected in recent decisions of international tribunals and in articulations of humanitarian organizations, reads the law as a manifest of humanitarian fraternity, and their role as its promoters. Whereas the former emphasizes reciprocity as underlying the law and informing its application, the latter highlights the overriding and

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3 “Civilians” is used here to refer to non-combatants who do not take direct part in hostilities: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [hereinafter Additional Protocol I] provides in Article 51(3): “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.” See also Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 19 (2005) (“Rule no. 6: Civilians are protected against attack unless and for such time as they take direct part in hostilities.”) I do not discuss the difficult question as to what amounts to taking direct part (see Henckaerts & Doswald-Beck, id. at 23-24).

4 1996 I.C.J. The ICJ declared that it could not “reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.” Id. at para. 97.

5 In the words of the preamble of the 1868 St. Petersburg Declaration.

6 According to the ICJ, it is “the overriding consideration of humanity” which is “at the heart of” the principles and rules of law applicable in armed conflict (Legality of the Threat or Use of Nuclear Weapons, supra note 2, at para. 95).
unconditional humanitarian obligation toward civilians regardless of their nationality. This internal tension within the *jus in bello* is captured by its two contemporary appellations: the more inspirational and prevalent “International Humanitarian Law” and the more neutral “Law on International/Non-International Armed Conflict.” This tension is not necessarily negative. To the contrary, it provides an internal ratcheting mechanism that constantly prods actors away from the harsh reciprocal realities toward humanitarian ideals. But when faced with stark questions such as the legitimacy of reprisals, or the questions this Article seeks to address, the tension between the two visions is revealed. Sometimes, however, this tension is more apparent than real, and the two visions actually converge to support a similar response. Therefore, in order to explore this tension context of the obligation to strive to prevent excessive harm to enemy civilians, it is necessary to start by examining the moral basis for this obligation.

I start with the premise that permeates human rights law: Every human being has the inherent right to life. Thus, civilians (“non-combatants” in the legal jargon) have a right to life, regardless of their nationality. This is one pole of the inherent tension of the *jus in bello*, a pole that projects an ideal vision for the law. Note that by doing so I do not suggest that human rights law applies or should apply directly to situations of international armed conflicts. This question is beyond the scope of this Article.

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7 See Yoram Dinstein The Conduct of Hostilities Under the Law of International Armed Conflict 13-14 (2004) (“[T]he coinage IHL is liable to create the false impression that all the rules that govern hostilities are—and have to be—truly humanitarian in nature, whereas in fact not a few of them reflect the countervailing constraints of military necessity.”)


After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings. Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the “categorical imperative” formulated by Kant in the field of morals: one ought to fulfil [sic] an obligation regardless of whether others comply with it or disregard it. *Id.* at para. 518


10 Also beyond the scope of this Article is the analysis of the same questions as they arise in domestic...
do I discuss the applicability of human rights law to the occupation of territories in the aftermath of hostilities. Rather, I wish to ask whether the principles that inspire the law on human rights have or should have any bearing on the interpretation and application of the law on the conduct of hostilities between enemies. The inspiration may come not only from international human rights law: Several national constitutions, most prominently the German Basic Law, demand unconditional adherence to human dignity. To what extent does the inherent right to life of every individual entail an obligation on an attacking enemy to protect that right including by risking its own soldiers’ lives? Put differently, and more concretely, is there any difference between the nature (not the legal source) of the obligations imposed on, say, the Russian forces operating in their “non-international armed conflict” in Chechnya (and thus subject to human rights law, in addition to the specific norms on non-international armed conflicts, where all civilians are also citizens, and where two different sets of norms—human rights law and the international law on non-international armed conflicts—govern."


12 The same question arises from the formula adopted by the International Court of Justice that views the laws of armed conflict as the lex specialis of human rights law (see Legality of the Threat or Use of Nuclear Weapons, supra note 2, paras. 24-25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, id. at paras. 104-106). This formula suggests that the law on the conduct of hostilities is in fact an act of renvoi for the purpose of interpreting the meaning of the term “arbitrarily” in Article 6(1) of the 1966 International Covenant on Civil and Political Rights (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” ) If this is a question of renvoi, the reference from the ICCPR to the laws of war cannot undermine the basic assumptions of human rights law, namely, the commitment to the universal principle of human dignity.

13 The German Basic Law, Article 1(1) (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”) On its applicability of the human dignity principle to warfare situations see note 18 infra. See also the Israeli Basic Law: Human Dignity and Liberty (Article 2: “There shall be no violation of the life, body, or dignity of any person as such,” Article 4: “All persons are entitled to protection of their life, body and dignity.”)
conflicts) and the NATO forces operating in an “international armed conflict” against Serbia?

Section II discusses the implications of endorsing a particular vision of human rights, one that is based on the principle of human dignity, as informing the jus in bello. It elaborates on the right to life and the corresponding duty to respect and ensure it, focusing on the duty holders in situations of international armed conflicts and the scope of their duties. This discussion is then used in Section III to evaluate the current range of norms—standards and rules—on the conduct of hostilities and to offer suggestions on their proper interpretation so that the law reflects the moral duties bearing on armies engaged in hostilities. Section IV concludes.

II. The Duty to Respect and the Duty to Ensure Enemy Civilians’ Lives: The View from Human Dignity

A. The Right to Life: Individuality and Universality

“Everyone has the right to life, liberty, and security of person,” states the Universal Declaration of Human Rights. This provision, and indeed the entire edifice of international human rights law is founded on the principle of human dignity. The most ambitious version of the notion of human dignity derives from Kant’s categorical imperative, which forbids treating human beings as mere instruments to secure the well being of others. This powerful version also informs national constitutions.

15 Who are not constrained by the European Convention on Human Rights according to the Bankovic decision, supra note 9.
16 The Preamble of the Declaration begins as follows: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” The preamble of the 1966 Covenant on Civil and Political Rights adds following that declaration that “these rights derive from the inherent dignity of the human person.”
17 “Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means;” Immanuel Kant, Grounding for the Metaphysics of Morals (James Ellington trans.) in ETHICAL PHILOSOPHY 36 (1993).
18 See supra note 13. The recent expression of this notion is the 2006 German Constitutional Court Decision concerning the so-called Aviation Security Act which authorized the German armed forces to shoot down hijacked planes turned into weapons against human lives. The Court found this Act unconstitutional, inter alia for infringing on the right of the hijacked passengers...
It can certainly offer a clear benchmark for the international law on human rights and for the law on the conduct of hostilities. The principle of human dignity is not inconsistent with the conduct of hostilities, for hostilities may well be justified when they are necessary to secure rights against those aiming to destroy them.\(^{19}\)

The principle of human dignity, emphasizing humans as rational actors, implies two principles that are important for our inquiry: the principle of individuality, which rejects collective responsibility and states that individuals are responsible only for their own actions,\(^ {20}\) and the principle of universality, which commands equal respect for all individuals regardless of group affiliation.

