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## A RETURN TO COERCION: INTERNATIONAL LAW AND NEW WEAPON TECHNOLOGIES

*Jeremy Rabkin\**

*John Yoo\*\**

### I. INTRODUCTION

In August of 2013, the White House acknowledged clear evidence that the Syrian army had used chemical weapons, despite firm warnings from President Barack Obama against using such munitions.<sup>1</sup> The White House tried to mobilize support for retaliatory military action by western countries, including France and Great Britain.<sup>2</sup> In the ensuing debate, some critics warned against costly entanglement in the ongoing civil war in Syria.<sup>3</sup> Others worried that outside intervention might allow rebel forces to install a dangerous Islamist government.<sup>4</sup> Some believed that western strikes might escalate the conflict and spread the fighting beyond Syria to neighboring countries, such as Turkey, Lebanon, Iraq, and Israel.<sup>5</sup>

Almost no one opposed retaliatory air strikes on the grounds that intervention, in itself, would run contrary to international norms. The Chemical Weapons Convention (“CWC”) prohibits the production, stockpiling, and use of chemical weapons, such as sarin and VX nerve

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1. See *Chemical Weapons Attack in Syria*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/issues/foreign-policy/syria> (last visited July 20, 2014).

2. *Syria Crisis: Where Key Countries Stand*, BBC NEWS (Sept. 12, 2013, 1:29 PM), <http://www.bbc.co.uk/news/world-middle-east-23849587>.

3. John Nichols, *Potemkin Checks & Balances: Boehner Blocks Real Action to Limit Syria Entanglement*, NATION (July 24, 2013, 10:49 AM), <http://www.thenation.com/blog/175410/potemkin-checks-balances-boehner-blocks-real-action-limit-syria-entanglement>.

4. Tom A. Peter, *As US Weighs War, Fears of Power of Jihadis in Syria*, CHRISTIAN SCI. MONITOR (Sept. 1, 2013), <http://csmonitor.com/World/Middle-East/2013/0901/As-US-weighs-war-fears-of-power-of-jihadis-in-Syria>.

5. *Syria Crisis: Where Key Countries Stand*, *supra* note 2.

gas.<sup>6</sup> But it does not authorize the use of force against violators—it only empowers states to refer a situation to the U.N. Security Council (alternatively “Security Council”).<sup>7</sup> In any case, Syria never signed the CWC. The U.N. Charter (alternatively “Charter”) empowers the Security Council to authorize the use of force to protect against threats to international peace and security,<sup>8</sup> for which the Syrian Civil War or the introduction of chemical weapons might qualify. Despite pressure from the United States, Britain, and France, however, the Security Council could not act because of the vetoes of other permanent members: Russia and China.<sup>9</sup>

It was hard to see the Obama administration’s proposal as anything other than “punishment.” The White House denied that intervention would aim at influencing the outcome of the civil war.<sup>10</sup> The announced goal was to “impose a price”—in more direct terms, to “punish” the Assad regime—for using such terrible weapons.<sup>11</sup> The administration did not propose air strikes to remove the chemical weapons by direct attack on stockpiles or assembly facilities. The aim was simply to impose some “cost” elsewhere to deter future use of these weapons.<sup>12</sup> Critics warned that the tactic would prove ineffective or have unacceptable side effects, but not that it was, in itself, improper.<sup>13</sup> The Obama administration finally embraced an alternate policy, negotiating with the Syrian government for internationally supervised removal or destruction of its chemical weapons.<sup>14</sup> Administration spokesmen insisted, however, that

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6. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art. 1, Jan. 13, 1993, 1974 U.N.T.S. 317 [hereinafter Convention on the Prohibition of Chemical Weapons]; see also 22 U.S.C. § 6701 (2006) (defining the chemical compositions of “sarin” and “VX” nerve gas).

7. See Convention on the Prohibition of Chemical Weapons art. 12, *supra* note 6, at 349.

8. U.N. Charter art. 39.

9. Holly Yan, *Syria Allies: Why Russia, Iran and China Are Standing by the Regime*, CNN (Aug. 29, 2013, 9:01 PM), <http://cnn.com/2013/08/29/world/meast/Syria-iran-china-russia-supporters>.

10. Anne Gearan & Ed O’Keefe, *Kerry, Hagel Lay Out Military Objectives During Senate Hearing on Syria Strike*, WASH. POST, Sept. 4, 2013, at A1.

11. See *id.*; *Syria Crisis: Barack Obama to Give Russia’s Chemical Weapons Plan a Chance, States Reasons for Military Action*, AUSTRALIAN BROADCASTING CORP. (Oct. 4, 2013, 1:28 PM), <http://www.abc.net.au/news/2013-09-11/us-president-barack-obama-addresses-nation-on-syria-crisis/4950614> [hereinafter *Syria Crisis: Barack Obama to Give Russia’s Chemical Weapons Plan a Chance*].

12. *Syria Crisis: Barack Obama to Give Russia’s Chemical Weapons Plan a Chance*, *supra* note 11.

13. KARL P. MUELLER ET AL., RAND CORP., AIRPOWER OPTIONS FOR SYRIA: ASSESSING OBJECTIVES AND MISSIONS FOR AERIAL INTERVENTION 1-2, 9-10, 12-15 (2013), available at [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR400/RR446/RAND\\_RR446.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR446/RAND_RR446.pdf).

14. Matt Smith & Catherine E. Shoichet, *Syria Chemical Arms Plan Promising ‘If It’s Real,’ Obama Says*, CNN (Sept. 10, 2013, 7:06 AM), <http://www.cnn.com/2013/09/09/world.meast/Syria->

this outcome had only been possible because it had previously threatened Syria with punitive strikes.<sup>15</sup>

So, the world seems to have returned to the idea that international law can, after all, accommodate punitive measures.<sup>16</sup> This runs counter to the view embraced by most specialists in international law, that the U.N. Charter banished the idea of punishing states for misconduct. In 2012, for example, Professor Gabriella Blum concluded that “the moral rhetoric of state ‘crime and punishment’ has been excised from the lexicon of international law” so that “coercive action against states can no longer be justified by any punitive urge but instead must be couched in terms of regulatory or preventive action.”<sup>17</sup> Blum questioned the value of this shift, even as a means of reducing resort to force in international affairs.<sup>18</sup> But, she still saw the renunciation of punishment as the culmination of long-developing trends, already visible before the establishment of the United Nations.<sup>19</sup>

We believe that recent efforts to purge the international system of punitive responses mistake the traditional principles of the laws of war. The older view acknowledged a much wider range of occasions for the use of force, and a wider range of legitimate targets. Today, most scholars insist that the resort to force, under the U.N. Charter, can only be appropriate in self-defense,<sup>20</sup> though many admit that the rule is

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civil-war; *Syria Crisis: Barack Obama to Give Russia's Chemical Weapons Plan a Chance*, *supra* note 11.

15. *Chemical Weapons Attack in Syria*, *supra* note 1; Smith & Shoichet, *supra* note 14; *Syria Crisis: Barack Obama to Give Russia's Chemical Weapons Plan a Chance*, *supra* note 11.

16. See Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT'L L. 57, 59, 65, 96 (2013) (citing examples of punishing or punitive actions by states against states); *Syria Crisis: Where Key Countries Stand*, *supra* note 2 (explaining the stances of several countries, none of which argue that punitive measures violate international law).

17. Blum, *supra* note 16, at 58.

18. *Id.* at 93-94, 96-97.

19. *Id.* at 63-73, 75-76.

20. See, e.g., STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 77-79 (1996) (explaining that the Security Council considered self-defense an inherent right of states); D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 223-25, 273-75 (1958) (discussing the legal responsibility of states when taking action in self-defense); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 274-75 (1963) (explaining that although ambiguous, the “ordinary meaning of the phrase [self-defense] precludes action which is preventive in character”); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 41, 50, 65, 98 (2004) (discussing Article 51’s limitation on the right accorded to states to act in self-defense); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 86-88 (2000) (discussing the academic debate centered around the interpretation of self-defense in Article 51); Louis Henkin, *The Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 38-39 (2d ed. 1991) (arguing that the only “just war” would be against an aggressor in self-defense).

mostly observed in the breach.<sup>21</sup> Many commentators have emphasized what seems the logical corollary—that force, when it is justified at all, must be limited to what is necessary for repelling attacks.<sup>22</sup> As a corollary, some commentators argue that forcible defensive measures must be exclusively targeted at the actual attacking forces.<sup>23</sup> Most commentary on the law of armed conflict concludes that lawful force must, at any rate, be aimed at “military objectives” and never at “civilian objects.”<sup>24</sup>

There is an evident logic to this chain of argument. If the aim is to constrain resort to force as much as possible, it seems reasonable both to limit the circumstances in which force can be lawfully exerted (under *jus ad bellum*) and then limit the scope of permissible use of force (under *jus in bello*).<sup>25</sup> If force is only proper as a defense against attack, the force should be limited to that purpose—to repelling or disabling the attacking force. Limiting force as much as possible might seem the best way of preserving or restoring peace. The parallel to domestic criminal law is obvious. States, like individuals, can only resort to force when they are under attack.<sup>26</sup> States, like individuals, have an obligation to turn to peaceful means to escape conflict, including help from a higher authority (the United Nations in international relations, the police in

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21. See, e.g., MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 84-87 (2001) (arguing that international law has failed to prevent nations from waging war); A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II 29-30, 33, 128-29 (1997) (arguing that states have regularly gone to war since 1945 in violation of the U.N. Charter); Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809, 810-12 (1970) (arguing that the U.N. Charter’s restrictions on the use of force ended in 1970); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 741-42 (2004) [hereinafter Yoo, *Using Force*] (discussing the U.N.’s lack of support in “preventing or ending interstate conflicts”).

22. James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law*, 44 VAND. J. TRANSNAT’L L. 285, 298-302 (2011); Yoo, *Using Force*, *supra* note 21, at 735-36.

23. Yoo, *Using Force*, *supra* note 21, at 752-53; Mohamad Syafiq Bin Sulaiman & Ibrahim Sadoun R. Tunesi, *The Right to Self-Defence of States: The Only Lawful Unilateral Use of Force 4* (2012) (unpublished seminar paper, International Islamic University) (on file with the *Hofstra Law Review*), available at [http://www.academia.edu/3481211/the\\_right\\_to\\_self-defense\\_of\\_states\\_the\\_only\\_lawful\\_unilateral\\_use\\_of\\_force](http://www.academia.edu/3481211/the_right_to_self-defense_of_states_the_only_lawful_unilateral_use_of_force).

24. Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655, 1670 (2012); Marco Sassòli, *Legitimate Targets of Attacks Under International Humanitarian Law 1* (Jan. 27-29, 2003) (unpublished Background Paper, Harvard University) (on file with the *Hofstra Law Review*).

25. Gina Heathcote, *Article 51 Self-Defense as a Narrative: Spectators and Heroes in International Law*, 12 TEX. WESLEYAN L. REV. 131, 135-37 (2005) (discussing and defining “*jus ad bellum*” and “*jus in bello*” limitations to the use of force in self-defense).

26. Onder Bakircioglu, *The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement*, 19 IND. INT’L & COMP. L. REV. 1, 7-9 (2009); Blum, *supra* note 16, at 114; Yoo, *Using Force*, *supra* note 21, at 738-39.

domestic affairs).<sup>27</sup> Governments hold a monopoly on the use of force, except for the inherent right of citizens or states to self-defense when government protection becomes unavailable. Both systems seek to regulate the level of violence down to zero.<sup>28</sup>

But the logic is hardly unassailable. Our world might be safer if it were more actively policed, just as it was discovered in the 1990s that more active policing could reduce violent crime in American cities even when directed against vandalism and disorderly conduct.<sup>29</sup> The idea that force is only justified to repel force implies that an attack already completed—if it does not involve an ongoing incursion of foreign troops—cannot be addressed by force. Though prominent commentators have embraced that conclusion,<sup>30</sup> it does not appeal to governments.<sup>31</sup> The international system lacks an effective supranational government that can stop violence in the same way that domestic institutions maintain law and order at home. Not only must nations use force more broadly in self-defense, but there is a greater need, in the absence of effective supranational government, for third-party intervention to prevent threats to global welfare from weapons of mass destruction, terrorism, and authoritarian nations with aggressive designs on their neighbors.

If there is a place for retaliation (as opposed to merely repelling attacks), however, the scope for resort to force will be enlarged—and it will no longer be obvious that retaliatory measures must actually be limited to attacks on “military objectives.”<sup>32</sup> Keeping the peace in the twenty-first century requires a return to earlier understandings of the use of force. International law should allow nations—as we believe it already does—to use force against civilian populations, so long as they

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27. Bakircioglu, *supra* note 26, at 11-12, 14.

