

**THE FOG OF PROTECTION: CONTESTED MEANINGS AND DELIBERATE
CIVILIAN DEATHS DURING ARMED CONFLICT**

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ABSTRACT

Why do belligerents intentionally kill legally protected civilians during armed conflict? Such acts not only violate the human security of people protected by the civilian immunity norm but may also be war crimes. The violation of this pillar of international humanitarian law (IHL), the body of law tasked with regulating armed conflict, has been the subject of significant research and policy deliberation. Many of the useful analyses produced by these efforts operate from common assumptions. One is that a monolithic understanding of the distinction principle, the obligation for belligerents to distinguish between permissible and impermissible targets and a core component of the civilian immunity norm, exists among those who monitor and disseminate IHL. Another assumption among scholars and practitioners concerned with deliberate civilian targeting is that a shared understanding of who is protected during armed conflict exists between those who monitor IHL and those who must abide by it. Through the analysis of interviews conducted with IHL experts and belligerents who fought in a variety of conflicts on the African continent, this study reveals that neither of these assumptions is warranted. It finds that not only is there a lack of consensus among belligerents as to whom they can permissibly target during armed conflict, but that there is still debate among IHL experts as to whom the law protects. Furthermore, this study finds that shared understandings of who is protected during armed conflict do not exist between experts and belligerents, so that belligerents claiming to abide by their particular interpretation of the distinction principle ostensibly target civilians deemed protected by IHL experts. Thus this study offers new avenues for understanding violations of the civilian immunity norm and possibly reducing their occurrence.

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PREFACE AND ACKNOWLEDGEMENTS

My interest in the plight of civilians in armed conflict emanated from my efforts to understand the 1994 Rwandan genocide as it unfolded. While researching this and other genocides, I quickly discovered the widespread nature of atrocities committed against civilians, particularly during armed conflict. I also noticed that many of the actors who were accused of violating legally mandated civilian protections claimed to embrace those very protections. It seemed to me a puzzling paradox. This dissertation aims to shed some light on this puzzle.

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*To Vega, Samara, and Raya
Who remind me of hope in the world when I find myself enveloped by its despair*

CHAPTER 1: INTRODUCTION

It's far more dangerous today to be a civilian than a soldier...~ Jan Egeland, former United Nations Emergency Coordinator¹

Do shared understandings of who belligerents can or cannot target during armed conflict exist?

The civilian immunity norm obligates belligerents to distinguish between permissible and impermissible targets. This obligation is known as the distinction principle. The International Court of Justice cites the distinction principle as one of the “cardinal principles contained in texts constituting the fabric of [international] humanitarian law [IHL]”.² The civilian immunity norm then prohibits belligerents from deliberately targeting the latter group, typically considered as consisting of civilians. Yet according to a statement made by Staffan de Mistura, Special Representative of the United Nations Secretary-General, in a press release regarding the UN Assistance Mission in Afghanistan’s 2010 Mid-Year Report on Protection of Civilians in Armed Conflict, an

intensified pattern of assassinations and executions reinforced the widespread perception of Afghan civilians that they are becoming more and more the primary target in this period of conflict.³

Civilians deliberately targeted by the Taliban include

teachers, nurses, doctors, tribal elders, community leaders, provincial and district officials, other civilians including children, and civilians working for international military forces and international organizations.⁴

¹ United Nations. 2005. “World must do more to protect civilians in armed conflict, Security Council told.” <http://www.un.org/apps/news/story.asp?NewsID=14692&Cr=civilian&Cr1=conflict> (February 20, 2009).

² International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, *ICJ Rep.* (1996) p. 257, paras. 78-79

³ United Nations Assistance Mission in Afghanistan. 2010. “Afghan civilian casualties rise 31 per cent in first six months of 2010.” <http://unama.unmissions.org/Default.aspx?tabid=1741&ctl=Details&mid=1882&ItemID=9955> (September 7, 2010).

⁴ United Nations Assistance Mission in Afghanistan (2010).

According to the report, such instances of civilian targeting reflect violations of IHL. If this is the case, could these IHL violations indicate a lack of understanding between relevant parties as to who can be targeted during armed conflict?

If one surveys the literature on deliberate civilian targeting during armed conflict, one might answer this question in the negative. Many scholars offer various explanations of the violation of the civilian immunity norm, assuming that relevant parties understand who this norm, and IHL which springs from it, protects. Is this a sound assumption to make when trying to understand the issue of impermissible civilian targeting?

This dissertation probes whether critical concepts in the civilian immunity norm are commonly understood by central actors in the civilian protection regime. It asks the following questions: Does a shared understanding of who is protected from the horrors of armed conflict, and who might not be, exist among central actors in the civilian protection regime? In other words, do these actors' conceptualizations of normative and legal obligations in armed conflict overlap? More specifically, this project asks: Do belligerents and legal experts share an understanding of who is considered a permissible civilian target? If they do not, can normative explanations account for these differences or do these differences exist solely for strategic purposes?

These issues are not just a matter of semantics. How belligerents interpret the distinction principle not only possesses the utmost importance for the civilians with which they interact, but also carries significant implications for their own futures. For instance, intentionally targeting civilians protected by IHL during armed conflict is a war crime. According to the 1977 Additional Protocol I to the 1949 Geneva Convention (AP), "Making the civilian population or individual civilians the object of attack when committed willfully and if they cause death or

serious injury to body and health” is a grave breach of the AP and hence, a war crime.⁵

Consequently, whether or not relevant actors commonly understand the distinction between permissible and impermissible civilian targets and how these understandings impact targeting decisions pose weighty questions worthy of meaningful consideration.

I explored these questions through analysis of data gathered from semi-structured interviews with former belligerents from the African continent and IHL experts, as well as through historiography. Interviews allowed me to probe deeper into how IHL experts, those who determine what IHL is and when it has been violated, and former belligerents, who arguably violate IHL, understand permissible civilian targets. While the normative frameworks presented in this study are generally couched in system level language, “their operation requires the construction of agent level perception.”⁶ Since interviews are “attempts to understand the world from the subjects’ point of view, to unfold the meaning of peoples’ experiences, to uncover their lived world to scientific explanations,”⁷ they serve as useful tools if the research objective is to determine how different actors perceive and constitute concepts like permissible civilian targets. Interviews provide the researcher an efficient means to enter worlds in which they have little experience.⁸

I conducted a multi-step qualitative analytical process after the completion of the transcription of the interview data. The first step aimed to determine whether former belligerent narratives indicated adherence to some version of the distinction principle. For those narratives that did, the next step entailed ascertaining whether intersubjectivity exists between the two

⁵ 1977 Additional Protocol I to the 1949 Geneva Conventions, Art. 85

⁶ Hermann, Richard K. and Vaugh P. Shannon. 2001. “Defending International Norms: The Role of Obligation, Material Interest and Perception in Decision Making.” *International Organization* 55:3, 625-626.

⁷ Kvale, Steinar. 1996. *Interviews: An Introduction to Qualitative Research Interviewing*, Sage: Thousand Oaks, 1.

⁸ Pouliot, Vincent. 2007. “‘Subjectivism’: Toward A Constructivist Methodology,” *International Studies Quarterly* 51:359, 370.

respondent groups on who is considered a permissible civilian target. Intersubjectivity connotes “shared understandings of desirable and acceptable behavior.”⁹ These shared understandings “provide people with reasons why things are the way they are and indications as to how they should use their material abilities and power.”¹⁰ Intersubjectivity is based on a perception that although “each of us thinks his own thoughts; our concepts we share with our fellow men.”¹¹ I separated former belligerent narratives that indicated intersubjectivity with IHL experts on the constitution of permissible civilian targets from those that did not, continuing my analysis with the latter group. Here my goal was to determine which of the normative frameworks discussed in Chapter 2 best described each narrative. The last step involved historical analysis to determine whether any lack of intersubjectivity between the two respondent groups manifested in the interview data also characterized previous understandings of permissible targets during armed conflict.

A central finding in this project is that critical actors in the civilian protection regime distinguish between permissible and impermissible civilian targets differently. This incongruence presents itself not only between the two groups but also within each group. Several of the belligerent narratives in which civilians are killed also claim to adhere to a particular understanding of the distinction principle, even when those very narratives reveal that doing so contradicts their interests. Thus, belligerents appear to violate the civilian immunity norm for non-strategic reasons; belligerent narratives indicate they violate the norm because they comply with a version of the norm that differs from those employed by norm proponents (consistent with a norm contestation framework). This dissertation also demonstrates that such inconsistency is

⁹ Kratochwil, Friedrich and John Gerard Ruggie. 1986. “A State of the Art on an Art of the State.” *International Organization* 40:4.

¹⁰ Adler, Emanuel. 1997. “Seizing the Middle Ground: Constructivism in World Politics.” *European Journal of International Relations* 3:3, 319, 322.

¹¹ Toulmin, Stephen. 1972. Human Understanding, Princeton: Princeton University Press, 35.

not solely a feature of current efforts to regulate armed conflict but shadowed the development of the distinction principle through time and space. This finding differs from much of the relevant literature which assumes that actors share an understanding of who is a permissible civilian target during armed conflict. In other words, this study offers insights into the civilian immunity norm's constitutive effects, a prerequisite for it to capably exert its regulative effects (which occupies much of the literature's focus).¹² Thus, this study offers new hypotheses for future studies to test as a means of enhancing our understanding of civilian targeting. It also suggests new theoretical insights on norm compliance and norm violation as well as suggestions for policies to curb such attacks.

The case of children in armed conflict usefully illustrates the argument made here. The association of childhood with innocence and harmlessness helps to explain why children are often unreservedly considered protected by the civilian immunity norm.¹³ The United Nations Office of the Special Representative of the Secretary General (UNOSRSG) for Children and Armed Conflict explains this perspective:

Children are innocent and especially vulnerable. Children are less equipped to adapt or respond to conflict. They are the least responsible for conflict, yet suffer disproportionately from its excesses. Children represent the hopes and future of every society; destroy them and you have destroyed a society.¹⁴

¹² A norm's constitutive and regulative effects are discussed in more detail in Chapter 2.

¹³ Carpenter, R. Charli. 2006. Innocent Women and Children: Gender, Norms and the Protection of Civilians, London: Ashgate Press, 26; Brocklehurst, Helen. 2006. Who's Afraid of Children: Children, Conflict and International Relations, Hampshire: Ashgate, 38; Hartle, Anthony E. 2002. "Atrocities in War: Dirty Hands and Noncombatants," *Social Research* 69:4; Teichman, Jenny. 1986. Pacifism and the Just War: A Study in Applied Philosophy, Oxford: Basil Blackwell; Sjobeg, Laura. 2006. "Gendered Realities of the Immunity Principle: Why Gender Analysis Needs Feminism," *International Studies Quarterly* 50; Primoratz, Igor. 2005. "Civilian Immunity in War," *Philosophical Forum*, 36:1; Nusseibeh, Sari. 1992. "Can Wars be Just?: A Palestinian Viewpoint of the Gulf War," in David Decosse (ed), But Was it Just?, New York: Doubleday.

¹⁴ United Nations. <http://www.un.org/children/conflict/english/issues.html>, accessed on March 12, 2010.

Contrast this view of children with the following statement from the Sri Lankan government in response to widespread condemnation to an airstrike that targeted children in August 2006: “If the children are terrorists, what can we do?”¹⁵ The United Nations International Children’s Emergency Fund (UNICEF) claimed these children were not terrorists, but were attending a first aid course. The Sri Lankan response suggests that the government did not make individual determinations of the threatening status of the children deliberately killed, opting instead for a categorical determination of threat based on age. This determination may have been influenced by the particular characteristics of the Sri Lankan conflict, namely the Tamil Tigers’ use of child belligerents. Instead of youthfulness being the reason for protection, it formed the basis for the Sri Lankan government’s targeting decisions. The government held on to this view in spite of wide opposition to the attack, opposition that might have materialized in the form of costs imposed on the government for maintaining its policy on children as “legitimate” targets.¹⁶

For the Sri Lankan government, the link between age based innocence and harmlessness is severed. For those maintaining this connection, confronting a situation in which children engage in threatening behavior can be extremely disconcerting and dangerous. For instance, Romeo Dallaire, Force Commander for the United Nations Assistance Mission for Rwanda, expresses the moral conundrum a UN peacekeeper faced during the Rwandan genocide when trying to protect Tutsis under fire from children: “Troops in the field will have ethical, legal and moral dilemmas. We’re talking about a 12 year old with an AK-47, for Christ’s sake.”¹⁷ The

¹⁵ Hugler, Justin. 2006. “Sri Lankan Army Warns Children Can be Targets,” *The Independent*. August 16, 2006. http://findarticles.com/p/articles/mi_qn4158/is_20060816/ai_n16643844, (accessed March 30, 2008).

¹⁶ Hugler (2006).

¹⁷ McGinnis, Sarah. 2010. “Fight for Human Rights Diluted, say Dallaire.” *Calgary Herald*. February 11. <http://www.calgaryherald.com/news/Fight+human+rights+diluted+says+Dallaire/2548568/story.html> (March 10, 2010).

peacekeeper wrestles with a *Sophie's Choice* dilemma. Who should the peacekeeper avoid harming, the children or the Rwandans under his protection? The cognitive struggle revolves around a conflict between realities, training that conditions peacekeepers to protect children uniformly as a group and a situation in which members of that group endanger those in immediate need of protection.

What the above discussion demonstrates are the complexities inherent with the civilian immunity norm's distinction principle. In one conflict (Sri Lanka), children died because belligerents categorically viewed them as permissible targets. In another conflict (Rwanda), a UN peacekeeper instinctively hesitated in targeting children because he did not see them as permissible targets. On the face of it, in both cases the belligerents incorrectly conceptualized the permissibility of targeting the children in question. Based on the facts available, the children in the Sri Lankan case were likely impermissible targets while the children in the Rwandan case were likely permissible targets. What explains the belligerents' errors? After all, AP I clearly states that civilians are permissible targets only if they directly participate in hostilities. Such civilians retain their civilian designation, but lose the protections offered to them by the civilian immunity norm when they directly participate in hostilities. This applies to children as well; children who directly participate in hostilities can be targeted under IHL. Meanwhile, civilians who do not directly participate in hostilities keep their civilian designation *and* the protections under the civilian immunity norm. This is the distinction principle in codified IHL. As clear as this may seem at first glance, problems arise because this critical phrase, direct participation in hostilities, is vague enough to generate different interpretations of its meaning. Children in armed conflict are one source of such contending views, as the above discussion illustrates. However, these differing views of the permissibility of child targets is not simply anecdotal; this

study reveals that such differences currently exist in the opinions of IHL experts and belligerents on whether children in armed conflict are permissible targets. And children are not the only point of contention among actors in the civilian protection regime when it comes to the matter of permissible targets.

For example, when asked how they understood the term civilian within the context of their protection missions, United Nations High Commissioner for Refugees (UNHCR) staff often referred to women and children collectively. This is surprising considering UNHCR often operates in contexts with females and children directly participating in hostilities, as well as male civilian victims who did not directly participate in hostilities when they were killed. They also employed an identity based distinction between permissible and impermissible civilian targets, much like the Sri Lankan government and the UN peacekeeper did, rather than the act based distinction (direct participation) encapsulated in the AP.

An examination of the relevant literature reveals that scholars also do not interpret the distinction principle consistently with IHL. For example, the terms civilian and noncombatant are often used interchangeably despite the different protections these labels confer.¹⁸

Noncombatants as a legal term applies to members of armed forces like wounded soldiers, prisoners of war and medical personnel. Civilians are included as one among many types of noncombatants.

¹⁸ For example, Igor Primoratz: “The immunity of civilians, or noncombatants, from deadly violence in war is enjoined by the centerpiece of the *jus in bello* prong of just war theory, the principle of distinction.” (Primoratz (2005) at 41). Richard Price: “Two central concepts from [the laws of war and international humanitarian law] that are relevant to [the issue of landmines] are civilian discrimination and unnecessary suffering. Discrimination (or noncombatant immunity) is one of the oldest notions of the just war doctrine.” (Price, Richard. 1998. “Reversing the Gun sights: Transnational Civil Society Targets Land Mines.” *International Organization* 52:3, 628. Michael Byers: “The Geneva Conventions are aimed at protecting... civilians (who are technically referred to as ‘non-combatants.’” (Byers, Michael. 2005. War Law: Understanding International Law and Armed Conflict. NY: Grove Press, 115).

Not only do scholars employ legal terminology incorrectly, their datasets occasionally lump civilian and combatants together in a fashion inconsistent with IHL. Presumably, the purpose of tracking these numbers is to document the number of impermissible civilian targets killed. One such dataset is that compiled by the Iraq Body Count. The Iraq Body Count (IBC) tracks the number of civilians violently killed since the commencement of hostilities in Iraq in 2003, and according to its website, has been used by researchers, policymakers and practitioners. It includes in its definition of civilian “members of Iraqi military or paramilitary/militia forces in our database, namely when they are killed — i.e. summarily executed — after capture.”¹⁹

Additionally,

Excluded from IBC are those aged 18 and over who, at the point of death, were reported as initiating deadly violence or being active members of a military or paramilitary organization. We also exclude overseas ‘contractors’ providing security and other private services related to the occupation of Iraq.

Included are all others killed violently, including regular local police forces.²⁰

The IBC definition of civilian contains several inconsistencies with IHL (these inconsistencies are discussed in more detail in following chapters). Namely, members of the military or paramilitary/militia forces would not be considered civilians under IHL even if executed after capture. Secondly, “contractors” who do not directly participate in hostilities may be considered impermissible civilian targets under IHL. Thirdly, IBC presumably includes child soldiers as civilians since it excludes those killed who were 18 and older when they initiated violence. However, children under 18 who directly participate in hostilities (i.e., initiate violence) can be targeted.

¹⁹ Iraq Body Count. 2010. <http://www.iraqbodycount.org/about/methods/3> (February 22, 2010).

²⁰ Iraq Body Count. 2010. <http://www.iraqbodycount.org/about/methods/3> (February 22, 2010).

Another example is the Political Instability Task Force Worldwide Atrocities dataset funded by the Central Intelligence Agency. The purpose of the Political Instability Task Force, to which this dataset belongs, is to describe

the deliberate killing of non-combatant civilians in the context of a wider political conflict. This data collection project, which is still ongoing, is intended to advance efforts to understand and anticipate atrocities, i.e., the deliberate use of lethal violence against non-combatant civilians by actors engaged in a wider political or military conflict.²¹

Pursuant to this purpose, noncombatant civilian is defined as follows:

...any unarmed individual who is not a member of a professional or guerrilla military group and who does not actively participate in hostilities by intending to cause physical harm to enemy personnel or property.²²

The dataset also includes targeting of the following types of people in its tally of noncombatant civilian deaths:

...we include as 'non-combatants' individuals who may be combatants in a different context, but who at the time they were killed were unarmed and unable to defend themselves. This would include, for example, members of guerrilla groups who had come into refugee camps unarmed in order to get food or medical care, or off-duty police eating at a pizza stand.²³

These individuals may not be considered civilians protected by IHL. For instance, depending on what position they held in the guerilla forces, guerillas could be permissibly targeted even if they were unarmed and unable to defend themselves (see Chapter 5). In other words, both datasets include in their count of protected civilians those whom IHL would deem as permissible targets.

²¹ Kansas Event Data System. 2010. <http://web.ku.edu/~keds/data.dir/atrocities.html> (March 16, 2010).

²² Kansas Event Data System. 2010. "Political Instability Task Force Worldwide Atrocities Event Data Collection Codebook Version 1.0B2." 3. <http://web.ku.edu/~keds/data.dir/atrocities.html>. (March 16, 2010).

²³ Kansas Event Data System. 2010. "Political Instability Task Force Worldwide Atrocities Event Data Collection Codebook Version 1.0B2." 4. <http://web.ku.edu/~keds/data.dir/atrocities.html>. (March 16, 2010).

The matter of multiple interpretations of permissible targets is problematic enough if it is limited to proponents of the civilian immunity norm like the practitioners and researchers discussed above. The problem becomes more complicated when differences occur between norm proponents and belligerents, especially when belligerents claim they abide by the distinction principle at a cost to them.

These observations hint that where impermissible civilian targeting occurs, there may be an absence of intersubjectivity on who is considered a permissible civilian target. The historical analysis conducted in this study determined whether this lack of intersubjectivity in the distinction principle is solely a feature of the current civilian protection regime or present in previous attempts to protect certain groups from the blight of armed conflict. It explores these protective efforts in legal environments pertinent to the former belligerents participating in this study (those who fought in conflicts on the African continent), namely European, Islamic and pre-colonial African legal traditions, as well as through the IHL codification process. This investigation reveals that various understandings of what constitutes permissible targets coexisted at any given time and place. In other words, while intersubjectivity existed on the obligation among belligerents to distinguish between permissible and impermissible targets, there never existed intersubjectivity on who constituted a permissible target, even after the codification of the distinction principle in the 1977 APs.

The analysis of the interview data demonstrates that this lack of intersubjectivity is not simply a relic of the past; it continues to plague the civilian protection regime. It does so in a manner that belies explanations rooted in a particular actor or conflict. This is because the data show that the distinction principle manifests in various forms today, differing within groups of relevant actors (IHL experts and former belligerents) and between them.

These findings mirror what the historical analysis of the distinction principle reveals. Relevant actors generally agree that some form of the distinction principle must regulate armed conflict. However, they do not always agree on how that distinction should be conducted. Belligerent narratives indicate a willingness to comply with the distinction principle, but their internalization of that obligation differs from norm proponents, like the IHL experts included in this study.

This study's findings hold implications for our understanding of violations of the civilian immunity norm in particular, and norms more generally. By arguing that central actors do not commonly understand the civilian immunity norm's obligations, this study questions a fundamental assumption in the relevant literature's explanations of its violations. If the civilian immunity norm lacks intersubjectivity, so that multiple interpretations of compliance and violation exist, how do we determine when it (or any ambiguous norm) has been violated? The lack of intersubjectivity evidenced here suggests that actors do not always violate norms in line with some of the literature's dominant explanations: to further some material interest or because of ignorance of normative obligations. Sometimes, norm violations occur because actors, operating in an ambiguous normative environment, formulate their own understanding of the norm's requirements. These interpretations may differ from those enforcing the norm, causing the appearance of norm violation. Consequently, this study's findings draw attention to the differential power capacities of the actors involved not only in norm development but also in norm implementation. The raising of such issues also offers new possibilities for policymakers interested in blazing new ground in civilian protection.

The subsequent chapters discuss these issues at length. Chapter 2 explains how the literature on international norms and civilian targeting offer insightful inquiries into these

violations of IHL, yet overlooks the utility of examining whether a lack of intersubjectivity can explain these very violations. Chapter 3 discusses the methodology used in this research project. Chapters 4, 5 and 6 are the analytical chapters. Chapter 4 explores how the concept of permissible targets was treated in various parts of the world prior to IHL codification, while Chapter 5 picks up on this discussion during the codification process. They show that actors were never able to consistently define permissible targets. Chapter 6 delves into how former belligerents and IHL experts currently understand the concept of permissible civilian target. Chapter 7 concludes this discussion by contemplating the wider implications of this issue and suggests some avenues for future research.

CHAPTER 2: NORMS AND CIVILIAN DEATHS

War by definition consists of killing, of deliberately going out and shedding the blood of one's fellow creatures. Now shedding blood and killing are activities which no society- not even a society of animals- can tolerate unless they are carefully circumscribed by rules that define what is, and is not allowed... ~Glen Gray²⁴

This chapter reveals that neither the extant literature on deliberate civilian targeting nor the broader literature on international norms fully appreciates the consequences of an absence of shared understandings of permissible civilian targets on violations of the civilian immunity norm. The norm diffusion literature helpfully explains the norm dissemination process but does not fully account for differing understandings of a norm's application in spite of this process. The norm violation literature claims norm violations occur because actors adhere to the logic of consequences: material interests drive actors who are individualist in orientation, and norms are valuable to the extent they support or enable action in pursuit of these interests. Lack of intersubjectivity is less of an issue because these theories assume that power (domestic or international) determines political behavior in the international realm.²⁵ The norm contestation does provide a theoretical avenue for examining the nature of intersubjectivity and norm violations, but scholars have yet to employ this framework within the context of deliberate civilian targeting.

²⁴ Fresard, Jean-Jacques. 2004. *The Roots of Behavior in War: A Survey of the Literature*. Geneva: ICRC, 23-24.

²⁵ Mearsheimer, John. 1995. "The False Promise of International Institutions," in Michael E. Brown, Sean M. Lynn-Jones, and Steven E. Miller (eds.), *The Perils of Anarchy*, Cambridge: MIT Press, 375; March, James G. and Johan P. Olsen. 1998. "The Institutional Dynamics of International Political Orders," *International Organization* 52:4; Gilpin, Robert. 1981. *War and Change in World Politics*, Cambridge: Cambridge University Press; Schweller, Randall L. and David Preiss. 1997. "A Tale of Two Realisms: Expanding the Institutions Debate," *Mershon International Studies Review* 4; Thompson, Kenneth W. 1980. *Morality and Foreign Policy*, Baton Rouge: Louisiana State University Press.

EXPLAINING NORM COMPLIANCE- LOGIC OF CONSEQUENCES AND LOGIC OF APPROPRIATENESS

International relations theories explaining norm compliance fall into several camps. The two predominant ones are: those that focus on instrumental rationality (where the logic of consequences motivates actors) and those focusing on value rationality (where the logic of appropriateness motivates actors).²⁶ Theories of instrumental rationality argue that rational, cost-benefit calculations (long term or short term) drive actor behavior, and are individualist in orientation.²⁷ Theories of instrumental rationality do not deny the contribution of norms; however, this recognition is often limited to their ability to support or enable utilitarian motivations.²⁸

Constructivism, the study of social relations,²⁹ follows the logic of appropriateness. For theories that emphasize value rationality, ideas (and norms) “play an autonomous or substantive role in explaining outcomes” because actors are more socially conscious than rationalists

²⁶ Tannenwald, Nina. 2005. “Ideas and Explanations: Advancing the Theoretical Agenda,” *Journal of Cold War Studies* 7:2, 17-18; See also March and Olsen (1998) for further explanation of the two logics.

²⁷ Mearsheimer, John (1995:375); March and Olsen (1998); Gilpin (1981); Schweller and Preiss (1997); Thompson (1980); Keohane, Robert. 1984. After Hegemony: Cooperation and Discord in the World Political Economy. Princeton: Princeton University Press; Jervis, Robert. 1978. “Cooperation Under the Security Dilemma,” *World Politics* 30:2, 171; Schelling, Thomas C. 1980. The Strategy of Conflict, Cambridge: Harvard University Press, 4; Snidal, Duncan. 2003. “Rational Choice and International Relations,” in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds), Handbook of International Relations, London: Sage.

²⁸ Kratochwil, Friedrich. 1989. Rules, Norms and Decision, Cambridge: Cambridge University Press, 61; Krasner, Stephen D. 1982. “Structural Causes and Regime Consequences,” *International Organization* 36:2, 191-192; Abbot, Kenneth W. 1999. “International Relations Theory, International Law and the Regime Governing Atrocities in Internal Conflicts,” *The American Journal of International Law*, 93:2, 365-366; Rudolph, Christopher. 2001. “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals,” *International Organizations* 55:3, 657; Tarzi, Shah M. 1998. “The Role of Norms, Principles and Regimes in World Affairs,” *Journal on World Peace* 15:4; Cardenas, Sonia. 2004. “Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior,” *International Studies Review* 6, 219-220.

²⁹ Onuf, Nicholas. 1989. “Constructivism: A User’s Manual,” in Vendulka Kubalkova, Nicholas Onuf, and Paul Kowert (eds), International Relations in a Constructed World, Armonk: M.E. Sharpe.

claim.³⁰ They do so when they are able to explain behavior that does not conform to the logic of consequences; that is, norms are “responsible for producing effects.”³¹ In other words, the logic of appropriateness can explain norm compliance in cases where the logic of consequences would predict otherwise. Actors comply with norms

for many reasons, among them being that norms define what and who they are, what they want, and how they view international politics. Compliance is therefore seen not only in terms of narrowly defined incentives but also in terms of shared normative understandings that provide matrices of meaning for national or supranational cultures.³²

As such, actor preferences are endogenously derived.³³ In the words of Alexander Wendt, “[a]ctors do not have a ‘portfolio’ of interests that they carry around independent of social context....”³⁴

One mechanism for ensuring norm compliance via the logic of appropriateness is through the diffusion of norms. Norm diffusion explains how “similar action by dissimilar actors in the absence of constraint” occurs.³⁵ In doing so, its explanations often, although not exclusively, encompass states as units of analysis and the social structures in which these units are embedded (such as the international system).³⁶ In explaining “similar action by dissimilar actors,” norm diffusion particularly focuses on the “transfer or transmission of objects, processes, ideas and

³⁰ Tannenwald (2005:18); Abbott (1999). See also Wendt, Alexander.1992. “Anarchy is What States Make of It: The Social Construction of Power Politics,” *International Organization* 46; Rudolph (2001), 658; Checkel, Jeffrey T.1998. “The Constructivist Turn in International Relations,” *World Politics* 50:2; Bjorkdahl, Annika.2002. “Norms in International Relations: Some Conceptual and Methodological Reflections,” *Cambridge Review of International Affairs* 15:, 9; Legro, Jeffrey W.1997. “Which Norms Matter? Revisiting the “Failure” of Internationalism,” *International Organization* 51:1; Ruggie, John Gerard.1998. “What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge,” *International Organization* 52:4; Fierke, Karin M. and Knud Erik Jorgensen (eds.).2001. Constructing International Relations: The Next Generation, Armonk: M. E. Sharpe.

³¹ Yee, Albert, S.1996. “The Causal Effect of Ideas on Policies,” *International Organization* 50:1, 70.

³² Thomas, Ward. 2001. Ethics of Destruction: Norms and Force in International Relations, Ithaca: Cornell University Press, 17.

³³ Pulkowski, Dirk. 2006. “Testing Compliance Theories: Towards US Obedience of International Law in the *Avena* Case,” *Leiden Journal of International Law* 19, 518.

³⁴ Wendt (1992:397-98).

³⁵ Finnemore, Martha.1996. National Interests in International Society, Ithaca: Cornell University Press, 6.

³⁶ True, Jacqui and Michael Minstrom.2001. “Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming,” *International Studies Quarterly* 45, 33.

information from one region or population to another” including principles, norms and rules.³⁷ According to Martha Finnemore and Kathryn Sikkink, who elucidate the diffusion mechanism as it relates to norms, once a critical mass of actors adopts a new norm and become norm leaders, these leaders diffuse the norm by socializing other actors to become followers, a process known as norm cascade.³⁸ Socialization is “the process of inducting individuals [or states] into the norms and rules of a given community.”³⁹ This socialization is usually done by states, networks of norm entrepreneurs or international organizations.⁴⁰ Generally, for norm cascade to occur, the norm has to be institutionalized in specific rules and international organizations.⁴¹ Institutionalization correlates with norm cascade by specifying exactly what the norm is and what constitutes its violation.⁴²

The aim of socialization via norm diffusion is to ensure compliance with the norm.⁴³ It instructs actors on what their obligations are and how to comply with them, in the hopes that the obligations become ingrained, “taken for granted.”⁴⁴ Constructivists argue that through this socialization process, state identity and interests are shaped to align with the norm being

³⁷ Checkel, Jeffrey T.1999. “Norms, Institutions and National Identity in Contemporary Europe,” *International Studies Quarterly* 43, 85.