The individuality principle implies that individuals are responsible only for their own actions, not those of their government, nor those of their army. Civilians not directly involved with the military effort must not bear the consequences of their association with combatants, regardless of whether the combatants are members of their families or fellow nationals. The notion of individuality immunizes those who do not take part in hostilities and thus pose no danger to the army. This immunity extends not only to civilians but also to combatants who are hors de combat—the sick, wounded, or those who have laid down their weapons.\(^ {21}\) This principle is recognized in the law on the conduct of hostilities. It forms the basis for the principle to human dignity. According to the Court, the state authorities, when acting under that law, would treat the passengers as mere objects for saving others ("behandelt sie als bloße Objekte seiner Rettungsaktion zum Schutze anderer."), Bundesverfassungsgericht, Aviation Security Act, 1 BvR 357/05, 15 February, 2006, para. 124 \(\text{available at} \) http://www.bundesverfassungsgericht.de/entscheidungen/frames/rs20060215_1bvr035705 (last visited May 9, 2006).


21 This principle related also to combatants was first emphasized by Jean-Jacques Rousseau, who said: "La guerre n’est donc point une relation d’homme à homme, mais une relation d’Etat à Etat, dans laquelle les particuliers ne sont ennemis qu’accidentellement, non point comme hommes ni même comme citoyens, mais non point comme soldats, non point comme membres de la patrie, mais comme ses défenseurs." (Jean-Jacques Rousseau, \textit{Du Contrat Social}, Book I.4 (1762)). The derivative "Rousseau-Portalis Doctrine," which stipulates that "war is directed against sovereigns and armies, not against subjects and civilians," is deemed implicit in the Hague Regulations of 1899 and 1907, the first conventions on the laws of war: Raphael Lemkin, \textit{Axis Rule in Occupied Europe: Laws of Occupation—Analysis of Government—Proposals for Redress} 79 (1944).
of distinction,\textsuperscript{22} the law’s requirement to target only combatants, those who pose a risk, and only for the purpose of averting the risk. The law does not condone killing per se, not even the killing of enemy combatants. The legitimate aim of combat is not to kill one’s individual enemies, but to \textit{weaken} the enemy.\textsuperscript{23}

The universality principle implies that all civilians, regardless of nationality or any other group affiliation, are endowed with the same rights, primarily an equal right to life. The principle of universality suggests that the right to life of enemy civilians is entitled to the same protection granted to that of our own civilians, that all civilians be shown the same concern during combat, regardless of their national affiliation. This principle is \textit{not} explicitly recognized in the law on the conduct of hostilities, and this lack of explicit recognition is the focus of the current inquiry. We must then ask, what is the reason for this omission, and whether the reason is morally justified? This leads us to inquire about agency.

\textbf{B. The Duty to Respect and Ensure}

As mentioned above, the universality principle implies that all civilians, regardless of nationality or any other group affiliation, are endowed with the same rights, primarily their equal right to life. But the relevant question for our discussion is who are the bearers of the \textit{duties} to respect and ensure this right, and more concretely, whether the civilian’s equal right to life is translated to an obligation on the attacking army to respect the lives of enemy civilians as much as they are expected to respect the lives of their own civilians.

The question of identifying the bearers of these duties is part of a more general question of agency in a world composed of nation states. Not accidentally, the Universal Declaration on Human Rights speaks in terms of human entitlements but leaves open the question of agency—namely, the identity of those who carry the obligation to respect and to ensure these rights. Subsequent human rights treaties define agency by assigning the obligation to respect and to ensure on states with respect only to

\textsuperscript{22} Additional Protocol I, Article 51(2) (“The civilian population as such, as well as individual civilians, shall not be the object of attack.”)

\textsuperscript{23} In the famous (though unrepeated) words of the 1868 St. Petersburg Declaration: “The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; […] for this purpose it is sufficient to disable the greatest possible number of men.” Note that the law also prohibits causing unnecessary suffering or superfluous injuries to enemy combatants.
individuals “within their jurisdiction,” a term that was interpreted to extend to all areas of direct “effective control” of individuals, but not beyond that. Philosophers also debate the extent to which communities have obligations to respect and ensure the right to life and other rights of non-citizens in foreign countries. Did the Allies have a duty to fight the Germans to save the Jews and others from extermination? Do the rich northern states have an obligation to allocate sufficient resources to save lives in the poorer southern states and ensure adequate living conditions?

Our inquiry focuses on the question of agency during international warfare. During warfare combatants often can directly affect the lives of foreign civilians even before establishing exclusive control over the area they inhabit. This direct power calls for recognizing duties towards those civilians. This duty should reflect the nature and scope of the power the attacking army has over the attacked population. The attacker’s power does not amount to an ability to control the lives of that population fully. The defending government is still in control, and in fact forcefully resists the attacker’s effort to gain exclusivity. Lacking such exclusive control, there is no basis to impose on the attacking army an obligation to ensure enemy civilians’ lives (protecting them, for example, from internal ethnic conflicts). Their army, which is still in control, has the duty to ensure their rights. Instead, before and during military attacks the attacker has lesser duties compared with the duties it will have once it occupies the enemy’s territory or otherwise assume exclusive control over enemy civilians. Before and during the attack, the attacking army owes a duty to respect enemy civilians’ lives. In contrast, the same army will assume the duty to ensure the rights of enemy civilians when they become subject to its effective control as prisoners of war, or “protected persons” in occupied territories.

See the sources cited in notes 11-12 supra. This principle reflects a philosophy that regards the concept of sovereignty as allocating the global burden of protecting individuals. As Max Huber wrote in the famous Island of Palmas (or Miangas), Arbitral Award (April 4, 1928, rep. in 22 Am. J. Int’l L. 867, 876 (1928)), the principle of territorial sovereignty “serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.”

Unless we recognize a universal duty to protect all individuals. See in this context Walzer, who does not distinguish among different groups of civilians: “the structure of rights stands independently of political allegiance; it establishes obligations that are owed, so to speak, to humanity itself and to particular human beings and merely to one’s fellow citizens.” (MICHAEL WALZER, JUST AND UNJUST WARS, 158 (1977)). My argument is that the structure of rights imposes obligations toward all civilians, but the scope of these obligations may vary.

See the sources cited in notes 11-12 supra, and in particular the ICJ decision in the Case Concerning Armed Activities on the Territory of The Congo, supra note 11, in which the court emphasizes the occupying power’s duties “to protect,” “to prevent,” and “to ensure respect” to the rights of
This duty to respect includes, besides the obvious and unconditional duty not to target enemy civilians, also the duty to refrain as much as possible from harming enemy civilians. The duty to respect is not only a negative duty. It is a positive duty in the sense that it requires armies to take precautions to reduce harms, and to use more discriminating weapons even if they are more expensive or take longer to take effect. The crucial question, however, is the extent to which the duty to refrain from harming enemy civilians requires armies to risk their own combatants’ lives in order to protect enemy civilians.