28. Yoo, *Using Force*, *supra* note 21, at 737-41.

29. See JAMES Q. WILSON, THINKING ABOUT CRIME 27, 61-62 (1985); George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders' Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217, 1222-24 (1998) (discussing how active policing contributed to a decrease in crime in New York City in the 1990s); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 163, 176-77 (2004) (arguing that the decrease in crime was attributed to “innovative policing strategies” as well as an increase in the number of police).

30. BRUNO SIMMA ET AL., 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1425 (3d ed. 2012) (“Lawful self-defense is restricted to . . . repelling an armed attack and must not acquire a retaliatory, deterrent, or punitive character.”); see JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 156 (2004) (“[I]t is the repulsing of the attack giving rise to the right that is the criterion against which the [lawfulness of the] response is measured.”).

31. See GARDAM, *supra* note 30, at 76-77; Bakircioglu, *supra* note 26, at 10.

32. See Blum, *supra* note 16, at 94, 113, 115; Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993, 1000-01 (2005).

do not involve lethal means of coercion. We reject more recent efforts to apply a broad definition of the principle of distinction—the idea that nations at war can only intentionally target each other’s military forces<sup>33</sup>—because it may have the unintended and perverse consequence of rendering war more likely and more destructive.

This Article proceeds in four Parts before concluding. In Part II, we show that practice, even in the past century, does not conform to current notions of restraint.<sup>34</sup> Limited retaliatory measures were among those least likely to be limited to purely military targets.<sup>35</sup> In Part III, we show that the view of war urged by international organizations, such as the International Red Cross, academics, and activists does not even conform to the understanding of *jus in bello* before very recent times.<sup>36</sup> In Part IV, we explain the real costs of adhering to an overly strict approach to the principle of distinction (which limits legitimate targets of attack to “military objectives”).<sup>37</sup> In Part V, we discuss the use of new military technologies that may include civilian targets, but cause less death and destruction in the short- and long-term.<sup>38</sup>

## II. FORCE OUTSIDE WAR

In 1902, the government of Venezuela reneged on debt payments owed to European lenders.<sup>39</sup> It also connived at attacks on Europeans, including merchant ships.<sup>40</sup> Though the United States had long warned against European military incursions into the Western Hemisphere (in the name of the Monroe Doctrine),<sup>41</sup> even President Theodore Roosevelt acknowledged that Britain and Germany were within their rights to demand redress.<sup>42</sup> British and German naval forces accordingly acted to close Venezuelan ports to foreign commerce.<sup>43</sup>

Commentators at the time described the intervention as “pacific blockade”—a practice with more than a dozen precedents, stretching

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33. See *infra* text accompanying notes 100-05.

34. See *infra* Part II.

35. See *infra* Part II.

36. See *infra* Part III.

37. See *infra* Part IV.

38. See *infra* Part V.

39. WALTER A. MCDUGALL, *PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776*, at 115 (1997).

40. Thomas G. Otte, *Of Congresses and Gunboats: Military Intervention in the Nineteenth Century*, in *MILITARY INTERVENTION: FROM GUNBOAT DIPLOMACY TO HUMANITARIAN INTERVENTION* 33-34 (Andrew M. Dorman & Thomas G. Otte eds., 1995).

41. MCDUGALL, *supra* note 39, at 115.

42. See *id.*

43. *Id.*

back to British naval sanctions imposed on the Ottoman Empire during the Greek war of independence.<sup>44</sup> The point of “pacific blockade” was not to disable the military force of the target state, still less to initiate a full clash of arms. The point was to impose financial cost on the target state. In the Venezuelan episode, the German navy ended up attacking Venezuelan ships and a Venezuelan fortification on land.<sup>45</sup> Germany was criticized in the United States (and even in Britain) for overly aggressive tactics—though the targets were “military.”<sup>46</sup> Venezuela did not acknowledge a state of war.<sup>47</sup> It did, however, acknowledge European claims: it agreed to accept international arbitration of European claims, and ultimately paid the resulting financial awards.<sup>48</sup>

Commentators at the time expressed satisfaction with a form of intervention that avoided the devastation of all-out war. “[I]t would seem that the existence of the right to undertake reprisals is an unqualified gain to international society,” wrote S. Maccoby in the *Cambridge Law Journal* in 1924.<sup>49</sup> Maccoby continued by saying: “The extreme step of a declaration of war, with its possibly fateful complications, has not necessarily to be taken in order to bring material pressure to bear to secure the redress of a wrong which may be small in itself.”<sup>50</sup>

The Venezuela blockade occurred before Europeans experienced the full horror of prolonged war with modern weapons. But somewhat similar episodes occurred after the First World War. In 1923, in one notable example, an Italian general was murdered while serving on an international diplomatic mission in Greece (to help resolve border disputes with Albania).<sup>51</sup> Italy demanded a formal apology from Greece.<sup>52</sup> When no apology was forthcoming, Italy occupied the island

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44. See ALBERT EDMOND HOGAN, *PACIFIC BLOCKADE* 151-57 (1908) (describing fifteen episodes of the practice of “pacific blockade” between 1832 and 1903); see also Otte, *supra* note 40, at 32, 34.

45. Otte, *supra* note 40, at 34.

46. *Id.* at 35.

47. HOGAN, *supra* note 44, at 157.

48. Otte, *supra* note 40, at 35.

49. S. Maccoby, *Reprisals as a Measure of Redress Short of War*, 2 *CAMBRIDGE L.J.* 60, 69 (1924).

50. *Id.* However, the author immediately acknowledges possible “abuses” arising from the fact that “in modern times the effective use of reprisals is confined to the Greater Powers in their relations with smaller.” *Id.* He somewhat undermines this qualification, however, by acknowledging the effective use of French reprisals—and threats of more serious reprisals—against Germany in the 1920s. *Id.* at 70.

51. JAMES CABLE, *GUNBOAT DIPLOMACY 1919-1991: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE* 37-38 (3d ed. 1994) [hereinafter CABLE, *GUNBOAT DIPLOMACY*].

52. *Id.* at 38; JAMES CABLE, *THE POLITICAL INFLUENCE OF NAVAL FORCE IN HISTORY* 115 (1998) [hereinafter CABLE, *POLITICAL INFLUENCE*].



of Corfu and held it until Greece met its demands.<sup>53</sup> The League of Nations did not intervene—there was no actual war. The British, French, Japanese, and American governments subsequently acknowledged that Italy had acted within its rights.<sup>54</sup> Its chosen tactic was not to attack Greek military assets, but to impose a cost—and a humiliation—on the people of Greece, which (as Italy expected) the Greek government could not endure for very long.

In the same year, France undertook reprisals for the arrest of several Frenchmen accused of smuggling near the border between the part of the German Rhineland, then occupied by France, and the territory still in German hands.<sup>55</sup> The French responded by occupying a German border town for several hours, during which they made “many arrests” of German civilians, then shut down travel between the French occupied areas of Germany and the rest of the country for ten days.<sup>56</sup> The problem does not seem to have recurred.

Also, in 1923, French and Belgian forces occupied the Ruhr region of Germany as reprisal for Germany’s failure to meet reparations payments.<sup>57</sup> While Germany responded by printing paper money and destroying its currency in the ensuing hyperinflation, the French ensured the short-term success of their occupation—lasting almost two years—by extracting payment-in-kind from German coal mines in the region, until a larger agreement on rescheduling reparation payments (assisted by American loans) was negotiated the following year.<sup>58</sup>

Such episodes may seem far in the past. But what seems most remote are the amicable, or at least formal, settlements that such interventions could prompt in earlier times. Recent peacetime interventions have often been more destructive—without being any more focused on military forces. In 1968, Israel retaliated against Lebanon for terror attacks on Israeli aircraft by Lebanon-based Palestinians: Israeli commandoes blew up twelve Lebanese passenger jets and one cargo plane while they were parked at the Beirut airport.<sup>59</sup> There were no casualties, but the targeted aircrafts were entirely civilian: the point was

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53. CABLE, GUNBOAT DIPLOMACY, *supra* note 51, at 38-39; CABLE, POLITICAL INFLUENCE, *supra* note 52, at 115-16.

54. CABLE, POLITICAL INFLUENCE, *supra* note 52, at 116.

55. Maccoby, *supra* note 49, at 68.

56. *Id.*

57. CONAN FISCHER, THE RUHR CRISIS, 1923-1924, at 29 (2003).

58. *Id.* at 26-27, 210-11, 215.

59. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 218-19 (1977).

to impose a sizable financial penalty on Lebanon for hosting Palestinian terror forces.<sup>60</sup>

In 2006, Israel sent troops into southern Lebanon to disarm Hezbollah militia forces that had been launching rocket attacks against northern Israel.<sup>61</sup> At the same time, the Israeli air force destroyed runways at the Beirut airport—ostensibly to prevent cargo planes from bringing in supplies to Hezbollah.<sup>62</sup> The attack had the foreseeable effect of imposing a longer-lasting penalty on the Lebanese economy. Fighting on the border ended in two weeks; the damage at the international airport inhibited commercial flights for some months.<sup>63</sup>

Israel is not the only country to engage in armed attacks for the purpose of punishment. After a terrorist attack on U.S. forces in Berlin in 1986, President Ronald Reagan authorized air strikes on Tripoli.<sup>64</sup> The attacks aimed at Libyan government buildings, but Muammar al-Gadhafi claimed that one of his children had been killed in a bomb directed at one of his own residences.<sup>65</sup> President Reagan's televised speech to the American people, defending the strikes, repeatedly used language portraying Gadhafi's regime as "criminal"—and implying that the American attacks were "just punishment."<sup>66</sup> It was not plausible to claim that the attacks would actually destroy offices or installations essential to planning future terrorist attacks.

While the Libyan attack was widely criticized at the time, even by European allies, there was much more acceptance of U.S. air strikes against Saddam Hussein's Iraq in the late 1990s.<sup>67</sup> In each case, the attacks were justified as responses to Saddam's failure to cooperate with international weapons inspectors, as he was obliged to do by the 1991

60. *Id.* at 219.

61. Jason S. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?*, 60 A.F. L. REV. 29, 47-48 (2007); Hassan M. Fattah & Steven Erlanger, *Israel Attacks Beirut Airport and Sets Up Naval Blockade*, N.Y. TIMES, July 14, 2006, at A1.

62. Fattah & Erlanger, *supra* note 61.

63. Wrachford, *supra* note 61, at 48; Fattah & Erlanger, *supra* note 61.

64. President Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya (Apr. 14, 1986) [hereinafter Address to the Nation], available at [http://www.reaganfoundation.org/pdf/Address\\_to\\_the\\_Nation\\_on\\_the\\_US\\_Air\\_Strike\\_Against\\_Libya\\_041486.pdf](http://www.reaganfoundation.org/pdf/Address_to_the_Nation_on_the_US_Air_Strike_Against_Libya_041486.pdf).

65. Christopher J. Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933, 936 (1987).

66. In justifying the air attack on Tripoli, President Reagan said that it would "not only diminish Colonel Qadhafi's capacity to export terror, it will provide him with incentives and reasons to alter his criminal behavior." Address to the Nation, *supra* note 64. See the characterization of this rhetoric as "punitive" in Blum, *supra* note 16, at 73.

67. Jamie McIntyre, *Pentagon Unveils Details of Operation Desert Fox*, CNN (Dec. 16, 1998, 10:11 PM), <http://www.cnn.com/WORLD/meast/9812/16/pentagon.02>.

cease fire agreement.<sup>68</sup> The targets included not only Iraqi military bases, but also buildings in downtown Baghdad, where political, intelligence, and military leaders were located.<sup>69</sup> The aim was clearly retaliatory; that is to say, punitive. There was no direct connection between destroying Iraqi military assets and enforcing Iraqi obligations to cooperate with inspections: certainly the targets were not road blocks at the entrance to sites which international inspectors sought to enter.<sup>70</sup> Legal commentators criticized these exercises in punitive force for not being exercises in self-defense in the sense of the U.N. Charter.<sup>71</sup> That did not worry Western governments at the time.