³⁸ Finnemore, Martha and Kathryn Sikkink.1998. “International Norm Dynamics and Political Change,” *International Organization* 52:4, 895.

³⁹ Hooghe, Liesbet.2005. “Several Roads Lead to International Norms, but Few via International Socialization: A Case Study of the European Commission,” *International Organization* 59, 865.

⁴⁰ Finnemore And Sikkink (1998:901); See also Khagram, Sanjeev, James V. Riker, and Kathryn Sikkink, (eds.).2002. Restructuring World Politics:Transnational Social Movements, Networks, and Norms. Minneapolis: University of Minnesota Press.

⁴¹ Finnemore and Sikkink (1998:900).

⁴² Id at 895.

⁴³ Compliance occurs “when the actual behavior of a given subject conforms to prescribed behavior...” Young (1979).

⁴⁴ Johnston, Iain.2001. “Treating Institutions as Social Environments,” *International Studies Quarterly* 45:4, 494

diffused.⁴⁵ Early on, Hedley Bull identified the importance of the shared norms and beliefs of international society particularly in the case of compliance with international law.⁴⁶

Constructivists acknowledge that this international socialization occurs via both coercion and persuasion.⁴⁷ Coercive socialization follows the logic of rationalist explanations for norm compliance, except that for constructivists, coercion takes the shape of social sanctioning.⁴⁸ Persuasive mechanisms of socialization include discourse conferring international legitimacy and enhancing self-esteem.⁴⁹

Regulation (effective or ineffective) of international relations, as well as the production of identity, falls on the shoulders of international law.⁵⁰ In the case of legal norms, “compliance with norms is significantly shaped by our values, among which deference to ‘the law’ is one of the most important.”⁵¹ In the realm of international law, compliance can be divided into six smaller bins that examine: problem structure, solution structure, solution process, norms, domestic linkages and international structure.⁵² The mechanism driving compliance via the logic of appropriateness is intersubjectivity and is discussed in the next section.

⁴⁵ Checkel, Jeffrey T.2001. “Why Comply? Social Learning and European Identity Change,” *International Organization* 55:3, 561.

⁴⁶ Simmons, Beth A.1998. “Compliance with International Agreements,” *Annual Review of Political Science* 1, 85.

⁴⁷ Landolt, Laura K.2004. “(Mis)Constructing the Third World? Constructivist Analysis of Norm Diffusion,” *Third World Quarterly* 25:3, 584.

⁴⁸ Checkel (2001:560).

⁴⁹ Keck, Margaret, and Kathryn Sikkink.1998. Activists Beyond Borders: Advocacy Networks in International Politics, Ithaca: Cornell University Press; Thomas, Daniel.2001. The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism, Princeton: Princeton University Press; Risse, Thomas.2000. “Let’s Argue! Communicative Action in World Politics,” *International Organization* 54; Ron, James.1997. “Varying Methods of State Violence,” *International Organization* 51:2, 278-279; Reus-Smit, Christian.2001. “Human Rights and the Social Construction of Sovereignty,” *Review of International Studies* 27.

⁵⁰ Kinsella (2005:164).

⁵¹ Kratochwil (1989:64).

⁵² Because the matter is beyond the scope of inquiry here, I will not elaborate on these concepts. For a more thorough examination of these concepts, please see Raustiala, Kal and Anne-Marie Slaughter.2003. “International Law, International Relations and Compliance,” in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds), Handbook of International Relations, London: Sage, 545-548.

Intersubjectivity

Since their adoption, the Additional Protocols I and II (APs) to the Geneva Conventions have become an integral part of international humanitarian law (IHL). IHL can be considered an international regime. According to the constructivist literature, international regimes are “principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue area.”⁵³ The concept of intersubjectivity captures this convergence. Intersubjectivity denotes “*shared* understandings of desirable and acceptable behavior” (emphasis added).⁵⁴ These shared understandings “provide people with reasons why things are the way they are and indications as to how they should use their material abilities and power.”⁵⁵ Intersubjectivity is based on a perception that although “each of us thinks his own thoughts; our concepts we share with our fellow men.”⁵⁶ The key concept in intersubjectivity, and hence international regimes, is the idea that actors involved know and accept similar conceptions of appropriate courses of action to take in a given situation. This is a crucial element for socially oriented theories like constructivism. Even among rationalist theories which are more individually oriented and emphasize instrumental rationality, the notion of shared understandings plays a subtle and less acknowledged role in accounting for international behavior. Peter J. Katzenstein explains that according to rationalists: “...behavior is related to the constraining conditions in which these actors, with their *assumed* interests, find themselves” (emphasis added).⁵⁷ Among rationalists, intersubjectivity takes the form of collective understandings that interest driven action is expected.

⁵³ Krasner (1982:185).

⁵⁴ Kratochwil and Ruggie (1996).

⁵⁵ Adler (1997).

⁵⁶ Toulmin (1972)

⁵⁷ Katzenstein, Peter J.1996. “Introduction: Alternative Perspectives on National Security,” in Peter J. Katzentessin (ed.), The Culture of National Security: Norms and Identity in World Politics, New York: Columbia University Press, 14.

Regime Components

As mentioned earlier, the component elements of international regimes are principles, norms, rules and decision-making procedures. Principles are “beliefs of fact, causation, and rectitude.”⁵⁸ According to Stephen D. Krasner, norms are “standards of behavior defined in terms of rights and obligations.”⁵⁹ Principles and norms make up the foundation of international regimes; they distinguish one regime from another.⁶⁰ Norms exert a variety of effects on actors, including regulative and constitutive effects.⁶¹ Norms exert regulative effects by providing actors guidance on how to act in a given situation.⁶² Constitutive effects occur when “ideational structures [like norms] construct actor interests and identities rather than merely constrain behavior.”⁶³ Constitutive effects are different from identities because whereas identities are “accounts of actors themselves,” constitutive effects inform actors on how to see others.⁶⁴ A difference between norms and principles is that norms contain a behavioral component that is a manifestation of underlying principles. Therefore, behavior attributed to norms implicitly references the principles buttressing them. As Ronald Jepperson, et al, state: “... norms establish expectations about who the actors will be in a particular environment and about how these particular actors will behave.”⁶⁵ Rules are defined as “specific prescriptions or proscriptions for

⁵⁸ Krasner (1982:186).

⁵⁹ Id.

⁶⁰ Id at 188.

⁶¹ Tannenwald, Nina.1999. “The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use,” *International Organization* 53:3, 437.

⁶² Carpenter (2006).

⁶³ Tannenwald (2005:19); see also Wendt, Alexander.1999. *Social Theory of International Politics*, Cambridge University Press, New York. The differences between regulative and constitutive effects correspond to the divide in constructivist literature between a compliance approach and a societal approach (Wiener, Antje.2003.

“Constructivism: the Limits of Bridging Gaps,” *Journal of International Relations and Development* 6:3, 252, 253).

⁶⁴ Kowert, Paul and Jeffrey Legro.1996. “Norms, Identity and Their Limits: A Theoretical Reprise,” in Peter Katzenstein (ed), *The Culture of National Security*, New York: Cambridge University Press, 453.

⁶⁵ Jepperson, Ronald, Alexander Wendt and Peter Katzenstein.1996. “Norms, Identity and Culture in National Security,” in Peter Katzenstein (ed), *The Culture of National Security*, New York: Cambridge University Press, 54

action.”⁶⁶ While norms may be general collective understandings of appropriate behavior, rules inform actors more specifically of what is required of them to conform to these generalized understandings and the principles from which they derive.

The strength of constructivist arguments depends on the shared understandings of appropriate behavior. It is how constructivists are able to explain compliance with a regime like IHL when rationalist predictions fall by the wayside. Intersubjectivity lies at the core of each regime component and imbues them with meaning. As stated earlier, intersubjectivity represents shared understandings of appropriate behavior. If there is contestation over what is considered appropriate behavior, a regime can become ineffective.

With regard to the civilian protection regime, the intentional targeting of civilians is important to both policymakers and scholars. It is important for policymakers because it calls into question their abilities to design effective policies to curb such noncompliance. It is also important to scholars because these acts cast doubts on arguments made by those who claim the significance of norms in explaining behavior. Yet, despite a history of lack of intersubjectivity, as revealed by Chapters 4 and 5, scholars of the civilian immunity norm and norms generally fail to adequately incorporate this factor into theories of norm violation. The following sections discuss how the literature on the violations of the civilian immunity norm treats the distinction principle as if it contains intersubjectivity and is uncontested. A subsequent section reveals that the broader norms literature also fails to thoroughly investigate intersubjectivity’s role in norm violation. But to appreciate the gravity of the questions presented in this study, a brief discussion of the civilian experience during armed conflict since the passage of the APs (which codified the distinction principle for the first time in international law⁶⁷) is presented first.

⁶⁶ Wiener (2003:253).

⁶⁷ Kinsella, Helen M.2006. “Gendering Grotius: Sex and Sex Difference in the Laws of War,” *Political Theory* 34:2

VIOLATIONS OF THE CIVILIAN IMMUNITY NORM

Blood flowed down the aisles of churches where many sought refuge; five priests and twelve women hiding out in a Jesuit center were slaughtered. A Red Cross ambulance was stopped at a check-point, the six wounded patients dragged out and bayoneted to death. Toddlers lay sliced in half, and mother with babies strapped to their backs sprawled dead on the streets of Kigali. The fighting was hand to hand, intimate and unspeakable, a kind of bloodlust that left those who managed to escape it hollow-eyed and mute.⁶⁸

The shooting started at about 4:00 p.m., but we were surrounded and could not escape. They [Serb troops] finally entered the village at 8:00 p.m. and immediately began setting houses on fire, looking for men and executing them. When they got to our house, they ordered us to come out with hands raised above our heads, including the children. There were four men among us, and they shot them in front of us. We were screaming, and the children cried as we were forced to walk on. I saw another six men killed nearby.⁶⁹

The driver saw that the road was blocked. He tried to reverse the van back. But then there were armed men, armed with assault rifles and dressed in green, came out from the roadside. They announced that all Buddhists would be killed, and started shooting at us one by one. My daughter was trying to lean to me when she was shot in the head.⁷⁰

Civilians in Armed Conflict

The plight of civilians during armed conflict tells a story marked by horror, pain and death. In a span of nine months, 3 million Bangladeshis met their end by Pakistani death squads during the 1971 civil war; 7000 were killed in one night.⁷¹ It is estimated that 95 percent of

⁶⁸ Rudolph (2001:655).

⁶⁹ Gendecide Watch. "Case Study: Bosnia-Herzegovina" http://www.gendecide.org/case_bosnia.html, last accessed 3/1/08

⁷⁰ Human Rights Watch. "No One is Safe: Insurgent Attacks on Civilians in Thailand's Southern Border Provinces," <http://hrw.org/reports/2007/thailand0807/>, last accessed on 8/8/07.

⁷¹ Gendecide Watch. "Case Study: Genocide in Bangladesh, 1971," http://www.gendecide.org/case_bangladesh.html, last accessed 3/1/08.

those killed in the conflicts in Bosnia, Rwanda and Somalia were civilians.⁷² While civilian protection forms the bedrock of IHL and the APs, actual war practices reveal a reality far removed from these legal commandments. William Eckhardt laments that such acts “suggests that the average war over the past three centuries has not been very ‘just’ as far as the killing of unarmed civilians was concerned.”⁷³

The next section will discuss how the literature on violations of the civilian immunity norm insufficiently appreciates the link between a lack of intersubjectivity and deliberate civilian targeting. Since this study considers the AP I definition of civilians as authoritative, discussion of the relevant literature will be limited to those studies covering conflicts that occurred after AP I went into legal effect.

Utilitarian Reasons for Violations of the Civilian Immunity Norm

Within the literature on civilians in armed conflict, many scholars attribute intentional civilian targeting to utilitarian reasons consistent with the logic of consequences. AP I states that civilians who do not take a direct part in hostilities cannot be the target of an intentional attack. Intentional attack means “any action that is taken to deliberately kill civilians.”⁷⁴ One such reason for deliberate attacks is belligerents’ inability to distinguish civilians from other belligerents.⁷⁵ Human Rights Watch (HRW) found that in the Colombian civil war, many

⁷² Greitens, Eric.2001. “The Treatment of Children in Armed Conflict,” in Frances Stewart and Valpy Fitzgerald (eds), *War and Underdevelopment: The Economic and Social Consequences of Conflict (Volume I)*, Oxford: Oxford University Press, 149.

⁷³ Eckhardt, William.1989. “Civilian Deaths in Wartime,” *Bulletin of Peace Proposals* 20:1, 91.

⁷⁴ Eck, Kristine and Lisa Hultman.2007. “One Sided Violence Against Civilians in War: Insights from New Fatality Data,” *Journal of Peace Research* 44:2, 235.

⁷⁵ See for example Chesterman, Simon (ed).2001. *Civilians in War*, Lynne Rienner: Boulder; Human Rights Watch, “War Without Quarter: Colombia and International Humanitarian Law,” <http://www.hrw.org/reports98/colombia/>; Hammes, Thomas X.2004. *The Sling and the Stone: On War in the 21st Century*, St. Paul: Zenith Press; Jones, Samuel Vincent.2006. “Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law?”

civilians are killed because belligerents on all sides claim they cannot distinguish between civilians and belligerents due to the nature of the conflict blurring the line between these two groups.⁷⁶ In criticizing Israeli airstrikes in Lebanon during the 2006 war, HRW Executive Kenneth Roth said,

Hezbollah fighters often didn't carry their weapons in the open or regularly wear military uniforms, which made them a hard target to identify... But this doesn't justify the IDF's [Israeli Defense Force] failure to distinguish between civilians and combatants, and if in doubt to treat a person as a civilian, as the laws of war require.⁷⁷

HRW goes to say,

Statements from Israeli government officials and military leaders suggest that, at the very least, the IDF has blurred the distinction between civilian and combatant, and is willing to strike at targets it considers even vaguely connected to the latter. At worst, it considers all people in the area of hostilities open to attack.⁷⁸

These statements intimate that it is not so much that belligerents cannot distinguish civilians; it is that it is too costly in terms of time, limited resources and troop losses to comply with the distinction principle. Consequently, civilian deaths result because it is more cost effective for belligerents not to distinguish.

Another utilitarian reason for violations of the distinction principle is belligerents' attempts to undermine opponents' sources of support.⁷⁹ Targeting civilians can lend more weight to calls to end hostilities or persuade survivors to back the other side. Benjamin

Examining the Confluence between Contract Theory and the Scope of Civilian Immunity During Armed Conflict," *Duke Journal of Comparative and International Law* 249.

⁷⁶ Human Rights Watch, "War Without Quarter: Colombia and International Humanitarian Law," <http://www.hrw.org/reports98/colombia/>.

⁷⁷ Human Rights Watch, "Israel/Lebanon: Israel Indiscriminate Attacks Killed Most Civilians," <http://www.hrw.org/english/docs/2007/09/06/isrlpa16781.htm>, last accessed 2/25/08.

⁷⁸ Human Rights Watch, http://hrw.org/reports/2006/lebanon0806/2.htm#_Toc142299220, last accessed 2/25/08

⁷⁹ Humphreys, Macartan and Jeremy M. Weinstein.2006. "Handling and Manhandling Civilians in Civil War," *American Political Science Review* 100; for a discussion on targeting the enemy populace in supreme emergencies see Walzer, Michael.2000. *Just and Unjust Wars: a Moral Argument with Historical Illustrations*. New York:Basic Books and Kaufman, Frederik.2007. "Just War Theory and Killing the Innocent," in Michael W. Brough, John W. Lango and Harry van der Linden (eds.), *Rethinking the Just War Tradition*, Albany: State University of New York Press.

Valentino, et al, posit that government forces intentionally kill civilian backers of popularly supported guerillas insurgencies on a massive scale in order to eliminate such essential support.⁸⁰ For instance, preventing civilian support for rebels in their fight against the Sudanese government is an oft cited reason for deliberate civilian targeting in Darfur by government backed Janjaweed forces.⁸¹ Stathis Kalyvas found that the similar motivations drove Islamist guerilla groups to target civilians in Algeria during the 1990s.⁸² The objective of undermining an opponent's source of support is also commonly attributed as one reason for terrorists' *modus operandi* of intentionally killing civilians.⁸³

Which regime type is more likely to participate in intentional civilian targeting for utilitarian reasons is contested. Alexander B. Downes argues that the susceptibility of democratic institutions and leaders to public opinion makes them prone to targeting civilians to quicken the termination of hostilities in. This is done in order to prevent heavy losses of their own troops in armed conflict.⁸⁴ This was the reason for France's targeting of Algerian civilians

⁸⁰ Valentino, Benjamin, Paul Huth, and Dylan Balch-Lindsay.2004. "Draining the Sea': Mass Killing and Guerrilla Warfare," *International Organization* 58:2.

⁸¹ Chiro, Daniel and Clark McCauley. 2006. Why Not Kill Them All? The Logic and Prevention of Mass Political Murder, Princeton: Princeton University Press, 152.

⁸² Kalyvas, Stathis.1999. "Wanton and Senseless? The Logic of Massacres in Algeria," *Rationality and Society* 11:3; Pape, Robert A..2003. "The Strategic Logic of Suicide Terrorism," *American Political Science Review* 97:3, 345; Museveni, Yoweri.1986. Selected Articles on the Ugandan Resistance War, Nairobi: NRM Publications; Human Rights Watch.1994. Civilian Devastation:Abuses by All Parties in the War in Southern Sudan, New York: Human Rights Watch; Weinstein, Jeremy M.2007. Inside Rebellion: The Politics of Insurgent Violence, Cambridge: Cambridge University Press.

⁸³ Pape (2003:345); See also Larsson, J.P.2004. Understanding Religious Violence: Thinking Outside the Box of Terrorism, Burlington:Ashgate; Jollimore, Troy.2007. "Terrorism, War and the Killing of the Innocent," *Ethical Theory and Moral Practice* 10:4; Wiktowicz, Qunitan and John Kaltner.2003. "Killing in the Name of Islam: Al Qaeda's Justification for September 11," *Middle East Policy* 10:2; Goodwin, Jeffrey.2006. "A Theory of Categorical Terrorism", *Social Forces* 84:4; Held, Virgin.2004."Terrorism and War," *The Journal of Ethics* 8:1

⁸⁴ Downes, Alexander B.2006. "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War," *International Security* 30:4, 153; see also Downes, Alexander B.2008. Targeting Civilians in War, Ithica: Cornell University Press, and Morrow, James D.2007. "When do States Follow the Laws of War," *American Political Science Review* 101:3.

during its conflict with Algeria.⁸⁵ However, Barbara Harff and R.J. Rummel independently found that democracies are less prone to deliberately targeting civilians.⁸⁶

Finally, civilians are intentionally targeted as a means of securing credibility.⁸⁷

According to rebel fighters in Sierra Leone, deliberately targeting civilians is “‘the best way to be taken seriously’ by the UN and other (wealthy) international agencies willing to contribute resources to ending such practices.”⁸⁸ This attitude is a reaction to the efforts of humanitarian organizations to encourage groups to stop attacking civilians.⁸⁹ Michael J. Boyle finds such signaling also explains the deliberate killing of civilians in Iraq as well:

These three logics of bargaining, fear, and of denial interact to shape the patterns of violence against civilians in Iraq, creating a vicious cycle which continually leaves civilians subject to atrocities and treats them as pawns in a complex bargaining game.⁹⁰

While these studies have made great strides in our understanding of the reasons for violations of the distinction principle, they share in common the assumption of intersubjectivity on permissible civilian targets. None of the examples discussed here question whether a common understanding of who is a permissible civilian target exists, or whether the absence of such an understanding contributes to seemingly deliberate civilian targeting. Such silence suggests an assumption that whether or not belligerents share the international community’s definition of permissible civilian targets is not a contributory factor to the violation of the

⁸⁵ Nielsen, Kai.1981. “Violence and Terrorism: Its Uses and Abuses,” in Leiser, B.M. (ed.), Values in Conflict, New York: Macmillian.

⁸⁶ Harff, Barbara.2003. “No lessons learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955,” *American Political Science Review* 97:1; Rummel, R.J.1995. “‘Democracy, Power, Genocide, and Mass Murder,” *Journal of Conflict Resolution* 39.

⁸⁷ Azam, Jean-Paul and Anke Hoefler.2002. “Violence Against Civilians in Civil Wars: Looting or Terror?,” *Journal of Conflict Resolution* 46:1; see also Hoffman, Danny.2004. “The Civilian Target in Sierra Leone and Liberia: Political Power, Military Strategy and Humanitarian Intervention,” *African Affairs* 103

⁸⁸ Ferme, Mariane C. and Dabby Hoffman.2004.“Hunter Militias and the International Human Rights Discourse in Sierra Leone and Beyond,” *Africa Today* 89.

⁸⁹ Hoffman (2004:218).

⁹⁰ Boyle, Michael J. 2009. “Bargaining, Fear, and Denial: Explaining Violence Against Civilians in Iraq 2004-2007.” *Terrorism and Political Violence* 21: 263.

distinction principle. Instead, the causes for this willful targeting are placed elsewhere (i.e. the variety of utilitarian reasons presented here). For example, Valentino, et al, institute their own understanding of “noncombatant” in determining the number of impermissible targets killed.⁹¹ Yet, this is the definition of civilian (or noncombatant, as it were) as understood by Valentino and his co-authors; how belligerents define the term and how their (mis)understanding of it results in deliberately civilian targeting is not addressed. Macartan Humphreys and Jeremy M. Weinstein, in their section titled “Theories of Civilian Abuse,” cite the conditions associated with either cooperative or coercive (and at times, lethal) extractive methods governing combatant-civilian relations as reasons for deliberate civilian targeting.⁹² Again, how belligerents understand permissible civilian targets is not included in this discussion. Downes, who admittedly uses civilian and noncombatant interchangeably, articulates his bewilderment that “civilian victimization”⁹³ occurs despite the fact that global public opinion condemns such practices and the widespread belief that doing so is ineffective.⁹⁴ Rather than exploring the possibility that varying definitions of permissible civilian targets may be the culprit, he attributes a state’s desperation to win protracted conflicts and territorial ambitions as explanations for civilian victimization. This is in spite of the fact that Downes admits to the difficulty in distinguishing between, in his words, civilians and combatants.⁹⁵

⁹¹ Valentino et al (2004) define a noncombatant as “any unarmed person who is not a member of a professional or guerilla military group and who does not actively participate in hostilities by intending to cause physical harm to enemy personnel or property,” (378-379).

⁹² Humphreys and Weinstein (2006) at 430-431.

⁹³ Civilian victimization “is a wartime strategy that targets and kills (or attempts to kill) noncombatants.” Downes (2006:156).

⁹⁴ Downes (2006:153).

⁹⁵ Id at 157.

Differing Methods of Interpretation of Direct Participation

“If you are holding a gun, you can no longer be a civilian” (former member of the Democratic Republic of Congo military)⁹⁶

“Those may have watched as the explosive device was planted along the road and did not give warning...That collusion makes them as guilty as the ones who planted the bomb”⁹⁷

In fact, the literature on the deliberate targeting of civilians does implicitly recognize ambiguity on who is considered a permissible civilian target. For example, legal scholar Ingrid Deter de Lupis declares, “it is really only in peacetime that a clear distinction exists between civilian and military forces.”⁹⁸ The ambiguity results from the vagueness of the phrase “direct participation in hostilities” generating multiple interpretations of its meaning, as the above quotes imply. This becomes evident when an examination of the literature yields different ways to determine direct participation. The purpose of many of these works is to guide or identify interpretations of this key but imprecise phrase for compliance purposes. Codified IHL offers no further guidance on what constitutes direct participation in hostilities. Consequently, a plethora of articulations of how direct participation can and has been determined is found within the relevant literature. These interpretations can be grouped into several categories; this study focuses on three: guilt/innocence, monist categorizations and specific acts.

The guilt/innocence paradigm of direct participation incorporates essentially subjective moral determinations of the distinction principle. This method of distinction commands those

⁹⁶ Personal Interviews (Summer 2005).

⁹⁷ The quote refers to the killing of Iraqi civilians by U.S. Marines in Haditha Time Magazine, June 2006.

⁹⁸ Deter de Lupis, Ingrid. 1987. The Law of War, Cambridge: Cambridge University Press, 272.

deemed “innocent” to be spared; those who are guilty can be permissively targeted.⁹⁹ Anthony

E. Hartle explains this manner of distinction:

In most cases people who are not engaged in or guilty of morally or legally indefensible activities would satisfy the condition of innocence. That condition would cover most people in the category we frequently use when we refer to noncombatants.¹⁰⁰

Based on this dichotomy, Jenny Teichman enumerates those historically considered innocent:

...rulers of states engaged in just wars; soldiers fighting in just wars- that is, those fighting on the morally right side; rulers who after serious deliberation and after taking counsel from wise men come to the sincere, though false, belief that their cause is just; ordinary soldiers on the morally wrong side who are not close to government and so cannot know that their rulers are in the wrong; children...; women (unless they have power in the state or have committed crimes); old men (with the same proviso); and all harmless unarmed folk such as peasants, clerics, and literary men.¹⁰¹

A second interpretation of direct participation is based on monist classifications.¹⁰² Here, identity is reduced to mere membership in a particular category which is then effectively treated synonymously with direct participation.¹⁰³ These reductionist classifications include gender, age, religion, ethnicity and other group membership. According to Laura Sjoberg, a gendered interpretation “*requires* men to be combatants and women to be passive victims.”¹⁰⁴ This may be a reason why males between the ages of 10-34 were targeted twice as much as women in

⁹⁹ For further discussion of this type of distinction, see also Armeson, Richard J.2006. “Just Warfare Theory and Noncombatant Immunity,” *39 Cornell International Law Journal* 663 and May, Larry.2005. “Killing Naked Soldiers: Distinguishing Between Combatants and Noncombatants,” *Ethics and International Affairs* 19:3

¹⁰⁰ Hartle (2002). For further discussion on the guilt/innocence based distinction, see also Pham, J. Peter.2005. Child Soldiers, Adult Interests: The Global Dimensions of the Sierra Leonan Tragedy, New York: Nova Science Publishers; Gardam, Judith J. and Michelle J. Jarvis.2001. Women, Armed Conflict and International Law, The Hague: Kluwer; Dombrowski, Nicole M.2004. Women and War in the Twentieth Century: Enlisted Without Consent, New York: Rutledge; Moser, Caroline O.N. Moser and Fiona C. Clark.2001. Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence, London: Zed Books; Turshen, Meredith and Clotilde Twagiramariya.1998. What Women do in Wartime: Gender and Conflict in Africa, London: Zed Books.

¹⁰¹ Teichman (1986:64).

¹⁰² Slim, Hugo.2003. “Why Protect Civilians? Innocence, Immunity and Enmity in War,” *International Affairs* 79:3, 496.

¹⁰³ Fenrick, William J.2007. “The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities,” *Journal of International Criminal Justice* 5.

¹⁰⁴ Sjoberg (2006:895).

Cambodia from 1975-1980.¹⁰⁵ Igor Primoratz's argument that if a moral interpretation of "innocent" were used as a method of distinction, then the number of people protected by the civilian immunity norm would shrink to "only children... and the aged and infirm..." because these groups "would be the truly innocent of the war," reflects one type of age-based distinction.¹⁰⁶ While lambasting U.S. economic sanctions against Iraq, Sari Nusseibeh provides another illustration of a gender and age bias in the impermissible civilian target conception:

...the enormous human cost of civilian casualties still being paid by Iraqi women and children... as a result of the continued embargo against Iraq is yet another mockery of the U.S. moral claims, and clearly violates the just war dictum against civilian casualties.¹⁰⁷

This use of sex and age as cognitive shortcuts helps to explain the sparing of women and children while men are categorically considered permissible targets.¹⁰⁸ Monist distinctions also explain the deliberate killing of Muslim civilians in Bosnia; the deliberate killing of Hema, Lendu and Ngiti civilians in the Democratic Republic of Congo (DRC); and the deliberate killing of civilians during genocides (as defined by the UN Convention on the Prevention and Punishment of the Crime of Genocide¹⁰⁹) that occur during armed conflict.¹¹⁰ In such cases "a critical part of a broader political war aim has often been the intention to eradicate a people or

¹⁰⁵ Hartely, Ralph J.2007. "To Massacre: A Perspective on Demographic Competition," *Anthropological Quarterly* 80:1, 239

¹⁰⁶ Primoratz (2005) at 49.

¹⁰⁷ Nusseibeh (1992:78).

¹⁰⁸ See for example Carpenter (2006); Kinsella (2006); Lindsey, Charlotte.2000. "Women and War: An Overview," *International Review of the Red Cross* 839, 561; Elshtain, Jean.1992. "Just War as Politics: What the Gulf War Told Us About Contemporary American Life," in Decrosse; Carpenter, R. Charli.2006. "Recognizing Gender Based Violence Against Civilian Men and Boys in Conflict Situations," *Security Dialogue* 37:1 (2006); Gardam, Judith.1993. "Gender and Non-combatant Immunity," *Transnational Law and Contemporary Problems* 3.

¹⁰⁹ Article 2 states, "... genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group..."

¹¹⁰ For expositions delving into the rationales for the creation of this essentialist categories, see Chirote and McCauley (2006); Kassimeris, George (ed.).2006. *The Barbarization of Warfare*, New York: New York University Press; Bloom, Mia.2005. *Dying to Kill: The Allure of Suicide Terror*, New York: Columbia University Press; Carr, Caleb.2002. *The Lessons of Terror: A History of Warfare against Civilians*. New York: Random House; Prunier, Gerard.2005. *Darfur: The Ambiguous Genocide*, Ithaca: Cornell University Press; Jones, Adam.2004. *Gendercide and Genocide*, Nashville: Vanderbilt University Press; Shaw, Martin.2003. *War and Genocide: Organized Killing in Modern Society*, Cambridge: Polity Press.

reduce them to such a degree that they will never again pose a significant *threat*” (emphasis added).¹¹¹

A third interpretation of direct participation focuses on specific acts committed by the actor in question. Conventionally, civilians engaging in acts that threaten belligerents are considered to directly participate and hence, are permissible targets.¹¹² However, scholars enumerate different specific acts which are considered examples of direct participation. This may be partially due to the fact the “merging of the ‘home’ and the ‘front’ into one makes any easy distinction between combatant and civilian difficult...”¹¹³ Consequently, direct participation includes acts in which the links of causality are short to those with more extended links. A litany of acts some scholars consider as direct participation would include: voluntarily acting as a human shield¹¹⁴; taking up arms¹¹⁵; gathering intelligence¹¹⁶; working on a military base during armed conflict on “mission-essential” tasks¹¹⁷; approaching a military checkpoint in a fast moving vehicle¹¹⁸; contributing to the opponent’s “war effort” as a munitions worker, farmer or

¹¹¹ Slim, Hugo.2008. Killing Civilians: Method, Madness and Morality in War. New York: Columbia University Press, 41

¹¹² Slim (2003) at 486.

¹¹³ Kinsella (2005) at 177.

¹¹⁴ Schmitt, Michael N..Summer 2005. “War, Technology and International Humanitarian Law,” *Program on Humanitarian Policy and Conflict Research Occasional Paper Series* 4, 37-38.