When armies attack they face two conflicting obligations. The first is the obligation to ensure the rights of their own nationals, and the second is the obligation to respect enemy nationals by not targeting them and by striving to reduce the harms the army inflicts on them. The juxtaposition of these two obligations suggests that each of the armies has a dominant goal, even a duty, to protect its civilians, their rights and interests in the pursuit of the war efforts. This dominant goal is beyond reproach. The laws of war do not question the legitimacy of pursuing the battle once started; they apply to aggressors and defenders alike, otherwise the effort to regulate the conduct of hostilities would collapse. Hence, the duty to respect enemy civilians must be subjected to ensuring the dominant goal of overcoming the enemy.

Conducting military operations in the legitimate pursuit of victory while subjecting enemy civilians to as little harm as possible would require the taking of protected persons ( paras. 208-211). “Protected persons” are defined by Article 4 of the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 [hereinafter the IV Geneva Convention].

27 On the question of reprisals, namely, whether targeting civilians is a legitimate reaction to law violations by the enemy see infra notes 84-88 and accompanying text.

28 This formulation of the duty (rather than a duty to protect enemy civilians) is based on the idea that the state and its agents have no duty to actively protect enemy civilians. This distinction facilitates the acceptance of Thomas Nagel’s absolutist position. According to Nagel “what absolutism forbids is doing certain things to people, rather than bringing about certain results.” Thomas Nagel, War and Massacre, in WAR AND MORAL RESPONSIBILITY 3, 10 (Marshall Cohen, Thomas Nagel, & Thomas Scanlon eds., 1974).

29 Provided that using these weapons does not compromise the ability to win the battle; see the discussion in Section III infra.

30 Can this goal justify extensive losses to enemy civilians? The ICRC commentary to the Additional Protocols suggests that Additional Protocol I “does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 1580 (Y. Sandoz, C. Swiniarski, & B. Zimmerman eds., 1987). In its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons (supra note 2, at para. 97), the ICJ declared that is could not “reach a definitive conclusion as to the legality or illegality
many precautions to reduce harm, but it would not require the risking of combatants. Two considerations support this claim. The security of the attacking forces may be viewed as part of the military goals of the attacking army. In addition, emphasis must be placed on the army’s obligation towards its combatants. Imposing risks on combatants is justified to the extent that the risk is necessary to secure their individual interests and their interests as citizens. Imposing risks on them to protect enemy civilians means using them as mere tools for the benefit of others. This does not preclude the moral duty of combatants to consider taking some risks to reduce the harm to enemy civilians, but not a duty to actually risk themselves.

Note that the attenuated duties that armies have toward enemy civilians is predicated on their limited and non-exclusive power over enemy territory. Once put under their exclusive authority, such as during occupation, the duty to ensure arises. In such situations, the principle of human dignity arguably obliges the occupying army to treat enemy nationals under its control as ends and not merely as means. The exclusivity of control also bolsters the specific prohibitions concerning hostage taking or denying quarters to prisoners of war. Needless to say, by adhering to these rules the army is exposing its combatants to risks.

of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.”

31 Thus, for example, Australia, Canada and New Zealand have stated that the term “military advantage” includes the security of the attacking forces: Henckaerts & Doswald-Beck, supra note 3, at 50.

32 According to Kant, imposing risks on combatants is based on their voluntary submission motivated by their wish to secure themselves and their country from external attacks. See Orend, supra note 19, at 360.

33 Walzer, supra note 25, at 151 (“soldiers are supposed to accept (some) risks in order to save [enemy] civilian lives”). See also id. at 155.

34 The obligation to “ensure” public order and civil life is recognized in Article 43 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land, annex to the Hague Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

35 On these rules see supra notes 88-95 and accompanying text. The positive duties on the occupant are even more pronounced under the IV Geneva Convention, supra note 26. See Benvenisti, Occupation, supra note 11, at 104-106.
III. The Attacker’s Duties as Reflected in the Laws of War

Having outlined the armies’ duties toward enemy civilians during hostilities under the principle of human dignity, it is now time to examine to what extent this principle resonates in positive law. When analyzing the translation into law of the moral duty to reduce harm to enemy civilians, additional normative and institutional considerations must be taken into account. From an institutional perspective, the armies’ attenuated duty toward enemy civilians must be closely regulated. These armies are not impartial to the possibilities of externalizing risks unto civilians. For this reason, international law attempts to constrain commanders’ and combatants’ actions through rules and standards on the excessive use of force. The law offers a sophisticated range of norms leading to different outcomes in terms of allocating discretion to various actors concerning the proper action to be taken and the consequences of breaching the law. The present inquiry seeks to outline (without attempting to offer a comprehensive account) the different types of norms that have been developed to address the diverse moral, legal, and institutional concerns. The more general norm provides a broad standard that seeks to capture and reiterate the moral duty explored above, requiring combatants to distinguish between combatants and non-combatants and refrain from exposing enemy civilians to “excessive harm.” But such a standard is open-ended, since it leads to more questions concerning both the suitable action in specific cases and the identity of the person or the institution responsible for making the decision (whether, for example, it is the commander at the time of action or a court).36 This general, inspirational standard is clarified and complemented by four different types


The questions which remain unresolved once one decides to apply the principle of proportionality include the following: a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects? b) What do you include or exclude in totaling your sums? c) What is the standard of measurement in time or space? and d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

The Report offers the following answer:

It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of
of norms. The first type consists of remedial norms addressing the consequences of breaching the standard. These norms are designed to assign criminal responsibility, or a duty to compensate for damages suffered as a consequence of an attack. The second type includes institutional norms, focusing on necessary procedural guarantees designed to build the army’s capacity to implement the general norm. The third is a list of absolute rules prohibiting specific measures, such as taking hostages or carrying out reprisals against enemy civilians. The fourth and final type of norms admits an exception to the prohibition under extreme conditions of self-defense.

A. The Standard: Preventing “Excessive Harm” to Enemy Civilians

The general, inspirational norm of international armed conflict prohibits the targeting of civilians.\textsuperscript{37} In addition, it stipulates that combatants must not engage in “indiscriminate attack” and must try to avoid “excessive harm” to enemy civilians. The law defines “indiscriminate attack” as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”\textsuperscript{38} “An attack shall be cancelled or suspended if it becomes apparent …that the attack may be expected to cause incidental loss of civilian life … which would be excessive in relation to the concrete and direct military advantage anticipated.”\textsuperscript{39}

The sweeping prohibition on causing “excessive” incidental loss to civilians raises many questions concerning its translation into concrete rules.\textsuperscript{40} Like other similar applications of the proportionality test, the obligation to prevent excessive harm to civilians involves factors that must be weighed ad-hoc: the necessity of the attack (is it instrumental to the aims of the combat? Is it indispensable to the overall war effort?) and its proportionality (how to measure human losses versus military gains? Given the expected and unavoidable toll on civilians, to what extent will the pursuit of the

\textsuperscript{37} Additional Protocol I, \textit{supra} note 3, requires distinction between combatants and non-combatants (Article 48). This distinction requires that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack,” (Article 51(2)) and that “indiscriminate attacks are prohibited.” (Article 51(4)).