The United States and its North Atlantic Treaty Organization (“NATO”) allies inflicted far more sustained and destructive attacks in the ten-week air campaign against Serbia in the Spring of 1999, designed to force Serbia to accept an international peacekeeping force in the rebellious Serb province of Kosovo.<sup>72</sup> Targets were carefully negotiated between American and European commanders, with guidance from military lawyers.<sup>73</sup> All targets of air strikes—including electric power stations, highway bridges, and television broadcasting towers<sup>74</sup>—could be categorized as measures to undermine the effectiveness of the Serbian military. But, NATO did not send any ground troops into Serbia during the actual conflict. Thus, it was rather strained to claim these targets were “military objectives” offering a “definite advantage” to NATO troops.<sup>75</sup>

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68. See Lothar Brock, *The Use of Force in the Post-Cold War Era: From Collective Action Back to Pre-Charter Self-Defense?*, in REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR 21, 33-34 (Michael Bothe et al. eds., 2005) [hereinafter REDEFINING SOVEREIGNTY].

69. Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 148-49 (1999).

70. *Operation Desert Fox*, DEP’T DEFENSE, [http://www.defense.gov/specials/desert\\_fox](http://www.defense.gov/specials/desert_fox) (last visited July 20, 2014).

71. See, e.g., Blum, *supra* note 16, at 73, 83, 94, 98; Brock, *supra* note 68, at 33-34.

72. Mary Ellen O’Connell, *American Hyper-Sovereignty from Kosovo to the “Global War on Terror,”* in REDEFINING SOVEREIGNTY, *supra* note 68, at 123, 130.

73. Michael Short, *Operation Allied Force from the Perspective of the NATO Air Commander*, 78 INT’L L. STUD. 19, 25 (2002).

74. See Marc Weller, *Forcible Humanitarian Action: The Case of Kosovo*, in REDEFINING SOVEREIGNTY, *supra* note 68, at 277, 300.

75. Blum, *supra* note 16, at 118-19. AP I requires that a lawful attack must not cause “incidental loss of civilian life” or even “damage to civilian objects,” which “would be excessive in relation to the concrete and direct military advantage anticipated” from the attack. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5)(b), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

The effect of the air strikes was to impose hardship on Serb civilians and that was certainly understood by NATO commanders. U.S. General Michael Short acknowledged at the time that the ultimate target was civilian morale:

I felt that on the first night, the power should have gone off, and major bridges around Belgrade should have gone into the Danube, and the water should be cut off so that the next morning the leading citizens of Belgrade would have got up and asked, 'Why are we doing this?' and asked [Serb President] Milosevic the same question.<sup>76</sup>

Two years later, he insisted that each air strike was "targeting a valid military target," while morale effects were "a peripheral result"—without denying his awareness that air strikes could "make the Serb population unhappy with their senior leadership because they allowed this to happen."<sup>77</sup>

If there is ambiguity about the reach of direct air attacks, there is no ambiguity about the reach of economic sanctions. After the armistice ending the first Gulf War, severe limits were imposed on Iraq's sale of oil—its main export<sup>78</sup>—to ensure its compliance with international inspections.<sup>79</sup> Iraq quickly lost the capacity to import basic supplies for civilians, along with military hardware or equipment.<sup>80</sup> By the late 1990s, U.N. agencies claimed hundreds of thousands of civilians had lost their lives from resulting shortages of food and medicine.<sup>81</sup> The Security Council established a special program to allow Iraqi oil sales to finance purchases of food and medicine.<sup>82</sup> But, no one claimed that civilians did not still suffer extreme hardship from the remaining export restrictions imposed on Iraq.<sup>83</sup>

In the same period, tightening economic sanctions were imposed on Serbia.<sup>84</sup> Average income declined by 50%, while unemployment rose to

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76. Craig R. Whitney, *Air Wars Won't Stay Risk Free*, *General Says*, N.Y. TIMES, June 18, 1999, at A22.

77. Short, *supra* note 73, at 29.

78. W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, 103 (1998).

79. *Id.* at 102.

80. *Id.* at 102-03.

81. Barbara Crossette, *Iraq Sanctions Kill Children*, U.N. Reports, N.Y. TIMES, Dec. 1, 1995, at A9.

82. DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S*, at 48-49 (2000).

83. *See, e.g.*, Reisman & Stevick, *supra* note 78, at 105-06 (arguing that the deteriorating conditions of the Iraqi economy were provoked by the sanctions, "which resulted from Saddam Hussein's decision to become personally involved in economic policy").

84. CORTRIGHT & LOPEZ, *supra* note 82, at 63, 65.

nearly 40%.<sup>85</sup> Western analysts judged that Serbia experienced “economic meltdown,” though not quite “the humanitarian catastrophe that gripped Iraq.”<sup>86</sup>

The U.N. Security Council endorsed these sanctions.<sup>87</sup> Critics, however, urged that the United Nations must pay more attention to the humanitarian implications.<sup>88</sup> They insisted that sanctions needed to be more carefully targeted—that they should be “smart sanctions,” not blunderbuss blows at the target state.<sup>89</sup> So, U.N. economic sanctions against Iran in the past decade (aimed at forcing the Islamic Republic to abandon its nuclear weapons program) have targeted the military supplies and resources of the elite Revolutionary Guards.<sup>90</sup>

However, the United States and the European Union have imposed their own economic sanctions.<sup>91</sup> They have not only barred Iranian oil sales to the United States and to all European countries, they have also deprived Iran of access to the American and European banking systems (and so, to foreign trade denominated in dollars, euros or British pounds) and to American and European insurance markets for Iranian tankers.<sup>92</sup> Oil supplied more than half of the Iranian government’s revenue in 2010.<sup>93</sup> The effect of the sanctions was to drive down Iranian oil revenues by 50%, “from \$100 billion in 2011 to approximately \$50

85. *Id.* at 73.

86. *Id.* at 73-74. The British medical journal *The Lancet* estimated that over half a million Iraqi children had died, although the figure was much disputed. Sarah Zaidi & Mary C. Smith Fawzi, *Health of Baghdad’s Children*, 346 LANCET 1485, 1485 (1995). American researchers subsequently estimated that the “most likely” figure for the increase in child mortality in Iraq, attributable to the effects of sanctions, was about 227,000. RICHARD GARFIELD, MORBIDITY AND MORTALITY AMONG IRAQI CHILDREN FROM 1990 THROUGH 1998: ASSESSING THE IMPACT OF THE GULF WAR AND ECONOMIC SANCTIONS 32-33 (1999), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/A2E2603E5DC88A4685256825005F211D-garfie17.pdf>.

87. CORTIGHT & LOPEZ, *supra* note 82, at 37-41, 63.

88. Roger Normand & Christoph Wilcke, *Human Rights, Sanctions, and Terrorist Threats: The United Nations Sanctions Against Iraq*, 11 TRANSNAT’L L. & CONTEMP. PROBS. 299, 336 (2001).

89. CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT’L L. 849, 880 (2009).

90. Quinton Cannon Farrar, Comment, *U.S. Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction*, 79 FORDHAM L. REV. 2347, 2371 (2011).

91. Steven Blockmans & Stefan Waizer, *E3+3 Coercive Diplomacy Towards Iran: Do the Economic Sanctions Add up?*, in CEPS POL’Y BRIEF 2-3 (Ser. No. 292, 2013), available at [http://aei.pitt.edu/42436/1/PB292\\_SB\\_%26\\_SW\\_Economic\\_Sanctions\\_on\\_Iran\\_final.pdf](http://aei.pitt.edu/42436/1/PB292_SB_%26_SW_Economic_Sanctions_on_Iran_final.pdf).

92. Barry E. Carter & Ryan M. Farha, *Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran*, 44 GEO. J. INT’L L. 903, 911-13 (2013); Farrar, *supra* note 90, at 2371; Richard Allen Greene, *New European Union Sanctions Target Iran Nuclear Program*, CNN (Jan. 23, 2012, 8:08 PM), <http://www.cnn.com/2012/01/23/world/Europe/iran-eu-oil/index.html?s=PM:Europe>.

93. Blockmans & Waizer, *supra* note 91, at 2.

billion in 2012.”<sup>94</sup> The value of the Iranian currency fell by 50%, inflation climbed over 30%, and unemployment increased 20%.<sup>95</sup> The sanctions did not prohibit imports of food or medical supplies, but both became scarce amidst general belt tightening.<sup>96</sup> There were food riots in some cities and reports of hospitals forced to suspend treatments for cancer and HIV, as necessary drugs became inaccessible.<sup>97</sup>

Whatever else one may say about economic sanctions, they do not spare civilians. Even commentators who urge that sanctions must respect humanitarian constraints do not argue that lawful sanctions must avoid any harm to civilians.<sup>98</sup> In countries where tyrannical governments can reallocate resources to protect themselves, there is no way to hurt the government without hurting the people. Yet, the International Red Cross and many legal commentators approach the law of armed conflict as if it required war to avoid harm to civilians—even to civilian property.<sup>99</sup> The traditional view was more realistic.

### III. JUST WAR AND CIVILIAN PROPERTY

The most restrictive view of lawful warfare is codified in the 1977 Additional Protocol (“AP I”) to the Geneva Conventions.<sup>100</sup> It stipulates that participants in international conflicts must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>101</sup> The official Red Cross commentary on AP I describes this “basic rule of protection and distinction” as expressing a long-standing principle, “the foundation on which the codification of the laws and customs of war rests.”<sup>102</sup>

94. *Id.* at 4.

95. *Id.* at 4-5.

96. *Id.* at 4.

97. *Iran’s Nuclear Programme: A Red Line and a Reeling Rial*, ECONOMIST, Oct. 6, 2012, at 57; *Iran’s HIV/AIDS Sufferers Struggle for Survival*, BBC NEWS (Dec. 3, 2012, 6:45 PM), <http://www.bbc.co.uk/news/world-middle-east-20579164>; Jason Rezaian, *Iran Faces Possible Health-Care Crisis*, WASH. POST, Nov. 22, 2012, [http://www.washingtonpost.com/world/iran-faces-possible-health-care-crisis/2012/11/21/fe6efb70-3026-11e2-9f50-0308e1e75445\\_story.html](http://www.washingtonpost.com/world/iran-faces-possible-health-care-crisis/2012/11/21/fe6efb70-3026-11e2-9f50-0308e1e75445_story.html).

98. See 1 RUDOLPH BERNHARDT ET AL., *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 745-46 (Bruno Simma et al. eds., 2d ed. 2012); Reisman & Stevick, *supra* note 78, at 128-31.

99. Protocol I, *supra* note 75, at art. 48; *War and International Humanitarian Law*, INT’L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>.

100. Protocol I, *supra* note 75, at arts. 48-68; *The Geneva Conventions of 1949 and Their Additional Protocols*, INT’L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), <http://icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

101. Protocol I, *supra* note 75, at art. 48.

102. INT’L COMMITTEE OF THE RED CROSS, *COMMENTARY ON THE ADDITIONAL PROTOCOLS*

But the Red Cross Commentary (“Commentary”) cites only one source for this claim, the 1868 St. Petersburg Declaration, which affirmed that “the only legitimate objective which States endeavor to accomplish during war is to weaken the military forces of the enemy.”<sup>103</sup> Even the Commentary acknowledges that this agreement—prohibiting the use of explosive bullets in combat—was “not aimed at specifically protecting the civilian population.”<sup>104</sup> Restraints in war can be traced back many centuries, but no treaty and no treatise on the subject ever proclaimed anything as sweeping as the “basic rule” laid down in AP I.<sup>105</sup>

One can see the point from the terminology: according to the Oxford English Dictionary, the term “civilian”—in the sense of non-military—did not appear in English usage until the very end of the eighteenth century.<sup>106</sup> Medieval theorists saw punishment as a legitimate aim of war.<sup>107</sup> Certainly, pillaging raids into the countryside were hard to justify except in those terms. The *chevauchée* expeditions of the Hundred Years War (by which English troops devastated crops and villages across France) have been described as early versions of “economic warfare.”<sup>108</sup> Sieges of walled towns commonly ended in a general sacking—in which soldiers made little distinction between enemy soldiers and their dependents or non-combatant neighbors.

Logically, given their starting point, medieval theorists of just war emphasized not the distinction between combatant and non-combatant, but the distinction between the innocent and the guilty. The Spanish theologian Franciscus de Vitoria cautioned that women should be spared—unless they aided the enemy and so could be classed among the “guilty.”<sup>109</sup> Even the distinction between the innocent and the guilty would give way to the claims of the side fighting in a just war: “it is also

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OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 598 (Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

103. *Id.* (internal quotation marks omitted).

104. *Id.*

105. See Michael Bothe, *Targeting*, 78 INT’L L. STUD. 173, 173-76 (2002) (outlining the history and development of targeting protocols).