¹¹⁵ Kaufman, Whitley.2003. “What is the Scope of Civilian Immunity in Wartime?,” *Journal of Military Ethics* 2:3, 187 (FN2); see also Downes (2006) at 157.

¹¹⁶ McDonald, Avril. April 2004. “The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities,” http://www.wihl.nl/index.asp?c_nr=1&sub_categorie=78&ssc_nr=379&anker=Databases, last accessed 4/2/2008.

¹¹⁷ Schmitt, Michael N.1999. “The Principle of Discrimination in the 21st Century,” 2 *Yale H.R. & Dev. L. J.* 143, 150.

¹¹⁸ Carter, Phillip.2003. “Why the Recent Civilian Shootings in Karbala, While Tragic, Were Probably Lawful,” *Findlaw’s Legal Commentary Journal*, http://writ.news.findlaw.com/commentary/20030405_carter.html, last accessed 3/24/2006; see also Kahl, Colin H.2007. “In the Crossfire or Crosshairs? Norms, Civilian Casualties and U.S. Conduct in Iraq,” *International Security* 32:1.

allegiant parent of a belligerent¹¹⁹; and preventing one's government from going on the war path.¹²⁰

The review of these studies reveals that a myriad of interpretations of direct participation, and consequently permissible civilian targets, exists. Yet, the possibility that violations of the civilian immunity norm occur as a result of conforming to one of these many interpretations as opposed to another has not adequately been raised. For example, Sjoberg states that applying the distinction principle based on a guilt/innocence rubric is problematic because

the distinction between those who are 'guilty' of the enemy offense and those who are 'innocent' is nowhere near as simple as it sounds. There is substantial debate concerning the line between innocence and guilt in war-fighting, and the method by which that distinction is made.¹²¹

But Sjoberg, like Downes, fails to capitalize on this insight as an avenue to explain seemingly deliberate civilian targeting and perhaps generates strategies to enhance the civilian immunity norm. Instead, she contends that the current approach to civilian protection (i.e., who can be the intended target) be abandoned in favor of one that incorporates an empathetic lens supported by a feminist framework (i.e., who might get hit by targeting strategies).¹²²

It is premature to advocate abandonment of the current civilian protection regime as a means for more effective civilian protections. Investing additional time on the question of who can be targeted can provide explanations for the tragedy that is the civilian experience during armed conflict. For instance, what if the ICRC utilizes an interpretation of direct participation that differs from that used by belligerents? A dilemma does not arise when the ICRC and

¹¹⁹ Slim at 497.

¹²⁰ Draper, Kai.2005. "Self-defense, Collective Obligation and Noncombatant Liability," *Social Theory and Practice* 24 (1998), 57; Cornwell, William, "The Burden of Autonomy: Non-combatant Immunity and Humanitarian Intervention," *Journal of European Ethics* 12:3.

¹²¹ Sjoberg (2006) at 892.

¹²² Id at 905.

belligerents utilize similar conceptions of direct participation. For instance, Vera Achvarina and Simon F. Reich demonstrate that the use of children as belligerents is a vastly underappreciated but incredibly grave problem in many current conflicts.¹²³ Children who fight are considered as directly participating and are therefore permissible targets.¹²⁴ Consequently, the ICRC acknowledges that child soldiers engaged in active hostilities “are recognized as combatants”¹²⁵; their youthfulness alone will not protect them under these circumstances.

However, what of instances where there is disagreement between the ICRC interpretation and belligerent interpretation of direct participation? There are many gray areas that could generate disagreement on what it means to be directly participating in hostilities (and therefore, a permissible civilian target). This is particularly the case when it comes to which specific acts qualify as directly participating. The current U.S. “War on Terror” is mired with these ambiguities. For instance, in 2002 the CIA conducted an operation in Yemen in which an unmanned military drone fired upon a vehicle, killing six suspected terrorists.¹²⁶ Would the CIA agents who operated the drone be considered directly participating? Does direct participation include suspicion of terrorism (which itself is variously defined)? While the United States would likely answer in the affirmative for the second question, the ICRC would likely not.¹²⁷ This instance serves to demonstrate that ambiguity in what constitutes direct participation can yield conflicting interpretations of appropriate behavior. In other words, the numerous methods of

¹²³ Achvarina, Vera and Simon F. Reich.2006. “No Place to Hide: Refugees, Displaced Persons and the Recruitment of Child Soldiers,” *International Security* 31:1.

¹²⁴ Wells, Sarah L. “Crimes Against Child Soldiers in Armed Conflict Situations: Applications and Limitations of International Humanitarian Law,” 12 *Tul. J. Int'l & Comp. L.* 287

¹²⁵ International Committee for the Red Cross, “Advisory Service on International Humanitarian Law: Legal Protection of Children in Armed Conflict,” ICRC website (last accessed 4/6/2009).

¹²⁶ Hersh, Seymour M.2002. ‘Manhunt: The Bush administration’s new strategy in the war against terrorism’, *The New Yorker* (December 23 and 30, 2002)

¹²⁷ International Committee for the Red Cross. “Developments in U.S. Policy and Legislation Toward Detainees: The ICRC Position,” <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/kellenberger-interview-191006>

distinction circulating in the literature and in practice may be an indicator of a systematic lack of intersubjectivity on what is a permissible civilian target.

EXPLAINING NORM VIOLATIONS

Unintentional Violations

The general inattention to intersubjectivity in the literature on civilian targeting is reflected as well in the international relations literature on norms more broadly. For instance, the norm diffusion literature fails to adequately take account of the role of lack of intersubjectivity on political behavior. This theory explains norm violations as unintentional action by actors unaware of their normative obligations. As stated earlier, the international community often looks to the ICRC for promoting the international socialization of IHL through its interpretation and diffusion of it.

Scholars widely agree that in carrying out its mandate, the ICRC “has played a fundamental role both in the evolution as well as enforcement of international humanitarian law.”¹²⁸ Because states and nonstate actors give weight to what the ICRC says, how the ICRC interprets the ambiguities within IHL is of critical importance. Placing the responsibility with one organization ensures that the norm diffused is similarly interpreted and executed among the various states.¹²⁹

¹²⁸ Maragia, Bosire.2002. “Almost There: Another Way of Conceptualizing and Explaining NGOs’ Requests for Legitimacy in Global Politics,” *Non-State Actors and International Law* 2:302, 330.

¹²⁹ Finnemore, Martha.1993. “International Organizations as Teachers of Norms: the United Nations Educational, Scientific and Cultural Organization and Science Policy,” *International Organization* 47:4, 565, 593.

The Geneva Conventions mandate the ICRC to act as guardian of IHL.¹³⁰ According to the ICRC, this includes dissemination of IHL to both armed state and non-state groups, including the APs, as well as monitoring the conduct of hostilities.¹³¹ One way the ICRC fulfills its mandate is through training seminars to teach states and belligerents what their obligations are under the APs during armed conflict, including the civilian immunity norm.¹³²

While the ICRC is responsible for the international socialization of the civilian immunity norm, states' desire for approval from the international community partially compels them to participate in this international socialization. This manifests in the form of announcements of their efforts to avoid civilian casualties or castigation of violators of the norm.¹³³ However, violations of the civilian immunity, particularly the distinction principle, may be attributed to a lack of diffusion, as evidenced by a statement made by a former soldier in the DRC military about deliberate civilian targeting by rebel groups:

... rebels, they don't know rules. They didn't go to school; they didn't go to training. They just take people and train them how to use the gun... how to shoot only... [This is] the training they give these rebels... [They] don't have that time to teach them¹³⁴

The diffusion literature is useful in explaining how “objects, processes, ideas and information” spread if one treats what is being diffused as monolithic. Norm violations stem from lack of diffusion as reflected in the quote above. However, it is less useful in examining why differing interpretations of a norm exists even when the norm has been diffused; in other

¹³⁰ Lavoyer, Jean-Phillipe and Louis Maresca.1994. “The Role of the ICRC in the Development of International Humanitarian Law,” *International Negotiation* 4:501, 504.

¹³¹ Id. See also Henckaerts, Jean-Marie and Louise Doswald-Beck (eds).2005. Customary International Humanitarian Law, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/section_ihl_customary_humanitarian_law; Fleck, Dieter.2006. “International Accountability for Violations of the *Jus in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law,” *Journal of Conflict and Security Law* 11:2, 184.

¹³² Id.

¹³³ Downes at 166.

¹³⁴ Personal interviews (2005).

words, why there is a lack of intersubjectivity. This is unsurprising for two reasons. First, as the above overview reveals, a norm diffusion analysis usually examines how a norm is propagated from its source and stops at the point in which it is accepted by a state. How the diffusion process continues beyond the system level, how a state internalizes the norm (which is often the source of norm variation), is typically not included in the analysis. Such an approach leaves little room for agency on behalf of the targets of norm diffusion.¹³⁵ As a result, it is a less helpful explanatory tool in instances when the norm being disseminated generates various interpretations of compliance (as this study argues may be the case with the civilian immunity norm). Second, norm diffusion is concerned with similar behavior among dissimilar states. Consequently, those norm diffusion studies that probe domestic level factors tend to focus on similarities in behavior (i.e., how states with different identities accepted the same norm), not their differences.¹³⁶ Yet, it is the differences in behavior in light of diffusion that create an empirical puzzle. These variations can mean the difference between norm compliance and norm noncompliance. A second generation of studies in the constructivist literature recognizing this limitation has incorporated domestic level investigations of norm diffusion.¹³⁷

¹³⁵ For a detailed description of a specific variant of norm “taker” agency in norm diffusion, see Acharya, Amitav.2004. “How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism,” *International Organization* 58

¹³⁶ For examples, see Finnemore (1996) about poverty alleviation as a development norm; Keck and Sikkink (1998) on the diffusion of women’s suffrage; Berkovitch, Nitza.1999. From Motherhood to Citizenship: Women’s Rights and International Organizations, Baltimore: Johns Hopkins University Press on the diffusion of women’s human rights; Price (1998) on diffusion of the norm against the usage of landmines; Hawkins, Darren and Melissa Humes.2002. “Human Rights and Domestic Violence,” *Political Science Quarterly* 117:2 on diffusion of the norm protecting women from domestic violence; Finnemore (1993) on diffusion of the norm of state coordination and direction of science through a science policy bureaucracy; Kollman, Kelly.2007. “Same-Sex Unions: The Globalization of an Idea,” *International Studies Quarterly* 51 on diffusion of the norm of legal recognition of same-sex unions

¹³⁷ For examples, see Risse, Thomas, Stephen C. Ropp and Kathryn Sikkink (eds).1999. The Power of Human Rights: International Norms and Domestic Change. Cambridge: Cambridge University Press; Cortell, Andrew P. and James W. Davis, Jr. 2000. “How Do International Institutions Matter? The Domestic Impact Of International Rules And Norms,” *International Studies Quarterly* 40:4; -----,2000. “Understanding The Domestic Impact Of International Norms: A Research Agenda,” *International Studies Review* 2:1; Gurowitz, Amy.1999. “Mobilizing International Norms: Domestic Actors, Immigrants and the Japanese State,” *World Politics* 51:3; Farrell, Theo.2001.

Intentional Violations and Logic of Consequences

The norm violation literature also fails to adequately take account of the role of lack of intersubjectivity on political behavior. Norm violations occur “when actual behavior departs significantly from prescribed behavior.”¹³⁸ As stated earlier, intersubjectivity does play somewhat of a role in rationalist theories because this paradigm expects actors to act on behalf of their interests. This includes intentionally violating norms that conflict with the advancement of these interests.¹³⁹ As Hans Morgenthau stated, with particular reference to international law, governments “are always anxious to shake off the restraining influence that international law might have upon their foreign policies, to use international law instead for the promotion of their national interests.”¹⁴⁰ Not only is it assumed that interests drive action, but the interests themselves are also assumed: power in its various manifestations.¹⁴¹ Variation in behavior is attributed to the pursuit (domestic or international) of power,¹⁴² not the *lack* of intersubjectivity, as demonstrated by the prior presentation of utilitarian reasons for deliberate civilian targeting.

“Transitional Norms and Military Development: Constructing Ireland’s Professional Army,” *European Journal of International Relations* 7:1; Risse-Kappen, Thomas.1994. “Ideas Do Not Flow Freely: Transnational Coalitions, Domestic Structures and the End of the Cold War,” *International Organization* 48:2; True and Minstrom (2001); Checkel (1999); Acharya (2004); Stiles, Kendall W.2006. “The Dissemination of International Liberal Norms: The Case of the ECHR and the UK,” *Canadian Journal of Political Science* 39:1; Clark, Ann Marie.2001. Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms, Princeton: Princeton University Press

¹³⁸ Young, Oran.1979. Compliance and Public Authority, Baltimore: Johns Hopkins University Press.

¹³⁹ Examples include several cases of noncompliance as a result of domestic power distribution (sectors with fewer resources place compliance lower on a ranking of priorities) (Chayes and Chayes, 1995); violation of civil and political rights resulting from concern for regime survival in the midst of state incapacity to deal with overpopulation (Henderson, Conway W.1993. “Population Pressures and Political Repression,” *Social Science Quarterly* 74:2); discrimination of Afghani women by the UN to protect organizational interests (Verdirame, Guglielmo.2001. “Testing the Effectiveness of International Norms: UN Humanitarian Assistance and Sexual Apartheid in Afghanistan,” *Human Rights Quarterly* 23; violation of the norm against unrestricted submarine warfare because of the German navy’s monopoly on agenda setting (Legro,1997).

¹⁴⁰ Simmons (1998).

¹⁴¹ Mearsheimer (1995) at 375.

¹⁴² Id; March and Olsen (1998); Gilpin, Robert (1981); Mearsheimer (1995); Schweller and Preiss 1997; Thompson (1980)

Vaughn P. Shannon faults rationalist explanations for failing to reliably predict instances of norm violation or account for norm compliance in the face of a threat to interests.¹⁴³ His critique of constructivism is that it presents more persuasive arguments for norm compliance than norm violation because of its focus on structure and obligatory action (logic of appropriateness).¹⁴⁴

Due to these limitations, Shannon offers a hybrid of constructivist and rationalist frameworks to explain norm violation. Using a political psychology approach, Shannon argues that norm violation occurs when a conflict between interests and norm obligations erupts.¹⁴⁵ The conflict reflects the hybrid nature of the model: actors want to pursue their interests (rationalist model) but still comply with the norm (constructivist model). However, because actors prioritize advancing their interests over meeting their normative obligations, they are forced to search for a socially acceptable way to violate the norm.¹⁴⁶ This is a much easier task if the norm in question is ambiguous enough to allow them to interpret their desired action as norm consistent.¹⁴⁷ The result is the use of “accounts” like apologies, denials, excuses, or justifications to explain this violation in a socially acceptable manner.¹⁴⁸ The norm’s ambiguity allows violators to offer an interpretation that, at least marginally, fits within the parameters of the norm while simultaneously permitting them to pursue material interests.¹⁴⁹ The interest- motivated

¹⁴³ Shannon, Vaughn P.2000. “Norms are What States Make of Them: The Political Psychology of Norm Violation,” *International Studies Quarterly* 44, 293.

¹⁴⁴ Shannon (2000) at 293.

¹⁴⁵ Id at 294.

¹⁴⁶ Id.

¹⁴⁷ Id.

¹⁴⁸ Accounts are explanations for “‘unanticipated or untoward behavior’ that can bring personal discomfort and disrupt the social order of an identity group by making conduct unpredictable and offenders untrustworthy. Shannon defines apologies as recognition of “‘fault for an inappropriate act, leading to a plea for forgiveness.” Denials acknowledge “‘neither the untoward act nor responsibility for it, and is limited to actions about which nobody... finds out.” “Excuses attempt to mitigate or relieve responsibility for the conduct in question.” Justifications involve acceptance of “‘responsibility for an act but deny the pejorative quality associated with it.” Shannon (2000) at 304.

¹⁴⁹ Id at 294.

interpretations generally do not conform to dominant interpretations of the norm. These differences in interpretation signal a lack of intersubjectivity on the norm's application.

The model Shannon lays out is quite powerful in explaining norm violations by actors possessing a prior intent to violate ambiguous norms for utilitarian reasons. Lack of intersubjectivity in Shannon's model is opportunistic. For example, Shannon explains that while the United States had been intending to violate the norm of nonintervention by invading Panama for quite some time, it had to wait until events emerged that could plausibly fall within the permissible exceptions to the norm of nonintervention (i.e., threats to national interests).

Shannon's case study demonstrates that the manipulation of intersubjectivity enables violations when material interests are threatened. What differentiates Shannon's model from a rationalist account of norm violation is the lip service norm violators pay to the norm while explaining deviant behavior. This lip service connotes that norms do still matter, even when they are violated.¹⁵⁰ For instance, the Bush Administration initially felt compelled, in the face of global and domestic outrage to its position that the Geneva Conventions did not apply to Guantanamo Bay detainees, to argue that these detainees would be treated humanely in accordance with the spirit of the Conventions.¹⁵¹ Secretary of Defense Donald Rumsfeld stated, "'we plan, for the most part, to treat them in a manner reasonably consistent with the Geneva Conventions, to the extent that they are appropriate.'"¹⁵²

Yet what of situations in which transgressions from an ambiguous norm occur, not because actors intended to violate the norm for utilitarian reasons, but because they complied

¹⁵⁰ Kratochwil and Ruggie (1986).

¹⁵¹ Mills, Kurt. 2005. "Neo-Humanitarianism: The Role of International Humanitarian Norms and Organizations in Contemporary Conflict," *Global Governance* 11,175. To view the argument that these acts were patently noncompliance, see Paust, Jordan J. 2005. "Executive Plans and Authorizations to Violate International Law," 43 *Columbia J. Transnat'l L.* 811.

¹⁵² Kinsella (2005) at 172.

with their interpretation of it? In other words, an absence of intersubjectivity leads to acts governed by the logic of appropriateness rather than the logic of consequences. This is different from Shannon's explanation of norm violation because it is not material interests that produce the norm violation, but compliance with a version of the norm that differs from the norm proponent (which, for international norms is the international community or its designated representative, i.e., the ICRC). In this case, compliance with this alternative interpretation may occur even when the pursuit of material interests would demand otherwise. For example, medieval Christian and Islamic soldiers killed women and child noncombatants of different faiths for moral reasons, despite the material benefits these noncombatants could offer their own societies as slaves (see Chapter 4). Here, a critical component of Shannon's model of norm violation, the intent to violate for material interests at the outset, is missing. So, while Shannon's model cogently explains how lack of intersubjectivity on an ambiguous norm, produced by utilitarian motivations, leads to normative transgressions, it does not explain lack of intersubjectivity leading to behavior in contradiction to these interests.

Shannon is not alone in overlooking this possible consequence of lack of intersubjectivity. For example, in discussing the norm of humanitarian intervention, Luke Glanville explains U.S. unwillingness to label events in Rwanda as genocide because it felt that such a label carried an obligation to launch a humanitarian intervention.¹⁵³ He states

The reluctance to describe what was occurring in Rwanda as genocide points to the substance of the norm prescribing intervention. We can observe an awareness among administration officials that any portrayal of the situation creates expectations of an appropriate response. The administration believed that, if the Rwandan crisis was portrayed as genocide, there would be increased pressure to "prevent and punish" it, as they had undertaken to do as a contracting party to the Genocide Convention.¹⁵⁴

¹⁵³ Glanville, Luke. 2006. "Rwanda Reconsidered: A Study of Norm Violation," *Journal of Contemporary African Studies* 24:2, 186.

¹⁵⁴ Glanville (2006) at 186.

One reason for U.S. reluctance to intervene in Rwanda was the absence of material interests. Glanville offers the instructions given to the Defense Department's Deputy-Secretary for African Affairs James Wood at the start of his term as evidence:

Look, if something happens in Rwanda-Burundi, we don't care. Take it off the list. US national interest is not involved and we can't put all these silly humanitarian issues on lists, like important problems like the Middle East, North Korea and so on. Just make it go away.¹⁵⁵

This absence of interest, coupled with the aftermath of Somalia, provided the impetus for the United States to deny genocide status to the horrific events in Rwanda, argues Glanville.¹⁵⁶ Since there was disagreement on what was happening on the ground in Rwanda, the United States tried to influence understanding of these events by employing the terminology of "acts of genocide" rather than "genocide."¹⁵⁷ The United States did this to prevent the invocation of humanitarian intervention it felt a classification of genocide compelled, despite the fact that many in the international community called it genocide.¹⁵⁸ That way, the United States would not have to commit resources to an intervention contrary to its interests while at the same time, appearing not to violate the norm of humanitarian intervention.¹⁵⁹ In doing so, Glanville writes, "Statesmen are often compelled to engage with the obligations prescribed by a norm in one way or another even when they choose to violate it."¹⁶⁰

Intentional norm violation frameworks either do not include lack of intersubjectivity in their accounts of norm violation (rationalist theories) or result from lack of intersubjectivity spurred on by utilitarian needs (Shannon). However, Shannon's framework cannot explain

¹⁵⁵ Id at 190.

¹⁵⁶ Id at 190-191.

¹⁵⁷ Id at 193.

¹⁵⁸ Id.

¹⁵⁹ Glanville (2006) at 198.

¹⁶⁰ Id at 185-186.

deviations from normatively expected behavior that contradicts these needs. These observations of the extant literature on violations of the civilian immunity norm and the literature on norm diffusion and norm violation establish that the impact of ideational factors on actor behavior and lack of intersubjectivity have not been fully explored.¹⁶¹

Norm Violations and Logic of Appropriateness

An emerging literature on norm contestation takes intersubjectivity more seriously. The extant contestation literature offers the most useful, if general, guidance if the query focuses on the nature of the intersubjectivity of a norm's constitutive elements. It is useful because, unlike the norm diffusion and violation frameworks, it acknowledges that norms operate in generalities which can lead to differing interpretations of compliance.¹⁶²

Rather than just focusing on behavior as a means to understanding how norms operate, the contestation framework also inquires into their social meaning.¹⁶³ The contestation framework argues that norms derive their meaning from "historical and cultural circumstances."¹⁶⁴ A contestation framework posits that these different interpretations of permissible behavior may be motivated by *non-material* influences which are shaped by particular contexts.¹⁶⁵ This differs from a norm diffusion framework which attributes variation in interpretation to lack of diffusion, or a norm violation framework which points a finger at

¹⁶¹ Legro (1997) at 34 also comes to the same conclusion.

¹⁶² Hoffman, Matthew J. March 2004. "Competition and Contestation in the Evolution of Social Norms," Draft paper prepared for presentation at the 2004 Annual Meeting of the International Studies Association, Montreal, Canada.

¹⁶³ Wiener, Antje. 2004. "Contested Compliance: Interventions on the Normative Structure of World Politics," *European Journal of International Relations* 10:2, 199.

¹⁶⁴ Harre, Rom and Grant Gillet. 1994. *The Discursive Mind*, Sage, Thousand Oaks, 33.

¹⁶⁵ Barnett, Michael. 1999. "Culture, Strategy and Foreign Policy Change: "Israel's Road to Oslo," *European Journal of International Relations* 5:1,5, 7. See also Joachim, Jutta A., 2007, *Agenda-Setting, the UN and NGOs: Gender, Violence and Reproductive Rights*, Georgetown University Press; Washington, D.C., 19-20.

material interests. Such an expanded approach is particularly beneficial when examining international legal language used in treaties codifying norms, such as the APs because,

... treaty language...comes in varying degrees of specificity. The broader and more general the language, the wider the ambit of permissible interpretations to which it gives rise.¹⁶⁶

Differing interpretations of what constitutes compliance with an ambiguous distinction principle can lead to variations in specific applications of the overarching norm which itself may be well accepted.¹⁶⁷ This fluidity can create conflict within a norm because differing interpretations of compliance may not be congruent.¹⁶⁸ Taken a step further, this incongruence, derived from the absence of intersubjectivity, can play a key role in the behavior observed.

The discussion of Shannon's framework for norm violation illustrates that lack of intersubjectivity can be the product of an intention to violate a norm. So then, how can one determine that norm contestation is occurring, rather than norm violation in disguise? I envision two elements in distinguishing norm contestation from other normative frameworks. First, as already mentioned, norm contestation involves a lack of intersubjectivity. Norm contesters possess a different understanding of appropriate behavior than norm proponents, a situation made more likely by ambiguous norms.

But norm violators, cognizant of the norm proponent's interpretation, may also claim to have such a differing opinion. Thus lack of intersubjectivity is a necessary but insufficient condition for norm contestation. The second element needed to differentiate norm contestation from norm violation is *compliance* with the alternative interpretation. Constructivists argue that actors follow norms even if it is against their material interests to do so; this is the root of the

¹⁶⁶ Chayes, Abraham and Antonia Handler Chayes.1995. "On Compliance," *International Organization* 47:2, 189.

¹⁶⁷ See Hoffman (2004); Klotz, Audie.1995. Norms in International Relations: The Struggle Against Apartheid, Ithaca: Cornell University Press.

¹⁶⁸ Hoffman (2004) at 4.

explanatory power of the logic of appropriateness and constructivism's value-added to theories of international relations. Consequently, the best way to differentiate norm contestation from norm violation is evidence of compliance with the alternative interpretation not necessarily congruent with material motivations. Whereas norm violators may follow an alternative interpretation only to abandon it at the point it no longer furthers their material interests, norm contesters are more inclined to conform with that interpretation even if it undermines these very interests.

In the case of civilian immunity norm violations, different interpretations of direct participation may have been influenced by the social context, in this case armed conflict, in which belligerents find themselves. Variations in these interpretations correlate to the civilian immunity norm's constitutive effects. Alexander Wendt offers some illumination:

...meanings depend on the practices, skills and tests that connect the community to the object represented in discourse... what counts as a lawyer or a state is equally not reducible to what is in people's minds, but out there in public practices.¹⁶⁹

For example, Colin H. Kahl notes that U.S. troops have fired upon Iraqi civilians using cell phones shortly after a bomb blast because improvised explosive devices are often triggered by cell phones.¹⁷⁰ In this instance, using a cell phone in the aftermath of a bomb blast is interpreted as direct participation. The presence of non-state belligerents in non-international armed conflicts also influences the interpretation of the distinction principle. The International Criminal Tribunal for Yugoslavia decided in the *Tadic* case that “‘membership in some form of resistance group’ in *itself* amounts to direct participation in hostilities” (emphasis added).¹⁷¹

¹⁶⁹ Wendt (1999) at 176.

¹⁷⁰ Kahl (2007) at 25.

¹⁷¹ Kleffner (2007) at 327. See also Paust, Jordan J.2010. “Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan.” *Journal of Transnational Law and Policy* 19.

Ambiguous norms enable these differing social contexts to produce multiple interpretations of compliance. This lack of specificity can diminish norm robustness and lead to norm violations.¹⁷² As Hugo Slim found, “

the extent of civilian suffering shows, this identity [civilian] is often genuinely difficult for enemies to accept within a war when they see the views and roles of some of the enemy population and perceive- quite rightly from one angle- that many civilians do have a very ambiguous identity in war.¹⁷³

Emanuel Adler critiques existing constructivist research for inadequately showing “how enemies and military threats are socially constructed by both material and social facts.”¹⁷⁴ Therefore, research which probes these issues adds much value to normative explanations of violations of norms as well as improves the effectiveness of policies aimed at preventing such incidents.

CIVILIAN CONTESTATION: A GOOD CASE STUDY

Despite contestation’s potential utility in broadening our understanding of how norms operate in the international system, its emergent status means its methodological toolkit to capture contestation and substantive foci are incomplete. This study aims to build up contestation’s repertoire in both areas by utilizing novel methodological approaches to the previously unexplored issue of deliberate civilian targeting.

¹⁷² Legro (1997) at 34.

¹⁷³ Slim (2008) at 187. For further discussion on the ambiguity of the civilian construct, see also Grimsley, Mark and Clifford J. Rogers (eds.).2002. Civilians in the Path of War. Nebraska: University of Nebraska Press.

¹⁷⁴ Adler (1997) at 347.

Preliminary Evidence

Patterns of civilian targeting constitute a helpful phenomenon with which to evaluate the possibility for contestation in explaining international norm violations. Exploratory research I conducted illustrates the difficulties described in using a norm violation framework to explain violations of the civilian immunity norm in the absence of intersubjectivity. While some of the responses to why deliberate civilian deaths occurred conform to these frameworks, respondents also gave accounts that did not easily fit. For example, several respondents attributed deliberate targeting because of support provided to opposition groups. One respondent described victims dying at the hands of state forces because they kept supplies for rebels.¹⁷⁵ In these cases, those killed were considered to be directly participating in hostilities, via their support, and therefore permissible civilian targets. This version is broader than the more conventional understanding of direct participation as bearing weapons.¹⁷⁶ What is interesting about these accounts is that these acts were considered as evidence of *compliance* with the distinction principle as determined by a particular reading of direct participation.

Another example that does not fit neatly into the norm violation and diffusion frameworks reflects a gendered bias.¹⁷⁷ Even though the AP language is sex neutral, instances of *compliance* with the distinction principle offered by respondents seemed to be dictated by a gendered interpretation of “civilian”. Respondents used “guys,” “men,” and “he” exclusively in discussions of permissible targets while proudly retelling stories of saving women under perilous

¹⁷⁵ Id.

¹⁷⁶ Article 44.3 of AP I states that belligerents retain their combatant status if they openly carry arms during military engagement, among other things.

¹⁷⁷ Carpenter (2006).

conditions.¹⁷⁸ Similar heroics involving male civilians were not recounted. This observation implies the use of sex as a proxy for direct participation in contradiction to actual practices.

These anecdotes run counter to the explanations offered in the existing norms literature for norm violations. This difference relates to the constitutive and regulative effects norms exert described earlier. Norms exert regulative effects by providing actors guidance on how to act in a given situation.¹⁷⁹ Norm violation and diffusion analyses of normative transgressions generally center on regulative effects. They seek to explain why actors diverge from collective expectations of appropriate behavior *in a given situation*. Within the context of civilian immunity, this includes inquiries into why civilians are intentionally killed in armed conflict when IHL dictates otherwise. The questions presented here center on a norm's constitutive effects, "the actions that will cause others to recognize that identity and respond to it appropriately."¹⁸⁰ This study asks an important question, who is a permissible target among civilians, which needs to be answered prior to the above investigation.

CONCLUSION

Wapiganapo tembo nyasi huumia. (Swahili)
*When elephants fight the grass gets hurt. (English)*¹⁸¹

The above quote reflects the notion that those least involved in armed conflict tend to be harmed by it. The civilian immunity norm emerged to protect this group of people. That belligerents continue to deliberately kill civilians, in light of nearly universal condemnation by global leaders

¹⁷⁸ Personal Interviews (2005).

¹⁷⁹ Carpenter (2006) at 11.

¹⁸⁰ Hopf, Ted. 1998. "The Promise of Constructivism in International Relations Theory," *International Security* 23:1, 171.