\textsuperscript{38} \textit{Id.} at Article 51(5)(b).

\textsuperscript{39} \textit{Id.} at Article 57(2)(b).

\textsuperscript{40} For a recent discussion of this question see Dale Stephens & Michael W. Lewis, \textit{The Law of Armed Combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the “reasonable military commander.” (\textit{id.} at para. 50).
combat itself become unlawful?). But existing norms do not hint at the question explored here, namely, whether combatants should expose themselves (or be ordered to do so by their commander) to greater risks in order to reduce civilian enemy losses. The open-ended standard of preventing “excessive harm” to enemy civilians leaves room for different possibilities. In light of the discussion in Section II, I suggest that the proper interpretation of the general legal norm calls for a duty to reduce harm to enemy civilians that does not entail an obligation to assume personal life-threatening risks.

Armies obviously embrace this conclusion but they seek to narrow it even further. As might be expected, armies are more concerned with their own security than with moral precepts. Determined to win the war, they accept restrictions on their conduct not necessarily because they subscribe to the principle of human dignity. They view the laws of war as an attempt to coordinate the level of violence, thereby reducing unnecessary suffering to combatants and non-combatants. In the words of the 1899 Hague Regulations, armies wish to “diminish the evils of war so far as military necessities permit.” Armies, therefore, tend to accept only reciprocal obligations that do not give advantages to the other side, since agreeing to rules that the other side is not likely to comply with would make little sense. For their part, armies realize that the obligation to minimize excessive incidental loss to civilians is extremely difficult to implement, and a calm analysis of potential gains and costs for every possible military maneuver is quite inconceivable in the midst of battle. Even more important, verifying the other side’s compliance with the same obligation is almost impossible and, due to lack of trust, errors committed by the enemy in attacking military positions are viewed as premeditated attacks on civilians.

For many armies it is difficult to subscribe to the human dignity principle because they indoctrinate their combatants on an opposite perception, one that dehumanizes the enemy. They coach their soldiers to fear and hate the enemy out of their belief that


41 Other questions include the legal consequences of causing excessive harm and institutional questions such as the proper arbiter of the ad-hoc analysis: the military commander at the time of planning the attack, or a disengaged judge, and, if the latter, what information would be relevant: the information the commander had (or was reasonably expected to have) before the strike or in retrospect.

42 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, Preamble: “In view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war so far as military necessities permit, are destined to serve as general rules
portraying adversaries as evil and malicious creates feelings that make killing easier.\textsuperscript{43} This approach seeks to prevent the recurrence of the behavior of Allied soldiers during the two World Wars, most of whom balked at firing at the enemy even when attacked.\textsuperscript{44} American troops in Vietnam acted differently, suggesting that new training methods fostering aggressive behavior have been effective\textsuperscript{45} and leading psychologists to conclude that soldiers who dehumanize the enemy fight better.\textsuperscript{46} Commanders and soldiers who are goaded to view their enemy as subhuman will find it enormously difficult to risk their lives to save those they had been told are unworthy creatures. And, of course, they believe that their—subhuman—opponent is equally motivated to kill them and their civilians.

Additionally, regular armies fighting irregular guerrilla forces that operate from densely populated areas\textsuperscript{47} often view the ambiguous norm prohibiting “excessive” civilian losses as non-neutral. This norm, which shifts the responsibility for civilian losses to the attacker, is exploited by irregular forces\textsuperscript{48} (insofar as they are not deterred by international law, which views this illegal practice as a war crime\textsuperscript{49}.) These difficulties suggest that armies, in particular armies that have airborne and long-range artillery of conduct for belligerents in their relations with each other and with populations.”


\textsuperscript{44} Joanna Bourke, \textit{An Intimate History of Killing: Face-to-Face Killing in Twentieth-Century Warfare} 61-62 (1999).


\textsuperscript{46} Neta Bar & Eyal Ben-Ari, \textit{Israeli Snipers in the Al-Aqsa Intifada: Killing, Humanity and Lived Experience}, 26(1) Third World Q. 133 (2005) challenge this conventional wisdom, based on interviews with snipers in the Israeli army. They suggest that additional factors that motivate soldiers are “rules of legitimate violence, [and] the culturally specific ideology of violence at work in specific cases. This kind of ideology may ‘humanize’ enemies but still classify them as opponents against which violence may be legitimately used.” (id. at 133, see also 149-151.)

\textsuperscript{47} W. Hays Parks gives several examples involving the Viet Cong during the Vietnam war, and PLO forces during the Israeli invasion to Lebanon in 1982, launching rockets, hiding troops, or shielding anti aircraft missile sites in the center of villages, on the roofs of hospitals and other immune sites: W. Hays Parks, \textit{Air War and the Law of War}, 32 A.F. L. Rev. 1, 160, 165-166 (1990).

\textsuperscript{48} Hays Parks, id. at 163.

\textsuperscript{49} This is made clear in Article 48 of Additional Protocol I, supra note 3, which states that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives....” Each side is expected to “avoid locating military objectives within or near densely populated areas” and to “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.” Additional Protocol I, supra note 3, Article 58 (b) and (c). Specifically, it is prohibited to use civilians as human shields “to render certain points or areas immune from military operations, in particular in attempts to shield military
capabilities, will tend to regard their own safety as a relevant and even paramount consideration, interpreting their obligations in this context rather narrowly.  

The assessment of relative risks in contemporary conflicts becomes even more complex due to indirect factors that can contribute to victory or defeat. Particularly in democratic countries, armies must take into account the weight of public opinion, both domestic and global. On the one hand, as Michael Reisman has noted, democratic societies involved in elective combat operations such as interventions in foreign countries to shield indigenous populations from massacre, will have little tolerance for high numbers of casualties among their own soldiers. At the same time, international criticism of combatants’ disregard for civilian deaths, promoted by media reports, may prompt more attention to civilian losses. Thus factors such as: the legitimacy of the conflict (its fairness or legality under the law on *jus ad bellum*), its significance for the country’s existence and safety, and the country’s sensitivity to external pressures, become politically—if not legally—relevant.

For all these reasons, armies interpret the law as granting them wide discretion. They wish to limit the commanders’ responsibilities rather than increase protection to civilians. They highlight the obligations imposed on the defending army. In

objectives from attacks or to shield, favour or impede military operations.” According to Article 51(7) “[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.” The ICC Statute mentions the latter act as a war crime: *See Article 8(2)(b) (xxiii), available at* http://www.un.org/law/icc/statute/romefra.htm (last visited May 25, 2006).

Some armies explicitly acknowledge that the security of their attacking forces is a relevant factor in assessing the proportionality of the attack: *see* Stephens and Lewis, *supra* note 40, at 72-73.


An emphasis on discretion of the “reasonable military commander” is also evident in the Final Report of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *supra* note 36.