106. 3 OXFORD ENGLISH DICTIONARY 257 (2d ed. 1989).

107. See MATTHEW STRICKLAND, *WAR AND CHIVALRY: THE CONDUCT AND PERCEPTION OF WAR IN ENGLAND AND NORMANDY* 34-41, 70, 140-43 (1996).

108. *Id.* at 70 (describing “ravaging and economic warfare, which involved the burning of crops and villages” as an integral part of English warfare); see also JONATHAN SUMPTION, *THE HUNDRED YEARS WAR: TRIAL BY BATTLE* 181 (1990) (describing the *chevauchée* in general as a “large-scale mounted raid, which was to be the hallmark of English strategy in France in the 1340s and 1350s”).

109. FRANCISCUS DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* 179 (Ernest Nys ed., 1964).

lawful to take the money of the innocent and to burn and destroy their grain and kill their horses,” Vitoria affirms, “if this is requisite in order to sap the enemy’s strength . . . it is lawful utterly to despoil all enemy-subjects, guilty and guiltless alike, for it is from their resources that the enemy is feeding an unjust war.”<sup>110</sup>

As late as the early seventeenth century, the great treatise of Hugo Grotius, *DE JURE BELLI AC PACIS LIBRI TRES*, still devoted many pages to war for the sake of punishment.<sup>111</sup> That was not the only kind of just war in his view, but still an important one.<sup>112</sup> Grotius admonished the rulers of his age, most of whom were involved in the very sanguinary Thirty Years War, to show restraint toward women and children, toward religious institutions and clergy, and toward ordinary agricultural workers.<sup>113</sup> He described these as “Christian” practices—exceptions to the “natural” logic of war, as practiced by others, notably the pagans of antiquity.<sup>114</sup>

By the mid-eighteenth century, writers on the law of nations, while still stressing its roots in principles of natural law, tended to embrace a wider set of constraints. By then, the influence of new natural rights theories (launched by Thomas Hobbes and John Locke in England, and Samuel Pufendorf in Germany) gave more emphasis to the self-interest of warring states.<sup>115</sup> From this perspective, it seemed more plausible to expect that even enemies could embrace mutual restraint, when it was in their mutual interest. Among other things, Emmerich de Vattel and Jean-Jacques Burlamaqui, the most influential writers of the mid-eighteenth century, devoted considerable attention to the rights of neutrals.<sup>116</sup> They assumed that wars would often look, at least to third parties, as contests between equally self-serving parties, rather than a moral struggle between the righteous and the wicked.<sup>117</sup>

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110. *Id.* at 180.

111. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 502-03 (Francis W. Kelsey et al. trans., 1995).

112. Grotius devotes two chapters totaling eighty-three pages (in the Kelsey edition) to “punishment” as a lawful purpose in making war. These chapters take up some twenty percent of his overall treatment of just and unjust causes of war. *See id.* at 463-545.

113. *Id.* at 734-37.

114. *Id.* at 743-44.

115. *See* 3 E. VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW: APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* 244 (Charles G. Fenwick trans., 1995).

116. *See* JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 502-03, 505-07, 516-17 (Petter Korkman ed., Thomas Nugent trans., 2006); VATTEL, *supra* note 116, at 268, 273, 277-78.

117. *See* BURLAMAQUI, *supra* note 116, at 516-17; VATTEL, *supra* note 116, at 268.



But even eighteenth century writers did not draw a sharp distinction between combatants and non-combatants. The treatise of the Swiss diplomat, Vattel, affirmed it was “lawful to take away the property of an unjust enemy . . . to weaken him or to punish him.”<sup>118</sup> It went on to affirm that “the same reasons authorize a belligerent [who] lays waste to a country and destroys food and provender, in order that the enemy may not be able to subsist there.”<sup>119</sup>

Along with Swiss philosopher Burlamaqui, Vattel accepted that war on the seas could aim at the enemy’s commerce.<sup>120</sup> Belligerents could seize merchant ships at will.<sup>121</sup> Both ship and cargo could be lawful “prizes of war” in order to hurt the enemy, even if that meant, as inevitably it did, hurting civilian trade among the enemy’s people.<sup>122</sup> These commentators did not argue that anything and everything was lawful in time of war. They acknowledged the established practice that only ships of the enemy could be lawful prize, not ships or cargoes belonging to neutrals.<sup>123</sup> The Framers of the U.S. Constitution also embraced this method of warfare, authorizing Congress to issue “letters of marque”—licenses to capture enemy merchant ships—and to make rules for “prize and capture,” without indicating any restriction of the practice to purely military equipment.<sup>124</sup>

Both this practice and theory remained compelling to statesmen and scholars throughout the nineteenth century and well into the twentieth century. The American Civil War, to cite a notable example, witnessed the massive seizure and destruction of private property.<sup>125</sup> It was not that the United States refused to acknowledge limits on its war-making power against the rebellious states of the Confederacy; on the contrary, the Union Army issued one of the first formal codes of war, which was prepared by the German *émigré* scholar, Franz Lieber.<sup>126</sup> Lieber’s Code cautioned against “cruelty,” “wanton destruction,” and “unauthorized destruction,” but did not limit permissible targets to armies and their military equipment.<sup>127</sup> Rather, it approved “all

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118. VATTEL, *supra* note 116, at 292 (citation omitted).

119. *Id.* at 292-93.

120. BURLAMAQUI *supra* note 116, at 503; VATTEL, *supra* note 116, at 107.

121. VATTEL, *supra* note 116, at 308.

122. BURLAMAQUI *supra* note 116, at 503; VATTEL, *supra* note 116, at 308.

123. BURLAMAQUI *supra* note 116, at 503-06; VATTEL, *supra* note 116, at 308-09.

124. STEPHEN C. NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 22-23 (2010).

125. See generally *id.* at 102-27 for a discussion regarding property that was seized and destroyed during the Civil War.

126. *Id.* at 56-57.

127. GENERAL ORDERS NO. 100: THE LIEBER CODE arts. 11, 44 (1863), available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp#sec2](http://avalon.law.yale.edu/19th_century/lieber.asp#sec2).

destruction of property and obstruction of the ways and channels of traffic, travel, or communication.”<sup>128</sup>

So far from emphasizing any sharp distinction between military objectives and civilian property, the Lieber Code urged commanders to “throw the burden of the war . . . on the disloyal citizens”<sup>129</sup> and held it “lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.”<sup>130</sup> General William Sherman’s devastation of civilian agriculture in his march through Georgia in 1864 (as with the contemporaneous devastation of farms in the Shenandoah Valley by General Phillip Sheridan) was regarded as consistent with the code.<sup>131</sup>

At the end of the nineteenth century, the first Hague Peace Conference produced a Convention on the Laws and Customs of War on Land, which was slightly revised at the 1907 Peace Conference.<sup>132</sup> The Convention follows the general lines of the Lieber Code (an acknowledged source for the drafters), and cautions against bombardment of undefended cities and against medical facilities and religious and cultural sites.<sup>133</sup> It did not, however, stipulate that attacks must never be directed at “civilian objects.” The term “civilian” does not figure at all in its restrictions.<sup>134</sup> Hague conventions on naval war sought to protect neutral shipping,<sup>135</sup> but placed no restrictions on seizing civilian cargoes and ships from the enemy.

The foremost scholar of international law in that period, Lassa Oppenheim, published the first edition of his classic treatise in 1905, and a second in 1912.<sup>136</sup> Oppenheim acknowledged many restrictions on the conduct of war between “civilized states”—implicitly conceding that

128. *Id.* at art. 15.

129. *Id.* at art. 156.

130. *Id.* at art. 17.

131. NEFF, *supra* note 124, at 91-101.

132. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277.

133. *Id.* at art. 25 (prohibiting bombardment of undefended cities); *id.* at art. 27 (prohibiting bombardment of buildings devoted to religion, arts, science, or charitable purposes, as well as historic monuments, hospitals, and places where the sick and wounded are collected).

134. The term appears only once—in relation to “civilians” carrying messages for the army—and stipulates that if captured by the enemy, such individuals are entitled to be treated by the enemy as prisoners of war. *Id.* at art. 29. So, the only “civilian” claim recognized in so many words is the claim of quasi-military individuals to be accorded military status. Here, as in the text, citations are to the “regulations” appended to the 1907 Convention (Hague IV) which remained in effect during the World Wars.

135. *See, e.g.*, Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in the Naval War (1907); Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War.

136. *See generally* 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (1905).

more destructive methods might be proper in colonial wars.<sup>137</sup> They were, in fact, used in colonial wars and the practice should not simply be attributed to European racism. As Oppenheim noted, Britain's war against the Boer guerrillas in South Africa—white farmers of Dutch descent—had involved deliberate devastation of farms to remove food supplies from guerrilla forces.<sup>138</sup>

Oppenheim noted that prominent European publicists had, over the course of the nineteenth century, embraced the doctrine that “no relation of enmity exists between belligerents [i.e., states and their armies] and . . . the private subjects of the respective belligerents.”<sup>139</sup> Still, as he noted, “British and American-English writers, however, never adopted [this doctrine], but always maintained that the relation of enmity between the belligerents extends also to their private citizens.”<sup>140</sup> Oppenheim, himself, insisted that given “the facts of war . . . there ought to be no doubt that the British and American view is correct. It is impossible to sever the citizens from their State and the outbreak of war between two States cannot but make their citizens enemies.”<sup>141</sup> He acknowledged that in practice, accepted restraints on the conduct of modern war made the dispute somewhat academic.<sup>142</sup> But, he pointed to seizure of enemy property at sea as an enduring exemplar of the Anglo-American view.<sup>143</sup>

In fact, the First World War exemplified wide approval of the Anglo-American view. Early on, the term “economic warfare” gained currency to describe the purpose of tightening Allied blockades and German U-boat attacks on civilian shipping.<sup>144</sup> Belligerent powers claimed—and exercised—the right to seize all assets of foreign nationals (not only ships in their ports, but equipment and facilities and financial resources of foreign-owned firms).<sup>145</sup> Such practice was deployed in

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137. 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 70-71 (1912).

138. *Id.* at 215-16.

139. *Id.* at 70.

140. *Id.* at 71.

141. *Id.*

142. *See id.* at 71, 85, 91.

143. *Id.* at 160.

144. DAVID STEVENSON, *CATAclysm: THE FIRST WORLD WAR AS POLITICAL TRAGEDY* 199-201 (2004) (explaining the new, more comprehensive approach to blockade that was launched in the First World War—along with the novel term, “economic warfare”).

145. 3 CHARLES CHENEY HYDE, *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1732* (2d rev. ed., 1951). Hyde states: “The general right of confiscation is incidental to that broader right of a belligerent to endeavor to weaken the enemy by striking at its economic as well as purely military resources, and that irrespective of their actual availability to either contestant in the prosecution of the war.” *Id.* As Hyde points out, German property that was confiscated by the Allied powers was not returned to German owners—even after the end of the First World War—because the Treaty of Versailles prohibited attempts at recovery.

both the First and Second World Wars from the outset.<sup>146</sup> Amidst far larger devastation from bombing raids on enemy territory, culminating in the destruction of entire cities, seizures of overseas enemy property provoked no objections from commentators.

In the aftermath of the Second World War, a 1949 conference in Geneva produced four new conventions on the law of international armed conflict. They sought to spell out protections for medical personnel, for injured or shipwrecked combatants at sea, for military prisoners of war, and for civilians in occupied territory.<sup>147</sup> The four Geneva conventions said nothing about limits on targeting—perhaps because so few limits had been observed in the war just past. The U.N. Charter, adopted in 1945, authorizes the Security Council to deploy “bomber forces,”<sup>148</sup> but says nothing about permissible limits on their targets—perhaps for the same reason. The Charter also authorizes the Security Council to impose “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication”—again, without acknowledging any limitations on such all-out embargoes.<sup>149</sup>

AP I was an innovation.<sup>150</sup> But, Article 48’s seemingly comprehensive language is somewhat undermined, even in the text, by later provisions. There are special admonitions to protect women<sup>151</sup> and children<sup>152</sup>—as if the general prohibition on attacks against civilians was not sufficient. It also offers a specific prohibition against any “attack” on “objects indispensable to the survival of the civilian population, such as foodstuffs . . . drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population.”<sup>153</sup> It is again an implicit acknowledgement that the general ban on attacking “civilian objects” cannot be taken at face value. A later provision, defining “grave breaches” of the convention, includes “[m]aking the civilian population or individual civilians the object of attack.”<sup>154</sup> Whereas direct attacks on non-combatants are proscribed in several distinct provisions, here,

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*Id.* at 1730.