¹⁸¹ <http://www.afriprov.org/resources/explain2001.htm>.

and public opinion, perplexes scholars and practitioners. The fact that such acts persists is worrisome. As Karma Nabulsi declares, “For those who seek to mitigate the effects of violent conflict, the primary difficulty is still how best to protect civilians.”¹⁸² Scholars and practitioners have studied the issue and tried to develop policy prescriptions to halt such actions, yet they continue. This study seeks to bring to the table another angle, contestation, in which to analyze this empirical puzzle. Specifically, this study asks whether the conception of permissible civilian target is contested. While not advocating that contestation provides the sole answer, it provides a perspective that differs from those used previously. In doing so, this study takes heed to Hugo Slim’s warning that “the civilian idea... can never be relied on as a given.”¹⁸³ By supplementing previous research focused on the regulative effects of the civilian immunity norm with research on its constitutive effects, a more comprehensive understanding of such an important and complex matter will emerge with the hope of producing more effective prescriptions to end deliberate civilian targeting. The next chapter discusses the outcome of a historical review of the civilian protection regime. This review reveals how the ambiguity as discussed in this chapter in the constitution of permissible targets was inherent in efforts to restrict war conduct across time and space.

¹⁸² Nabulsi at 9.

¹⁸³ Slim (2003) at 482.

CHAPTER 3: METHODOLOGY

Perplexity is the beginning of knowledge~ Khalil Gibran

This chapter will discuss the qualitative techniques used in this study, rooted within a constructivist paradigm. One of the ways a constructivist analysis differs from a rationalist analysis is that it examines the way in which social facts are collectively understood.¹⁸⁴ Consequently, the primary purpose of this study was to determine whether intersubjectivity (collective understandings) on “permissible civilian targets,” a social fact, exists between civilian immunity norm proponents (international humanitarian law, IHL, experts) and norm implementers (former belligerents). My strategy for investigating the existence of intersubjectivity was to analyze interview data collected from the two respondent groups. In particular I scrutinized belligerent narratives which expressed espousal of the distinction principle and expressed a conceptualization of permissible civilian targets which differed from the distinction principle advocated by the International Committee for the Red Cross (ICRC). These particular belligerent narratives were important because they were used to determine which of the normative frameworks discussed in Chapter 2 could explain instances of differing interpretations of a belligerent’s obligations during armed conflict. I also conducted a historiography to ascertain whether previous attempts to mitigate the ill effects of war possessed shared understandings on permissible targets.

¹⁸⁴ Social facts are “things like money, sovereignty and rights, which have no material reality but exist only because people collectively believe they exist and act accordingly.” Finnemore, Martha and Kathryn Sikkink. 2001. “Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics.” *Annual Review of Political Science* 4, 391, 393.

INTERVIEWS

Respondent Selection

In this study, I interviewed two sets of respondents, former belligerents and IHL experts. I selected former belligerent respondents from those in residence at Dukwi Refugee Camp in northern Botswana. There were several reasons why I decided to focus on African belligerents for this study and Dukwi as a site for field research. Firstly, more actors engaged in one-sided violence,¹⁸⁵ violence committed against civilians, in the African region than in other regions as depicted in the following figure produced by the Uppsala Conflict Data Program:

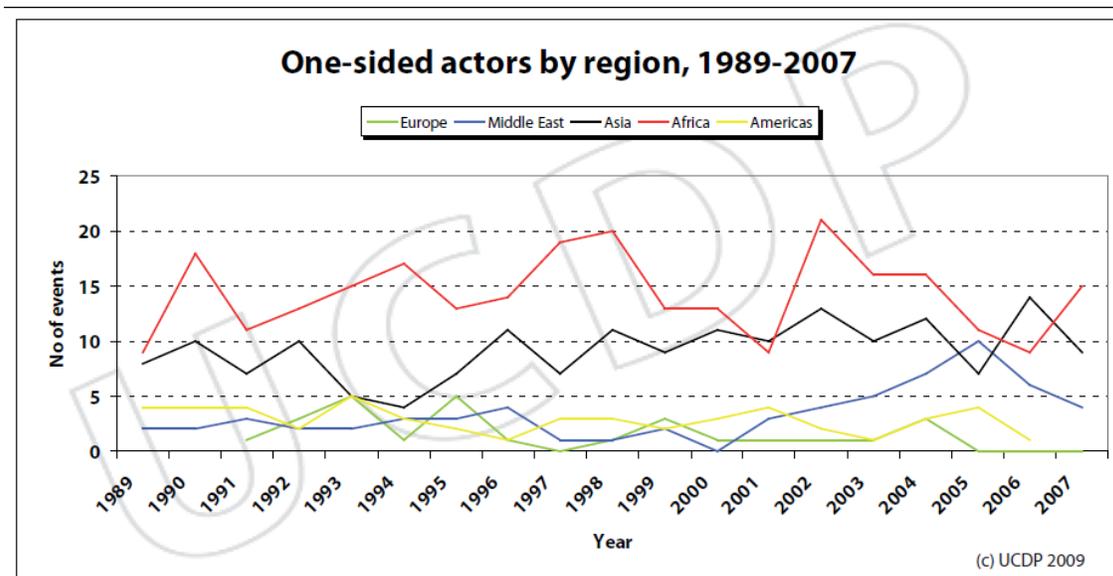


Figure 3.1 One-sided actors by region, 1989-2007¹⁸⁶

¹⁸⁵ The Uppsala Conflict Data Program defines one-sided violence as “The use of armed force by the government of a state or by a formally organized group against civilians which results in at least 25 deaths in a year. Extrajudicial killings in custody are excluded.” Uppsala Conflict Data Program (Date of retrieval: 2010/07/30) UCDP Database: www.ucdp.uu.se/database, Uppsala University.

¹⁸⁶ Uppsala Conflict Data Program (Date of retrieval: 2010/07/30) UCDP Database: www.ucdp.uu.se/database, Uppsala University.

Thus, it would be important for a study examining civilian deaths to situate itself where more of the actors who engage in these activities have been documented. Additionally, Africa could arguably be considered a hard case for norm contestation based differences in interpretations of belligerent obligations because as Chapter 2 illustrates, a great deal of the discussion in the relevant literatures examining African conflicts emphasizes the utilitarian nature of such acts. These arguments conform to a norm violation framework. Another reason why Africa might be a hard case for the norm contestation framework is the extent of inadequate infrastructure there to assist in the dissemination of IHL and the number of non-state armed groups in operation in African conflicts that do not have the resources to provide legal training for their fighters. These factors give weight to the norm diffusion framework for explaining civilian targeting.

I selected Dukwi to conduct my former belligerent interviews for a number of reasons. Firstly, it houses former state and non-state belligerents from both international and non-international conflicts. Consequently, conducting interviews in Dukwi offered me the convenience of providing in one location former belligerents from different conflicts where civilians have been intentionally killed. In terms of which conflicts to include in this study, while some scholars would argue that treaty ratification indicates a states' commitment to comply with treaties like Additional Protocol (AP) I and II,¹⁸⁷ I do not limit myself to selecting belligerents from these states since, according to many legal scholars, both APs have acquired customary international law status.¹⁸⁸ Consequently, all states and their populations are

¹⁸⁷ As Chayes and Chayes (1995) argue, this is because, at a minimum, treaty ratification (a voluntary endeavor) creates expectations of compliance. Chayes, Abram and Antonia Handler Chayes. 1998. The New Sovereignty: Compliance with International Regulatory Agreements. Boston: Harvard University Press, 184. See also Bassiouni, Cherif, Sharon A. Williams, Michael Scharf, Jimmy Gurule, Bruce Zargaris, and Jordan Paust. 1996. International Criminal Law: Cases and Materials. Durham: Carolina Academic Press; Morrow, James D. 2002. "The Law of War, Common Conjecture and Legal Systems in International Politics." *The Journal of Legal Studies* 31:4.

¹⁸⁸ Henckaerts and Doswald-Beck (2005:20).

beholden to the APs regardless of whether they ratified it.¹⁸⁹ Furthermore as Chapter 4 demonstrates, African norms for armed conflict historically required belligerents to engage in some form of distinction. Thus, current African belligerents operate in an environment which endorsed the distinction principle independently of codified IHL. For this particular study, I interviewed belligerents who fought for state and non-state armed forces in Angola, Zimbabwe, the Democratic Republic of Congo, Mozambique and Namibia (see Appendix V).

In terms of selecting belligerent respondents, I employed snowball sampling as a means of securing interviewees through two refugees I recruited to assist me. These were refugees I befriended during my last visit to the camp whom I knew possessed good reputations among refugees as well as camp stakeholders. I purposely enlisted the help of well respected refugee assistants for several reasons. First, I knew entry for me into the refugee community, particularly among former belligerents, would be difficult. Many former belligerents resident in the camp fled persecution instigated by “sell outs,” people who provided intelligence to one of the armed parties to the conflict in their homelands. Often times, these people were trusted members of the former belligerents’ network. As a result of this violation of trust, former belligerents understandably viewed strangers, especially strangers asking sensitive questions, with a great deal of skepticism (see discussion below). Consequently, I knew it would be difficult for me to secure interviews if I approached former belligerents directly. Having a trusted member of the community serving as an intermediary greatly enhanced my chances of interviewing as many former belligerents as possible.

Because of the air of mistrust surrounding strangers to the camp, I used well-reputed refugees to also ensure that my research purposes were accurately communicated. It would be

¹⁸⁹ According to Gary D. Solis, “Customary international law is binding on all states.” Solis, Gary D. 2010. The Law of Armed Conflict: International Humanitarian Law in War. Cambridge: Cambridge University Press. 12.

relatively easy to misrepresent the nature of my study given the topic it addressed, thus jeopardizing data collection efforts. Consequently, I strove to enlist credible members of the community to act as ambassadors for my project to that community.

The reason the refugee community held these two particular refugees in high esteem was because they were very active members in civil society in the camp. They served as mentors, coaches, and representatives to stakeholders in the camp. As such, they were networked into the camp in such a way as to know who had fought in a conflict prior to arrival at the camp. Many former belligerents would refuse to casually reveal this information for fear of deportation (often unwarranted). Thus, my assistants would be able to offer me access to a larger pool of former belligerents than if I had attempted to recruit respondents on my own.

To protect my belligerent respondents, I sought Institutional Review Board approval of the interview protocols to ensure that they comply with regulations protecting human subjects prior to conducting my interviews. A second protective measure was to initially conduct interviews in a neutral location. My residence while conducting exploratory research served such a purpose well because it was situated in a section of Dukwi set apart from refugee settlements and stakeholder offices. I secured a similar residence for the use upon my return to conduct this field research.¹⁹⁰ Additional protective measures included assigning a number to each respondent to avoid using their names and erasing the recorded interviews after transcription.

IHL experts included ICRC delegates and IHL scholars who were willing to participate in this study. I selected the ICRC because it is considered a norm proponent since it is responsible for IHL monitoring,¹⁹¹ as well as interpreting and diffusing IHL to belligerents.¹⁹²

¹⁹⁰ I later had to change the site of interviews for reasons explained below.

¹⁹¹ Lavoyer and Maresca (1994:504).

Consequently, IHL expert interviews enabled me to explore various norm frameworks. With regard to ICRC interviews, my goal was to include the significant decision-makers for legal policy at ICRC headquarters. I consider such informants most knowledgeable about the issue due to the position they hold.¹⁹³ In the case of ICRC headquarters in Geneva, Switzerland, the significant decision-makers for legal policy are the legal advisors. I recruited ICRC respondents in Geneva by using a snowball sampling method through a contact in ICRC headquarters.

*Interview Protocols*¹⁹⁴

I pursued several objectives in my interviews. The first objective entailed determining whether or not belligerents espoused some form of the distinction principle. The purpose of this objective was to assess the presence of intersubjectivity with IHL experts on this obligation. Some form of the question, “Can anyone be killed in armed conflict?” served this objective. Since I designated the IHL experts as norm proponents, I assumed they embraced the distinction principle.

I also sought to determine the similarity between any articulated distinction principle in belligerent narratives and IHL expert narratives. To accomplish this, I asked IHL experts what makes a civilian a permissible target. For former belligerents who claimed they abided by some form of the distinction principle, I employed indirect interrogation techniques to determine the kinds of distinction methods they used. I employed indirect methods because with these types of voluntarist accounts,¹⁹⁵ there are concerns with the data collected, particularly when it is of such

¹⁹² Maragia (2002).

¹⁹³ McEvily, B. and A. Zaheer. 1999. “Bridging Ties: A Source of Firm Heterogeneity in Competitive Capabilities.” *Strategic Management Journal* 20:12.

¹⁹⁴ See Appendix IV for my core interview questions (both belligerent and IHL expert).

¹⁹⁵ Essentially, voluntarist accounts come from the perspective of the participants in the phenomenon studied. Skocpol, Theda. 1979. States and Social Revolutions: a Comparative Analysis of France, Russia and China. Cambridge: Cambridge University Press, 18

a sensitive nature. As Norma Kriger writes, “How can one know that individuals actually believe what they say or say what they believe?”¹⁹⁶ Yet despite this concern, like Kriger, I feel that researchers should not avoid the inclusion of people’s voices. As was the case with her work, this study believes that “what people say or do matters.”¹⁹⁷ However, to help ensure open and honest discussions and to minimize incentives to misrepresent the truth (e.g., fear of incrimination), I employed hypothetical scenarios. Thus, I would ask former belligerents some form of the question: if you could only save one person in a village, who would it be and why. This helped me understand who belligerents considered worthy of protection. I also tried to minimize any misrepresentation of the truth by asking belligerents to recount whether and how other fighters implemented the distinction principle. I also asked belligerents questions about who they considered most dangerous in a conflict as well as what kinds of actions would civilians (or “people” if they did not know the word “civilian”) take that made them threatening to belligerents.

In order to uncover the rationales for selective targeting of civilians among those belligerents who articulated some version of a distinction principle, I asked former belligerents to explain targeting decisions they made or witnessed. Here, the goal was to determine which of the frameworks examined in this study explained civilian targeting. For instance, former belligerents were asked about the costs and benefits of complying with a particular method of distinction. These belligerents were also asked how they acquired their particular method of distinction. Thus, I asked them whether they received training in IHL, if the ICRC or another international organization or non-governmental organization talked to them about IHL, or if any foreign actors told them they were restricted in what they could do when fighting.

¹⁹⁶ Kriger, Norma J. 1992. *Zimbabwe’s Guerrilla War*. Cambridge: Cambridge University Press, 6

¹⁹⁷ Id.

Challenges in Data Collection

Conducting interviews, while potentially extremely fruitful, can also pose challenges, particularly to novice researchers. The challenges of interviewing elites specifically are well documented,¹⁹⁸ and my experiences interviewing elites in the ICRC is consistent with this literature. Instead, I would like to concentrate this section's discussion on my experiences interviewing former belligerents. This set of interviews highlighted issues that feature less prominently in the discourse on qualitative approaches.

Despite my previous experience in the camp in 2005, I encountered several unexpected situations during my 2009 stay in Dukwi that hindered the study's progress. Firstly, Dukwi hosted far fewer refugees in 2009 than it did in 2005. Rumors ran rampant in the camp; one such rumor was that reduction in the population was because the government of Botswana planned to shut down the camp soon. Regardless of the reason, the reduced population impacted my study because there were fewer potential interviewees. This meant that my study would not include the diversity of conflict experience I had anticipated.

Secondly, the weather wrecked havoc on my tightly packed schedule. With limited funding and time, every day spent in the camp was valuable. This was one reason I decided to go to Botswana during the dry season; I did not want cancelled interviews on account of rain. Despite these planning efforts, Botswana experienced several days of uncharacteristically heavy rains during my time there. Heavy rains turned Botswana sand into an impassable sludge, hindering movement about the camp and thus, forcing me to cancel or postpone interviews. The rains also washed away the large termite mounds abundant in the camp, some more than five feet

¹⁹⁸ See for example Dexter, Lewis Anthony. 2006. *Elite and Specialized Interviewing* (volume 13). Colchester: ECPR Press; Aberbach, Joel D. and Bert A. Rockman. 2002. "Conducting and Coding Elite Interviews." *Political Science and Politics* 35:4, 673-676; Delaney, Kevin. 2007. "Methodological Dilemmas and Opportunities in Interviewing Organizational Elites." *Sociological Compass* 1:1, 208-221; Herod, Andrew. 1999. "Reflections on Interviewing Foreign Elites: Praxis, Positionality, Validity and the Cult of the Insider." *Geoforum* 30: 313-327.

tall. As a result, thousands of termites scurried about, giving the ground the impression of a vibrating black carpet. While visually interesting, walking in the camp after the rains became a painful and slow process as these termites bit me while traversing my feet.

Another issue I confronted dealt with how refugees viewed me. Structural factors played out in the one on one interactions between the refugees and myself. My identities as a woman, as an Indian, and as a researcher from the United States acted as both a boon and a constraint. The gendered dynamics inherent in the refugee camp enabled many of the respondents to view me as non-threatening. Being a small woman and regarded as younger than my years put many of the males I interviewed at ease, thus lowering their guard and ultimately led to rather candid discussions.

My Indian heritage also helped in this regard. The shared colonial experiences of the national communities from which we descended opened doors that might have remained otherwise shut. This perception of me resonated particularly with Angolan and Zimbabwean belligerents who fought in wars of resistance against the Portuguese and the British. They assumed me to be an empathetic comrade even though I spent little time in India; belligerents would say to me, “Sister, you understand.”

Paradoxically, for some, my “Americanness”¹⁹⁹ loomed larger than any assumed camaraderie generated by my birth in a former colony. The questions I asked, in conjunction with the fact that I pursued my degree from an American university, spoke with an American accent and behaved more like a Westerner, raised suspicions among certain members of the refugee community. Stories circulated that I belonged to the Central Intelligence Agency (CIA) and was looking to arrest people for violations of international law. This occurred despite my

¹⁹⁹ Henderson, Frances B. 2009. “We Thought You Would be White: Race and Gender in Fieldwork.” *Political Science and Politics* 42:291-294

efforts to prevent such misinformation by working with trusted members of the community. Initially, these stories amused me, but I soon realized the gravity of the situation when one of the refugees I hired as an assistant was threatened with physical violence if he continued to work with me. I immediately stopped the interviews and had to spend some time contemplating whether to continue with the project. As important as this research was to me, nothing was worth jeopardizing my assistant's safety. An account of being a foreigner, I never feared for my own safety, but I could not be certain as to my assistant's. I consulted with community leaders, explaining my presence in the camp and the problems I faced. After convincing them of my actual purposes (which included testimonials from refugees I worked with during my previous visit), these leaders then spread the word as to why I was there, persuading their constituents not to fear me. It was this intervention by community leaders that permitted the continuation of my project. The intervention quashed the CIA rumors, and I did not have trouble from that point on. I also began conducting interviews in the homes of respondents, rather than in my residence, in an effort to increase transparency, which also helped to lower suspicions refugees had of me. I was concerned that problems for my assistant might resurface upon my departure from the camp, but thankfully, that has not been the case. However, I lost considerable time during this process that had been allocated for interviews. In the end, I collected 19 former belligerent interviews, 8 IHL expert interviews and 10 interviews with civilians who experienced armed conflict.

The concerns for my research team exacted a toll on me mentally. So did the stories I gathered in my interviews. I spent considerable mental energy devising strategies to enable respondents to offer as truthful accounts as possible. However, I did not spend enough time preparing myself for what I would hear. I was unprepared to learn about the horrors of war, and often needed time between days of interviews to absorb these stories and recoup from them.

These interviews impacted me so much that it took some months after I returned from the field for me to be able to review the transcripts and begin data analysis. In essence, I experienced “burnout,” resulting from “feelings of exhaustion and tiredness... often feeling quite overwhelmed by the nature of the data.”²⁰⁰

Interview Data Analysis

Coding

For constructivist research agendas, exploring the constitution of social facts is essential in understanding how they influence behavior.²⁰¹ To uncover how the two respondent groups in this study constituted the social fact of interest here, permissible civilian target, I subjected the interview data to a particular type of inductive examination, grounded theory,²⁰² for qualitative analysis.

I conducted this analysis with assistance from the University of Pittsburgh’s Qualitative Data Analysis Program (QDAP). QDAP consults with researchers to develop a coding scheme appropriate to their projects. It employs and trains graduate students in the use of ATLAS.ti and to understand and help shape the coding scheme relevant to a specific project. Working in tandem with the principle investigator or project team, QDAP staff members produce project outputs such as statistics, summaries, and analyses.

One of the first steps in using a grounded theory approach is open coding. Anselm Strauss, a pioneer of the grounded theory approach, defines open coding as the “unrestricted

²⁰⁰ Dickson-Swift, Virginia, Erica L. James, Sandra Kippen, and Pranee Liamputtong. 2009. “Researching Sensitive Topics: Qualitative Research as Emotion Work.” *Qualitative Research* 9: 70, 71. See also Sriram, Chandra Lekha, John C. King, Julie A. Mertus, Olga Martin-Ortega and Johanna Herman (eds). 2009. Surviving Field Research: Working in Violent and Difficult Situations. New York: Routledge

²⁰¹ Finnemore and Sikkink (2001), 394.

²⁰² According to Barney G. Glaser and Anselm L. Strauss, a grounded theory approach is “the discovery of theory from data systematically obtained from social science research.” Glaser, Barney G. and Anselm L. Strauss. 2006. The Discovery of Grounded Theory: Strategies for Qualitative Research. Edison: Transaction Publishers, 2.

coding of data... The aim is to produce concepts that seem to fit the data.”²⁰³ QDAP coders and I conducted open coding by scrutinizing a portion of the transcripts word by word to develop “concepts that seem to fit the data.”²⁰⁴ Attention focused on concepts that would inform the question of how respondents constituted the category of permissible civilian targets. This was broadly conceived in order to capture the myriad ways in which respondents discussed the matter. Articulations of permissible civilian targets were categorized along two dimensions: actor and act. I chose these categories because they reflect the categories existing in the literature and in practice.

Once the QDAP coders and I derived a list of open codes, I then explored any thematic patterns that emerged from this list. According to Strauss, this type of grouping should be done in terms of paradigm items.²⁰⁵ These paradigm items are conditions that give rise to a category, the context, strategies utilized and the consequences of the strategies.²⁰⁶ The aim of this examination is to yield a new set of codes called axial codes. In order to conduct this organization, open codes may be combined to make them fit a paradigm heading better and others may be dropped because they do not fit any heading. Through this process, we had to constantly reference the open codes and axial codes. Steven I. Miller explains this is how grounded theory is derived, through “constant interplay between proposing and checking. This back and forth movement is what makes...theory grounded.”²⁰⁷ Eventually, we created a list of axial codes with the open codes partially forming their definitions.

The next step in grounded theory analysis is to “delimit coding to only those codes that relate to the core codes in sufficiently significant ways as to be used in a parsimonious

²⁰³ Strauss, Anselm. 1987. *Qualitative Analysis for Social Scientists*. Cambridge: Cambridge University Press, 28.

²⁰⁴ Strauss (1987), 28.

²⁰⁵ Id at 32.

²⁰⁶ Id.

²⁰⁷ Miller, Steven I. 1999. “How Does Grounded Theory Explain,” *Qualitative Health Research* 9:4, 541.

theory,”²⁰⁸ in order to derive a list of selective codes. The core codes are “that category of data that accounts for most of the variation of the central phenomenon of concern and around which all the other categories are integrated.”²⁰⁹ The QDAP coders then used these codes to code the entire dataset over six rounds. An example of a selective code is “Targets~Legitimate,” used to capture belligerent conceptualizations of permissible civilian targets.²¹⁰ The coders coded relatively reliably; the average Fleiss’ kappa result²¹¹ for the “Targets~Legitimate” selective code was .71.²¹²

Analysis of Coded Data

In order to explore the constitution of permissible civilian targets, my first step was to determine whether former belligerents claimed adherence to some version of the distinction principle if their narratives recounted the intentional killing of civilians. What I was looking for

²⁰⁸ Strauss (1987), 33.

²⁰⁹ Kendall, Judy. 1999. “Axial Coding and the Grounded Theory Controversy.” *Western Journal of Nursing Research* 21:6, 743, 747.

²¹⁰ This code is defined as follows in the Codebook (see Appendix III): References to targets of lethal action that are considered to be legitimate, with “lethal action” clearly referring to death and destruction. This code also includes references to the characteristics of those targets of lethal action that are considered to be legitimate, as well as the reasons a target might be considered legitimate (e.g., someone identified as/ considered to be a spy).

²¹¹ The kappa statistic “measure[s] the degree of agreement between two raters who rate each of a sample of subjects on a nominal scale... and incorporate a correction for the extent of agreement expected by chance alone.” Fleiss, Joseph L. 1971. “Measuring Nominal Scale Agreement among Many Raters.” *Psychological Bulletin* 76:5, 378.

²¹² While there is no generally accepted measure of significance for agreement, the following is a common guide:

Interpreting Kappa Agreement:

< 0 Less than chance agreement

0.01–0.20 Slight agreement

0.21– 0.40 Fair agreement

0.41–0.60 Moderate agreement

0.61–0.80 Substantial agreement

0.81–0.99 Almost perfect agreement

Viera, Anthony J. and Joanne M. Garrett. 2005. “Understanding Interobserver Agreement: the Kappa Statistic.” *Family Medicine* 37:5, 362.

Appendix VI has the kappa scores for the codes used in this project.

here was whether belligerent narratives articulated limitations on who could be targeted during armed conflict, and if so, what are the parameters of those limitations. I interpreted these limitations as indicating that belligerents delineated some members of the population as impermissible targets and others as permissible targets. For instance, a response implying that anyone could be killed during armed conflict indicated to me that the belligerent did not endorse the distinction principle.

For those belligerent narratives which claimed adherence to some version of the distinction principle under these conditions, I compared the articulated principle to those of the IHL experts. The purpose of this step was to determine whether intersubjectivity exists on this concept. Since the IHL respondents offered different distinction methods, I used the Guidance for comparative purposes. Specifically, I compared belligerent explanations for what act or attribute made a civilian a permissible target. Thus, I compared these articulations along two dimensions: act based distinctions and actor based distinctions. As mentioned earlier, these two categories reflected the two predominant themes I observed in the literature. Act based distinctions mirror the distinction principle reflected in codified IHL through the language of direct participation in hostilities. Thus, with this method of distinction, particular acts or behavior separate permissible from impermissible civilian targets. An example of this distinction method would be one in which civilians engaged in espionage are treated as permissible targets, while those civilians who do not are considered impermissible targets. Actor based distinctions are distinctions premised on an individual's membership to a group. An example would be a distinction method in which a child is spared, regardless of what she is doing when a belligerent encounters her, because that belligerent views children as a blanket category of impermissible targets.

The third step was to assess which of the dominant theoretical explanations for norm violations (see Chapter 2) apply to each belligerent narrative among the narratives that offered a differing version of the distinction principle from that contained in the Guidance. To make this assessment, I analyzed the rationales provided by former belligerents to explain their observed interpretations and actions regarding intentional civilian targeting. For those narratives in which belligerents claimed they did not receive training or did not interact with foreign actors, I labeled as consistent with the norm diffusion framework. I labeled those narratives which claimed utilitarian or strategic motivations influenced the killing of civilian targets as consistent with a norm violation framework. I labeled the narratives in which civilians were intentionally killed even when it contravened the stated interests of the respondent or the respondent's group as consistent with the norm contestation framework. I also inquired whether the norm contestation or norm violation framework applied to the narratives coded with the norm diffusion code, despite the lack of diffusion.

A valid argument could be made that narratives articulating adherence with the distinction principle which differs from that of IHL experts should be viewed with suspicion. This is because the respondent may want to hide an intentional violation in the guise of compliance. In this case, respondents would know that their version of distinction is different from the version advanced by norm proponents. To avoid being reprimanded for violating the norm proponent's version of the distinction principle, respondents claim compliance, albeit with their own version. The problem with this scenario is that if respondents use an alternative method of distinction to escape punitive measures for what they know to be violations, why would they volunteer violations as examples of compliance? As I mentioned earlier, respondents were initially very suspicious of the purposes of my interviews. To hedge against

the possibility that I was actually collecting information to support criminal investigations, it is more likely that respondents would provide examples of compliance that resonated with norm proponents rather than the less certain strategy of arguing compliance with an alternative version of the distinction principle.

HISTORICAL ANALYSIS OF THE DISTINCTION PRINCIPLE

In addition to investigating the contemporary presence of intersubjectivity on the concept of permissible civilian targets in the interview data, I embarked on an historical analysis of the distinction principle in order to assess whether it existed during other time periods. In particular, I was interested in the intersubjective understandings of permissible targets found in normative frameworks that might have influenced the former belligerents I interviewed. Consequently, I delved into whether and how rules encapsulated this idea in Western European, Islamic and pre-colonial African legal norms, as well as in the period of IHL codification by the international community. The Western European, Islamic and pre-colonial African traditions helped shape the rules regulating armed conflict on the African continent prior to the IHL codification era. Once IHL codification occurred, many of these traditional rules took on customary law status so that they bound all states in the international system, irrespective of whether they individually ratified each treaty.

To engage this question, I pursued a type of historiography, defined as “the writing of history based on a selective, critical reading of sources that synthesizes particular bits of information into a narrative description or analysis of a subject.”²¹³ With this method, the

²¹³ Thies, Cameron G. 2002. “A Pragmatic Guide to Qualitative Historical Analysis in the Study of International Relations.” *International Studies Perspective* 3, 351.

historical record provides the data used to answer the research question.²¹⁴ Consequently, the choice of historical source materials carries great significance. Since I am not a historian by profession or a polyglot, I relied on a diversified set of secondary sources written by experts to gain an understanding of how the distinction principle manifested in these various traditions. I cast my net far and wide to gather a *mélange* of perspectives in an effort to reduce bias and selectivity. I examined the collected material to glean whether first, there existed a tradition of restricting who belligerents can target and if so, whether I could discover commonalities in these restrictions within each legal tradition and between them. The next chapter discusses the results of this analysis.

²¹⁴ Thies 2002, 354.

CHAPTER 4: AMBIGUITIES IN THE DISTINCTION PRINCIPLE PRIOR TO IHL CODIFICATION

Remember:

- 1) *Fight only combatants*
- 2) *Attack only military targets*
- 3) *Spare civilian persons and objects*
- 4) *Restrict destruction to what your mission requires*²¹⁵

The United States issued the “Pocket Card on Rules of Engagement” (from which the opening quotation is taken) to its soldiers during the first Gulf War. This particular passage aims to articulate the distinction principle within the civilian immunity norm, which Hugo Slim summarizes:

The idea that there are certain groups of people who should be protected from the killing and wounding of war and from the worst effects of its impoverishment and disruption is an ancient and enduring one. The idea holds that there is a category of people who must somehow be set apart from the fury of battle because of who they are, what they do or what they cannot do.²¹⁶

International humanitarian law (IHL) regulates the conduct of armed conflict with two main purposes: to restrict the conduct of hostilities and to render certain categories of persons *hors de combat*, or outside the scope of conflict.²¹⁷ The distinction principle, which belligerents employ to determine who is *hors de combat* and who is not, has long played and continues to play a pivotal role in IHL.²¹⁸ For example, in the pre-Christian era, Celtic tribes forbade the killing of poets to ensure a record of the battles fought.²¹⁹ Megasthenes writes in 300 B.C.E. that

²¹⁵ May (2005:40)

²¹⁶ Slim (2008:1)

²¹⁷ Bennounne, Karima. 1993-1994. “As-Samalu Alaykum? Humanitarian Law in Islamic Jurisprudence,” *15 Michigan Journal of International Law* 605, 608.