Declarations of the United Kingdom upon Ratification of the Additional Protocols (1998), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList166/A06D567EA584477CC1256B6605F94B8 (last visited May 9, 2006). “Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.”

Hays Parks, *supra* note 47, at 162: “under the customary law of war, casualties resulting from a defender’s use of the civilian population as concealment or cover from attack of legitimate military
applying the test of proportionality, they stipulate that the means used should be measured against the overall aim of winning the military conflict rather than against the particular aim of winning a specific battle. And this overall aim is defined subjectively. The army’s position, therefore, views the duty to spare enemy civilians as implying a prohibition on “willful intent” to inflict civilian casualties or, at most, as synonymous with “wanton disregard for the safety of the civilian population,” or with “recklessness.” Otherwise, the enemy civilians are exposed to the risk of error.

[56] See the declaration of the United Kingdom, supra note 54: “(i) Re: Article 51 and Article 57: In the view of the United Kingdom, the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.” See also Henckaerts & Doswald-Beck, supra note 3, at 49 (“Several States stated that the expression “military advantage” refers to the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack”). Compare this with the ICRC Commentary to the Additional Protocols, which asserts that:

[i]t is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 [of Additional Protocol I] and with paragraphs 1 and 2 of […] Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive. (ICRC Commentary, supra note 30, para. 1580).

[57] Australia and New Zealand maintain that the attack is legitimate as long as there is a bona fide expectation that the attack would make a relevant and proportional contribution to the objective of the military attack involved see Henckaerts & Doswald-Beck, supra note 3 at 50.

[58] See the Australian Military Manual (1994): “Collateral damage or injury would be unlawful in any instance in which such injury or damage becomes so excessive as to clearly indicate willful intent or wanton disregard for the safety of the civilian population.” (cited in Knut Doerrmann, Elements of War Crimes under the Rome Statute of the International Criminal Court 172 (2002)).

[59] Final Report, supra note 36, at paras. 62 & 70:

It is the opinion of the committee that the bridge was a legitimate military objective. The passenger train was not deliberately targeted. The person controlling the bombs, pilot or WSO, targeted the bridge and, over a very short period of time, failed to recognize the arrival of the train while the first bomb was in flight. The train was on the bridge when the bridge was targeted a second time and the bridge length has been estimated at 50 meters […]. It is the opinion of the committee that the information in relation to the attack with the first bomb does not provide a sufficient basis to initiate an investigation. The committee has divided views concerning the attack with the second bomb in relation to whether there was an element of recklessness in the conduct of the pilot or WSO. Despite this, the committee is in agreement that, based on the criteria for initiating an investigation (see para. 5 above), this incident should not be investigated…."

While this incident is one where it appears the aircrews could have benefited from lower altitude scrutiny of the target at an early stage, the committee is of the opinion that neither
This discussion suggests that the reciprocal relationship between fighting armies is not likely to engender the level of civilian protection set by the human dignity principle. Instead of earnest assessment of necessity and proportionality armies may opt for self-serving rationalizations. The question, to be explored in the subsequent section, is then to what extent other types of international norms could offer effective remedies.

B. Remedial Norms

The “army’s position,” I submit, overlaps the stance of potential defendants in war crimes trials. Preoccupied with questions of personal criminal responsibility, armies emphasize the actor’s *mens rea* as a necessary component of the combatant’s duty toward enemy civilians. This reading collapses the two levels of legal regulation—the general inspirational norm and the derivative norms providing remedies for its violation. For cogent reasons, criminal responsibility for civilian casualties will be predicated on the doer’s intent. These reasons are grounded on basic principles of criminal law, requiring *mens rea* as a prerequisite for responsibility. This is why the Statute of the International Criminal Court emphasizes *mens rea* elements—knowledge of the excessive damage and intent on inflicting it—as necessary components of the relevant crime. But these valid considerations do not replace the general norm on the prevention of excessive harm to enemy civilians stipulated in the constitutive documents on the conduct of hostilities.

The distinction between the general norm and the derivative, remedial norms concerning criminal responsibilities may help to focus on the other remedial norm, concerning the obligation to compensate civilians for damages that resulted from enemy attacks. In the context of monetary compensation, the emphasis is not only on the doer’s culpability but also, if not solely, on the victim’s plight and the obligation to offer compensation. Failure to distinguish between military and civilian targets due only to negligence (without malice or intention) may not suffice to charge combatants with war crimes, but may well be enough to establish an obligation on the combatant’s state to pay compensation.

the aircrew nor their commanders displayed the degree of recklessness in failing to take precautionary measures which would sustain criminal charges. The committee also notes that the attack was suspended as soon as the presence of civilians in the convoy was suspected.

60 Under the ICC Statute, *supra* note 49, Article 8(2)(b)(iv), it is a war crime to:
Remedial norms on monetary compensation for civilian losses during military conflict are widely acknowledged in international law, though not yet fully explored. Whereas the 1907 Hague Convention Respecting the Laws and Customs of War on Land established a responsibility of compensation for violating laws on the conduct of hostilities, the law is silent on whether the appropriate standard for liability is intent, negligence, or strict. Another aspect relates to the question of whether individuals are entitled to compensation directly or through the agency of their government, and whether international practice and law prefers so-called “lump sum” inter-state agreements to litigation in national or international tribunals. In the context of the present inquiry, the appropriate translation of the general (moral and legal) duty to refrain as much as possible from harming enemy civilians into a remedial duty to compensate may be reflected in a standard of negligence. According to some, commitment to the human dignity principle would require the recognition of such

\[ \text{Intentionally launch an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. (my emphasis E.B.)}\]

61 Hague Convention Respecting the Laws and Customs of War on Land, Convention IV (18 October 1907), Article 3: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” This principle is reiterated in Article 91 of the Additional Protocol. See Reisman, supra note 51 at 397; Emanuela-Chiara Gillard Reparation for Violations of International Humanitarian Law; 85 I.R.R.C. 529 (2003). The ICJ in its recent advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra note 11, at paras. 151-152, mentioned compensation as one remedy for the violations of \textit{jus in bello} obligations.