146. *Id.* at 1727.

147. Protocol I, *supra* note 75, at art. 8.

148. U.N. Charter art. 42.

149. *Id.* at art. 41.

150. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 121 (2010).

151. Protocol I, *supra* note 75, at art. 76.

152. *Id.* at art. 77.

153. *Id.* at art. 54.

154. *Id.* at art. 85.

attacks on “civilian objects” are mentioned only in connection with other prohibited targets. The same provision admonishes against “[m]aking the clearly recognized historic monuments, works of art or places of worship . . . the object of attack”—implying that some “civilian objects” deserve greater protection than others.<sup>155</sup>

All of these special provisions in AP I are nods to past practice. The Hague Conventions singled out these special claims to protection, as did earlier treatises on the laws of war.<sup>156</sup> But, acknowledging past practice also implies respect for its logic. It is quite possible to endorse the humanitarian aim of trying to spare civilians from direct threats to life and safety, without embracing the conclusion that all “civilian objects” are, per se, exempt from attack or entitled to claim the same degree of caution from attackers. What is implied in the details of AP I is more directly indicated in American military manuals. The U.S. Navy Commander’s Handbook on Naval Operations reframes the AP I distinction to embrace (as permissible targets for “attack”) “objects which . . . effectively contribute to the enemy’s war-fighting or war-sustaining capability.”<sup>157</sup> As critics have pointed out, “this [formula] might easily be interpreted to encompass virtually every activity in the enemy country.”<sup>158</sup> But, the United States has not rescinded or narrowed the doctrine affirmed in the Commander’s Handbook.<sup>159</sup>

The United States has not ratified AP I, and thus, it is not bound by every detail.<sup>160</sup> Even states that have subscribed to AP I have done so with reservations that capture the spirit of earlier thinking.<sup>161</sup> AP I

155. *Id.*

156. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 27 (admonishing against attack on institutions devoted to “religion, arts, science, or charitable purposes,” as well as historic monuments and hospitals); *id.* at art. 57 (prohibiting seizure and destruction of property belonging to institutions dedicated to religion, charity, education, the arts and sciences); 3 EMMERICH DE VATTEL, *THE LAW OF NATIONS* § 168 (property should be spared when devoted to religion or when constituting architectural monuments).

157. See generally A.V. Lowe, *The Commander’s Handbook on the Law of Naval Operations*, in 64 INTERNATIONAL LAW STUDIES 1991: THE LAW OF NAVAL OPERATIONS (Horace B. Robertson, Jr. ed., 1991) [hereinafter 64 INTERNATIONAL LAW STUDIES].

158. Frits Kalshoven, *Noncombatant Persons: A Comment to Chapter 11 of the Commander’s Handbook*, in 64 INTERNATIONAL LAW STUDIES, *supra* note 158, at 310.

159. *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, in 73 INTERNATIONAL LAW STUDIES 402 (A.R. Thomas & James C. Duncan eds., 1999).

160. Lea Brilmayer & Geoffrey Chepiga, *Ownership or Use? Civilian Property Interests in International Humanitarian Law*, 49 HARV. INT’L L.J. 413, 427 n.71 (2008).

161. Ratification of France to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Assemblée Nationale No. 2833, Dec. 20, 2000, at 35; Ratification of Germany to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, §§ 6-7, Feb. 14, 1991, 1607 U.N.T.S. 529; Ratification of Canada to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims

purports to ban attacks on “civilian objects” even by way of “reprisal,” just as it prohibits killing of prisoners and direct killing of civilians, even in reprisal for enemy killings of protected persons.<sup>162</sup> In one notable example, Great Britain ratified AP I with a number of formal reservations, one of which reserved the right to retaliate in kind for attacks on “civilian objects.”<sup>163</sup> It did not claim the right to kill war prisoners or civilians, even in reprisal. Its reservations distinguished, in effect, between categorical humanitarian obligations, which should be respected at all times, and more contingent restraints, which might in some circumstances be lawfully waived.<sup>164</sup> It also recognized that the distinction between these two obligations does not simply correspond to AP I’s demarcation between “civilian objects” and “military objectives.”<sup>165</sup> France, Germany, Australia, and Canada made similar reservations when joining and ratifying AP I.<sup>166</sup>

Prominent commentators acknowledge the distinction discussed above. According to Professor Yoram Dinstein, “there is no reason why every inanimate civilian object must be shielded from belligerent reprisals.”<sup>167</sup> Professor Mark Osiel concurs, stating “[t]here clearly exists no settled legal opinion against civilian reprisal[s].”<sup>168</sup> Prominent textbooks implicitly acknowledge the point by distinguishing “humanitarian” obligation from the principle of “distinction.”<sup>169</sup> There is

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of International Armed Conflicts, art. 52, Nov. 20, 1990, 1591 U.N.T.S. 465; Ratification of Australia to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 52, June 21, 1991, 1642 U.N.T.S. 474; see also Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 849 INT’L REV. RED CROSS 1, 16 (2003) (summarizing the declarations of each country with respect to Article 52 of the AP I).

162. Protocol I, *supra* note 75, at art. 52 (“Civilian objects shall not be the object of attack or of reprisals.”); Brilmayer & Chepiga, *supra* note 160, at 427-29.

163. U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 420-21 (2004).

164. Ratification of United Kingdom of Great Britain and Northern Ireland to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jan. 1, 1998, 2020 U.N.T.S. 75-76.

165. *Id.* at 77-78.

166. See sources cited *supra* note 161.

167. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 259 (2d ed. 2010). Dinstein, Professor at Tel Aviv University and the U.S. Naval War College, was a consultant to the International Red Cross study, Customary International Humanitarian Law. *Id.*

168. MARK OSIEL, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR 55 (2009). The American Society of International Law recognized this as a book of “special merit” in 2010.

169. SOLIS, *supra* note 150, at 250-51.

an obligation to limit loss of life in war, particularly civilian life, but that is not the same as an obligation to avoid all harm to “civilian objects.”<sup>170</sup>

None of these qualifications would matter if security could be adequately achieved by attacks confined to “military objectives”—as defined by the Red Cross school of legal commentators<sup>171</sup> but that seems unlikely. Throughout the 1990s, the United States responded to terrorist challenges with offshore missile strikes.<sup>172</sup> At the beginning of the twenty-first century, the United States launched full-scale land invasions of Afghanistan and Iraq.<sup>173</sup> They were, for the most part, fought within the rules set down in AP I. The U.S. Armed Forces did not directly target “civilian objects,” except when these “objects” were being used as platforms for military hostilities by combatants.<sup>174</sup> Whatever the achievements of these ventures, they greatly diminished American political support for land invasions. We are likely to see a return to earlier approaches. New technology will generate new opportunities for “punishing” hostile or delinquent states—but not necessarily by focusing attacks on “military objectives.”

#### IV. DISTINCTION AND RATIONAL BARGAINING

We have argued that neither historical nor recent practice supports a strict principle of distinction for all uses of force in international armed conflicts. Nations have employed wartime measures not just against combatants, but also against civilians.<sup>175</sup> Economic embargoes and naval blockades, for example, can inflict harm on civilians in equal, if not greater, measure to that on soldiers.<sup>176</sup> Just war theorists once recognized that civilians were, in part, responsible for the war making of their societies, and thus, could become legitimate targets.<sup>177</sup>

We are not arguing for a wholesale repudiation of the principle of discrimination, but for renewed attention to its roots and a re-evaluation

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170. See, e.g., GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 114-25 (2012) (describing “military necessity” and “humanity” as “cardinal principles,” then discussing “distinction” and “proportionality” as “implementation principles”); SOLIS, *supra* note 150, at 250-52 (discussing “distinction” as one of “four core principles,” but then treating avoiding “unnecessary suffering” as a separate core principle).

171. DINSTEN, *supra* note 167, at 89, 96, 98-100.

172. *Id.* at 135; see SOLIS, *supra* note 150, at 257-58.

173. See DINSTEN, *supra* note 167, at 135; SOLIS, *supra* note 150, at 539; Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT’L REV. RED CROSS 445, 457-58 (2005).

174. SOLIS, *supra* note 150, at 540-43; Schmitt, *supra* note 173, at 459, 463-66.

175. See DINSTEN, *supra* note 167, at 95-96; Schmitt, *supra* note 173, at 457-59, 461-63.

176. HOGAN, *supra* note 44, at 11; see also WALZER, *supra* note 59, at 147.

177. WALZER, *supra* note 59, at 145-46.

of its application in light of changes in the techniques of forcible coercion. We are not arguing for anything revolutionary. Additionally, AP I marked a departure from the traditional approach, particularly as interpreted by the Red Cross and academic commentators. We urge a partial return to earlier views. Under certain circumstances, an overly strict principle of distinction might even have the perverse effect of making war more, rather than less, likely. By requiring nations to concentrate hostile actions only upon combatants, strict distinction could encourage unnecessary destruction during wartime. It might create perverse incentives for nations to develop and deploy even more harmful weapons in combat. Nations may better honor the policy goals behind the principle of distinction by using force more broadly, but in a less lethal manner. If the purpose of war is to convince another nation to accept a desired policy outcome, then the law should permit more calibrated means of using force as a way to signal more precisely in bargaining situations.

Requiring nations at war to distinguish between military and civilian targets, to the extent possible allowed by current weapons technology, serves the interests of returning to peacetime. Out of pure self-interest, nations will contain the ravages of war in order to help maintain the conditions for peace and to preserve the value of the civilian economy for the post-war period.<sup>178</sup> Defenders in a war, of course, do not want to kill their fellow countrymen or destroy their own territory (although defenders might destroy civilian property as part of a scorched earth policy). Invaders who wish to expand would have no interest in ruining their prize. Reducing civilian casualties may also encourage an end to the conflict. Targeting the civilian population and destroying non-military objects and resources may harden nations at war and make compromise more difficult. The unexpected carnage of World War I, for example, made a *status quo ante* peace politically difficult for both sides.

Exceptions and counter-arguments to these reasons may prevail, depending upon the circumstances. An attacker might target civilian populations that produce supplies for troops in the field. Or, an attacker might believe that hitting civilian locations might demoralize an enemy or place political pressure on leaders to end the fighting. Some of these reasons motivated the Allied bombing of German cities in World War II, although the primitive nature of targeting technology also required

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178. See James Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. 41, 44, 54-55 (2002); Eric A. Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297, 302-07 (2003).



widespread bombing to reach a high probability of destroying a target.<sup>179</sup> We do not dispute that belligerent states have a duty to minimize direct loss of life among civilians, as far as possible. But, we do not endorse the claim that the same restraints apply to civilian property and equipment.<sup>180</sup> In particular, we disagree with recent efforts to broaden the principle and apply it during periods leading up to an armed conflict or against enemies that do not fight as conventional nation-states.<sup>181</sup>

In fact, coercion against civilian targets might help reduce the chances that war will come. To see why this might be the case, we employ here a rationalist framework for understanding war, which views armed conflict as the result of a bargaining failure between parties in a dispute.<sup>182</sup> This model of war shares its theoretical origins with legal and economic approaches to the choice between settlement and litigation in the field of civil procedure, where litigation similarly is understood as a failure to resolve a dispute through less costly means.<sup>183</sup>

Assume, for simplicity, that two nations are in a dispute. They should generally choose a peaceful settlement over war. War is costly, risky, and creates deadweight loss by destroying lives and property. By agreeing to divide a disputed territory or resource, nations can avoid complete defeat and the costs of an armed conflict. A rational settlement should mirror the balance of forces between the two nations. Each nation will have an expected value that it places on winning a dispute. That expected value will be a function of the expected benefit of winning (the probability of prevailing in war times the value of the asset) minus the expected costs of the conflict. If both nations know each other's probability of winning, the value of the matter in dispute, and the costs in war, they should reach a settlement. If nation A, for example, threatens to go to war if it does not receive disputed territory, but nation B knows that A's expected costs outweigh its expected benefits, then B will not budge. In that case, A should not go to war either. If A's expected benefits outweigh its costs, however, then B should agree to

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179. See CONRAD C. CRANE, BOMBS, CITIES, AND CIVILIANS: AMERICAN AIRPOWER STRATEGY IN WORLD WAR II 106-08 (Theodore A. Wilson et al. eds., 1993); ROBERT A. PAPE, BOMBING TO WIN: AIR POWER AND COERCION IN WAR 23-25 (1996).