²¹⁸ Gardam, Judith G. 1992. “Noncombatant Immunity and the Gulf Conflict,” *Virginia Journal of International Law* 813, 814

²¹⁹ McKeogh, Colm. 2002. Innocent Civilians: the Morality of Killing in War, NY: Palgrave, 2.

belligerents in India were instructed to spare those who laid down their arms.²²⁰ A speech by the first Muslim Caliph exclaims:

Stop, O people, that I may give you then rules to keep by heart!... You must not mutilate, neither kill a child or aged man or woman... You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives...²²¹

Michael Walzer, a noted scholar on the laws of war, confirms the long standing and universal importance of the distinction principle,

the tendency to set certain classes of people outside the permissible range of warfare, so that the killing of any of their members is not a legitimate act of war but a crime. Though their details vary from place to place, these rules point toward the general conception of war as a combat between combatants, a conception that turns up again and again in anthropological and historical accounts.²²²

In 1929 the International Committee for the Red Cross (ICRC) used the term “civilian” to denote those categories of people considered as protected and impermissible targets.²²³

While it may seem surprising given the lengthy history of the distinction principle, there never existed a consensus on who belongs to the permissible and impermissible target categories.²²⁴ As John Kelsay notes, “The notion of noncombatant immunity is actually *one* way [emphasis added]- the way most characteristic of just war thinking- of specifying who the just (or the innocent are).”²²⁵ This chapter will reveal how the boundary between permissible and impermissible targets fluctuated throughout the centuries and across geographical regions. Such is the case despite the widespread support for the obligation requiring belligerents to distinguish

²²⁰ Van der Wolf, Rene and Jan Van der Wolf. 2004. Laws of War and International Law (vol. 1), Nijmegen: Wolf Legal Publications, 10

²²¹ Van der Wolf et al (2004) at 11.

²²² Walzer, Michael. 1977. Just and Unjust Wars, New York: Basic Books, 42.

²²³ Slim (2008) at 19

²²⁴ Slim (2008) at 2.

²²⁵ Kelsay, John. 1990. “Islam and the Distinction between combatants and noncombatants,” in James Turner Johnson and John Kelsay (eds.), Cross, Crescent, and Sword: the Justification and Limitation of War in Western and Islamic Tradition, NY: Greenwood Press, 197.

between permissible and impermissible targets. The chapter will also show that the justifications for considering someone a permissible target did not always fall along strategic lines.

Consequently, rather than culminating in a clearly defined protection regime, this chapter (along with the next chapter) argue instead that the historical evolution of the distinction principle produced a fog of protection which confusedly, and even erroneously, guided belligerents through targeting decisions. Instead of clearly delineating who possessed immunity, these variations in the distinction principle created a legacy of confusion that continues today.

This chapter is organized in the following manner. The first section explains why an examination of the origins of current norms is fruitful in understanding how they operate, and conversely, why they are violated. It then proceeds into a discussion of the evolution of the distinction principle in three disparate normative environments: Western European, Islamic and pre-colonial African traditions.

THE UTILITY OF AN HISTORICAL EXAMINATION OF A NORM IN UNDERSTANDING ITS VIOLATION

As Chapter 2 demonstrates, much of the literature on norms centers on why actors choose to adhere to or violate norms. However, a discussion of the genesis of these norms is often lacking, despite the clarity such a discussion can offer to understanding norm violations. Ward Thomas argues,

... while empirical studies based on sociological insights have done a good job of showing how norms can explain outcomes in ways that rationalist theories cannot, this work seldom examines where the norm in question came from, focusing on their effects. ...while many sociological institutionalists 'take existing international relations theory to

task for treating the construction of political actors and their preferences as exogenous, [they] tend to treat their own core concepts as exogenously given.²²⁶

A grasp of the origins of normative principles is vital to understanding their current operation; as Francois Bugnion notes, “It is impossible to grasp fully the sense and the scope of a rule without first understanding the context in which it was first established and that in which it was supposed to take effect.”²²⁷ Regarding the civilian immunity norm, the literature generally explores whether and how it influences the behavior of actors, without delving into the history of the norm. Those that do tend to offer an historical inquiry into attempts to mitigate the ills of war, with an underlying assumption of uncontested victimhood. Without this historical grounding, attempts to fully understand the civilian immunity norm, and to determine whether intersubjectivity on its constituent elements exists, may fall short. This chapter attempts to partially fulfill this lacuna.

A HISTORY OF THE DISTINCTION PRINCIPLE IN EUROPEAN JURISPRUDENCE

While much of the legal codification of IHL occurred in the 19th and 20th centuries, efforts to limit the tragedies of warfare were not limited to activists and scholars of those periods. As Geoffrey Best writes,

Abhorrence of war and with it the making of plans for its abolition, prevention, or limitation is an old-age aspect of man’s confused and ambivalent thinking about war... demonstrating... that the 20th century’s endeavors in this direction have more solid foundations than simply utopian aspiration.²²⁸

²²⁶ Thomas (2001).

²²⁷ Bugnion, Francois. 2003. The International Committee of the Red Cross and the Protection of War Victims, Oxford: Macmillan, 3.

²²⁸ Best, Geoffrey. 1991. “The Restraint of War in Historical and Philosophical Perspective,” in Delissen, Astrid J.M. and Gerard J. Tanja (eds.), Humanitarian Law of Armed Conflict: Challenges Ahead, London: Martinus Nijhoff, 7.

A major element of the movement to restrain war is the idea that the negative effects of war should not be felt by everyone.²²⁹ Honore Bouvet, prior of a Benedictine monastery and trained in canon law pleaded,

Valiant men and wise, however, who follow arms should take pains, so far as they can, not to bear hard on simple and innocent folk, but only on those who make and continue war, and flee peace.²³⁰

Hugo Grotius, considered by many to be the father of IHL, also advocated the principle that certain members of societies should be protected during times of war. Citing proclamations from the Old Testament to the Roman writers of the Christian era, Grotius noted their calls to respect the protected classes during warfare.²³¹ For example, women, children, philosophers, priests and merchants were considered defenseless and uninvolved in war; from this characterization stemmed their protected status.²³²

Early European jurists determined that it was unlawful to deliberately kill certain classes of people on the basis of pragmatism and relied on reciprocity for compliance to advance their arguments. These jurists premised this immunity categorically on the basis of one's contribution to society and the ability to fight. Governments issued prohibitions against killing merchants, clerics and farmers due to the importance of their role in ensuring a fully functional society.²³³ Traditionally protected classes, women and children, enjoyed this immunity as long as all sides complied. And it was in the interests of belligerents to comply because women and children

²²⁹ Slim (2008) at 11.

²³⁰ Allmand, Christopher. 1999. "War and the Noncombatant" in Maurice Hugh Keen (ed.), Medieval Warfare: a History. Oxford: Oxford University Press. 268

²³¹ Hartigan, Richard Shelly. 1982. The Forgotten Victim: A History of the Civilian, Chicago:Transaction Publishers, 19.

²³² Hartigan (1982) at 19.

²³³ Alexander, Amanda. 2007. "The Genesis of the Civilian," *Leiden Journal of International Law* 20, 360.

could be used as slaves.²³⁴ Mark Grimsley and Clifford J. Rogers note that, “‘the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof,’ were to be taken and used.”²³⁵ Additionally, the victor had an interest in restricting warfare because a total war may foster such feelings of hostility as to make control difficult over conquered territories,²³⁶ a sentiment aptly expressed by Shakespeare’s Henry V: “‘For when lenity and cruelty pay for a kingdom, the gentler gamer is the soonest winner.’”²³⁷

As the Christian Church rose in prominence in Europe, it managed to not only dictate the substance of norms for daily life but military activity as well. Because European societies continued to wage wars which required Christians to apply deadly force, the question inevitably arose: was it ever acceptable for a Christian to kill? Early Christian thought stressed the value of pacifism, but this value became difficult to adhere to once Christians came to power and needed to defend their territorial realm against invaders.²³⁸ Augustine would provide the answer in the form of just war theory. Just war theory emerged as the amalgamation of Christian thought, chivalric codes and Roman law that enabled Christians to reconcile their divine principles against human constraints.²³⁹ Just war theory possesses two components: *jus ad bellum*, which dictates the appropriate conditions under which to wage war, and *jus in bello*, rules determining appropriate belligerent behavior once war commenced.²⁴⁰

Rather than taking a completely pacifist stance when it came to *jus ad bellum*, Augustine promoted a position of limited warfare. For Augustine, it was acceptable to kill if done in a just

²³⁴ Carpenter (2006:44-45).

²³⁵ Grimsley and Rogers (2002:xii).

²³⁶ Van der Wolf and Van der Wolf (2004) at 8.

²³⁷ Meron, Theodor. 1992. “Shakespeare’s Henry the Fifth and the Law of War,” *American Journal of International Law* 86:1, 3.

²³⁸ Bainton, Roland H. 1960. Christian Attitudes toward War and Peace: A Historical Survey and Critical Re-evaluation, NY: Abingdon Press, 75.

²³⁹ Johnson, James Turner. 2000. “Maintaining the Protection of Non-Combatants,” *Journal of Peace Research*, 37:4, 427.

²⁴⁰ Johnson (2000) at 427.

war.²⁴¹ Augustine defines just war as “...those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it.”²⁴² Such wars were just because Christians were compelled to restore order so that their earthly realm mirrored their divine realm.²⁴³

What Augustine attempted to do with this immunity was to incorporate a moral element to the basis of its utilitarian analysis.²⁴⁴ Augustine sought to restrict the outbreak of war and to ensure that when war did break out, it was fought humanely.²⁴⁵ He sought to distinguish and protect the innocent, a word derived from the Latin *in-nocens*, meaning not harmful.²⁴⁶ The Peace of God movement continued the development of *jus in bello* by offering the earliest formal statement of the distinction principle through its articulation of the wholesale innocence of ecclesiastical persons.²⁴⁷

Augustine provided early Christians a means to wage war; however, this did not signal the end of moral conundrums faced by Christian scholars. The next issue they had to contend with was, even if Christians engaged in just wars, what if they killed those who committed no wrongs? Thomas Aquinas carved out an exception to the killing of the harmless if doing so were a means to a public good (collateral damage in modern parlance).²⁴⁸ He put forth the rule of double effect, which Michael Walzer summarizes:

- (1) The act is good in itself or at least indifferent, which means... that it is a

²⁴¹ Hartigan (1982) at 28.

²⁴² Hartigan (1982) at 29.

²⁴³ Bainton (1960)

²⁴⁴ Hartigan (1982) at 29.

²⁴⁵ Slim (2008) at 13.

²⁴⁶ Zehfuss, Marta. 2008. “Killing Civilians: Thinking the Practices of War.” Paper presented at the International Studies Association Annual Convention, San Francisco, CA, 5.

²⁴⁷ Johnson, James Turner. 1997. The Holy War Idea in Western and Islamic Traditions, University Park: Pennsylvania State University Press, 105.

²⁴⁸ Hartigan (1982) at 47.

- legitimate act of war;
- (2) The direct effect is morally acceptable...;
 - (3) The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends;
 - (4) The good effect is sufficiently good to compensate for allowing the evil effect...²⁴⁹

As is the case with Augustine's just war, Thomas Aquinas focused on intent to exempt Christians in the exercise of violence. Generally, just war theory offered immunity to the uninvolved; killing them was excused only if it met the requirements of double effect. *Jus in bello* stipulated that those engaged in traditionally peaceful occupations or unable to bear arms were considered impermissible targets.²⁵⁰

Yet for the most part, the general immunity offered was limited to those within a certain group, Christians.²⁵¹ For example, immunity advocated by the Peace of God movement only held in Christendom, not to the lands in which the Crusades were fought.²⁵² Christian soldiers deliberately targeted Muslims belonging to the same categories that protected Christians.

It would be a Spanish theologian who would alter the applicability of the immunity norm. To Francisco de Vitoria, the basis of such immunity should be premised on objective, material fact.²⁵³ The key objective, material fact is whether or not the person bore arms.²⁵⁴ Only those who bear arms qualify as permissible targets because they are "obviously dangerous."²⁵⁵ If not bearing arms, then they pose no imminent threat and therefore should be spared.²⁵⁶ As such, Vitoria's distinction between permissible and impermissible targets shifted from one based on

²⁴⁹ Johnson (2000) at 425.

²⁵⁰ Johnson (2000) at 429.

²⁵¹ Hartigan (1982) at 75.

²⁵² Johnson (1997) at 106.

²⁵³ Hartigan (1982) at 84.

²⁵⁴ McKeogh (2002) at 85.

²⁵⁵ Hartigan (1982) at 84.

²⁵⁶ Donovan, James M. 2003. "Civilian Immunity and the Rebuttable Presumption of Innocence," *Journal of Law in Society* 5, 421.

identity to one based on action.²⁵⁷ Vitoria's contemporaries like Gentili and Suarez also supported this sentiment.²⁵⁸ His directive leaves little room for scrutiny of religious beliefs. For instance, Vitoria proposed a prohibition against killing Muslim women and children, previously considered permissible targets by virtue of their faith, if they did not engage in hostilities.²⁵⁹ Consequently, Vitoria's ideas secularized the distinction principle.

Vitoria may have been influenced by the battlefield behavior of knights who complied with chivalric codes. These codes placed primacy on a person's ability to fight in targeting decisions.²⁶⁰ Social norms compelled knights to fight only those trained in the art of warfare or those physically able to fight.²⁶¹ In this time period, this generally excluded women, children, the injured and the aged from attack.²⁶² However, much like the Peace of God movement, chivalric protections only applied to Christians.²⁶³

Ostensibly, the ability to fight served as the means by which knights distinguished between permissible and impermissible targets. However, upon closer inspection, identity formed the basis of these chivalric protections. An individual would not be deliberately targeted if s/he belonged in a particular category. These categories were protected for a variety of reasons. One reason includes prevailing stereotypes of innocence via inability to harm. This is the reason women, children, the elderly and the aged were considered impermissible targets, while young men who posed no harm died at the hands of knights. Functional importance was another reason. Those in functionally necessary or powerful roles received protection. Hence the reason farmers, merchants, clergy and ambassadors found themselves formally immune to

²⁵⁷ Donovan (2003) at 414.

²⁵⁸ Meron (1992) at 25.

²⁵⁹ Cockayne, James. 2002. "Islam and international humanitarian law: From a clash to a conversation between civilizations," *International Review of the Red Cross* 84:847 (2002), 600.

²⁶⁰ Johnson (2000) at 429.

²⁶¹ Johnson (2000) at 429.

²⁶² Johnson (2000) at 429.

²⁶³ Johnson (1997) at 107.

deliberate targeting. Political interests dictated another category. During the Crusades, European armies focused on ousting Islamic forces in the Holy Land. Shirking these *jus in bello* obligations, many believed, would ensure victory. Consequently, European forces did not extend these protections to non-Christians. Vitoria and his peers attempted to shift the distinction between permissible and impermissible targets from a categorical (identity based) concept to an action (and thus, individually) based one. However, the shift did not occur instantaneously, so that both the categorical and individual based distinctions coexisted.

The concepts underlying immunity of the “uninvolved” continued to develop in a more objective fashion and were greatly influenced by wars in Europe. By the time of Emmerich von Vattel, another important figure in the history of the distinction principle, the norm was arguably well established. Incorporating fairly recent ideas such as the state, Vattel asserted states are the combatants.²⁶⁴ Consistent with the Rousseau- Portalis doctrine, Vattel argued that war rages between states.²⁶⁵ More specifically, war fighting was to be limited to battles between trained and disciplined armies of states.²⁶⁶ Possessing citizenship of an enemy state did not automatically make one an enemy, and hence a permissible target.²⁶⁷ In this line of thinking, members of the population not actively engaged in fighting were impermissible targets.²⁶⁸ If they did not resist, they were immune to deliberate attack; in the words of Vattel, “but these enemies who offer no resistance, and consequently the belligerent has no right to maltreat or otherwise offer violence to them, much less put them to death.”²⁶⁹ This differed from much of

²⁶⁴ Hartigan (1982) at 108.

²⁶⁵ Meurant, Jacques. 1987. “Inter Arma Caritas: Evolution and Nature of International Humanitarian Law,” *Journal of Peace Research*, 24:3, 240.

²⁶⁶ Rosenblad, Esbjorn. 1979. International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems, Geneva: Henry Dunant Institute, 53.

²⁶⁷ Best, Geoffrey. 1994. *War and Law Since 1945*, NY: Clarendon Press, 32.

²⁶⁸ Horne, John. 2002. “Civilian Populations and Wartime Violence: Towards a Historical Analysis,” *International Social Science Journal* 54:174, 484.

²⁶⁹ Best, Geoffrey. 1980. Humanity in Warfare, NY: Columbia University Press, 55.

the prevailing view which conformed to an identity based distinction, viewing everyone residing within the territory of the enemy state as enemies and hence permissible targets. In the tradition of Vitoria, immunity was based on what one did, rather than who one was, and echoed a distinction in Hugo Grotius's magnum opus, *De Jure de Bellis ac Pacis*.²⁷⁰

The French Revolution would challenge Vattel's notion of states as combatants because it would return the idea of *levee en masse* back into discussions of *jus in bello* in Europe. *Levee en masse* describes situations in which the population participates in conflict, making it difficult to distinguish between belligerents and non-belligerents.²⁷¹ In such circumstances, efforts to mobilize the populace, and involving it in the war effort, afforded opponents the opportunity to argue the entire population was a permissible war target.²⁷² War strategies included attacking unarmed citizens to break their will to resist.²⁷³ As a result, an opponent's political, psychological and moral resources were considered permissible targets regardless of the traditional act based distinction.²⁷⁴ By blurring the line between traditional notions of uninvolved and involved, the French Revolution ushered in a return to an identity based distinction between permissible and impermissible. The way belligerents implemented this distinction method enlarged the number of people who could be permissibly targeted. In doing so, it took the movement to limit the category of permissible targets several giant steps backwards.²⁷⁵ It would take the codification efforts of the international community some effort before this widened scope of permissible targets narrowed.

²⁷⁰ Meurant (1987) at 240.

²⁷¹ Horne (2002) at 484.

²⁷² Hartigan (1982) at 108.

²⁷³ Horne (2002) at 485.

²⁷⁴ Horne (2002) at 485.

²⁷⁵ Hartigan (1982) at 112.

A HISTORY OF THE DISTINCTION PRINCIPLE IN ISLAMIC JURISPRUDENCE

There are many similarities between Western legal thought on permissible and impermissible targets and another of the world's influential legal traditions, Islamic jurisprudence. An historical examination of the distinction principles warrants a discussion of Islamic perspectives since, as the guide for Christianity's foe during the Crusades, it also influenced Western thought on the laws of war. Edmond Rabath writes that Europeans

...found in their chivalrous adversaries from the time of the Crusades, pre-set rules concerning the declaration of war, combatants and non-combatants, the sick and wounded, prisoners of war... It is natural that these principles were amalgamated with more or less analogous seeds of law to form, by the end of the Middle Ages this unwritten code of law of war which formed the basis of the international legal concepts in this field until the contemporary period.²⁷⁶

Much like the above brief overview of Western traditions reveals, Islamic legal tradition contains a deep and reflective history of laws related to armed conflict. And as is the case with Western legal tradition, the distinction principle varied throughout its evolution in Islamic law.

Despite the fact that Islam emerged well after Christianity, its rules of war possessed an organizational structure that contemporary Western law lacked.²⁷⁷ The *Siyar* constitutes the body of Islamic law pertaining to public law, and addresses the proper justifications for war and the proper conduct of war.²⁷⁸ It includes the Koran and the Sunna, treaties enacted between Muslim leaders and the opinions of Muslim jurists, among others.²⁷⁹ The *Siyar* requires belligerents to distinguish between permissible and impermissible targets.²⁸⁰ For example, one of the principle

²⁷⁶ Bennounne (1993-1994: 640-641).

²⁷⁷ Freamon, Bernard K.. 2003. "Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History," *Fordham International Law Journal* 27, 313.

²⁷⁸ Van Engeland, Anniseh. 2008. "The differences and similarities between international humanitarian law and Islamic humanitarian law: Is there a ground for reconciliation?" *Journal of Islamic Law and Culture* 10:1, 82.

²⁷⁹ The Sunna "are compilations of the sayings, deeds and customs of the Prophet Mohammed as laid down by scholars..." and is similar to the modern day concept of custom. Bennounne (1993-1994) at 613, 614.

²⁸⁰ Kelsay, John. 2003. "Al-Shaybani and the Islamic Law of War," *Journal of Military Ethics* 2:1, 64.

Islamic legal texts, the *Viqayet*, forbids the intentional targeting of women, children, the elderly, the sick and merchants during armed conflict.²⁸¹

While the corpus of Islamic law is arguably less known than its Western counterpart, *jihad* is likely one of the most familiar and least understood of Islamic legal concepts. An in depth discussion of this concept is beyond the scope of this chapter; however, a cursory description is important to understanding Islamic laws of war.

Jihad originates from the Arabic term *jahada* which means to struggle or exert. There are essentially two versions of *jihad*. The *Sunna* states that exertion on the battlefield is minor *jihad* while internal exertion to comply with Islam is major *jihad*.

Minor *jihad* is relevant to Islamic ideas on international relations. Classical Islam divided the international system into two realms: *dar-al harb* (roughly, non-Muslim territories) and the *dar al-Islam* (Muslim territories). Classical jurists like al-Shaybani typically characterized the relationship between these two realms as violent since they felt the Koran only permitted war with non-Muslims.²⁸² As John Kelsay notes, “In the Prophetic report, ‘Fight those who refuse to acknowledge God’; that is, as indicated by their refusal of an invitation to accept Islam or its hegemony.”²⁸³

However, many modern jurists disagree with this interpretation, arguing instead that relations between the two realms are to be peaceful rather than violent, and *jihad* is defensive rather than offensive. This constitutes *jus ad bellum* in Islamic jurisprudence. Scholars like Agha Shahi and Muhammed Abduh posit that divergent practice by Muslim leaders reflect political considerations rather than religious philosophy.²⁸⁴

²⁸¹ Meurant (1987:239)

²⁸² Johnson (1997:118).

²⁸³ Kelsay (2003:70).

²⁸⁴ Bennounne (1993-1994: 616-618).

Like its Western counterpart, political considerations, as well as religious and societal influences, also shaped Islamic legal traditions on appropriate battlefield behavior, *or jus in bello*.²⁸⁵ Much like Just War theory, these considerations produced sets of rules for Muslims that sought to humanize warfare. As An-Na`im finds,

Historically, jihad was a positive phenomenon because it humanized the practice of warfare in the Middle Ages. First, Sharia prohibited the prevalent practice of using war for material gain or revenge. Second, the Prophet and his companions, acting in accordance with the Quran and the Sunna, laid down very specific and strict rules for honorable combat.²⁸⁶

However, these factors also drove the way in which belligerents considered who they can target. Consequently, since Muslims often faced non-Muslims on the battlefield, a religiously based distinction between permissible and impermissible targets emerged in early Islamic jurisprudence. Much like early Christian just war thought, immunity was generally only applicable to those of the faith; non-believers did not benefit from this immunity and all were considered permissible targets.²⁸⁷ However, Muslims honored the Peace of God Movement's edict: they granted immunity to Christian monks as long as they did not join the ranks of belligerents.²⁸⁸

Yet there existed inconsistency among early Islamic jurists as to how immunity should be implemented. Take women for example. Mohammed instructed a military commander, Abdur Rahman ibn Awf to 'never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman.'²⁸⁹ While some Islamic scholars argued this meant that all women should be spared, al-Shafi'i (who belonged to the scholarly generation succeeding al-Shaybani's)

²⁸⁵ Kelsay (2003:197).

²⁸⁶ Bennounne (1993-1994: 621).

²⁸⁷ Kelsay (2003: 201).

²⁸⁸ Trombly, Frank R. 2003. "The Arabs, the Byzantine State and the Islamic Law of War," in Paul Robinson (ed.), Just War in Comparative Perspective, 164.

²⁸⁹ Bennounne (1993-1994: 624).

advocated that polytheistic women could be considered permissible targets while women of the Book (Jews and Christians) were impermissible targets.²⁹⁰ Such a policy contravened the interests of society which would benefit from slave labor if belligerents spared these women. There was also disagreement on how men should be viewed. Some jurists like Yamani argued all able-bodied men were permissible targets regardless of whether they actually engaged in hostilities; others argued that clerics and those under a certain age should be spared.²⁹¹ Furthermore, whereas Shaybani interpreted Koranic scripture to require the refusal of a formal invitation to Islam and the payment of tribute to render a person a permissible target, al-Shafi'i posited that any non-Muslim could be permissibly targeted since he assumed everyone "heard" the invitation to Islam.²⁹² Still others argued it is inappropriate to ever kill a prisoner.²⁹³ A preeminent jurist, Ibn Rushd, describes this dissidence:

The source of their disagreement on the matter is that they [the jurists] disagree on the legal cause for killing the unbelievers. The jurists who claimed that the legal cause for killing the unbelievers is their disbelief do not exempt [from killing] any of the unbelievers. Those who claim that the legal cause is the capacity [of the unbelievers] to fight. . . exempt from killing those who are unable to fight or who are usually not inclined to fight such as peasants and serfs.²⁹⁴

Furthermore, some Islamic jurists declared differential treatment even among Muslims. Wars against the *bugha*²⁹⁵ operated under more restricted rules of engagement than wars against other Muslim foes.²⁹⁶ In wars against the *bugha*, belligerents were prohibited from executing

²⁹⁰ Kelsay (2003:201)

²⁹¹ Bennounne (1993-1994: 628-629).

²⁹² Kelsay (2003:73).

²⁹³ El Fadl, Abou. 2007. "The Rules of Killing at War: An Inquiry into Classical Sources," *The Muslim World* 89:2, 153.

²⁹⁴ El Fadl (2007:152).

²⁹⁵ *Bugha* are Muslims who fight with a reasonable interpretation of Islam or cause. However, classical jurists did not agree on what is considered a reasonable interpretation or cause. El Fadl (2007:145).

²⁹⁶ El Fadl (2007:145).

prisoners and intentionally killing women and children.²⁹⁷ Wars against Muslims fighting for lesser causes proceeded under less restrictive rules.

The basis of the distinction between permissible and impermissible targets may also have been a function of the nature of conflict; impermissible targets consisted of those who were not conventionally considered as militarily threatening.²⁹⁸ This non-threatening construct, coupled with their utility as slaves, justified their immunity.²⁹⁹ Hence the reason why most men of fighting age, believers and non-believers alike, were labeled permissible targets while women and children held protective status.

While some Islamic jurists declared certain categories of people impermissible targets, others argued individuals lost that immunity once they engaged in hostilities.³⁰⁰ Yet, as is the case with Christian Just War theory, there existed division among Islamic jurists as to what engagement in hostilities entailed. While some limited the coverage to those bearing weapons, others took a more expansive view. For some, those playing a supportive role in armed conflict (e.g., via the provision of food or supplies) were engaged in hostilities.³⁰¹ For example, during the battle of Hunayn, Muslim soldiers reportedly killed a centenarian for giving advice on the battlefield.³⁰² Furthermore, impermissible targets could be killed if their deaths were foreseen but unintended, much like the Christian doctrine of double effect.³⁰³

What this brief discussion reveals is that, much like its Christian counterpart, Islamic rules of war fluctuated, both within and between time periods, on the notion of permissible

²⁹⁷ El Fadl (2007:144).

²⁹⁸ Johnson at 119.

²⁹⁹ El Fadl (2007:154).

³⁰⁰ Johnson (1997:117).

³⁰¹ Van Engelen (2008:88).

³⁰² Bennounne (1993-1994:629).

³⁰³ Kelsay (2003:72).

versus impermissible targets. Neither legal tradition held a constant position on what many considered IHL's most pivotal issue.³⁰⁴

A HISTORY OF THE DISTINCTION PRINCIPLE IN AN AFRICAN CONTEXT

If Islamic perspectives on rules and norms of armed conflict are less known compared to Just War thought, African perspectives are even less so. The discussion of African rules of war prior to colonization (after which colonizers implemented their rules of war in the continent) in this section is thinner in relation to above discussions of Just War and Islamic traditions for several reasons. First, pre-colonial African jurisprudence on armed conflict possesses much more diversity than the other pan-regional legal frameworks discussed above due to a lack of a unifying religious or political structure.³⁰⁵ As such, African societies differed in their structure, security arrangements and codes of conduct for their belligerents more so than European and Islamic societies.³⁰⁶ This variety extended to the manner in which warfare was conducted.³⁰⁷ Secondly, the literature offers few examinations of pan-African rules of war before colonization. Thirdly, much of what is written about pre-colonial African rules of war focuses on the Zulu practices in present day South Africa. This is due to the fact that the Zulu maintained one of the few standing armies on the continent.³⁰⁸ As such, the Zulu operated under more formalized rules than their martial counterparts. However, because African societies bore comparatively fewer

³⁰⁴ Cockayne (2002:597).

³⁰⁵ Provost, Rene. 2007. "The International Committee Of The Red Widget? The Diversity Debate And International Humanitarian Law," *Israel Law Review* 40:614, 623.

³⁰⁶ Mazrui, Ali A. 1997. "The Warrior Tradition and the Masculinity of War," in Ali A. Mazrui (ed.), The Warrior Tradition in Modern Africa, Leiden E.J. Brill, 74-75.

³⁰⁷ Bello, Emmanuel G. 1980. African Customary Humanitarian Law. Geneva: International Committee for the Red Cross. 1

³⁰⁸ Personal Interview (Pittsburgh, 2009).

similarities with each other, an understanding of Zulu war practices does not necessarily offer insight into the rules and norms espoused by other societies.

Nonetheless, despite the differences in African cultures, “conflicts and war between remote lineages were regulated by legal norms” so that when “war did break out between them, defined rules of behavior were followed and respected.”³⁰⁹ As African leaders expanded and consolidated their empires, they also managed to harmonize norms operating within their domains, including the norms for warfare. Consequently,

These conscious attempts to disseminate and assimilate a new code of conduct in warfare and in peace time made it possible to propagate certain standards of behavior in the different regions of Africa.³¹⁰

For example, African societies share in common an association of belligerency with adulthood³¹¹; that is, only adults were considered fighters and therefore only they could be permissibly targeted during armed conflict. And generally speaking, only adult males played the role of belligerent.³¹² African societies, with the exception of the Zulu, designated this role to a select minority of their populations, although during emergencies African leaders called all able-bodied men into service.³¹³ Despite an esteemed status, these select men did not serve as belligerents exclusively.³¹⁴ They were not full-time soldiers. They held this role concurrently with other roles like farmer or religious leader, with circumstances dictating which they would play. This multiplicity of roles inevitably made it difficult for belligerents to determine who was a fighter and who was not.

³⁰⁹ Bello (1980:2).

³¹⁰ Bello (1980:2).

³¹¹ Mazrui (1977:75).

³¹² Welch, Claude E. 1977. “Warrior, Rebel, Guerilla, and Putschist: Four Aspects of Political Violence,” in Ali A. Mazrui (ed.), The Warrior Tradition in Modern Africa, Leiden E.J. Brill, 84.

³¹³ Welch (1977:84).

³¹⁴ Ocaya-Lakidi, Dent. 1977. “Manhood, Warriorhood, and Sex in Eastern Africa,” in Ali A. Mazrui (ed.), The Warrior Tradition in Modern Africa, Leiden E.J. Brill, 136.