62 According to the Commentary on the International Law Commission’s Draft Articles on State Responsibility, there is no general rule of international law concerning the standard that triggers state responsibility:

\[ \text{[S]tandards, whether they involve some degree of fault, culpability, negligence or want of due diligence […] vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.}\]


63 See Gillard, supra note 61, at 535 et seq. On models of post-war reparations for individuals see Henckaert & Doswald-Beck, supra note 3, at 541-50.
cause of action, as a German court has recently ruled.\textsuperscript{64} According to such a standard, negligence in the identification of targets, in the use of weapons or ammunition, or similar acts failing to take into account civilian casualties, would give rise to an obligation to compensate victims either directly or through their governments.\textsuperscript{65}

**C. Institutional Norms**

Important institutional obligations stem from the general norm to prevent excessive harm to enemy civilians. An earnest effort to minimize harm to enemy civilians must include procedural safeguards that will provide responsible decision-makers information enabling them to assess the relevant risks emanating from their combat operations.\textsuperscript{66} Appropriate procedures will also ensure discipline among combatants and increase their commitment to comply with the general norm. Hence, international law prescribes taking precautions in preparation for actual combat.\textsuperscript{67} In particular, the obligation to take the necessary precautions to limit damage to enemy civilians requires armies to educate combatants on the need to comply with the law,\textsuperscript{68} to set

\begin{itemize}
\item \textsuperscript{64} The Varvarin Bridge decision, Oberlandesgericht Köln, Judgment from July 28, 2005, Az. 7 U 8/04, available at http://voelkerstrafrecht.org/Urteile/OLG_Koeln_Varvarin_28072005.pdf (last visited May 9, 2006). The suit demanded compensation from Germany for its involvement in the NATO attack on the bridge. The court ultimately denied responsibility, only after asserting that \textit{jus in bello} violations could and should be compensated under the German tort law, which is informed by the constitutional principle of human dignity.
\item \textsuperscript{65} Michael Reisman, \textit{supra} note 51, at 398, has argued that belligerents have a duty to compensate enemy civilians for damages “\textit{w}hether or not \textit{n} the party’s injurious actions were intentionally criminal or were marked by a chain of grievous errors.”
\item \textsuperscript{66} Additional Protocol I, \textit{supra} note 3, Article 57(2)(a)(i) stipulates that “\textit{t}hose who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects … but are military objectives.”
\item \textsuperscript{67} \textit{Id.} Article 57(2)(a)(ii):

\begin{quote}
[t]hose who plan or decide upon an attack shall … take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; [and] refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
\end{quote}
\item \textsuperscript{68} In the case of HCJ 4764/04 Physicians for Human Rights v. The Commander of the IDF Forces in the Gaza Strip [2004] IsrSC 58(5) 385, the Israeli Supreme Court concluded that:

\begin{quote}
[a]ccording to the humanitarian principles of international law, military activities require the following: First, that the rules of conduct be taught to, and that they be internalized by, all combat soldiers, from the Chief of General Staff down to new recruits. […] Second, that procedures be drawn up that allow implementation of these rules, and which allow them to be put into practice during combat. (id. at para. 66).
\end{quote}
\end{itemize}
up mechanisms to minimize mistakes and verify legitimate targets,\textsuperscript{69} and to ensure in advance the necessary support for the civilian population about to be affected by the attack.\textsuperscript{70} A duty to investigate attacks that involved civilian casualties, well recognized under human rights law,\textsuperscript{71} is yet to be developed in the law on international armed conflicts, at least when significant civilian damage has been inflicted.

Given the fluidity of the general standard on excessive harm on the one hand, and the growing involvement of third party decisionmakers revisiting commanders’ decisions in retrospect (to determine criminal or civil liability) on the other hand, it can be expected that the emphasis on institutional norms will increase. Effective procedures that enable armies to take precautions before and during attacks will be proof of the commanders’ good faith. More importantly, such effective precautions will produce an overall picture of an army that strives to comply with its obligations, a picture that third party decisionmakers will tend to obtain when assessing responsibility for particular incidents.\textsuperscript{72}

D. Absolute Prohibitions

As noted, the general rule on preventing excessive harm to civilians grants the different actors wide discretion. The obvious concern is that commanders may abuse this discretion, leading to a failure of efforts to impose effective limitations on armies in battle. Several rules were therefore designed to delimit the scope of the commanders’ discretion. They address specific practices in absolute terms, providing clear rules to complement the more abstract obligation to refrain from excessive harm to civilians.

Additional Protocol I, \textit{supra} note 3, Article 83, requires parties to educate their soldiers and civilians on the laws of war “so that those instruments may become known to the armed forces and to the civilian population.”

\textsuperscript{69} During the Gulf War in 1991, the selection of targets during the coalition air campaign was constantly monitored and reviewed by officers of the Judge Advocate General Corps: \textit{see} Michael W. Lewis, \textit{The Role of Aerial Bombardment In the 1991 Gulf War}, 97 Am. J. Int’l L. 481 (2003).

\textsuperscript{70} In the case of Physicians for Human Rights (\textit{supra} note 68, at para. 38), the Israeli Supreme Court required the IDF to prepare in advance for the needs of the Palestinian civilian population in the battle zone, based on the principle that “the rule is that a military commander that takes over an area by way of combat must provide for the nutritional needs of the local residents under his control.”

\textsuperscript{71} Subsequent acts would include, for example, inquiries in cases of civilian casualties. \textit{See} in the context of the European Convention of Human Rights, the case of Meskine v. United Kingdom, 35 Eur. Ct. H.R.25 (2002) where the duty to investigate is inferred from the state’s duty to protect the right to life. \textit{See also} the Isayeva case, \textit{supra} note 14.

\textsuperscript{72} \textit{See} Prosecutor v. Kupreskic, \textit{supra} note 8, at para. 526 (emphasizing “the cumulative effect” of the attacks); Final Report of the Committee Established to Review the NATO Bombing Campaign.
This is the area recording the most significant change in the laws of war since World War II, probably as an effect of its consequences and of the growing emphasis on human dignity in the international law instruments on human rights. This section will briefly explore the key rules.

1. Targeting Civilians to Undermine Enemy Resolve

Armies have resorted to targeting civilians as means to weaken or pressure the enemy into capitulation particularly during sieges and during so-called “strategic bombings.” Siege of defended areas is considered a lawful method of warfare, but the question arises as to the plight of the civilians trapped inside. Initially, the law imposed on the besieged army the responsibility for the civilians under its control. Since that army has the choice of surrendering, the fact that it chooses to stay put is deemed the key to the suffering of the civilians. Hence, it was regarded as lawful to force a siege by targeting civilians who tried to flee from the besieged area. In one of the famous post World War II warcrime trials, the “von Leeb” case, the military tribunal absolved a German army commander from criminal responsibility for ordering the killing of civilians fleeing the besieged city of St. Petersburg, because strengthening the siege was considered at the time a legitimate measure aimed at effecting the capitulation of the city and the surrender of the Red Army units present there. Siege continues to be a legitimate means of warfare, as long as it is directed toward a specific military objective and not aimed at starving a civilian population. But nowadays, the onus has shifted to the besieging army with respect to the areas under its control: the besieging army must allow the trapped civilians to leave the besieged area, and it

73 Undefended areas may not be subjected to attack (see Article 25 of the Hague Regulations).

74 The besieged army was denied the choice of expelling the civilians. As the Lieber Code of 1863 clearly states, “When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.” (Article 18 of Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863, available at http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument (last visited May 9, 2006)).


76 “Starvation of civilians as a method of warfare is prohibited” (Additional Protocol I, supra note 3, Article 54(1)), but if the purpose of the siege is military and not to starve a civilian population, then the siege would be legitimate; HENCKAERTS & DOSWALD-BECK, supra note 3, at 188. Of course, the general standard of excessive harm to civilians remains relevant.
must also allow the passage of foodstuffs and supplies into that area. State practice particularly since the 1990s with respects to the fighting in the former Yugoslavia and Iraq strongly supports these emerging obligations.