180. CRANE, *supra* note 179, at 19, 23-24, 26.

181. Yoo, *Using Force*, *supra* note 21, at 739, 749-52.

182. See James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379, 387-88, 390, 397 (1995) [hereinafter Fearon, *Rationalist Explanations*]; Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2528, 2531 (2006); Robert Powell, *Bargaining in the Shadow of Power*, 15 GAMES & ECON. BEHAV. 255, 257-58, 274 (1995).

183. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 449-50 (1994); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1075, 1078 (1989).

compromise and avoid the costs of war in addition to the loss of the territory. In either case, no war should occur. As with the Coarse Theorem, the territory will end up in the hands of those who value it the most, the costs of war are avoided, and the only difference is in the distribution of gains.

There are a few situations where this model does not apply. First, rational bargaining requires that the leaders of the nations in dispute act rationally. Leaders may be delusional or motivated by incentives other than costs and benefits, such as a messianic religious vision. There will be less room to compromise with these leaders, such as the Taliban regime in Afghanistan before the American invasion in October 2001. Second, a regime—especially an authoritarian one—may hold little concern about a nation’s people, so long as they can improve their own welfare.<sup>184</sup> Such a nation might still risk going to war because the regime’s expected gains are high, even with a low probability of winning, and it will not bear the lion’s share of any costs. This may explain why compromise with Hussein in the 1990 Gulf War proved so elusive.<sup>185</sup> Third, there may be cases where nations have placed such different values on gaining a territory or an interest that there is no real overlap between the two nations’ acceptable ranges of outcomes which would make a peaceful settlement possible. Poland, for example, likely could have done nothing to prevent Germany from invading in 1939 because Adolf Hitler placed such an outsized importance on gaining territory to the East.<sup>186</sup>

But nations that do not suffer from these problems, and are acting rationally, may still go to war. A primary difficulty lies in imperfect information.<sup>187</sup> If nations A and B do not know each other’s probability of winning a conflict, valuation of the asset, or expected costs, they cannot decide accurately whether to go to war or to settle. Perfect information is necessary for bargaining to succeed. Nations A and B, for example, might understand each other’s valuation of a territory because it is easier to observe. Each side, however, will still have private information about their military capabilities and political determination that directly affects both their probability of winning and expected costs

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184. See Dan Reiter & Allan C. Stam III, *Democracy, War Initiation, and Victory*, 92 AM. POL. SCI. REV. 377, 378 (1998).

185. See James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 582 (1994) [hereinafter Fearon, *Political Audiences*] (discussing Hussein’s regime in 1990).

186. See ANDREW ROBERTS, *STORM OF WAR: A NEW HISTORY OF THE SECOND WORLD WAR* 6-7, 585-608 (2011); Fearon, *Rationalist Explanations*, *supra* note 182, at 388; Yoo, *Using Force*, *supra* note 21, at 745.

187. Fearon, *Political Audiences*, *supra* note 185, at 583.

of war. They will lack reliable means to fully discover the strength and resolve of their opponent, which will discourage bargaining. Imperfect information also creates an incentive to bluff, which makes the outcome of war even more uncertain.<sup>188</sup>

Nations can overcome the obstacles of imperfect information by engaging in signaling. Coercive measures, short of war, can display political will, asset values, and even capabilities that could affect the outcome of a direct conflict.<sup>189</sup> The more costly the signal, the more credible the information becomes.<sup>190</sup> A nation's leader, for example, can make a threat of war and send military forces into a potential theater of operations.<sup>191</sup> Deployments consume resources that a state would be unlikely to waste if it were bluffing. Threats would inflict political costs on leaders, particularly in democracies, if they have to back down. Escalating forms of coercion or force send costly signals by consuming resources, moving closer to war, and showing a hint of military capability. The more means of signaling that become available, the more avenues to communicate credibly will exist. Likewise, the chances for bluffing will decrease.<sup>192</sup> When engaged in signaling, the resulting information will allow two nations in a dispute to more accurately judge the variables that go into reaching a settlement.<sup>193</sup>

Barring coercion against civilian targets during an international dispute will have the effect of making war more likely, not less. Civilian locations and objects open the possibility for a larger number of credible signals.<sup>194</sup> They not only provide more targets, but they also allow for a wider range of coercion.<sup>195</sup> Nations in a dispute, for example, can bring pressure to bear on civilian targets without loss of life or even destruction of property. During the 1999 NATO aerial war against Serbia, the U.S. Air Force dropped graphite on Belgrade's electrical grid.<sup>196</sup> The graphite subjected Belgrade to a blackout, but

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188. *Id.* at 578; Nzelibe & Yoo, *supra* note 182, at 2528.

189. Fearon, *Rationalist Explanations*, *supra* note 182, at 397; Nzelibe & Yoo, *supra* note 182, at 2529.

190. Fearon, *Political Audiences*, *supra* note 185, at 579.

191. *Id.* at 578.

192. Nzelibe & Yoo, *supra* note 182, at 2528.

193. *Id.* at 2531-33.

194. *See* Fearon, *Rationalist Explanations*, *supra* note 182, at 404; Nzelibe & Yoo, *supra* note 182, at 2530.

195. Nzelibe & Yoo, *supra* note 182, at 2536.

196. CBU-94 "Blackout Bomb" BLU-114/B "Soft Bomb," FED'N AM. SCIENTISTS, <http://www.fas.org/man/dod-101/sys/dumb/blu-114.htm> (last updated May 7, 1999, 6:20 AM) [hereinafter *CBU-94 Blackout Bomb*]; *see also* Interview by PBS Frontline with Gen. Wesley Clark, Former NATO Supreme Allied Commander, <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/clark.html> (last visited July 20, 2014) [hereinafter Interview with Gen.

only until Serbian engineers repaired the equipment.<sup>197</sup> Broader, non-lethal uses of force could include disabling networks—depending on computer systems—such as financial markets, transportation, and communications. Nationwide coercion of civilians could take the form of blockades and embargoes, economic sanctions, and prohibitions on travel.

Limiting the use of force in a war bargaining situation can have several harmful effects. First, narrowing the range of targets only to military objects could have the effect of escalating the damage and death of signaling. In a crisis, nation A may want to send a signal that inflicts a certain cost on nation B. With a broader base of civilian targets, nation A could choose a relatively low level of harm to produce the desired level of coercion. Temporarily knocking out the electricity supply to the capital city, for example, will cause inconvenience to a large number of civilians. To produce the same level of harm upon a smaller base of military personnel and assets will require a higher per capita level of force. Attempting to coerce nation B—consistent with a broad approach to distinction—might require nation A to attack and potentially destroy nation B's military targets and kill military personnel. Limiting the universe of targets to purely military sites could even destabilize crises by encouraging nations to launch vulnerable offensive weapons systems first, before they themselves are attacked.<sup>198</sup> This “use it or lose it” incentive could force early and extreme escalations of a crisis into a military conflict.<sup>199</sup>

Second, a prohibition on coercing civilians could raise the chances of miscommunications that might lead to war. Distinction, as defined by the Red Cross, AP I, and some commentators—but not by the traditional practice of states—will reduce the number of possible targets; only military personnel, facilities, and assets would be fair game.<sup>200</sup> This strategy will limit the means of coercion between states. Only military means will prove effective against military units.<sup>201</sup> It may also prove

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Wesley Clark].

197. *CBU-94 Blackout Bomb*, *supra* note 196; Interview with Gen. Wesley Clark, *supra* note 196.

198. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 207 (1963).

199. *Id.*; Robert Powell, *Crisis Stability in the Nuclear Age*, 83 *AM. POL. SCI. REV.* 61, 67 (1989).

200. Protocol I, *supra* note 75, at arts. 26-27; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 102, at 598-99; *see also supra* text accompanying notes 146-59.

201. 3 JOSEPH SINISCALCHI, *NON-LETHAL TECHNOLOGIES: IMPLICATIONS FOR MILITARY STRATEGY 20* (1998) (explaining that the military's use of non-lethal means, if used to “eliminate the enemy's military capability and backed by a credible legal threat, can be an effective coercive tool”).

impossible, even with highly precise guided munitions, to tailor non-lethal uses of force solely to strike military units.<sup>202</sup> Disrupting electrical supplies or destroying fuel stocks may exert low-intensity coercion against an opposing military, but it may also hit civilians and non-military installations equally, if not worse. Other types of non-lethal tactics, such as cutting off access to the international financial system, may not have any direct effect on military targets at all.

Reducing the number and types of targets and limiting the means to pursue them could increase the odds of war. Imperfect information can lead rational states to miscalculate.<sup>203</sup> Credible signals can help overcome this problem.<sup>204</sup> If there are further steps to convey reliable information, nations will have more accurate information on the expected values of war. That information will allow them to consider settlements before making the fateful decision for war. The more steps up an escalatory ladder, the more opportunity nations have to jump off before they reach the stage of international armed conflict. On the other hand, limiting the ability of nations to communicate will reduce their ability to reach settlements of their differences. If nations have less opportunity to credibly signal information to each other, the chances of miscalculation and war will increase.

Third, limiting force only to military targets may encourage the development and use of more destructive munitions. If nations expect that coercion will only take the form of attacks on their militaries, they will make military targets more difficult to attack.<sup>205</sup> They may improve their military defenses to the extent that the attacking nation must deploy a significantly greater level of force to prevail.<sup>206</sup> A defending nation, for example, might place critical facilities underground or in bunkers. It might even disperse critical military assets among the civilian population. Attacking military targets may force a nation to undertake an act of greater force to seek resolution of a dispute, while using lower levels of non-lethal force involving civilian targets may have equally communicated its message.

Critics might respond that once nations breach the distinction between military and civilian targets, greater attacks on civilians will result. They might argue that the International Committee of the Red Cross ("ICRC") and AP I's recent efforts to broaden the definition of

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202. *Id.* at 17 ("The ability to use technology to defeat an enemy without casualties . . . is . . . unrealistic.")

203. Fearon, *Political Audiences*, *supra* note 185, at 583-85.

204. SCHELLING, *supra* note 198, at 77-80.

205. See Sassòli, *supra* note 24, at 3-5.

206. See *id.* at 4-5.

distinction have led to lower civilian casualties.<sup>207</sup> This view, however, mistakes hope for reality. As we have shown, nations at war have targeted civilians in the past.<sup>208</sup> To be sure, interstate wars of the post-World War II period have caused less military and civilian casualties. By one count, the rate of international armed conflicts has fallen by an entire order of magnitude since the end of World War II, when compared to similar periods in the Westphalian era.<sup>209</sup> For example, from 1715-1814, there were .019 wars per state per year.<sup>210</sup> Between 1815-1914, the figure was .014, and between 1918-1941, .036.<sup>211</sup> But, between 1945-1995, the figure dropped to .005, and even the conflicts in Iraq and Afghanistan since then would not raise the rate to pre-World War II levels.<sup>212</sup>

We suggest, however, that the reduction in deaths from military combat has resulted from advances in precision-guided munitions, and surveillance and targeting technology, rather than any devotion by combatants to a new, broader principle of distinction. Modern air forces no longer need to level whole cities in order to assure the destruction of munitions plants or military headquarters.<sup>213</sup> Ground combat between advanced militaries occurs within a short period of time because of the advantages of highly maneuverable, fast, and armored formations closely integrated with air operations and precision-guided munitions.<sup>214</sup> The great bulk of allied casualties in the Afghanistan and Iraq wars, for example, occurred after conventional battlefield operations had ceased and occupation had begun.<sup>215</sup> Most of the casualties in Iraq were not armed combatants, but civilians—a 2013 Brown University study estimates 134,000 violent Iraqi deaths.<sup>216</sup>

Wars since the end of World War II have produced massive civilian casualties. While war-related deaths in the post-war period have not reached the levels of World Wars I and II, they have been of a similar

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207. See Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT'L L. REV. 1083, 1095-99 (2001).

208. See *supra* Parts II–III.

209. See JOHN YOO, POINT OF ATTACK: PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WELFARE 26, 31 (2014) [hereinafter YOO, POINT OF ATTACK]; Yoo, *Using Force*, *supra* note 21, at 747.

210. YOO, POINT OF ATTACK, *supra* note 209, at 31-32.

211. *Id.* at 31.

212. *Id.* at 31-32.