Additionally, this literature does reveal that like their European and Islamic counterparts, African norms of armed conflict required a distinction between permissible and impermissible targets.³¹⁵ The Zulu in particular possessed an organized set of rules applicable to non-belligerents during armed conflict.³¹⁶ For instance, Zulu fighters were expected to spare anyone who dropped their spears in battle and to enslave both men and women.³¹⁷ In the wars between the Kikuyu and the Maasai, Kikuyu fighters spared Maasai fighters who laid down their weapons and held a Nyarageta grass as a sign of surrender.³¹⁸ Women, children, the elderly, slaves, laborers and emissaries were generally considered impermissible targets.³¹⁹ The Zulu spared women, and young girls in particular, because of the material benefit they offered Zulu society: they more easily assimilated into society than males, could bear children (vital to a continent that made survival difficult) or could be sold as slaves.³²⁰ While the Zulu also enslaved men, the Zulu preferred females over males since female slaves fetched a much higher price in the slave markets than male slaves.³²¹ Slave traders shifted their preference away from females to male slaves with the institution of slavery in the Americas, arguably reducing the targeting of male non-belligerents.³²²

While the distinction principle possessed an important role in African legal traditions as it did in European and Islamic legal tradition, how it performed this role similarly varied. As Emmanuel G. Bello states, “Some tribes took pride in according respect and human rights to

³¹⁵ Provost (2007:624).

³¹⁶ Otterbein, Keith F. 1967. “The Evolution of Zulu Warfare,” in Paul Bohannon, Law and Warfare: Studies in the Anthropology of Warfare, Natural History Press, 352.

³¹⁷ Otterbein (1967:352).

³¹⁸ Bello (1980:30).

³¹⁹ Provost (2007:624).

³²⁰ Laband, John. 2007. “Introduction: African Civilians in Wartime,” in John Laband (ed.), Daily Lives of Civilians in Wartime Africa: From Slavery Days to Rwandan Genocide, Westport: Greenwood Press, 3.

³²¹ Lovejoy, Paul E. 2007. “Civilian Casualties in the Context of the Trans-Atlantic Slave Trade,” in John Laband (ed.), Daily Lives of Civilians in Wartime Africa: From Slavery Days to Rwandan Genocide, Westport: Greenwood Press, 21.

³²² Lovejoy (2007:23).

women, children and old persons; others were ready to kill everyone who might be considered a potential enemy.”³²³ The immunity offered to women serves as a useful example. It varied considerably among the different African fighting forces. For instance, Kenyan tribes did not allow the deliberate killing of women because they considered it disgraceful.³²⁴ Meanwhile, Nuer (present day Sudan) immunity to women depended on the identity of their opponent. Nuer fighters spared foreign women of marriageable age while killing older women.³²⁵ However, the immunity was expanded to all women and children when fighting neighboring tribes.³²⁶ Since warfare between the Nuer and their neighbors was common, this expansion of immunity was predicated on reciprocity.³²⁷ While the Nuer sometimes spared women, the Galla and Bovana (Ethiopia) did not offer immunity to women as they considered them permissible targets.³²⁸

CONCLUSION

This chapter focused on the implementation of the distinction principle in various traditions prior to IHL codification. It reveals that despite the development of normative practices to distinguish between permissible and impermissible targets, relevant actors (including fighters and scholars) within and between various time periods and normative traditions differed as to who fell into each category. These practices did share some similarities (many placed women, children and

³²³ Bello (1980:28).

³²⁴ Bello (1980:34).

³²⁵ Bello (1980:34).

³²⁶ Id.

³²⁷ Id.

³²⁸ Id.

the elderly within the impermissible target category), but they also deviated greatly from each other as to the designation of permissible targets. These categorizations fluctuated based on regime, reason for conflict, external influences, interests and salient normative preferences. For example, the shift in preference from female to male African slaves reflects the utilitarian foundation of the norm of civilian immunity in its infancy, a foundation present not only on the African continent but in the other regions previously discussed. Political and economic changes in the international system transformed the linkage between sex and the distinction principle: able bodied men once considered permissible targets because of their sex were no longer so for the same reason. However, non-utilitarian arguments also defined permissible and impermissible targets, as exemplified by the call of Christian and Islamic jurists to kill those religiously distinct despite the value to their own societies as slaves. Thus, a belligerent fighting in an armed conflict in any of the traditions discussed here could chose from a plethora of distinction methods at any given point during that armed conflict. Imagine the situation when two or more of these normative traditions encountered each other. It would not be a stretch to claim that operating in such an ambiguous environment could result in violations of the civilian immunity norm. The next chapter will reveal that ambiguity on permissible targets permeated the international community's efforts to codify IHL, ambiguity that is still present today.

CHAPTER 5: AMBIGUITIES IN THE DISTINCTION PRINCIPLE DURING IHL CODIFICATION BY THE INTERNATIONAL COMMUNITY

It is the bidding of mercy, if not justice, that, except for reasons that are weighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction. ~Grotius³²⁹

The previous chapter traced the development of the distinction principle in different normative traditions, concluding that they commonly produced an unclear sense of the protected and unprotected. This chapter overviews the major developments during the IHL codification process. As contact within the community of states increased, and with it, the number of conflicts, the international community launched a codification effort to ensure its members operated under a uniform set of codes during armed conflict. This chapter will show that, as was the case in the pre-codification period, inconsistency in what constitutes a permissible target plagued the codification era as well. This was inherent from the first general codification of IHL, the Lieber Code, to the first definition of civilian in the 1977 Additional Protocols to the Geneva Conventions (AP). Throughout this history, while the international community maintained its commitment to the distinction principle, it was unable to arrive at a clearly articulated definition of what constitutes a permissible civilian target.

This chapter begins with a discussion of how the Lieber Code treats the distinction principle. It moves on to an examination of early IHL treaties like the 1864 and 1906 Geneva Conventions. It then examines more recent international agreements like the 1949 Geneva Conventions and their 1977 APs. The chapter closes with an inquiry into whether these more recent additions to the body of IHL clarify the constitution of permissible civilian targets.

³²⁹ Quoted in Rudolph (2001:655).

THE LIEBER CODE

The 19th century marked an era of intense codification of IHL. The excessive casualty rates during the French Revolution, the continuous outbreak of conflicts between newly conceived “states”, and technological advancements in the science of lethality spurred the international community’s efforts to restrict war practices.³³⁰ Political leaders and jurists felt that compliance with IHL, and hence fewer casualties, would result if laws were codified.³³¹ Prevailing thought was that ambiguity in customary international law produced many of the atrocities that occurred.³³² This ambiguity could be minimized by writing laws down in treaty form with states publicly acknowledging their commitment to them.³³³ Codifying IHL would also allow fighters to operate under a common framework rather than the differing rules that were the subject of the previous section.

The Lieber Code amounts to the first attempt by a Western state to codify IHL.³³⁴ It is considered “a concise and careful rendering of international legal theory and practice up to Lieber’s time.”³³⁵ Drawn up by Columbia University political science professor Francis Lieber, at the request of President Abraham Lincoln, the 1863 General Orders No. 100 (the Lieber Code’s more formal appellation) tackled the question of how to discern permissible and impermissible targets vexing military officials during the U.S. Civil War.³³⁶ Article 21 of the Lieber Code states:

³³⁰ of Jochnick, Chris and Roger Normand. 1994. “The Legitimation of Violence: A Critical History of the Laws of War,” *Harvard International Law Journal* 35:1 (1994), 63.

³³¹ Kalshoven, Frits. 1987. Constraints on the Waging of War, Martinus Nijhoff, 7.

³³² Kalshoven (1987:7).

³³³ Kalshoven (1987:7).

³³⁴ Hartigan, Richard Shelly. 1983. Lieber’s Code and the Law of War, Chicago: Precedent, 1.

³³⁵ Hartigan (1983:15).

³³⁶ Kinsella, Helen M. 2005. “Discourses of Difference: Civilians, Combatants and Compliance with the Laws of War,” *Review of International Studies* 31, 175; see also Howard, Michael, George J. Andreopoulos, and Mark R.

The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.³³⁷

The Lieber Code goes on to articulate the civilian immunity norm,

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.³³⁸

Thus, the immunity offered to unarmed enemy citizens in a conflict between countries is not absolute. The Lieber Code extends immunity only as far as “the exigencies of war will admit.”

Military necessity tempers these protections,

Art. 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Art. 15. Military necessity admits of all direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of the war....³³⁹

For conflicts occurring within a country, the Lieber Code states,

Art.155. All enemies in regular war are divided into two general classes -- that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

Shulman. (eds.). 1994. The Laws of War: Constraints on Warfare in the Western World, New Haven: Yale University Press.

³³⁷ U.S. War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (April 24, 1863), Article 21 (hereafter “Lieber Code”).

³³⁸ Lieber Code, Article 21

³³⁹ Lieber Code

Art.156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens, of the revolted portion or province....³⁴⁰

While the Lieber Code did address the distinction principle, its primary focus centered on the proper treatment of fighters, in particular Confederate soldiers.³⁴¹ Were they rebel fighters or belligerents? At the time, international law distinguished between rebellions, which fell under the purview of domestic law, and belligerency, for which international law possessed jurisdiction.³⁴² Yet despite this limited focus, the Lieber Code encompassed a version of the distinction principle which would influence the subsequent development of the civilian protection regime.³⁴³

1864 AND 1906 GENEVA CONVENTIONS, ST. PETERSBURG DECLARATION AND 1907 HAGUE CONVENTION

The focus on fighters, compared to non-fighters, as evidenced in the Lieber Code also manifested in subsequent IHL treaties like the Geneva Conventions of 1864 and 1906.³⁴⁴ This characteristic trait of IHL treaties would continue until the 1949 Geneva Conventions. While these early Geneva Conventions focused on the treatment of wounded and sick fighters, they merit

³⁴⁰ Lieber Code

³⁴¹ Hartigan (1983:7).

³⁴² Moir, Lindsay. 1998. "The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949," *International and Comparative Law Quarterly* 47, 338-339.

³⁴³ Paust, Jordan J. 2001. "Dr. Francis Lieber and the Liber Code." *American Society of International Law Proceedings* 95: 112, 113. See also Best, Geoffrey. 1979. "Restraints on War by Land Before 1945," in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict*, Oxford: Oxford University Press, 21.

³⁴⁴ Johnson (2000:431).

discussion on the topic of the distinction principle for their connection to the International Committee for the Red Cross (ICRC), an instrumental player in the realm of IHL.

The 1864 and 1906 Geneva Conventions were the products of the efforts of Henri Dunant, the founder of the ICRC.³⁴⁵ Dunant was moved by the suffering of wounded soldiers he came across in a battlefield near Solferino, Italy during the Battle of Italian Unification in 1859.³⁴⁶ Unable to forget the battlefield images seared into his memory, a few years later Dunant wrote *A Memory of Solferino*, a huge success particularly among contemporary influential elites.³⁴⁷ It generated a movement to improve the treatment of fighters during armed conflict. This movement was inclusive of all fighters, regardless of religion, a departure from previous *jus in bello* practice.³⁴⁸ A year later, on the basis of the arguments presented in his book, Dunant and others formed the ICRC.³⁴⁹ Within a year of its founding and with the help of the Swiss government, the ICRC organized a diplomatic conference which would give birth to the first Geneva Conventions in 1864.³⁵⁰ Thus began the era of modern IHL:

Through the ages communities have created humanitarian rules of one kind or another, limiting the evils of war and protecting its victims. No period in history, and no civilization, can take sole credit for the ‘invention’ of humanitarian law. That being said, Solferino was unquestionably the inspiration for modern humanitarian law, enshrined in treaties, having a secular basis and aspiring to universality...³⁵¹

This practice of convening international conventions after the identification of gaps in existing IHL or its implementation became the method by which the ICRC promulgated IHL

³⁴⁵ <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList288/FAFDE5C21CBC5ACDC1256B66005B0E39>

³⁴⁶ Id.

³⁴⁷ Id.

³⁴⁸ Cockayne (2002:600)

³⁴⁹ <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList288/FAFDE5C21CBC5ACDC1256B66005B0E39>

³⁵⁰ <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList288/FAFDE5C21CBC5ACDC1256B66005B0E39>

³⁵¹ ³⁵¹ Bugnion (2003:4).

development.³⁵² Consequently, the ICRC quickly became a major force in the development of IHL.³⁵³ As Rene Provost finds, the ICRC

exerted considerable influence by setting agendas, lending its credibility to the process, acting as an independent expert advisor throughout the negotiations, and issuing authoritative commentaries after the adoption of the conventions.³⁵⁴

However, despite Dunant's desire for universal appeal, states without a majority Christian population were absent at the 1864 Geneva Convention.³⁵⁵

Consistent with Dunant's motivations, the early Geneva Conventions focused primarily on the treatment of fighters, much like the Lieber Code. In particular, they focused on the proper treatment of combatants rendered *hors de combat*. Prior to these Conventions, wounded soldiers were left to fend for themselves as Dunant witnessed at the Battle of Solferino, and medical staff was often targeted.³⁵⁶ However, the Conventions endorsed the distinction principle through their identification of these fighters and those who aid them as impermissible targets. However, they did not contain language referring to non-military personnel (other than hospital staff) as immune.

The next development in IHL originated in Russia. Czar Alexander II of Russia convened an international conference to address the issue of explosive rifle bullets.³⁵⁷ As such this Conference addressed one particular branch of IHL, the Law of The Hague, which limits the means of harming the enemy during armed conflict; the other branch of IHL, the Law of Geneva,

³⁵² Provost (2007:642).

³⁵³ Pursuant to this status the ICRC has tried to minimize suffering caused by war effects in primarily four ways: establishment of humane standards and neutrality status for noncombatants; provision of aid and safe return of prisoners of war; delivery of humanitarian aid; and establishment of access to and humanitarian treatment of political prisoners. Finnemore, Martha. 1999. "Rules of War and Wars of Rules," from John Boli (ed), Constructing World Culture, Stanford: Stanford University Press, 151.

³⁵⁴ Provost (2007:642-643)

³⁵⁵ Provost (2007: 617)

³⁵⁶ For more detailed discussion of this point, see Bugnion (2003), Chapter 2, Book I.

³⁵⁷ Kalshoven (1987:7)

provides protections for victims of armed conflict and includes the above mentioned 1864 and 1906 Geneva Conventions.³⁵⁸ As was the case with the first Geneva Conventions, the plight of fighters motivated the organizers of the St. Petersburg Conference. At its conclusion, delegates produced the St. Petersburg Declaration of 1868, affirming that the “the necessities of war ought to yield to the requirements of humanity.”³⁵⁹ With this Declaration, delegates sought to end the practice of “total” war in which fighters disregarded the distinction principle. As such, while not explicitly articulating the distinction principle, the Preamble of the St. Petersburg Declaration argued that a state’s armed forces constituted the only permissible target during armed conflict.³⁶⁰

A persistent theme among these treaties was the use of ambiguous language. Chris af Jochnick and Roger Normand critique the St. Petersburg Declaration for its imprecise wording:

The drafters of the St. Petersburg Declaration set an example to be followed at subsequent international conferences of... avoiding difficult subjects through vague, non-binding resolutions incapable of imposing practical limits on conduct.³⁶¹

Such imprecise language would become the hallmark of codified IHL.

The 1907 Hague Convention represented the international community’s first broad attempt to restrict land warfare.³⁶² Forty-four states met in The Hague, attempting to minimize the ambiguity in IHL in order to reduce the brutal effects of war. This time, non-majority

³⁵⁸ Bugnion (2003: 60-61).

³⁵⁹ 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes of Weight. Available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>.

³⁶⁰ Rogers, A.P.V.2004. *Law on the Battlefield*, Manchester: Manchester University Press, 6.

³⁶¹ af Jochnick and Normand (1994: FN 72, 67).

³⁶² Jaworski, Eric. 2003. “‘Military Necessity’ and ‘Civilian Immunity’: Where’s the Balance?,” *Chinese Journal of International Law* 2:1, 179; Valentino, Benjamin, Paul Huth and Sarah Croco. 2006. “Covenants without the Sword: International Law and the Protection of Civilians in Times of War,” *World Politics* 58

Christian states including Persia and the Ottoman Empire attended.³⁶³ James Brown Scott, U.S. delegate to the Conference, recounts Chairman de Nelidow's announcement at the start of the conference,

This task, gentlemen, as outlined in the program of the Conference and accepted by all the governments, is composed of two parts. On the one hand, we are to seek the means of settling in a friendly manner any differences which may arise among the nations, and of this preventing ruptures and armed conflicts. On the other hand, we must endeavor, if war has broken out, to mitigate its burdens both for the combatants themselves, and for those who may be indirectly affected... I was told, 'the peoples waging it must feel its full weight so that they will seek to put an end to it as soon as possible and not desire to resume it. This idea, gentlemen, seems absolutely fallacious to me.'³⁶⁴

Pursuant to this goal, the delegates of the Hague Convention produced and adopted the 1907 Convention No. IV Respecting the Laws and Customs of War on Land and the Regulations Respecting the Laws and Customs of War on Land. In accordance with the humanitarian spirit of the Convention, Article 22 of the Annex to the Convention famously declared, "the right of fighters to adopt means of injuring the enemy is not unlimited..."³⁶⁵ It also adopted a universalist orientation: the Conference officially declared a secular approach to its humanitarian ideals.³⁶⁶ However, much like the Lieber Code and the first Geneva Conventions, the Hague Convention focused disproportionately more on fighters than on civilians³⁶⁷: "The central problem plaguing the lawmakers at The Hague was most emphatically *not* about the protection of civilians but defining what types of combatants the laws were to cover."³⁶⁸ For instance, it offered a definition of belligerent without similar treatment of "civilian." The Hague

³⁶³ Kleffner, Jann K.. 2007. "From 'Fighters' to 'Fighters' and Civilians Directly Participating in Hostilities- on the Principle of Distinction in Non-International Armed Conflict One Hundred Years after the Second Hague Peace Conference," *Netherlands International Law Review* 54, 316

³⁶⁴ Scott, James Brown. 1909, The Hague Peace Conferences of 1899 and 1907, Baltimore: Johns Hopkins Press, 108-109.

³⁶⁵ 1907 Hague Conventions, Article 22.

³⁶⁶ Cockayne (2002:608).

³⁶⁷ Jaworski (2003:180).

³⁶⁸ Nabulsi, Karma. 2001. "Evolving Concepts of Civilians and Belligerents: One Hundred Years after the Hague Peace Conference," in Simon Chesterman (ed.), Civilians in War, Boulder: Lynne Rienner, 12.

Conventions did provide a general list of protected persons.³⁶⁹ This list included combatants rendered *hors de combat*, residents living in undefended centers of population, and in occupied territory, those that did not bear arms or engage in espionage.³⁷⁰ Reciprocity governed these protections: they held until the first state violated them.³⁷¹ Furthermore, these protections only applied in international conflicts.³⁷²

While it attempted to humanize war practices through its call to honor the distinction principle, the 1907 Hague Convention gave the principle short shrift because of the imprecise manner in which it was done. Regarding the distinction principle, for instance, the previously mentioned Article 22 announces its restrictions without further clarification as to who is considered “the enemy” or what is meant by unlimited means.³⁷³ The indefinite language used about the distinction principle prompted scholars af Jochnick and Normand to claim regarding battlefield practices subsequent to the Hague Convention, “the Hague laws are vaguely worded and permissive, enabling powerful states to use the latest military technology with little regard for humanitarian consequences.”³⁷⁴

In addition to imprecise language, these treaties underserved the distinction principle because of their limited applicability. These efforts to humanize the practice of warfare applied primarily within the European and American domains. Restrictions like the distinction principle played a much less significant role in battlefield practices in colonial wars. Contemporary legal

³⁶⁹ Turner (2000:431).

³⁷⁰ Turner (2000: 431).

³⁷¹ Hartigan (1982:114).

³⁷² Hartigan (1982:114).

³⁷³ af Jochnick and Normand (1994:74).

³⁷⁴ af Jochnick and Normand (1994:52-53).

scholar John Westlake argued that “‘savages of half-civilized tribes’ should be treated quite differently in combat.”³⁷⁵

1949 GENEVA CONVENTIONS

The World Wars had a profound impact on the development of the distinction principle, primarily because so many civilians died during the course of them. One of the reasons for the heavy civilian casualties during the two World Wars is tied to the blurring of the line distinguishing permissible from impermissible civilian targets. During the World Wars, civilian workers in military installations, the wide exercise of voting rights in democracies on the war path, and the merging of the home-front and the front-lines broke down the more definitive line separating fighters from others present in previous wars, and led many to make broad based arguments that contributing to the war effort amounted to hostile acts.³⁷⁶ William Ford explains:

Hardly a century ago war was a matter involving but small numbers of people. The situation changed when national consciousness and democracy began to develop... Sir Winston Churchill said, ‘When democracy forced itself upon the battlefield, war ceased to be a gentlemen’s game.’³⁷⁷

Essentially they argued for an expansion in who was conventionally considered a permissible civilian target.³⁷⁸ In fact, some argued that permissible civilian targets included anyone who had the misfortune of finding herself within the zone of hostilities.³⁷⁹

³⁷⁵ Kinsella (2005:180).

³⁷⁶ Hayashi, Mika Nishimura. 2005. “The Principle of Civilian Protection and Contemporary Armed Conflict,” in Howard M. Hensel (ed.), *The Law of Armed Conflict: Constraints of the Contemporary Use of Military Force*, Burlington: Ashgate, 110.

³⁷⁷ Quoted in Nabulsi (2001:11).

³⁷⁸ van der Wolf, Rene and Willem-Jan van der Wolf (2004:299); Gardam, Judith. 1991-1992. “Noncombatant Immunity and the Gulf War,” *Virginia Journal of International Law* 32:813; Elbridge, Colby. 1926. “Laws of Aerial Warfare,” *Minnesota Law Review* 10: 207; Spaight, J.M. 1944. “Legitimate Objectives in Air Warfare,” *British*

This more expansive (and strategic) view partially accounts for bombing strategies during World War II. It led to “total war... fought by entire nations in wherein all are considered ‘combatants’ ...” (emphasis added).³⁸⁰ This was the case for states that engaged in bombing strategies (as the previous quote indicates) and those victimized by them. For instance, German civilians (that is, citizens who were not in the armed forces) killed during British bombing raids were buried with full military honors and considered soldiers who died for their country.³⁸¹ Such a perspective was an offshoot of the *levee en masse* (discussed earlier) leading military planners to categorize “political, psychological, and moral resources as military targets...”³⁸² And at the time, codified IHL fell silent as to the legitimacy of this categorization. Recall that none of the previously mentioned treaties defined “civilian.” A.P.V. Rogers finds that military air planners

would not have found a list of legitimate targets or a definition of the distinction between combatant and non-combatant; at best, they ‘would have found considerable disagreement and confusion among scholars.’³⁸³

As Ward Thomas explains

...the failure of the bombing norm in the 2nd WW was caused not only by the strategic interests of the fighters but also by the inherent weakness of the norm itself...³⁸⁴

Yearbook of International Law, 158; Nurick, Lester. 1945. “The Distinction between Combatant and Noncombatant in the Law of War,” *The American Journal of International Law* 39:4, 692; Kalshoven (1987:91)

³⁷⁹ Alexander (2007:365).

³⁸⁰ of Jochnick and Normand (1994:78). This statement echoes the sentiment expressed by Lester Nurick that “On occasion, fighters... have extended the definition of combatant to include almost all important elements of the enemy’s civilian population” Nurick (1945:680).

³⁸¹ Kloft, Michael. 2003. *Firestorm*. First Run Features.

³⁸² Horne (2002:485).

³⁸³ Rogers (2004: 12-13).

³⁸⁴ Thomas (2001: 91)

Consequently, the World Wars witnessed heavy bombing campaigns on both sides, leading to the deaths of millions, counter to the purpose of IHL. It led many to question the future of the distinction principle.

In response to the massive violations of IHL during the World Wars, the Swiss government, in collaboration with the ICRC, convened a diplomatic conference on April 21, 1949 to address these issues.³⁸⁵ Two hundred seventy-seven delegates representing fifty-nine countries attended.³⁸⁶ The horrific discrepancy between IHL and the conduct of hostilities during the World Wars sent a message to IHL advocates that the law needed to be revised or the distinction principle was in danger of becoming extinct. Consequently, the Geneva Conventions, specifically the Fourth Geneva Convention of 1949, recognized civilians as a distinct category under IHL which came with rights and obligations no longer contingent on reciprocity.³⁸⁷ “Civilian” in this context differed semantically from previous usage of the term.³⁸⁸ Prior to this point, “civilian” did not connote necessarily a protected class but the non-military members of the population (including members of non-state armed groups).³⁸⁹

Article 4 defines some protected persons as those “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”³⁹⁰ Common Article 3 of the Geneva Conventions states the most basic minimum rules applicable to protected persons³⁹¹:

³⁸⁵ Bugnion (2003:314, Book II).

³⁸⁶ Bugnion (2003:314, Book II).

³⁸⁷ Nabulsi (2001:19); see also Gregory, Derek. 2006. “Death of the Civilian,” *Environment and Planning D: Society and Space* 24; Slaughter, Anne-Marie and William Burke White. 2002. “An International Constitutional Moment,” *Harvard International Law Journal* 43:1, 6

³⁸⁸ Alexander (2007:361).

³⁸⁹ Alexander (2007: 361).

³⁹⁰ 1949 Geneva Conventions, Article 4

³⁹¹ 1949 Geneva Conventions, Common Article 3(1), (1949). Today, Common Article 3 also applies as a minimum customary law in international armed conflicts (see Paust (2005)).

...each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

The distinction principle, as embodied in the Geneva Conventions, differentiated between those who take no active part in hostilities and those who do, with the former being impermissible targets. The basis of this distinction can be traced back to chivalric codes discussed in the previous chapter in which protection was offered to those who did not enter the knights' exclusive realm of warfare.³⁹²

The Geneva Conventions would also expand the jurisdictional base of IHL to include non-international conflicts, continued further by Additional Protocol II.³⁹³ For example, the Geneva Conventions apply to undeclared wars between parties and powers (including non-state actors), occupations and those not a party to the Conventions.³⁹⁴ Consequently, IHL protections like the civilian immunity norm, once limited to international conflicts, now governed conflicts and protected victims once without redress because they fell under the sacrosanct domain of sovereignty.³⁹⁵

³⁹² Nabulsi (2001:16).

³⁹³ Kleffner (2007:324).

³⁹⁴ 1949 Geneva Conventions, Articles 2 and 3.

³⁹⁵ Bugnion (2006:42)

Groundbreaking as the Geneva Conventions may have been, they still left many issues related to war's effects on impermissible targets unanswered.³⁹⁶ For example, Common Article 3 does not offer further guidance as to how to interpret the pivotal phrase, "active part in hostilities." One reason for this was the political considerations which greatly influenced the shape of the civilian protection regime during the drafting of the Geneva Conventions.³⁹⁷ For instance, the victors of World War II dictated the content of the civilian protection regime contained within the Geneva Conventions.³⁹⁸ Consequently, much of the deliberations focused on the distinction principle within the context of the treatment of civilians under enemy occupation and enemy detainment, rather than the civilian experience of aerial bombardment.³⁹⁹ This is despite the fact that many decried the bombardment of enemy population centers to break morale as impermissible targeting. Many jurists espoused the view that

No matter how closely a civilian might be engaged in war-supporting, indeed, war enabling work, so long as he was not actually a fighting man, equipped personally to carry on hostilities against you or to defend himself against you, he must not be counted a combatant any more than should the soldier's fiancée, wife or parents.⁴⁰⁰

Yet, many experts considered civilians working in industries directly related to the war effort as permissible targets.⁴⁰¹ Even the ICRC discounted the common association of "civilian" with inability to harm; its commentary on the 4th Geneva Convention posits

wounded and prisoners of war are human beings who have become harmless, and the State's obligation towards them are not a serious hindrance to its conduct of the hostilities; on the other hand, civilians have not in most cases been rendered harmless, and the steps taken on their behalf may be a serious hindrance to the conduct of war.⁴⁰²

³⁹⁶ Hayashi (2005:108).

³⁹⁷ Best (1994:115)

³⁹⁸ Best (1994:115)

³⁹⁹ Best (1994:115)

⁴⁰⁰ Best, Geoffrey. 1980. Humanity in Warfare : The Modern History of the International Law of Armed Conflict, London: Weidenfeld and Nicholson, 264-265

⁴⁰¹ Rogers (2004:31).

⁴⁰² Kinsella (2005:178).

Consequently, the basic distinction principle in the Geneva Conventions reflected a particular perspective of targeting decisions of those, within one's effective control or in occupied territory, which did not encompass the full experience during armed conflict or a consensus among legal experts.

1977 ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS

Much like the evolution of IHL in response to the World Wars, global events continued to influence the development of the distinction principle in codified IHL. As a result of the tremendous loss of life during the Vietnam War, as well as liberation struggles in the post-colonial era, the ICRC recognized the need for revisions to the 1949 Geneva Conventions.⁴⁰³ Consequently, in 1968 the ICRC commenced a new effort to reaffirm and update IHL.⁴⁰⁴ The reaffirmation of the distinction principle possessed particular importance to the ICRC since the community of states had expanded significantly in the post-1949 Geneva Conventions era.⁴⁰⁵ The ICRC wanted to ensure these new states bound themselves to IHL.⁴⁰⁶ However, these new states did not want to pledge their commitment to laws they had no hand in drafting.⁴⁰⁷ Therefore, the ICRC initiated efforts to revise the 1949 Geneva Conventions.

The Additional Protocols of 1977 (APs) were a product of such activities. They were adopted during the Diplomatic Conference on the Reaffirmation and the Development of International Humanitarian Law Applicable in Armed Conflict, held in Geneva from 1974 to

⁴⁰³ Hayashi (2005:112)

⁴⁰⁴ Wilson, Heather. 1988. International Law and the Use of Force by National Liberation Movements, Oxford: Clarendon Press, 162.

⁴⁰⁵ Greenwood, Christopher. 1999. "A Critique of the Additional Protocols to the Geneva Conventions of 1949," in Durham, Helen and Timothy L.H. McCormack(eds.), The Changing Face of Conflict and the Efficacy of International Humanitarian Law, The Hague: Martinus Nijhoff, 6.

⁴⁰⁶ Greenwood (1999:6).

⁴⁰⁷ Bugnion (2003:320).

1977.⁴⁰⁸ More than one hundred countries attended the conference.⁴⁰⁹ It is no small feat that with this many in attendance the APs were adopted by consensus.⁴¹⁰ The APs in essence merged the Law of The Hague and the Law of Geneva and supplemented Geneva Convention protections.⁴¹¹ AP I applies to international conflicts (which includes self-determination movements against colonial and racist regimes) and AP II applies to non-international conflicts of a certain intensity.⁴¹²

The rather unprecedented number of countries present during this convention allowed the presentation of, and debate over, issues that previously received less attention.⁴¹³ One was the impact of asymmetrical warfare between two states on compliance with IHL. Lesser developed countries argued that insufficient technology and fewer resources would prevent them from being able to properly distinguish between permissible and impermissible targets, as well influence the composition of these categories.⁴¹⁴ Further disagreements over the purposes and the means for achieving those purposes produced a treaty, which according to Antonio Cassese,

... is replete with general or ambiguous clauses designed to please both the States hostile to the development of international legislation on the matter and those which desired to create an international instrument of considerable substance.⁴¹⁵

⁴⁰⁸ Meurant (1987:243).