A similar prohibition has emerged in the post World War II era with respect to the so-called “strategic” or “carpet” bombing campaigns, referring to the targeting and the destruction of London, Dresden, Berlin, and Tokyo, and later Hiroshima and Nagasaki. At the time, armies deemed this practice a lawful strategy well within the confines of the general duty to prevent excessive harm. The harm, the argument went, was simply not excessive since the military goal of winning the war justified these means. Although without any direct military value, these attacks were justified as serving to “undermine the morale” of the civilian population, thereby reducing the enemy’s resolve, or otherwise putting indirect pressure on the enemy to surrender. At the end of the war, the US Military Tribunal acknowledged the legality of that policy as an act of legitimate warfare, provided its only aim was to affect the nation’s surrender. Today, this view is widely perceived as a war crime. If the principles of individuality and universality are of any consequence, it is as the basis for calling any attack directed against civilians unlawful. Accordingly, Additional Protocol I defines “military objectives” in rather strict terms to preclude abusing the standard on the prohibition of excessive harm.

77 Henckaerts & Doswald-Beck, id., & 193-200. See also Dinstein, supra note 7 at 133-137.
78 See in particular the practice described by Henckaerts & Doswald-Beck, supra note 3, at 193-200. The effort to set up the “oil for food” program for Iraq during the 1990s was in fact required to ensure that the sanctions regime would not turn Iraqi civilians into hostages.
80 USA v. Ohlendorf et al. (1948) (The Einsatzgruppen case) (American Military Tribunal, Nuremberg) 4 U.N. War Crimes Commission, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 1, 467 (cited by Jochnick & Normand, id. at 92). Jochnick and Normand, mention that no defendant was prosecuted for “indiscriminate bombing” (id. at 91).
82 As the ICRC Commentary to Additional Protocol I mentions, it was the World War II experience which prompted the effort to define military objectives: supra note 30, at para. 2000.
83 Additional Protocol I, supra note 3, Article 52 (2) (“military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at
2. Belligerent Reprisals

The logic of reciprocity stipulates that the violation of rules by one side entitles the opponent to respond in kind. This logic has spawned two doctrines in international law. Under the first, the violation of the laws of war by one side releases the other from the obligation to follow the law. Under the second, the violation entitles the opponent to resort to reprisals—counter violations in kind. Contemporary governments still adhere to this second doctrine.\textsuperscript{84}

the time, offers a definite military advantage.”) According to the ICRC Commentary, “it is not legitimate to launch an attack which only offers potential or indeterminate advantages”\textsuperscript{(supra note 30, at para. 20-24).}

\textsuperscript{84} The Trial Chamber of the ICTY, in the case of Prosecutor v. Kupreskic,\textsuperscript{(supra note 8, at n.785, reproduces the assertions of France, the U.K. and the U.S. (citations omitted):}

In his report to the United States Secretary of State, the U.S. Deputy Legal Adviser and Head of the U.S. Delegation to the Geneva Diplomatic Conference of 1974-77 stated that in his view the Geneva Conference had “gone unreasonably far in its prohibition of [reprisals]” and added: “It is unreasonable to think that massive and continuing attacks directed against a nation’s civilian population could be absorbed without a response in kind. By denying the possibility of response and not offering any workable substitute, Art. 51 [of Additional Protocol I] is unrealistic and cannot be expected to withstand the test of future conflicts. On the other hand, it will not be easy for any country to reserve, explicitly, the right of reprisal against an enemy’s civilian population, and we shall have to consider carefully whether such a reservation is indispensable for us.” Furthermore, it has been reported that the United States JCS (Joint Chiefs of Staff), faced with the possibility that other States would not accept individual monitoring mechanisms, expressed misgivings about the acceptance of the prohibition of reprisals against civilians: “If the United States cannot rely on neutral supervision to ensure compliance with humanitarian law, then the threat of unilateral retaliation retains its importance as a deterrent sanction to ensure at least a minimum level of humane behaviour by US adversaries.”\textsuperscript{)}

France voted against the provision prohibiting reprisals, stating,\textit{inter alia}, that it was “contrary to existing international law” (\textit{id. n.791}). The U.K. declared, upon ratifying Additional Protocol I, as follows (concerning reprisals): (m) \textit{Re: Article 51-55:} The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United
It would seem that the principle of human dignity, would eschew the first doctrine and restrict the second to responses that do not target the civilian population.\textsuperscript{85} Kant’s categorical imperative was relied upon to explain the strict prohibition of treating enemy civilians as hostages to their army’s misconduct.\textsuperscript{86} Those civilians have no responsibility for such war crimes, and they should not be punished for a crime they did not commit.\textsuperscript{87} In retrospect, the difference between this contemporary position and the one articulated right after World War II by the US Military Tribunal is astounding. As late as 1949, the Tribunal stated that the laws of war permitted the German army to execute innocent civilians in retaliation for losses caused by partisan activities in occupied territories.\textsuperscript{88}

3. \textit{Enemy Nationals in the Hands of the Army}

Once enemy nationals fall in the hands of the hostile army, they are protected from violence. The army’s exclusive control over them generates its duty to ensure their safety.\textsuperscript{89} In a clear departure from World War II practice, the 1949 Geneva Conventions outlawed the taking of hostages. Recourse to this erstwhile legitimate practice is prohibited in both international\textsuperscript{90} and internal conflicts.\textsuperscript{91} Under the ICC Statute, taking hostages is a war crime.\textsuperscript{92} The ban on human shields is equally strict. Under Article 28 of the Fourth Geneva Convention, “the presence of a protected person may not be used to render certain points or areas immune from military operations.”

Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.”

\textsuperscript{85} Prosecutor v. Kupreskic, \textit{supra} note 8, \textit{see esp.} paras. 511, 518, & 527.

\textsuperscript{86} \textit{Id.} at para. 518.

\textsuperscript{87} Doctrinally, it is also suggested that norms protecting civilians have assumed a peremptory status of non-derogable “\textit{jus cogens}”: \textit{id.} at para. 520.

\textsuperscript{88} List et al (“The Hostages Trial”) 8 U.N. War Crimes Commission, Law Reports of Trials of War Criminals, Case No. 47 (1949) (the Tribunal recognized the principle of collective responsibility whereby, for instance, villagers were responsible for the acts of resistance fighters who found refuge in that village: “hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. The taking of hostages is based fundamentally on a theory of collective responsibility.” at 61).

\textsuperscript{89} \textit{See} the distinction made in Section II between the duty to respect and the duty to ensure.

\textsuperscript{90} Article 34 of the IV Geneva Convention, \textit{supra} note 26: “The taking of hostages is prohibited.” (This Article appears in the section that relates to obligations concerning civilians in occupied territories as well as in the territories of the parties to the conflict.)