213. Dakota S. Rudesill, Note, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT'L L. 517, 534 (2007).

214. See *id.* at 533-34.

215. See *id.* at 535 n.100, 536, 538.

216. Press Release, Brown University, Iraq War: 190,000 lives, \$2.2 trillion (Mar. 14, 2013) (on file with the *Hofstra Law Review*).

magnitude. According to some estimates, World War I killed 13-15 million, and World War II killed 65-75 million.<sup>217</sup> Since 1945, war-related deaths have reached about 40 million.<sup>218</sup> Some scholars estimate that 80-90% of the deaths in these post-World War II conflicts have been civilian.<sup>219</sup>

International wars have not produced this huge jump in innocent deaths. Rather, civilians have been dying at the hands of their own countrymen.<sup>220</sup> A steep rise in internal armed conflicts has produced a large number of civilian deaths.<sup>221</sup> Civil wars cause such high civilian casualties because the fighting often involves armed groups who are waging war with less sophisticated, more destructive weaponry and tactics. Civil wars also may cause greater civilian casualties because of religious, ethnic, or historic rivalries that go beyond the interests of state may fuel the fighting. Combatants in internal armed conflicts may seek to achieve rapid political gains by deliberately targeting civilians.

The change in the nature of war from interstate to intrastate, and the greater harm to civilians as a result, has significant implications for the principle of distinction. First, groups fighting in civil wars will have less interest and incentive in obeying the laws of war.<sup>222</sup> If that is true, then broadening the principle of distinction, as sought by non-governmental organizations (“NGO”) and scholars, will do little to constrain the main source of civilian casualties in the post-war world. Second, a broad application of distinction may perversely defeat the rule’s very purpose: to reduce civilian casualties.<sup>223</sup> This might happen if the principle of distinction becomes so demanding that the great powers reduce their willingness to intervene in internal armed conflicts to halt the widespread killing of civilians. Civil wars will continue longer and with more intensity without external efforts at prevention.

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217. Yoo, *Using Force*, *supra* note 21, at 747 (citing Milton Leitenberg, *Death in Wars and Conflicts in the 20<sup>th</sup> Century* 9 (Cornell Univ. Peace Studies Program, Occasional Paper No. 29, 3d ed. 2006)).

218. *Id.*

219. Bethany Lacina, *Explaining the Severity of Civil Wars*, 50 J. CONFLICT RESOL. 276, 276 (2006); Erik Melander et al., *The ‘New Wars’ Debate Revisited: An Empirical Evaluation of the Atrociousness of ‘New Wars’* 19 (Uppsala Univ., Dep’t of Peace and Conflict, Research Paper No. 9, 2006), available at [http://www.pcr.uu.se/digitalAssets/18/18585\\_UPRP\\_No\\_9.pdf](http://www.pcr.uu.se/digitalAssets/18/18585_UPRP_No_9.pdf).

220. See Rudesill, *supra* note 213, at 532, 537.

221. YOO, POINT OF ATTACK, *supra* note 209, at 31-32; Dan Kuwali, *Defending the Defenseless: How to Protect Civilians in Contemporary Conflicts*, in IMPROVING THE PROTECTION OF CIVILIANS IN SITUATIONS OF ARMED CONFLICT 17 (Harvard Kennedy Sch. Carr Ctr. for Human Rights Policy, Working Paper, 2011).

222. Yoo, *Using Force*, *supra* note 21, at 750.

223. See Int’l Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 89 INT’L REV. RED CROSS 719, 720-21 (2007).

One could object that allowing force against civilian targets seems to be an unlikely way to reduce civil wars, which are already more harmful to civilians and more difficult to deter. On the other hand, expanding the use of force by intervening powers may allow for greater pressure on the combatants in civil wars, or at least discourage them from preying upon civilians. The principle of distinction may end up only restraining the great powers, which have not fought any wars between themselves in seven decades, while it goes unobserved by those responsible for the great majority of civilian deaths in war today.

## V. APPLICATIONS

In this Part, we discuss how a return to the traditional rule of distinction may allow nations to employ a wider range of force that could bring international crises to less harmful outcomes. Three forms of such coercion may run counter to a broad application of distinction—as sought by NGOs and academics—either by intentionally targeting civilians or by harming them collaterally in an excessive way. The first, economic sanctions, is a familiar method that many might prefer to direct armed conflict, even though its primary aim is to inflict costs upon civilians. Second, advances in weapons and intelligence technology make possible the use of military force, short of full-scale armed conflict, to pressure electorates. Third, cyber warfare shares the common objective of pressuring a society to persuade its leaders to settle an international dispute rather than go to war.

### A. Economic Sanctions

Economic sanctions undoubtedly target civilians, yet they can encourage the resolution of international disputes without full-scale armed conflict. Complete embargoes of both imports and exports indisputably harm civilians as well as hostile militaries.<sup>224</sup> Blocking imports, such as food, fuel, medicines, or even less vital products as cars, planes, and computers will harm civilians. The tightest American restrictions on trade include Cuba,—which is subject to an almost complete embargo—Iran, and North Korea.<sup>225</sup> Under the current sanctions regime, American companies do not export food, fuel, or other

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224. Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1170-71 (1987).

225. See Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1, 37-53, 86-89 (1997); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 42 (2001).



vital supplies to these countries.<sup>226</sup> Such measures do not discriminate between civilians or the military. Indeed, a complete embargo will probably harm civilians as much as, if not more than, a military in an authoritarian nation, which can give priority of consumption to regime supporters.

Even sanctions that seek to block assistance to another nation's military may harm civilians. This is particularly the case with dual-use goods. Reducing the supply of oil and gas to a hostile nation may degrade an opposing military's capabilities, but it will also impact the civilian society's transportation and electrical networks. An embargo on aircraft parts may disable an enemy's air force, but it may also ground civilian airliners. U.N. sanctions on North Korea may prohibit the sale of computers that are useful for the design and testing of nuclear weapons and ballistic missiles, but such computational powers also fall within the capabilities of computers widely available for civilian use.

Embargoes can directly harm civilians not only by stopping imports of critical goods, but also by preventing exports. Blocking exports of armaments, of course, may have a targeted effect on a rival's military. But, current U.S. sanctions regimes block the Cuban, North Korean, and Iranian export of most other goods, as well.<sup>227</sup> News accounts suggest that the U.S.-led effort to block Iran's oil exports, for example, has caused significant economic instability.<sup>228</sup> Preventing exports is designed to cause harm to civilians by lowering economic output, employment, and wealth. It seeks to cause enough economic pain so that the population will pressure its leaders to change policy in a direction more agreeable to the United States.

Indeed, the most successful economic sanctions seem to be those that target more than just the military. Apparently, North Korea and Iran have suffered the most from sanctions that have cut their economies off from the international financial system.<sup>229</sup> Western sanctions, for example, have frozen Iran's bank accounts abroad, which prevents it

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226. For a survey of U.S. economic sanctions regimes, see Bhala, *supra* note 225, at 37-53, 86-89, 98-101; Carter, *supra* note 224, at 1168-83; Cleveland, *supra* note 225, at 9-12, 31-43.

227. Anne Q. Connaughton, *Factoring U.S. Export Controls and Sanctions into International Trade Decisions*, 27 STETSON L. REV. 1211, 1224-25 (1998).

228. See Farrar, *supra* note 90, at 2373; Rick Gladstone, *Data on Iran Dims Outlook for Economy*, N.Y. TIMES, Oct. 13, 2012, at A10; Uri Berliner, *Crippled by Sanctions, Iran's Economy Key in Nuclear Deal*, NPR (Nov. 25, 2013, 2:52 AM), <http://www.npr.org/2013/11/25/247077050/crippled-by-sanctions-irans-economy-key-in-nuclear-deal>.

229. See Jack I. Garvey, *A New Architecture for the Non-Proliferation of Nuclear Weapons*, 12 J. CONFLICT & SECURITY L. 339, 351-53 (2007); Orde F. Kittrie, *New Sanctions for a New Century: Treasury's Innovative Use of Financial Sanctions*, 30 U. PA. J. INT'L L. 789, 792-93, 797-804 (2009).

from receiving payments for any oil or other exports and blocks it from paying for imported goods and services.<sup>230</sup> North Korea returned to the negotiating table in the 2000s when its regime members could no longer transfer hard currency with offshore accounts.<sup>231</sup> Today, North Korea cannot pay for any imports and has to resort to a bartering system with other authoritarian regimes to engage in any trade at all.<sup>232</sup> While effective, these sanctions clearly have their greatest effect because they target the mechanisms of the civilian economy. Portions of that economy may support the military or civilian elites that support a regime, but the sanctions succeed because they go well beyond military targets to disable the civilian economy.

It should be clear that the theory of economic embargoes and sanctions depends on their ability to harm civilians. Some embargoes may work because they prevent a military from acquiring the raw materials, military supplies, or manufactured weapons systems needed to continue operations. The success of such measures, however, has long been doubted—the effectiveness of the blockades of Germany in World Wars I and II remains the subject of debate.<sup>233</sup> But sanctions—as a measure—go beyond just those goods needed for the military. Cutting a country off from goods—and not just armaments or fuel—seeks to make life difficult for a civilian population.<sup>234</sup> An embargo will deprive civilians of desired goods, cause economic distortions that create other shortages, and retard economic growth and prosperity.<sup>235</sup> Such hardships, it is hoped, will cause a population to demand changes in policy to stop the sanctions, if not turn against its elites or regime altogether.<sup>236</sup> Sanctions cannot succeed politically without causing harm to civilians.

If this is correct, then the recent efforts to broaden the principle of distinction in armed conflict should fail. There should be no difference between the use of economic sanctions and the use of military force—

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230. See Carter & Farha, *supra* note 92, at 910-13; Kittrie, *supra* note 229, at 797-99.

231. Garvey, *supra* note 229, at 351-52; Kittrie, *supra* note 229, at 799 n.39.

232. See Hugh Griffiths & Lawrence Dermody, *Shadow Trade: How North Korea's Barter Trade Violates United Nations Sanctions*, STOCKHOLM INT'L PEACE RES. INST. (July 17, 2013), <http://www.sipri.org/media/expert-comments/shadow-trade-how-north-koreas-barter-trade-violates-united-nations-sanctions>.

233. See Carter, *supra* note 227, at 1163; Tor Egil Førland, *The History of Economic Warfare: International Law, Effectiveness, Strategies*, 30 J. PEACE RES. 151, 153-54 (1993); Adam Winkler, *Just Sanctions*, 21 HUM. RTS. Q. 133, 138 (1999).

234. See, e.g., Christopher C. Joyner, *United Nations Sanctions After Iraq: Looking Back to See Ahead*, 4 CHI. J. INT'L L. 329, 334-39 (2003); Winkler, *supra* note 233, at 136, 138-40.

235. See, e.g., Joyner, *supra* note 234, at 334-39; Winkler, *supra* note 233, at 136, 138-40.

236. George Friedman, *Sanctions and Strategy*, GEOPOLITICAL WEEKLY (Nov. 23, 2009, 2:02 PM), [http://www.stratfor.com/weekly/20091123\\_sanctions\\_and\\_strategy](http://www.stratfor.com/weekly/20091123_sanctions_and_strategy).

the law should consider the amount of harm done regardless of the methods used. As reflected in the U.N. Charter, nations today seem to agree that non-lethal measures are legal in international politics. Article 41 of the Charter declares:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.<sup>237</sup>

Broad-based embargoes or blockades cause all members of a civilian population to suffer some amount of harm. Because they seek to alleviate harms to civilians, the laws of war should allow measures that impact a smaller group of civilians in the same amount as an embargo, or measures that cause less harm but to a broader class of the population. In either case, the formal difference between economic sanctions and other forms of coercion should not stand in the way of measures that might reduce overall harm to civilians or bring disputes to a more timely end.

### *B. Non-Lethal Coercion*

Understanding the mechanism behind economic sanctions and embargoes should point the way toward a more nuanced approach to the use of non-lethal force. This class of activities includes the use of weapons that do not kill, tactics designed to inconvenience or disrupt an enemy's operations, or broader uses of force to compel a political outcome.<sup>238</sup> In our view, nations have accepted—and even prefer—methods such as economic sanctions that fall heavily on civilians in order to produce a political change in an opponent's policies. Therefore, acceptable methods in war should include means that may increase costs on civilian activities, but do not cause death, in order to produce political pressure on an enemy to settle an international dispute.

One of the most well-known examples of this approach was NATO's use of BLU-114/B munitions against Serbia. In order to convince the Milosevic regime to cease its campaign of ethnic cleansing, NATO air force units dropped the BLU-114/B on electricity

237. U.N. Charter art. 41.

238. Jason C. Nelson, *The United Nations and the Employment of Sanctions as a Tool of International Statecraft: Social Power Theory as a Predictor of Threat Theory Utility*, 29 *LAW & PSYCHOL. REV.* 105, 111, 113-15 (2005).

transformers in Belgrade.<sup>239</sup> While details remain classified, it appears that the weapon dispersed a large number of carbon graphite filaments which short-circuited equipment used to transmit and distribute electricity.<sup>240</sup> In one night of strikes, about seventy percent of Serbia's electricity went offline. The damage to Serbian facilities, however, was only temporary.