⁴⁰⁹ Gasser, Hans-Peter. 1987. "The U.S. Decision not to Ratify Additional Protocol I to the Geneva Conventions on the Protection of War Victims: An Appeal for Ratification by the United States," *American Journal of International Law*, 81:912, 915.

⁴¹⁰ Kalshoven (1987:71)

⁴¹¹ Meurant (1987:240).

⁴¹² Von Oppeln, Constanze., 2002. "Victim's Protection in International Law: The Normative Basis and a Look into the Practice," *European Journal of Crime, Criminal Law and Criminal Justice*, 10:2-3, 239.

⁴¹³ For example, AP I included an article addressing mercenaries, a recurring issue in post-colonial wars. For further discussion of this issue, see Viljoen, Frans. 2001. "Africa's Contribution to the Development of International Human Rights and Humanitarian Law," *African Human Rights Journal* 1:18

⁴¹⁴ Geiß, Robin. 2006. "Asymmetric Conflict Structures," *International Review of the Red Cross*, 88:864, 761.

⁴¹⁵ Cassese, Antonio. 1981. "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts," *International and Comparative Law Quarterly*, 30:2, 418.

In other words, state interests contributed to the vagueness in the APs. Richard D. Rosen claims,

Not all conference participants were motivated by a selfless desire to protect civilians from the devastation wrought by war. Many delegations, particularly those from so-called third world nations and with assistance from the Soviet bloc, fiercely advocated for the development of targeting restrictions that would negate the military superiority of Western nations, most notably the United States and Israel.⁴¹⁶

George H. Aldrich, chairman of the U.S. delegation to the Diplomatic Convention which produced the 1977 APs, also alludes to this prioritization of state interests at the expense of crafting a more effective civilian protection regime: “In general, I believe it can be said that [the APs] provide as much protection to civilians as was negotiable at the time.”⁴¹⁷ Thus, state interests of both developed and developing countries, rather than humanitarian concern, drove the negotiations on civilian protection. That state interests colored the language and scope of the AP treaties comes as no surprise. As Shirley V. Scott points out,

The entwining of international law with world politics is evident in the realm of treaties insofar as treaties are the product of negotiations between states and states can be expected to approach negotiations... as a political exercise. Each state will bring its own political objectives and strategies to the negotiating table, and as the product of those negotiations, the resultant treaty text is likely to reflect the political compromises that were required to reach agreement.⁴¹⁸

Despite the discord produced by the diversity of perspectives present, the AP convention did manage to produce a treaty that continued the development of the distinction principle. The

⁴¹⁶ Rosen, Richard D. 2009. “Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity.” *Vanderbilt Journal of Transnational Law* 42:3, 687.

⁴¹⁷ Aldrich, George H. 1981 “New Life for the Laws of War,” *American Journal of International Law* 75: 764, 778

⁴¹⁸ Scott, Shirley V. 2004. *International Law in World Politics: An Introduction*. Boulder: Lynne Reiner. 5

extensive protections offered to civilians differentiate the APs from other IHL treaties.⁴¹⁹

Aldrich endorsed this view:

The Protocol is, without any doubt, the most important treaty codifying and developing international humanitarian law applicable in armed conflicts since the 4 Geneva Conventions of 1949, and it is the first such Treaty since 1907 to deal with methods and means of warfare and the protection of the civilian population from the effects of warfare.⁴²⁰

As stated earlier, the primary purpose of the APs was to reaffirm the applicability of the distinction principle in all conflicts⁴²¹ and is encapsulated in Article 48, AP I:

the Parties to the conflict shall 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.⁴²²

Article 50.1, AP I defines a civilian for the first time in codified IHL as “any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol.”⁴²³ This language represents a departure from previous official versions of the distinction principle. In prior versions, impermissible target status was premised on identity-based criteria, such as membership in a particular group or contemporary notions of innocence.⁴²⁴ Additionally, the 1949 Geneva Conventions offered a list of protected persons. The APs, instead, confer protection on a homogenous group (civilians)

⁴¹⁹ Kinsella (2005:173); Wright, R. George. 1991. “Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality,” *Notre Dame Law Journal* 67, 335; Gardam (1991-1992:814)

⁴²⁰ Aldereich, George H., “Why the United States of America Should Ratify Additional Protocol I,” at 130 in Delissen, Astrid J.M. and Gerard J. Tanja (eds.). 1991. Humanitarian Law of Armed Conflict: Challenges Ahead. Martinus Nijhoff Publishers, 130

⁴²¹ Greenwood, Christopher, “Customary Law Status of the 1977 Geneva Protocols” in Delissen, Astrid J.M. and Gerard J. Tanja (eds.). 1991. Humanitarian Law of Armed Conflict: Challenges Ahead. Martinus Nijhoff Publishers, 108

⁴²² Article 48, Additional Protocol I of 1977.

⁴²³ Article 50.1, Additional Protocol I.

⁴²⁴ Alexander (2007: 360).

based on the criterion of inactivity.⁴²⁵ According to Article 51, §3, AP I civilians lose the protections afforded by the civilian immunity norm “unless and for such time as they take a direct part in hostilities.”⁴²⁶ This marks a slight change in language (from “active part in hostilities” in Common Article 3 of the Geneva Conventions).⁴²⁷

AP II, which applies to both state and non-state armed forces in non-interstate armed conflicts, is much less developed than AP I.⁴²⁸ While using the term “civilian,” AP II does not offer a definition of it. For instance, Article 13(2) states that “the civilian population as such, as well as individual civilians, shall not be the object of attack,”⁴²⁹ but does not define who is considered a civilian. Neither is there a definition of combatant. Consequently, AP II fails to clearly lay out the core elements of the dominant distinction dichotomy. It does echo the distinction principle as expressed in AP I; Article 13, AP II mirrors Article 51, §3, AP I by stating civilians lose immunity from attack for “such time as they take a direct part in hostilities.”⁴³⁰ Both APs resemble language in Common Article 3 (1) of the Geneva Conventions. However, the less developed nature of AP II leads Frits Kalshoven to conclude that “provisions on the protection of the civilian population... hang somewhat in the air.”⁴³¹

As articulated by the APs, being a civilian does not in itself entitle one to immunity. That is because once a civilian takes a “direct part in hostilities,” she forfeits the protections of the

⁴²⁵ Alexander (2007:360).

⁴²⁶ Article 51, §3 Additional Protocol I.

⁴²⁷ The International Criminal Tribunal for Rwanda decided that this change in language is insignificant, and considered the words “active” and “direct” to be considered synonymous in this case. See *The Prosecutor v. Jean-Paul Akayesu*, Case N° ICTR-96-4-T, decision of 2 September 1998, § 629. For a discussion arguing that the AP should include both the words “active” and “direct,” see Paust (2010).

⁴²⁸ Gasser, Hans-Peter.1991. “Negotiating the 1977 Additional Protocols: Was it a Waste of Time?” in Delissen, Tanja, (eds.). Humanitarian Law of Armed Conflict: Challenges Ahead. Martinus Nijhoff Publishers, 83; see also Von Oppeln, Constanze. 2002:241)

⁴²⁹ Article 13(2), Additional Protocol II.

⁴³⁰ Article 13.3, Additional Protocol II.

⁴³¹ Kalshoven (1987:143)

civilian immunity norm, and can be subject to direct, intentional and lethal attack.⁴³² However, she retains her civilian status. Only civilians who do not directly participate in hostilities are immune from direct, intentional attack. As such, there are essentially two levels of distinction in the APs: a distinction between civilians and combatants (of which the latter can be targeted at anytime unless rendered *hors de combat*), and between civilians who directly participate in hostilities and civilians who do not directly participate in hostilities. Only those that fall within the latter category are deemed impermissible targets. This parallels the distinction principle contained in the Lieber Code discussed earlier.

Permissible targets are those that further a military objective and confer a definite military advantage. Article 52 (2), AP I address military objective and military advantage:

...military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁴³³

Permissible targets include combatants *and* civilians who directly participate in hostilities.⁴³⁴

Military necessity trumps blanket civilian protection:

The direct participation rule represents a paradigmatic example of this dynamic in that attack is permitted against civilians only in the face of clear military necessity—where those civilians are so harming the enemy.... that withdrawal of their protection from attack is merited.⁴³⁵

Consequently, the meaning of direct participation holds the utmost importance to the current civilian protection regime.

⁴³² Gehring, R.W. 1980. "Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I" *Military Law Review* 90, 51.

⁴³³ Article 52(2), Additional Protocol I

⁴³⁴ Fenrick (2007:334).

⁴³⁵ Schmitt, Michael N. 2010. "Deconstructing Direct Participation in Hostilities: the Constitutive Elements." *NYU J Int'l L. & Pol.* 42, 713.

CONTINUED AMBIGUITY IN THE DISTINCTION PRINCIPLE

As the above overview demonstrates, the civilian immunity norm imposes certain obligations upon belligerents toward civilians within the context of armed conflict. One such obligation is to distinguish between permissible and impermissible targets. Belligerents can only target the former. The APs decree that direct participation dictates the identification of permissible targets among the civilian population.

However, if the purpose of the APs was a clearer enunciation of permissible and impermissible targets, the end product fell far from its mark. As Antonio Cassese noted, the APs are filled with ambiguous terms. The ambiguity that plagued the distinction principle prior to codification continues today because “unless and for such time as they take a direct part in hostilities” is tremendously ambiguous from a legal and operational perspective.⁴³⁶ This is so despite the fact that Article 51 (AP I) instructs belligerents to assume a person is a civilian when in doubt.⁴³⁷ The ambiguity is so significant that the ICRC, tasked with the monitoring and dissemination of IHL, convened a panel of IHL experts in a multi-year investigation into how best to clarify this critical phrase.⁴³⁸ In the workshops’ output, 2009 *Interpretive Guidance on Direct Participation in Hostilities under International Humanitarian Law* (Guidance), the ICRC recognizes this problem:

International humanitarian law has addressed the trend toward increased civilian participation in hostilities by providing a basic rule, found in both Additional Protocols to the Geneva Conventions, pursuant to which civilians benefit from protection against direct attack “unless

⁴³⁶ Queguiner, Jean-François. 2003. “Direct Participation in Hostilities under International Humanitarian Law.” Report Prepared by the International Committee for the Red Cross. [http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_Sept_2003_eng.pdf](http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_Sept_2003_eng.pdf)

⁴³⁷ Article 51 of the 1977 AP I states “In case of doubt whether a person is a civilian, that person shall be considered a civilian.”

⁴³⁸ For more information about these Workshops, please visit <http://www.icrc.org/Web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205>

and for such time as they take a direct part in hostilities.” It is the meaning of this notion-direct participation in hostilities- that the present Interpretive Guidance seeks to explain. In examining the notion of direct participation in hostilities the ICRC not only had to face longstanding dilemmas that had surrounded its practical application... but also had to grapple with more recent trends that further underlined the need for clarity.⁴³⁹

Courts can also be counted in this group. Hilly Moodrick Even-Khen describes the Israeli Supreme Court landmark decision in *The Public Committee against Torture v. The Government of Israel* (regarding the legality of targeted killing in IHL)

...it seems to the Court that according to the international literature, there is no customary agreed-upon definition of the term “direct” in the context under discussion. Hence, it reaches the conclusion that “there is no escaping going case-by-case, while narrowing the area of disagreement.”⁴⁴⁰

As such, scholars and policymakers offer a variety of means for interpreting this vital phrase.⁴⁴¹ To maintain the humanitarian purposes of the distinction principle, some argue that the term should be interpreted to comprise those activities that military personnel would perform.⁴⁴² Others suggest a narrow interpretation so that few actions would be considered direct participation. Others argue that a more liberal interpretation would honor this humanitarian spirit. For example Michael N. Schmitt claims,

While broadly interpreting the activities that subject civilians to attack might seem counterintuitive from a humanitarian perspective, it actually enhances the protection of the civilian population as a whole by encouraging distance from hostile operations.⁴⁴³

⁴³⁹ Kellenberger, Jakob. 2009. International Committee for the Red Cross. Interpretative Guidance on the Notion of Direct Participation in Hostilities. Geneva: ICRC. 5.

⁴⁴⁰ Even-Khen, Hilly Moodrick. 2007. “Case Note: Can We Tell What ‘Direct Participation in Hostilities’ Is?”, *International Law Forum of the Hebrew University of Jerusalem*, 22.

⁴⁴¹ Chapter 4 offers a more detailed discussion of this point

⁴⁴² For example, see Schmitt (2005:FN 93 at 593)

⁴⁴³ Schmitt, Michael N. 2005. “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,” *Chicago Journal of International Law* 5:511, 532.

The distinction becomes more muddled with the increased use of private military contractors.⁴⁴⁴ The ambiguity between what is a permissible and impermissible target is even stronger in the case of non-international armed conflict where IHL is much less developed.

The parameters of direct participation are not the only ambiguous language in the Additional Protocols handicapping the distinction principle. There is also much uncertainty as to what “unless and for such time” means.⁴⁴⁵ The Commentaries to the APs state that loss of immunity is confined to this time period.⁴⁴⁶ However, even if actors agreed upon an interpretation of direct participation, what is the duration of the participation for which civilians would lose their immunity? How this phrase is understood is of pivotal consequence for it is during this time period that a civilian loses immunity and can be deliberately targeted with lethal force. Yet, IHL offers no consensus direction, and the Commentaries to the APs offer little guidance.⁴⁴⁷ They advise that participation is not limited to the actual attack, but also includes the period involving the preparation or return from attack.⁴⁴⁸ However, they offer no further instruction as to what acts fall under the gambit of preparation. For instance, would “unless and for such time” extend to the entire period of membership in a terrorist group, inclusive of rest periods between acts of preparation for an attack, or just the period of actual implementation of the attack?⁴⁴⁹ Many argue that this phrase gives rise to the “revolving door” problem whereby a civilian who directly participates in hostilities through the use of a weapon can reclaim his or her immunity simply by dropping the weapon.⁴⁵⁰

⁴⁴⁴ Schmitt (2005)

⁴⁴⁵ Kalshoven (1987:91).

⁴⁴⁶ Commentaries, AP I.

⁴⁴⁷ EvenKhen (2007:23).

⁴⁴⁸ Commentaries, AP I.

⁴⁴⁹ Fenrick (2007:336-337)

⁴⁵⁰ Queguiner (2003).

The ICRC, recognizing the multitude of problems related to the distinction principle as articulated in the 1977 APs, issued its 2009 Guidance in an attempt to clarify the matter. It notes,

aspects of contemporary warfare have given rise to confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks....

Under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations. Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Derived from Article 3 common to the Geneva Conventions, the notion of taking a direct or active part in hostilities is found in many provisions of IHL. However, despite the serious legal consequences involved, neither the Conventions nor their Additional Protocols provide a definition of direct participation in hostilities.⁴⁵¹

It goes on to summarize its conceptualization of “civilian” in international and non-international armed conflicts:

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.⁴⁵²

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In noninternational armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).⁴⁵³

As for direct participation in hostilities,

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

⁴⁵¹ Melzer, Nils. 2009. “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.” Geneva: ICRC. 12.

⁴⁵² Melzer (2009:15).

⁴⁵³ Melzer (2009:15).

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁴⁵⁴

Furthermore,

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.⁴⁵⁵

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians... and lose protection against direct attack, for as long as they assume their continuous combat function.⁴⁵⁶

Yet, despite this laudable attempt to enhance compliance with IHL, the Guidance did not, and does not, eradicate the ambiguity connected to permissible civilian targets. Workshop participants disagreed on what constitutes a permissible civilian target. This contentious nature of the expert meetings led some scholars to conclude,

To some extent, the process ended in failure. The experts were unable to agree on several key issues though there was a considerable degree of common ground... Nevertheless, the ICRC, encouraged by the amount of agreement there was, decided to publish their own 'Interpretative Guidance' based on the process. As Section 1 states, the Guidance 'is widely informed by the discussions held during these expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts. The ICRC have therefore expressed their own views 'informed by' but not necessarily reflective of the

⁴⁵⁴ Melzer (2009:15).

⁴⁵⁵ Melzer (2009:16).

⁴⁵⁶ Melzer (2009:16).

views of the experts. This is an important factor to bear in mind when considering the Guidance.⁴⁵⁷

CONCLUSION

This chapter sought to examine the distinction principle during the era of IHL codification. It reveals that throughout this process, ambiguity plagued key elements of the distinction principle. At times during this codification process, ambiguity was intentionally created in order to cater to state interests. As the continued high civilian casualty rates that followed each attempt to improve the civilian protection regime suggest, the ambiguity created in codified law ultimately undermined its humanitarian objectives. While interested parties may debate the reasons for this ambiguity, that pivotal elements of the distinction principle, particularly those in the APs, are vague is clear, as noted by some members of government delegations to the Diplomatic Conference that led to the APs,

As the interpretation of these terms may affect matters of life or death, it is indeed regrettable that the ambiguities are left for resolution to the practice of States in future conflicts.⁴⁵⁸

While the APs are the main subject of inquiry for this study, such an allegation can be leveled at the distinction principle in all its many forms throughout its history. Fighters and scholars throughout the centuries have disagreed on who is considered a permissible target. This legacy of ambiguity created, and as evidenced in the following chapter, continues to create, a fog of protection surrounding the civilian immunity norm.

⁴⁵⁷ Garraway, Charles. 2010. "To Kill or Not to Kill?- Dilemmas on the Use of Force." *Journal of Conflict and Security Law* 14:3, 505.

⁴⁵⁸ Parks, W. Hays. 2010. "Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect." *NYU J Int'l L. & Pol.* 42, 782.

CHAPTER 6: IHL EXPERT AND FORMER BELLIGERENT VIEWS ON PERMISSIBLE CIVILIAN TARGETS

*There are few IHL topics as timely or contentious as direct participation in hostilities.*⁴⁵⁹

This chapter demonstrates that different interpretations of the distinction principle are not simply a relic of the past; they continue into current manifestations of the civilian protection regime. It also provides a demonstration of the norm contestation framework as a tool for understanding these variations in distinction methods. It does so in the following manner: first, an examination of the various ways IHL respondents (ICRC delegates and IHL scholars) conceptualize permissible civilian targets is offered. This discussion reveals that IHL respondents do not completely agree on what constitutes a permissible civilian target. Then an exploration of the nature of intersubjectivity on permissible civilian targets among former belligerents follows. This exploration exposes the multitude of distinction methods former belligerents use in their narratives describing intentional civilian deaths. The chapter also discusses belligerent narratives that conform to a norm violation framework.

DOES INTERSUBJECTIVITY EXIST AMONG IHL EXPERTS ON THE DISTINCTION PRINCIPLE AND PERMISSIBLE CIVILIAN TARGETS?

Distinction Principle, DPH, and Permissible Targets

As mentioned in previous chapters, AP I states that civilians are protected from deliberate attack if they do not directly participate in hostilities (DPH). An ICRC delegate, instrumental in the drafting of the 2009 ICRC “Interpretive Guidance on the Notion of Direct Participation in

⁴⁵⁹ Schmitt (2010:700).

Hostilities under International Humanitarian Law”⁴⁶⁰ (Guidance), explained the connection between the distinction principle, permissible civilian targets and DPH in IHL. According to this respondent, the notion of military necessity acts as the backbone to the distinction principle (discussed in Chapter 5). If there is no military necessity to attack a target, then there is no need to deliberately attack that target. Military necessity captures the essence of the distinction between permissible and impermissible targets. If it is militarily necessary to target something, then it is a permissible target. If it is not, then that target is impermissible. In the case of civilians, it might be a military necessity to deliberately target some civilians, but certainly not a military necessity to target all civilians. When would civilians become a permissible target? They become permissible targets when they directly participate in hostilities. Thus, civilians who DPH are permissible targets under IHL, while still retaining their civilian status.

Therefore, DPH serves an incredibly important concept in IHL for it informs belligerents when they can and cannot target civilians. Despite its importance, this respondent acknowledged that IHL did not adequately define DPH prior to the ICRC organized workshops (Workshops) which produced the Guidance: “there was a lack of criteria for the distinction between peaceful civilians and others... there is no definition in treaty law, state practice or jurisprudence...”⁴⁶¹ The ICRC delegate stipulated that there were no gaps in the law; just that the law needed to be clarified. This created the impetus for the Workshops to clarify the matter. As such, these Workshops needed to answer three questions: who is a civilian; what does DPH mean; and what are the modalities of suspension of protection.

⁴⁶⁰ Personal Interview (Pittsburgh, May 2008).

⁴⁶¹ Personal Interview (Pittsburgh, May 2008).

Another respondent detailed the three prong test the Guidance proposed to further explain the operation of DPH.⁴⁶² First, DPH requires the act in question to meet a threshold of harm. Once this threshold of harm has been met, the act needs to directly cause the harm. Consequently creating or distributing propaganda would not qualify as direct participation in hostilities because the connection between the act and the potential harm caused is not direct enough. For this reason, financing, feeding and housing the opponent would also not qualify. Lastly, there needs to be a belligerent nexus. Violence between private citizens would not be considered direct participation in hostilities.

Intersubjectivity on Distinction Principle and DPH

IHL respondents almost unanimously stated that the method for distinguishing between targetable and untargetable civilians hinged on DPH. In other words, civilians who DPH could be permissibly targeted. Therefore, one could conclude that intersubjectivity exists among IHL experts on direct participation as the method of distinction between permissible and impermissible civilian targets.

Based on this consistent identification of the DPH standard and the detailed understanding of its parameters after the Workshops, it might seem that there is little room for ambiguity about the distinction principle among interested parties. However, intersubjectivity deteriorated when respondents were asked what acts constitute DPH. As stated earlier, this phrase is vitally important as it helps to determine when civilian might be targeted and whether a war crime has been committed. Despite the importance of this phrase, IHL experts less consistently articulated its meaning in practice. Take the act of bomb making for example. Some IHL respondents thought bomb making should be considered DPH, while several others

⁴⁶² Personal Interview (Geneva, November 2009).

disagreed.⁴⁶³ Those who disagreed felt that bomb making did not fit the three prong test of DPH as discussed previously. In particular, they felt there is not a direct enough connection between the act of bomb making and the harm caused by the bomb created. Instead, those who disagreed thought that the act of placing the bomb in its detonation site would satisfy the direct link element.

IHL respondents not only disagreed on what acts constitute DPH, they also could not agree on how certain categories of people should be viewed for the permissible/impermissible target distinction. The notion of childhood serves as a prime example. Respondents acknowledged that there is no consensus on what constitutes a child. Not only is there a lack of consensus on what constitutes a child, there is lack of consensus on what presumption to make regarding children. IHL respondents could not agree on whether children should have blanket immunity during armed conflict. That this issue came up during the course of my discussions with them about DPH is interesting because the Guidance asserts that DPH is act based. However, the discussion on children centered on actor based notions of which civilians can or cannot be targeted. Thus, this discussion reveals another level of the lack of intersubjectivity among IHL experts on what is a permissible target during armed conflict.

The lack of consensus is not lost upon these respondents. Several respondents I spoke to readily admitted that the legal, military and humanitarian practitioner communities disagree on the parameters of DPH, particularly as it is articulated in the Guidance. These disagreements manifested in the Workshops as well. The disagreements on which specific acts constitute DPH reflect different opinions on the scope of DPH. One expert pinpointed this issue as one source of contention during the Workshops.⁴⁶⁴ According to this participant, state representatives wanted

⁴⁶³ Personal Interview (Geneva, November 2009).

⁴⁶⁴ Personal Interview (Geneva, November 2009).

to leave the concept of DPH vague; they had an interest in keeping “the definition from being too precise.”⁴⁶⁵ Another IHL respondent corroborated this sentiment: “the military does not think [the guidelines] are wide enough and the NGOs think it’s too wide.”⁴⁶⁶ Another respondent offered more detailed elaboration: the air force representatives lobbied for a wide interpretation of DPH while the army representatives wanted a more restrictive interpretation.⁴⁶⁷

Furthermore, there is still confusion about some of the terms used in the Guidance. For instance, the Guidance states that civilians who DPH are only targetable while they directly participate, whereas civilians who assume a continuous combat role in an organized armed group are targetable any time as long as they have that role in the organization during armed conflict.⁴⁶⁸ In essence, the difference relates to when civilians regain their immunity from deliberate attack. For those civilians who DPH, immunity resumes once they terminate their action. For those civilians who belong to an organized armed group and hold a continuous combat role, their immunity resumes when they terminate their relationship with that organization or they cease to have a continuous combat role within the organization. The language in the Guidance discussing these two related concepts was such that one expert said that “it can be difficult to distinguish between civilians who directly participate in hostilities and those who have a continuous combat role.”⁴⁶⁹ The confusion created may be because the Guidance utilizes two disparate methods of distinction for civilians: an act based one for civilians who directly participate in armed conflict and an actor based one for those civilians who possess a continuous combat role in an organized armed group.

⁴⁶⁵ Personal Interview (Geneva, November 2009).

⁴⁶⁶ Personal Interview (Geneva, November 2009).

⁴⁶⁷ Personal Interview (Geneva, November 2009).

⁴⁶⁸ Personal Interview (Geneva, November 2009).

⁴⁶⁹ Personal Interview (Geneva, November 2009).

What my interviews revealed was that IHL respondents do agree that the concept of “direct participation in hostilities” determines which civilians can be targeted and which civilians cannot. As for what exactly qualifies as DPH, the consensus crumbles. While IHL respondents did agree that some acts constituted DPH (spying), this agreement was not comprehensive. Respondents also disagreed on whether some acts could be considered DPH. They expressed this disagreement not only to me, but during the Workshops organized for the purpose of clarifying this crucial concept in IHL. This disagreement serves as one indicator of the lack of intersubjectivity on permissible civilian targets. IHL respondents also seemed unclear on another level: whether the conceptualization of permissible civilian targets should be act centered or actor centered. While the Guidance argues the basis of determinations of permissible civilian targets should be specific acts, respondents also indicated that actor perception still factors into assessments of permissible targets. This was evident in the discussions about how children should be viewed. As such, not only were respondents lacking consensus on which acts should determine a permissible target, but whether such perceptions should matter as well and if they should, how they should matter.

DOES INTERSUBJECTIVITY EXIST AMONG FORMER BELLIGERENTS ON THE DISTINCTION PRINCIPLE AND PERMISSIBLE CIVILIAN TARGETS?

The previous discussion reveals that intersubjectivity on DPH as the appropriate means for distinguishing between permissible and impermissible civilian targets exists among IHL respondents. It also reveals that intersubjectivity is inconsistent among this group when it comes to what DPH means in practice. This condition exists even after the conclusion of Workshops to

clarify the matter and the creation of the Guidance to assist various armed groups as well as other interested parties. The consequences of this disunity pose less severe hazards if the lack of intersubjectivity were isolated to this particular group of actors. But is it? How do belligerents fare when asked what determines a permissible civilian target? The next section discusses how former belligerents view the obligation to distinguish, and if they accept this duty, whether they consistently identify permissible civilian targets.

Distinction Principle

Much like the IHL respondents, nearly all the former belligerents I interviewed acknowledged the obligation to distinguish between permissible and impermissible civilian targets. Of the twenty former belligerent narratives collected (which discussed the actions of both the respondent and the respondent's opponents), only one respondent described an instance of a rejection of the distinction principle, and this was in reference to the respondent's opponent.

Not only do they acknowledge this obligation, belligerents also claimed to abide by it. For instance, none of the former belligerent respondents spoke of total war; they claimed to make an effort to be selective about which civilians they would target. This finding corroborates a statement made by an ICRC delegate I interviewed: "I never met anyone who said all is fair in war."⁴⁷⁰ Consequently, it appears that intersubjectivity on the obligation to distinguish between permissible and impermissible targets exists among former belligerent respondents.

However, like the IHL respondents, this intersubjectivity weakens when former belligerent respondents were asked what constitutes a permissible civilian target. As will become apparent in the following discussion, these respondents proffered myriad methods of distinction. Many of these methods differ significantly from those offered by IHL respondents.

⁴⁷⁰ Personal Interview (Geneva, November 2009).

Permissible Civilian Targets: Actor-based Distinctions

Age- Children

As the introductory chapter reveals, children are not always deemed innocent, unthreatening and worthy of protection simply because they are children. Former belligerents I interviewed also expressed such a complex view of children. That the conflicts in which these belligerents fought saw the direct participation of children negated the presumption of innocence often attached to children:

...which type of a child because when we say of “this size” they might be around 6, 7, 8, 10...this one is not a problem as such but the person who is, maybe around 12, is dangerous because he can maybe come with a bomb... around that age of 12, if he is approaching, if they see him coming and they are not sure, they are not familiar to this child, they can point a gun. If he is an innocent person he can surrender, he can raise the hands. But if you see the person [at which] you are pointing a gun, [and] he is carrying something dangerous, if maybe he comes closer, it can harm you. You can attack that person or injure so that you can question the person.⁴⁷¹

The excerpt indicates that the concept of child is quite different from that in other societies. Children above the age of 12 lose the presumption of innocence because those in that age group have been used to carry out attacks. As such, these belligerent children over the age of 12 are viewed with heightened suspicion when they approach a military camp.

A Zimbabwean soldier’s narrative supports this sentiment. When asked about how he viewed young people in conflicts where there existed child soldiers, he offered his method of distinction based on the use of child soldiers in that conflict:

Interviewer: I heard in some conflicts in Africa that some of the rebel groups will use children as soldiers...

⁴⁷¹ Interview 09060801 (Dukwi, 2009).

Respondent: Young to the tune of about seven because at seven years old, you will be about that much [raises his hand above the ground to the estimated height of a seven year old]. From seven and above, up to 15, they are turned into soldiers. That is very prominent in those countries you are talking about.

Interviewer: In those countries [in which child soldiers fought], when you are going into the bush or you are going to these villages, if you saw a young person, would you think that person is dangerous?

Respondent: When you are in those countries it's a question of knowing [whether] that person knows something about weapons... is he involved in the conflict that I have come here for? That's all you have to find out. No young boys of about 7 years or 10 years in those countries who know weapons.⁴⁷²

In these narratives, respondents articulate an age based distinction, one that seems calibrated. According to such narratives, belligerents are more likely to consider children appearing older than 10 to be permissible targets because they experienced children in that age group participating in hostilities and thus, posing a threat to them.

However, not all children are viewed with equal suspicion. Narratives imply that children appearing to be younger than 10 are viewed as non-threatening. In respondent narratives, children deemed non-threatening were protected:

Respondent: With children, [fighters] will protect them because they have no way to protect themselves. They are young. If they run, they might run toward the enemies.⁴⁷³

Age-Elders

Village elders were often targeted by the opposing side during attacks on villages because of their importance (in this case, the opposing side is the Movimento Popular de Libertação de Angola or MPLA):

⁴⁷²Interview 09052800(Dukwi, 2009).

⁴⁷³ Interview 09062402 (Dukwi, 2009).

...the senior members or the senior elders in the village. Usually they are [MPLA] targets because they work together to control that village and to have some other important information.⁴⁷⁴

These village elders were targeted because they often collaborated with the União Nacional para Independência Total de Angola (UNITA), providing intelligence and logistical support for UNITA. Thus, by killing them, MPLA was able to eliminate a crucial resource upon which UNITA depended. Hence, rationalizes another UNITA fighter, the reason why the elders might be offered special protection:

...any information communicated to the community comes through the chief. The chief tells the community what is happening, what are the plans of the government. He is even told some secrets which he cannot tell the village. That may be at a certain point of time it can be released, maybe to a few people or some. So he will be keeping some secrets. Now, [the UNITA fighters] will make sure that they save him, so that those secrets are not revealed to their enemies. They protect the information.⁴⁷⁵

While the above excerpt is used to explain why UNITA protected the elderly, the following excerpt explains why UNITA also employed an age based distinction to target elderly people in MPLA villages:

Interviewer: Were [UNITA fighters] ever concerned about spies or informers in the villages?