\textsuperscript{91} Common Article 3(b) of the 1949 Geneva Conventions.

\textsuperscript{92} ICC Statute, \textit{supra} note 49, Article 8(2)(a)(viii).
“Utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations” constitutes a war crime under the ICC statute.\(^{93}\) This rule recognizes no limitations. As the Israeli Supreme Court recently announced, even an individual’s consent to be used by the combatants, for example, to relay a warning to the person whom the army wishes to arrest, carries no effect.\(^{94}\)

Enemy combatants in the hands of the hostile army are also protected by absolute rules. These include the prohibition on torture,\(^{95}\) and the prohibition on killing prisoners of war (even at the height of battle, when the attacking unit cannot spare soldiers to detain enemy soldiers who have surrendered).\(^{96}\)

4. Self-Defense, Necessity, and Duress as Exceptions to the Absolute Prohibitions?

The ICC Statute recognizes certain “grounds for excluding criminal responsibility.”\(^{97}\) According to it:

A person shall not be criminally responsible if, at the time of that person’s conduct: (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. [...] (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may

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\(^{93}\) Id. at Article 8(2)(b)(xxiii)


\(^{95}\) Common Article 3(b) of the 1949 Geneva Conventions.

\(^{96}\) Additional Protocol I, supra note 3, Article 4 (“It is prohibited to order that there shall be no survivors”).

\(^{97}\) ICC Statute, supra note 49, Article 31.
either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person’s control.

These defenses correspond to the defenses recognized, respectively, as “self defense,” “duress,” and “necessity” under contemporary national systems of criminal law. They reflect an ancient respect for the plight of individuals facing life-threatening situations. Under stringent conditions, such individuals may be excused for harming innocents in order to save themselves or others from imminent threat coming from another person (duress) or results from emergency circumstances (necessity), or justified in their actions to repel an unlawful assault (self-defense).

Introducing the concepts of self-defense and necessity into the context of the regulation of combat leads to a conceptual difficulty. The regulation of combat activities assumes that the actors are in the midst of a fight, each struggling to avert serious threats to themselves if not to ensure their very survival as human beings and as political entities. But were not the rules constraining combatants inspired, in the words of the 1907 Hague Regulations, “by the desire to diminish the evils of war, as far as military requirements permit”? Since the rules—including those relating to criminal responsibility—have already been shaped by considerations of military necessity during combat, an additional layer of such defenses would undermine the effort to balance between necessity and evil. Similarly, as noted, the rules seek to address and constrain the spectrum of reprisals in response to the enemy’s violations of the law. If a ubiquitous claim of self-defense were available for any violation of the law, the attempt to constrain reprisals would be futile.

It has been suggested that an added layer of defenses is not unthinkable in the context of combat since not every battle is a battle for survival, and armies can usually choose from a range of strategies, targets, and weapons. Combatants are threatened throughout but only in specific circumstances do they find themselves with their backs against the wall, having no alternative but to violate the law so as to ensure their personal survival and the survival of their country as a political entity. This is Walzer’s distinction between “emergency” and “supreme emergency,” following Winston Churchill’s explanation for his decision to bomb German cities in the earlier stages of

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98 See George P. Fletcher, Basic Concepts of Criminal Law ch. 8 (1998); George P. Fletcher, Rethinking Criminal Law ch. 10 (1978).
99 See the preamble of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land (my emphasis E.B.).
Walzer suggests that only in its early stages could the Allied bombing of German cities be viewed as representing conditions of supreme emergency, because only these bombings could have averted the calamitous consequences of German victory. Subsequent bombings, when alternative means of combat became available, could not be similarly justified. And yet, the proportionality test, that is the heart of rule on excessive harm, is in principle capable of allowing such considerations in balancing the legality of an attack. Perhaps, then, the answer is that the exception to the rule is needed to keep the rule from expanding and becoming meaningless.

A full analysis of the justification for exceptions in the regulation of hostilities and of the proper relationship between rules and exceptions exceed the scope of this Article. Note, however, that repeated invocation of these exceptions undermines the rules, as was indeed the case in World War II. We must also recall that terrorists use the same argument to justify their targeting of civilians. I wish, however, to make two brief observations. First, exceptions may not necessarily justify (or excuse) the violation of all the absolute prohibitions. Some have argued, for instance, that murder and torture could never be claimed to have been a proper act of necessity because such crimes could never be considered necessary so as to avert a threat. Necessity and proportionality are weighty considerations, even under conditions of supreme emergency.

Second, the availability of these defenses is determined only in retrospect. When they decide to violate the law, actors assume the risk that their assertion of supreme emergency may be later rejected and their act considered a crime. The threat of punishment will act here as an effective deterrent. It will not be an excessive

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100 Walzer, supra note 25, at 252-253. See also Michael Walzer, Arguing About War 33-50 (2004).
102 Walzer, Arguing About War, supra note 100; id.; Saul Smilansky, Terrorism, Justification, and Illusion, 114 Ethics 790, 801-805 (2004).
deterrent because, under extreme threat, combatants will focus on their survival rather than on their subsequent criminal responsibility. If the threat is not dire enough to dampen concerns about future indictments, it is not ominous enough to permit recourse to exceptions.

V. Conclusion

There is tension between the way armies interpret their duties towards enemy civilians and the ideal that the principle of human dignity posits. But there is no cleavage. The principle of human dignity recognizes a general attenuated duty to reduce harm to enemy civilians and more specific rules against using them as human shields, hostages, or objects for retaliation. In general there is no requirement to risk combatants to reduce the risk to enemy civilians, but some of the specific rules entail the assumption of such risks. The human dignity principle informs the interpretation of the law on the conduct of hostilities and provides a built-in mechanism for improving armies’ treatment of enemy civilians. It inspires additional remedial and institutional norms that could overcome armies’ distrust of each other during the height of battle.

An apparent paradox due to the potential tension between the duty to reduce harm to enemy civilians and the prohibition on using them as human shields or hostages deserves note in this conclusion: If an attacking unit was permitted to use individuals as human shields during a door-to-door infantry attack, it could conquer an area with less casualties (civilians and combatants) than those caused by recourse to the permitted practice of shelling the same area from afar.

This apparent paradox brings to mind a story about a meeting between two generals in the midst of the Cold War. The Soviet General asks his American counterpart what is the American practice for clearing a minefield during battle. The US general responds without hesitation: the unit disperses and waits until specially trained soldiers clear a path through the field. This startles the Soviet General who exclaims: “But in the meantime the unit suffers heavy casualties from bombardment! We have a better drill: when we hit a minefield, the commander orders his men to make a single column and then sends them across the field. The first to cross, clears the mines for the rest, with fewer casualties!”
The paradox is not real once we abandon reliance on utilitarian considerations as our only guide. Protection of the right to life must be implemented in a way that respects the human dignity of the protected individuals and of those called upon to protect them. The law protects both civilians and combatants. Civilians are protected against excessive risks and against their being used as tools. Combatants are protected from having to obey orders that would turn them into murderers.