It seems clear that NATO intended the strikes to harm Serbian civilian society as well as the military. Both, of course, depend on electricity, but knocking out seventy percent of the nation's transmission ability went well beyond military necessity. General Wesley Clark, the commander of NATO and U.S. forces in Kosovo, justified the strikes: "The strike against the electricity was a big step in terms of taking away the ability of the Serb leadership to save fuel, and to easily coordinate mobilizing the population."<sup>241</sup> Clark was clear that the target was not just the military. Clark went on to say "[e]lectricity is like the circulatory system in the body. It's fundamental to everything the country and the military infrastructure is doing."<sup>242</sup>

These strikes raised the costs on Serbia's civilian population of supporting the expulsion of Albanians from Kosovo. Combined with other steps taken by NATO, such as the threat of a ground invasion, they signaled NATO's willingness to escalate the fighting in order to prevail.<sup>243</sup> It seems that these measures helped convince Milosevic to agree to NATO's terms.<sup>244</sup> An attempt to broaden the principle of distinction, however, might demand that NATO only attack facilities that were providing a substantial portion of their electricity to the military. Because power in an electrical network may be fungible, a careful distinction of this kind may not have been possible. If an expanded version of distinction required NATO to place the Serbian electrical system as a whole off limits, the goals of the laws of war would have suffered. NATO would have lost a means of communicating its intentions to Serbia, one that helped bring the conflict to an expeditious close. Or it may have encouraged NATO to turn to more destructive, albeit more targeted, alternatives to the temporary disabling of the Serbian electrical network.

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239. See Interview with Gen. Wesley Clark, *supra* note 196.

240. *CBU-94 Blackout Bomb*, *supra* note 196.

241. See Interview with Gen. Wesley Clark, *supra* note 196.

242. *Id.*

243. *Id.* ("If Milosevic hadn't buckled, I have no doubt that the alliance would have moved toward the commitment of ground forces. That would have been my advice.")

244. *Id.* ("I always thought there was a chance that Milosevic could concede early—but it was only a chance. . . . The planned phased air operation was meant to go for a long time—as long as it took . . .").

Another example of non-lethal coercive force is the security barrier between Israel and the West Bank. Beginning in 2000, the barrier roughly traces Israel's pre-1967 border, but with some important differences along about eight to nine percent of it.<sup>245</sup> The barrier's main purpose is to prevent the infiltration of suicide bombers from the Palestinian-controlled West Bank into Israel.<sup>246</sup> In order to achieve this objective, the barrier prevents immediate travel between the two communities unless the traffic passes through security checkpoints.<sup>247</sup> While the barrier uses force by preventing Palestinian civilians unrestricted access into Israel, it does not involve lethal methods. According to Israeli government reports, the barrier has contributed to a steep drop in suicide bombings.<sup>248</sup>

Nevertheless, critics claimed that the security barrier amounted to a violation of international law, one that sought to permanently change the border between Israel and the West Bank. In a 2004 advisory opinion, the International Court of Justice ("ICJ") agreed and called for its removal.<sup>249</sup> The Court found that the barrier amounted to an illegal use of force to seize portions of Palestinian territory, could not be justified as self-defense, and inflicted economic and humanitarian harms.<sup>250</sup> Palestinians in the West Bank, the Court found, lost immediate access to the territory on the Israeli side of the barrier.<sup>251</sup> While Israel's Supreme Court found some portions of the barrier to impose unacceptable hardships on Palestinians, it upheld the overall project, and Israel refused to obey the ICJ's decision.<sup>252</sup>

The ICJ's advisory opinion followed the unduly broad theory of distinction promoted by the ICRC and AP I.<sup>253</sup> The security barrier primarily impacts the civilian traffic flows across the border, even though its aim is to interrupt the small number of terrorists covertly seeking to infiltrate Israel.<sup>254</sup> The barrier imposes economic harm on

245. See *Guide to the West Bank Barrier*, BBC NEWS, <http://news.bbc.co.uk/2/shared/spl/hi/guides/456900/456944/html/nn1page1.stm> (last visited July 20, 2014).

246. *Id.*

247. *See id.*

248. See *Saving Lives: Israel's Anti-Terrorist Fence-Answers to Questions*, ISRAEL MINISTRY FOREIGN AFFAIRS (Jan. 2004), <http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/saving%20lives-%20israel-s%20anti-terrorist%20fence%20-%20answ.aspx>.

249. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, 147, 201-02 (July 9, 2004) [hereinafter *Legal Consequences of the Construction*].

250. *Id.* at 190-92.

251. *Id.* at 189-92.

252. H.C.J. 7957/04 *Mara'abe v. The Prime Minister of Isr.* [2005] (Isr.), *translated in* 45 I.L.M. 202, 238-40 (2006).

253. See *Legal Consequences of the Construction*, *supra* note 249, at 175-76.

254. *Id.* at 192-94.

Palestinians, who are cut off from potential employment in Israel.<sup>255</sup> Even those with permits to work in Israel are burdened by onerous waits at checkpoints.<sup>256</sup>

In our view, however, the merits of the security barrier demonstrate why the effort to expand the principle of distinction undermines the goals of the laws of war. We assume that the laws of war apply to Israel's actions in the West Bank under international humanitarian law, though a dispute continues over whether the law of occupation applies (since 1949 no nation has acknowledged that its actions are covered by the provisions of the Fourth Geneva Convention concerning occupation).<sup>257</sup> The barrier does not distinguish between civilian and military targets. It affects the former far more than the latter, though this is due in part to the terrorists' own violation of the laws of war by disguising themselves as civilians. Nevertheless, the barrier has achieved two important objectives that advance humanitarian goals. First, it has dramatically reduced civilian deaths within Israel from suicide bombers. According to Israeli military officials, casualties from terrorist attacks have fallen significantly since the completion of the barrier.<sup>258</sup> Second, it has sent an important Israeli signal to the Palestinians in their ongoing territorial and political dispute that negative consequences follow for continued support of terrorist attacks within Israel, but without resorting to military strikes that would have involved an even greater use of force with higher levels of lethality. The security barrier reduced the harm to civilians and made more destructive uses of force unnecessary.

### C. Cyber Warfare

Cyber warfare is a third area where the broad application of a principle of distinction may undermine the humanitarian goals of the laws of war. Cyber warfare can take many forms, but for our purposes includes the jamming of both civilian and military communications, disabling infrastructure control systems, interfering with transportation and energy networks, or even shutting down financial markets and an economy.<sup>259</sup> A narrow example includes the Stuxnet computer virus,

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255. *Id.* at 191-92.

256. *Id.*

257. *See, e.g.*, EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 43-45, 84-85, 221-22 (2d ed. 2012).

258. *Fatalities and Injuries in the Last Decade*, ISRAEL SECURITY AGENCY, <http://www.shabak.gov.il/English/EnTerrorData/decade/Fatalities/Pages/default.aspx> (last visited July 20, 2014).

259. Arie J. Schaap, *Cyber Warfare Operations: Development and Use Under International Law*, 64 A.F.L. REV. 121, 126-27, 133, 141, 156 (2009).

reportedly designed by U.S. intelligence agents to cause Iranian nuclear centrifuges to malfunction.<sup>260</sup> A broader type of attack might include Russia's reported hacking of Georgia's government and military websites as part of its 2008 invasion of South Ossetia.<sup>261</sup>

Cyber warfare presents opportunities and dangers for the methods and goals of the laws of war. It could allow contending nations to target each other's militaries more precisely and hence reduce harms to civilians.<sup>262</sup> Cyber warfare techniques might allow a nation to disable only certain military facilities, while leaving nearby civilian assets untouched. It could allow the discrete targeting of communication and information networks used primarily by the military without interfering with civilian networks. Hackers might steal and disable only military and intelligence secrets, or steal funds and freeze resources, without harming the larger civilian banking system and economy. Cyber attacks could hijack control systems to induce death and destruction in the real world. But they could also simply disable networks, which would not cause physical death and destruction, but only create inefficiencies and inconveniences that degrade economic activity.

Cyber warfare could also broaden non-lethal attacks on civilian populations. It might allow the United States, for example, to achieve the results of the 1999 bombing of Serbia's electrical grid, but without the bombs. Rather than drop a specialized ordinance over Belgrade, the United States could hack Serbia's network controls and shut down its electrical network without killing anyone in the electrical facilities. Cyber warfare can also allow for more steps of escalation that would not involve lethal force. The United States, for example, could pressure a nation highly dependent on the Internet by interfering with its banking and financial systems, or forcing its air and ground transportation systems offline. It could block communications networks or access to the Internet. It could impose blackouts nationwide or in discrete geographic regions—all without risking lives in combat operations, either directly or collaterally.

The U.S. government believes that the laws of war govern such attacks.<sup>263</sup> In September 2012, the Legal Advisor to the State Department, Harold Koh, spoke at an Inter-Agency conference hosted

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260. Jeremy Rabkin & Ariel Rabkin, *Navigating Conflicts in Cyberspace: Legal Lessons from the History of War at Sea*, 14 CHI. J. INT'L L. 197, 199, 209-10 (2013).

261. Schaap, *supra* note 259, at 145.

262. *Id.* at 158.

263. Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks at the USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012), *available at* <http://www.state.gov/s/l/releases/remarks/197924.htm>.

by U.S. Cyber Command.<sup>264</sup> He affirmed that cyber attacks that caused “death, injury, or significant destruction would likely be viewed as a use of force,” triggering the right to exercise force in self-defense under the U.N. Charter.<sup>265</sup> He also insisted that “[a]s in any form of armed conflict, the principle of distinction requires that the intended effect of the attack must be to harm a legitimate military target.”<sup>266</sup> He did not explain how or why the Stuxnet virus attack on the Iranian nuclear program involved a “legitimate military target.”<sup>267</sup> He did not speculate on whether Iran might be entitled to retaliate for U.S. attacks.

In our view, Koh’s position is a wooden approach to distinction that could well result in greater harm to civilians and nations. Cyber warfare can provide for the more precise targeting of military, as well as civilian, targets. But, its greater promise is that it could allow for attacks that may harm civilians at much less intense levels than might be required if a principle of distinction was understood to call for more harmful attacks on military targets. Cyber warfare might allow the United States, for example, to take offline Serbia’s entire electrical network. While a large number of civilians as well as military facilities would lose power, using cyber weapons would risk fewer lives than a bombing run over Belgrade, even with specialized munitions. Or, to take Stuxnet as an example, using a virus to delay the Iranian nuclear program by several years alleviated the need to launch a military strike to attempt the same outcome.<sup>268</sup> A return to a traditional understanding of the laws of war, one that rejects contemporary efforts to expand distinction, would allow such methods. These methods may achieve military objectives with less destruction and death, and avoid blunter forms of escalation that might lead to more intense armed conflict.

## VI. CONCLUSION

This Article has addressed the challenges for the laws of war presented by the rise of new forms of conflict. It has argued that nations have the right to use force for purposes that go beyond self-defense. In Syria, the Obama administration considered air strikes to punish the Assad government for using chemical weapons against rebels.<sup>269</sup> The proposal echoed President Reagan’s 1986 air strikes against Libya in retaliation for Libyan-sponsored terrorist attacks against U.S. personnel

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264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Rabkin & Rabkin, *supra* note 260, at 199.

269. See *supra* text accompanying notes 10-12.



in Europe. Such interventions help maintain an international order that has led to historic levels of international peace and security.

Recent efforts to expand the definition of the principle of distinction threaten to undermine these gains. The International Red Cross, activists, academics, and even states have sought to completely immunize civilians from all uses of force.<sup>270</sup> They have advanced a new definition of distinction in AP I to the Geneva Conventions which seeks to narrow the use of force.<sup>271</sup> In our view, however, this new definition is at odds with historical understandings of distinction and the recent practice of states. Worse yet, removing less harmful steps to escalate conflicts will result in more destructive attacks on military units, reduce the ability of states to resolve international disputes, and perhaps produce more conflict. We believe that advances in military technology will prompt a return to a more traditional understanding of the principle of distinction, one that better advances the goal of reducing the death and destruction of war.

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270. See *supra* text accompanying notes 100-05; see also Protocol I, *supra* note 75, at art. 51.

271. Protocol I, *supra* note 75, at arts. 48, 51, 52.