Respondent: ...those things did not happen with the young ones. It used to happen with grown up people.

Interviewer: The older people would be spies?

Respondent: Yes.

Interviewer: Why were the older people more likely to be spies than the younger people?

Respondent: When they were still there, young ones were not given secretive information or private information about the war or politics which the adults know. So most of the information were with the grown up people.

⁴⁷⁴ Interview 09060801 (Dukwi, 2009).

⁴⁷⁵ Interview 09060400(Dukwi, 2009).

Interviewer: Why would they not give that information to the younger people? Were they not trusted?

Respondent: With the young ones, in that kind of environment, war, they are considered to not have much experience in life. So they are less likely to receive information. They are not clever enough. They can't keep that information to themselves.⁴⁷⁶

These narratives conceive elderly as threatening because their advanced age signals wisdom and importance. This was also the reason why they were protected. This view of the elderly contrasts with those described in previous chapters as needing protection because they are viewed as weak and vulnerable.

Gender

Among the narratives, gendered ideas influence the conception of the distinction principle in different ways. In some narratives, this influence plays out in ways that might challenge gendered notions of permissible targets contained in Western European, Islamic and pre-colonial African normative traditions. For instance, a soldier fighting for the Rhodesian military acknowledged that the soldiers would inquire about the whereabouts of both young men *and* women because women also fought for nonstate armed groups during that country's civil war once Robert Mugabe became President:

Interviewer: When the Rhodesian army came to the village and asks, where are your sons, would they only ask about the sons, or they asked about the daughters as well?

Respondent: [T]hey used to ask both women and men because also women were going for some training.

Interviewer: So there were women fighting on the guerilla side?

Respondent: Yes, they were on the guerilla side.⁴⁷⁷

⁴⁷⁶ Interview 09060400(Dukwi, 2009).

According to one UNITA fighter, a gender-neutral sense of belligerency also prevailed in Angola, at least among UNITA fighters:

Interviewer: Do [UNITA fighters] only examine men for these [marks that fighters had on their bodies]? Would they examine women and children as well?

Respondent: ...UNITA side also, they will look at women and children, the way she walks, the cleverness, the way someone looks. They will tell that, 'Look, this is not just the cleverness of a civilian.' The way this person behaves, she knows something, she is not a civilian. They will tell, they will know.⁴⁷⁸

While a gender-neutral sense of belligerency compelled fighters to inquiry about both absent sons and daughters, as well as scrutinize the behavior of men and women they encountered in villages, gendered perspectives on appropriate attire played a role in decisions to attack women as articulated by the above Rhodesian soldier:

Respondent: ...it was not very easy to identify a woman [fighter] but there was one thing which was common. You see, during our African culture and tradition, during that time, women were not recommended, were not even allowed, to wear some trousers. But those who were from training, you could see them that this one is from training by wearing a trouser, maybe a jean.

Interviewer: So women who were wearing trousers were suspected of being soldiers?

Respondent: They were because most of the common women in the village would not wear a trouser or a short. So this one who is trained now, she knows what a trouser is. You cannot run away with a dress or you cannot fight with a dress. You need a trouser. So it was easy. You find a woman with a trouser or with a jean, automatically you know that this one is different from the others, she is trained and is ready to fight.

Interviewer: So if [Rhodesian soldiers] came across a village and found a woman who was wearing trousers, what would they do?

Respondent: ...when the soldiers come across a woman like that, automatically a fight starts because that woman also won't be alone. She would be having her people. When they move, the way they move, maybe there will be twenty. They will move in small groups of two's or three's, even someone will be alone but someone maybe twenty to fifteen meters away. Others are around. So once they see that woman, they come to her,

⁴⁷⁷Interview 09061101(Dukwi, 2009).

⁴⁷⁸ Interview 09062402 (Dukwi, 2009).

they confront the woman. Those will be watching...a fight, they start fighting. Whenever they meet, they start fighting.⁴⁷⁹

What this exchange reveals is that gender operates in very complex ways during conflict.

Gendered perspectives do not preclude an assumption that women may be fighters, but, via societal understandings of appropriate garb for women, they do serve as an assessment tool to determine belligerency. This gendered notion of appropriateness, that a woman wearing trousers must be a fighter because female civilians would not wear pants, acts as a cognitive shortcut to distinguishing between permissible and impermissible targets. Thus women wearing pants are permissible targets, and women who do not are not impermissible targets.

The interaction of gender and conflict also factors into how UNITA fighters view women who are considered impermissible targets:

Interviewer: Earlier [you] said [UNITA fighters] were limited in who they could protect when fleeing a village under attack. If they had to choose, they would have a preference for women and children and old people. Why would they prefer those groups of people?

Respondent: ...And with women, they are the mothers of the nation. Without women, you will not have soldiers for tomorrow. So they will protect them for that.⁴⁸⁰

Women's protection stems from a strategic reading of their gendered role in a society experiencing armed conflict: women are protected because of their roles as mothers capable of sustaining the rebel force by giving birth to future generations of fighters.

What these narratives demonstrate is that gender colors the way the distinction principle is discussed. Respondents articulate a form of the distinction principle, a gendered form, in these narratives: women are permissible targets because of their image as a maternal figure. However,

⁴⁷⁹ Interview 09061101 (Dukwi, 2009).

⁴⁸⁰ Interview 09062402 (Dukwi, 2009).

their use of gender inappropriate garments serves as a mark of their alleged belligerency, thus transforming them from impermissible to permissible targets.

Physical characteristics

Physical characteristics also serve as a mode of distinction among respondents. Respondents observed that fighters tended to have certain marks on their body resulting from carrying their backpacks and wearing combat boots for lengthy periods of time. Opponents would search suspected fighters for these declared signs of belligerency, killing those who possessed these marks. Those that did not have these marks were presumed not to be rebels. However, the correlation between these marks and belligerency was not always perfect so that various cases of misidentification occurred,

...there were special marks when you are closer to a guerilla. It's through carrying that gun and axe. There are marks here [pointing to his back]. Also, they use to wear those boots, high boots, so there were also marks here [pointing to his shin] because you can wear that boot, maybe for six months without changing it. So it leaves marks. So they use to identify [rebels] through those marks. So [the Zimbabwean military] killed a lot of people. Then they go there, they look for those marks, they don't see them. So you see, that person they killed him just because they suspected him...⁴⁸¹

Zimbabwean fighters were not the only ones who used physical marks to identify fighters. UNITA and the South West Africa People's Organization (SWAPO) fighters also used this method of distinction.

Permissible Civilian Target: Act-based Distinctions

Opponent Support via Refusal to Assist

Former belligerent narratives expressed the attribution of support for the opposition to various acts. One act was the refusal to join the armed forces. For example, a former UNITA

⁴⁸¹ Interview 09061101 (Dukwi, 2009).

fighter explained that young civilians (approximately 15-40 years of age), particularly males, would be killed if they refused to join UNITA. The reason given was that if these civilians did not want to join, it was because they were supporting UNITA's opponents,

Those who accept to go [to become a UNITA fighter]..., they carry them, they go with them. Those who refuse, [UNITA soldiers] kill them. [UNITA fighters] say, 'why they are refusing, there is something which they know. Why they are remaining?'⁴⁸²

This method of distinction was not confined to Angola; it was operational in Zimbabwe as well. In the following excerpt, a former fighter for a nonstate armed group in Zimbabwe explains why government officials who would not support the guerrilla movement were targeted:

Interviewer: Who can be legitimately targeted?

Respondent: I was trained as a guerilla. In a liberation movement, you are there to liberate your country. So then I would target those in power. Also, the forces of the colonials. Policeman, soldier, administrators. Guerrillas will warn that people must stop doing these jobs. So if you continue to do those jobs, it's like you are supporting the government. So then you can't complain.

Interviewer: Why?

Respondent: Because we warned you ahead of time. If you can't support us, you are the enemy and can be killed.⁴⁸³

Thus, the narratives justify civilian killing on the refusal to support the cause. The refusal to support one's own group is viewed as implicit support for the opposition. Essentially, this method of distinction assumes no neutral parties in armed conflict: all civilians support at least one group in some way. The act of refusal serves as way of legitimizing the killing of those civilians who support the opposition. Those who provide their support are spared.

⁴⁸² Interview 09060202 (Dukwi, 2009).

⁴⁸³ Interview 09062901 (Dukwi, 2009).

Opponent Support via not Obeying Evacuation Orders

Support for the opposition could also be manifested by refusing to heed evacuation orders. A UNITA fighter recounts how UNITA would ask civilians to leave an area that it planned to attack; only those who stayed behind were killed because they were assumed to be a MPLA supporters:

Respondent: ...[UNITA fighters] will give [villagers residing near MPLA bases] instructions, telling the people on our side to stay up during the night at this time because we will be attacking in that camp. We are going to kill everyone. If you want to survive, run from that place. Escape from that place. Go to our side. We are telling you this so you don't associate with these people, even if they captured you this way. You should make some plans to leave there because they are not our people. If those people, they don't leave, then they will still be there. What UNITA will do is, they will get in and attack. Not to destroy their people, but to kill the others and to avoid their people from being around their enemies.

Interviewer: So they chose to attack the people that stayed behind. Why did they attack those people?

Respondent: It's like they want to follow those [MPLA]. They don't want to run or come back like their colleagues.⁴⁸⁴

Much like the civilians who refused to offer support, the act of remaining around the base after being forewarned of an upcoming attack, served to legitimize these civilian deaths. According to the narrative, only the civilian who remained were targeted; those who fled were not.

Threatening Behavior

Threatening behavior distinguished permissible civilian targets from impermissible civilian targets. What respondents considered threatening behavior varied. However, by far the most commonly offered example of threatening behavior was collecting intelligence.

Respondents who fought for both state and nonstate armed groups claimed the act of spying, or

⁴⁸⁴ Interview 09062402 (Dukwi, 2009).

even the suspicion of spying, could get a civilian killed. A soldier for the Zimbabwean government explained,

Yes, and then for the civilian people, is like usually, they are so unlucky that so many things happen in war like information spying and so on, crossfire and things like that. You find that some die because they are suspected that they are passing on information. Some might actually be caught in the cross fire; they might not be able to run away. But mostly is about crossfire and being suspected of, you know, passing on information from one group to the other. It was very common for us in DRC [Democratic Republic of Congo]. Yes, you would find that once we suspected or we got information that some civilian people were going to the rebel guys, we will take them for investigation and sometimes... you know how it ends up...⁴⁸⁵

Another narrative from a Zimbabwean soldier reiterates this point:

...during the military training you are told, you see that lady there, that one there, that lady is going for something. You can even read from her walking that she is very reluctant, and she is not worked about time. So I can sit down and look at her and say that one, no. But if it is a person that is sent to come and get news about us to go and report to the rebels, you will see with his walking: he looks around and he is very attentive. He wants to see nearly everything. Then you know that one, that one has been sent by the rebels. Ok, let me watch him. He goes there, he reaches there, he comes back again. Within two minutes he comes back... yes, yes, yes, come. You give him one good “mama” [a beating], and he will tell you I have been sent by the rebels.⁴⁸⁶

This interpretation of the distinction method was not limited to Zimbabwean soldiers fighting for the government. A fighter fighting for a Zimbabwean nonstate armed group offered a similar explanation:

Respondent: It was really more or less a war of blacks against settlers. So it was assumed that, well, we were operating among them, it was assumed that the blacks were our supporters. But we had cases where the civilians were killed. The guiding principle was, each person has the right of his opinion, but at the end of the day, you find that some guerillas, sometimes, would kill someone suspected of being, collaborating with the enemy. The rationale being that if we don't, we are going to be killed.

Interviewer: What kinds of activities would be considered collaboration with the enemy?

⁴⁸⁵ Interview 09052500 (Dukwi, 2009).

⁴⁸⁶ Interview 09052800 (Dukwi, 2009).

Respondent: The army would go around to the villages and ask for the presence of the guerillas. Some people were paid by the government to give this information.

Respondent: People are called spies, sell outs. Sell out is a very common name, a very common word. Once they call you a sell out, you are in trouble. Once you are labeled a sell out, then the guerrilla will say we can't take chances. Because if the enemy gets information, they will just come and kill us. We are dead. They will say that we would rather kill those we suspect.⁴⁸⁷

As demonstrated by these narratives, respondents claimed civilians were targeted based on certain acts they engaged in which raised the suspicion of spying. These narratives indicate belligerents used these acts to designate which civilians would be subjected to lethal action. If belligerents determined that a civilian's actions did not signal intelligence gathering, they were left alone. However, actions that implied spying legitimated a civilian's maltreatment.

Intersubjectivity on Distinction Methods among Former Belligerents?

The previous discussion illustrates that former belligerent respondents did articulate the use of the distinction principle in the narratives explaining deliberate civilian deaths. The narratives show that certain civilians were targeted while others were left alone. However, selection criteria for targeting fluctuated. Some respondents discussed actor-based distinctions, while others discussed act-based distinctions. Sometimes the methods of distinction were shared, and sometimes they were not. For instance, fighters who encountered child soldiers felt it was permissible to target children. However, it was not appropriate to target all children; only those who conformed to an image of child soldiers, even if there was not actual evidence of their belligerency. Belligerents who did not encounter child soldiers did not articulate instances in which it would be permissible to target children (as they defined children).

⁴⁸⁷ Interview 09062901 (Dukwi, 2009).

The same could be said of women. Respondents used certain indicators to inform them which women would be permissible targets (those who might be fighters). They claimed to not have killed women who did not fit this image. Those who did not experience combat with women tended to offer a categorical immunity to females.

Additionally, many respondents counted acts of espionage as well as suspicion of espionage as reasons for the targeting of civilians. By engaging in spying or appearing to spy, a civilian transformed from an impermissible to a permissible target. This method of distinction was used by respondents with different types of conflict experience.

Nature of Intersubjectivity on Permissible Targets

Thus, it appears that intersubjectivity on permissible targets among former belligerents is mixed, just as is the case among IHL respondents. It exists on some measures but not on others. There is also a mixed assessment on intersubjectivity between IHL respondents and former belligerents. These two groups agree on some things that would make a civilian a permissible target. This includes spying, as well as the following articulation of the distinction principle by a former soldier in the South African military:

Interviewer: When a rebel soldier puts on civilian clothing, how do you know who is a soldier and who is a just civilian?

Respondent: You will never detect unless when he starts shooting.

Interviewer: Can you shoot when there are people shooting at you?

Respondent: Yeah when they are shooting at us.⁴⁸⁸

However, spying was one of the very few acts upon which the groups agreed legitimated deliberate civilian targeting. Former belligerent respondents offered several other methods of

⁴⁸⁸Interview 09052702 (Dukwi 2009).

distinction that IHL respondents did not. Furthermore, narratives offered by both groups do not agree on the exact parameters of spying that allow permissible civilian targeting (IHL respondents: current engagement in the act of spying; former belligerents: suspicion of spying or past acts of spying). In essence, there is a disagreement on the temporal nature of the acts that make a civilian a permissible target. This disagreement may be related to the additional observation that none of the former belligerent respondents couched their method of distinction in the language of DPH, as IHL respondents consistently did.

CONTESTATION IN FORMER BELLIGERENT NARRATIVES

The next issue to explore is how former belligerents justified the use of their distinction method. If former belligerent respondents justified the use of their particular method in the language of utilitarian concerns, then a norm violation framework holds (as well as a norm diffusion framework if these narratives also claim ignorance of the ICRC's interpretation). The above discussion of the different methods of distinction appearing in former belligerent respondents provides some evidence to support this claim.

However some of these former belligerent respondents also presented narratives that did not conform to a utilitarian based argument. That is, former belligerent respondents described the use of different methods of distinction that contravened their group's interests. Such narratives would be consistent with a norm contestation framework. A contestation framework argues that actors abide by their version of the norm even when doing so goes against strategic interests. This differs from a norm violation framework which posits actors claim a different

understanding of a norm because they want to violate it (to further some objective) without appearing to do so (through the use of accounts to justify the norm violation).

Since the narratives provided by ICRC delegates lack intersubjectivity, there is the issue of which distinction method should be used to determine divergence between ICRC and former belligerent methods of distinction. Since this is the case, I looked to the Guidance for answers as this document is supposed to guide belligerents on how to make these determinations. I then selected methods of distinction contained in former belligerent narratives that differed from what the Guidance advises.

Of the 21 distinction methods for which I could apply a normative code, just more than half (52%) conformed to a norm contestation framework.⁴⁸⁹ That is, former belligerents discussed killing or protecting civilians, in compliance with their articulated distinction method, in a manner which did not further some interest which they articulated, and which differed from the Guidance. The following discussion cites examples of such articulations. This includes compliant behavior which might actually pose a risk to the respondent.

Distinction Based on Support

One distinction method used by belligerents which differed from the method used by the Guidance is one based on support for the opposition. This distinction method contravenes the method advocated by the Guidance because the link between the civilian's act and the resulting harm is not direct enough. An example involves the killing of young people from villages supporting the opposition. Upon first glance, killing these civilians is a strategic move because it

⁴⁸⁹ See Appendix V. It was not possible to discern which normative frameworks applied to every belligerent narrative that claimed adherence to the distinction principle. This was mainly because it was difficult to determine the costs and benefits for some belligerents to comply with a particular interpretation of the distinction method in the narrative. For these unclear narratives, no code was applied.

eliminates this support. In civil wars like those fought in Angola, every advantage counts, and taking away any advantage an opponent has is a realistic goal,

[MPLA] thought was that in those villages where civilians stayed is where the soldiers, the young ones who will grow up to become soldiers. They will come from those villages. So it was better to destroy them so that Savimbi, the leader of UNITA, will not have enough human resource.⁴⁹⁰

However, upon closer inspection, one could argue that killing these civilians is not the most strategic move. As this former UNITA soldier goes on to explain, UNITA could forcibly recruit villagers to help it wage war:

Interviewer: Did [UNITA fighters] force those young people to be soldiers on their side?

Respondent: There were situations like that whereby the young ones are forced, even older men, they are forced to join⁴⁹¹

Support for the position that there are benefits to not killing MPLA supporters is offered through the narrative of another UNITA fighter:

But what [UNITA fighters] used to do is to take young men and instead of killing them, they would make them join the military.⁴⁹²

These young men could be used to fill in the ranks, and also fight on the front lines in order to preserve the more valued fighters. A Namibian soldier offers a similar narrative:

Interviewer: Would South African fighters get any benefit if they didn't kill these civilians who were supporting SWAPO?

Respondent: ...they can use the civilians on both sides: South African can use the civilians which they get from the SWAPO side to provide them with information and they will not even bother to, to...at other times to kill them... they will get them, train them and maybe put them aside for other things. Maybe if this person is trained or is kept maybe for a year, sometimes they can use them. Both sides, even SWAPO, even

⁴⁹⁰ Interview 09060202 (Dukwi, 2009).

⁴⁹¹ Interview 09060202 (Dukwi, 2009).

⁴⁹² Interview 09062402 (Dukwi, 2009).

South Africans, they will use them to be the people to provide them some information, some directions where to get to the camps of their enemies on both sides.⁴⁹³

Belligerent narratives employ this distinction method even though doing so might undermine utilitarian considerations. For instance, narratives from respondents who fought on behalf of nonstate armed groups, which were typically under-resourced in human resources, describe the forcible recruitment of civilians to serve as frontline fighters. Rather than place the limited number of loyal and trained fighters in lead positions of an offensive strike where casualty rates were higher, respondents said civilians supporting the opposition would be forced to take those positions. Thus civilians could be used to further tactical objectives and spare the lives of the more valued fighters.

Civilians could also be kept alive to act as porters, wives, and cooks. Furthermore, these respondents acknowledged that keeping civilians alive (even those supporting the enemy) could promote good will toward a group by demonstrating its kindness, mercy and power:

See, there are situations whereby something can happen, you will try to find a way that maybe you don't just fight anyhow. You try to make sure that this person who is trying to attack you, or to take you to be very bad, will see you to be a good person. That is what you want, to liberate, not just to kill. These people will leave your side, go, maybe to that MPLA side, and tell them that those people are just okay. I was with them like "this, this," and they didn't fight me.⁴⁹⁴

Such acts of kindness and mercy would increase the chances of converting these civilians to their supporters, providing them with much needed resources such as food, lodging and protection.

⁴⁹³ Interview 09060803(Dukwi, 2009).

⁴⁹⁴ Interview 09060202(Dukwi, 2009).

Distinction Based on Age

Another way in which contestation manifests in the former belligerent narratives is through the extension of immunity to civilians who might pose a threat to these respondents. Some of the belligerents would not target children even though children served as fighters and spies, and in these capacities, undermine the respondent's physical security. One narrative described earlier indicates that a child younger than a certain age (typically 10) is categorically considered an impermissible target. This is so even when such a child carries a weapon, as suggested by another Zimbabwean soldier's narrative:

Interviewer: ...are there certain types of people that soldiers would say, no I can't shoot that person? For instance, if you see a child carrying a gun, would some people say, no I can't shoot that person because this is a child even though they are carrying a gun?

Respondent: Yes there are. Like small children. You try by all means to capture that child because you will never know, maybe the enemy is hiding behind. Or maybe he just only picked the gun from the home, he doesn't know how to use that gun.⁴⁹⁵

A Rhodesian soldier's narrative suggests that opponents exploited this assumption of innocence to their advantage:

Respondent: [Opponents] send young boys like that one (points to a very young boy nearby), you see this one and above this one. These are the boys they send to go and check how many [Rhodesian soldiers] are and how they are positioned.

Interviewer: Why would they send the young boys?

Respondent: War is all about information. That's the point number one. War is about information. You have to know the opponent of your friend, his strength, his maneuvers and his position.

Interviewer: Why would they send the young boys rather than grown ones?

Respondent: Young boys are less suspected.⁴⁹⁶

⁴⁹⁵ Interview 09052702 (Dukwi, 2009).

⁴⁹⁶ Interview 09052800 (Dukwi, 2009).

Consequently, complying with this distinction between categories of children might not always work in the belligerent's favor as the children they assume to be non-threatening, and thus impermissible civilian targets, might well pose as much of a threat as those children considered as threatening. Furthermore, such a nuanced distinction method must be difficult to implement. The physical difference between a ten year old and a seven year is difficult to discern, especially when the children are malnourished as may be the case in the conflicts in which these belligerents fought.

The Guidance does not obligate belligerents to distinguish between categories of child civilians. Instead it declares that DPH controls this analysis. As such, the Guidance states

The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.⁴⁹⁷

In other words, the determination of permissible and impermissible targets is based on “specific hostile acts,” rather than a person's identity. This direct participation in hostilities suspends civilian immunity from deliberate attack “exactly as long as the corresponding civilian engagement in direct participation in hostilities.”⁴⁹⁸ Therefore, children, regardless of their age, lose protection for the duration of their direct participation and regain it once they cease this participation. They are also protected against categorical targeting; they cannot be targeted if they do not DPH, even if children of the same age serve as child soldiers.

⁴⁹⁷ International Committee for the Red Cross. 2009. Interpretative Guidance on the Notion of Direct Participation in Hostilities. Geneva: ICRC. 45.

⁴⁹⁸ International Committee for the Red Cross. 2009. Interpretative Guidance on the Notion of Direct Participation in Hostilities. Geneva: ICRC. 70.

Distinction Based on Gender

Respondents provided a similar type of narrative when discussing female belligerents. These narratives describe the suspension of suspicion for women even though they fought female fighters. For instance, some allege that belligerents scrutinize young men for signs of distress assumed to result from fear that their belligerent status will be revealed. Belligerents hone in on young men because young men typically fought for the opposing side. So the selection criteria for careful scrutiny are based on the belligerent's previous combat experience. If the respondent did not experience female fighters, it was hard to image the possibility of their existence as indicated by this excerpt from an interview with a Rhodesian soldier:

Interviewer: Do [the opponents] use women also as soldiers?

Respondent: Ahh... in the Great Lake region I didn't see that. In Zimbabwe, soon after independence, women were involved as soldiers but they were not going in the war front. They were working.

Interviewer: What about on the rebel side?

Respondent: Uhh, there was no woman... soldier's life (laughs).⁴⁹⁹

Even when belligerents have fought against female fighters, women were not always scrutinized as intently as their male counterparts. The narrative of a Namibian soldier, who fought for the South African Defense Force (SADF), exemplifies this point,

Respondent: ...yes it can be that [SADF soldiers] can observe much on men but even with women and children they can observe because the enemies can use the women to attack them. So they will carefully look at them, but usually with women they were not a threat. But when they come, if [SADF soldiers] observe that there is no danger in those people, even with men, what they will do, they will provide them with food.

Interviewer: Even though the enemy has used women in the past to attack them... they are not as afraid of the women as they are the men. Why is that?

⁴⁹⁹ Interview 09052800 (Dukwi, 2009).

Respondent: ...a woman is someone who is kind, who is having mercy compared to a man.⁵⁰⁰

This narrative suggests that gendered notions enable the respondent arguably to relax security measures when encountering females while taking more precautions when it comes to males.

These gendered notions also likely played a part in who belligerents killed as indicated in the following explanation of UNITA actions by a UNITA fighter,

Interviewer: Among the villagers, who was most likely to be tortured or killed?

Respondent: Usually when they are fighting, when they attack, one cannot tell easily who the enemy is to target. But young men who are likely to join the army will be targeted.

Interviewer: So young men, men that look like they might join the army, are the ones who would be attacked?

Respondent: Yes.

Interviewer: What is the purpose of attacking these men?

Respondent: See, UNITA needs power. To get power is to win. How to win is to attack those who are in a position to join the enemy's forces. So they are trying to take away this support.

Interviewer: So they attack young, strong looking men as a way of weakening the opponents?

Respondent: Yes.

Interviewer: So is it the case that these men always join the opponent's forces, or are some just unwilling to fight?

Respondent: Usually with the young ones, energetic men, what they would do is, if they are attacking a village, if they have a chance to run away, they will run away and go to other countries. But if there's nowhere to run, then they are forced to surrender and hand themselves over to the opponents. They will get these men. The men have no option, they will do as their opponents wish them to do.⁵⁰¹

⁵⁰⁰ Interview 09060803(Dukwi, 2009).

⁵⁰¹ Interview 09062400 (Dukwi, 2009).

As stated previously, the Guidance directs belligerents to use act based criteria to determine permissible targets, not actor based criteria like gender. The Guidance would not include potential future soldiering as a direct enough act to be considered DPH:

For a specific act to qualify as ‘direct’ rather than ‘indirect’ participation in hostilities there must be a sufficiently close causal relation between the act and the resulting harm... direct causation should be understood as meaning that the harm in question must be brought about in one causal step. Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities.⁵⁰²

However, these narratives utilize gender based distinctions in ways that contravene the Guidance as well as the interests of armed groups. Thus, as is the case in the previous examples, the justifications used in these narratives go against the stipulations of the Guidance as well as the group’s interest.

DELIBERATE CIVILIAN TARGETING NOT EXPLAINED BY NORM CONTESTATION

While the discussion so far suggests the presence of norm contestation in narratives that describe civilian deaths, it does not aim to suggest that this is the exclusive rationale appearing in narratives that recount civilian deaths. The norm violation framework also plays a part in the narratives I collected; in fact, 48% of codable narratives conformed to a norm violation framework. Belligerents described the killing of civilians in furtherance of some interest. This is the case even among former belligerent respondents who offered narratives of compliance with their particular version of the distinction principle.

⁵⁰² International Committee for the Red Cross. 2009. Interpretative Guidance on the Notion of Direct Participation in Hostilities. Geneva: ICRC. 52-53.

While IHL respondents did acknowledge that belligerents may employ different interpretations of permissible targets, they argued such use is strategic and intentional. Any claimed confusion on the part of belligerent serves a mask for the pursuit of interests. In other words, these claims conform to Shannon's description of accounts used to justify or excuse a deliberate norm violation.

Instead of considering whether the lack of consensus among IHL respondents on permissible civilian targets might be mirrored among belligerents, and that such potential disagreements might impact their targeting decisions as the previous discussion revealed, IHL respondents offered other explanations for civilian targeting. Respondents acknowledged that it occurs intentionally and unintentionally. Sometimes civilian killing occurs unintentionally because belligerents lack intelligence or sophisticated weapons that have precision targeting capacities. Without good intelligence, belligerents may mistake an impermissible civilian target for a permissible civilian target. Without precision guided weapons, there may also be instances of collateral damage in which civilians die despite the fact they were not the primary targets. And to expect some of the actors currently involved in armed conflict to acquire these types of technologically advanced weapons is "unrealistic."⁵⁰³

Another reason civilians may be killed is because belligerents in non-international conflicts are not obligated to wear uniforms.⁵⁰⁴ In such circumstances, belligerents commit perfidy by wearing civilian clothes and hiding among civilians. Under these conditions, identifying the belligerents is a difficult task. Civilians inevitably get killed because they are more likely to be mistaken for belligerents.

⁵⁰³ Personal Interview (Geneva, November 2009).

⁵⁰⁴ Personal Interview (Geneva, November 2009).

In addition to explaining unintentional civilian deaths, IHL respondents suggested a host of reasons for the deliberate targeting of civilians during armed conflict. One reason was linked to the psychological impact of fighting.⁵⁰⁵ In a sense, belligerents become desensitized to killing so that the act loses its moral and psychological weight. Under these conditions, belligerents turn numb and kill without much thought to what they are doing.

IHL respondents also presented some of the utilitarian motivations that influenced deliberate civilian targeting. One such motivation was to clear territory belligerents wanted to seize. Taking property with hostile residents is a difficult task under the best of circumstances. Killing some civilians instills fear among these populations; they do not want to live under the control of belligerents who are willing to kill people who are not involved in the conflict. These civilians would rather flee their homes than live under such conditions. Belligerents, one IHL respondent stated, employed these strategies during the Rwandan genocide as well as the Yugoslav conflict as ‘an integral part of winning the war or waging war... the goal was to get people out.’⁵⁰⁶

Deliberate civilian killing is also a way to demoralize the opposition and the communities that support them. Belligerents feel demoralized because they cannot protect their support base.⁵⁰⁷ Civilians, because of this incapacity, may then throw their support to the other side. As such, this strategy weakens the morale of the fighting forces of the opposition and helps to eliminate crucial support they need from the populace (with the added bonus that this populace may even turn against those they initially supported).

⁵⁰⁵ Personal Interview (Geneva, November 2009).

⁵⁰⁶ Personal Interview (Geneva, November 2009).

⁵⁰⁷ Personal Interview (Geneva, November 2009).

Another reason for deliberate civilian targeting is that civilian protections are based on a double standard.⁵⁰⁸ Belligerents expect their opponents to refrain from attacking their civilian supporters. However, if the situation arises, these belligerents will not restrain themselves from attacking the civilian supporters of their opponents.

Impunity may play a role in deliberate civilian targeting. According to one IHL respondent, “there is a prevailing sense of immunity; that nothing will happen.”⁵⁰⁹ This is because the obligation to distinguish is difficult to enforce. Because few are convicted for intentional targeting of civilians, belligerents violate the law when it is in their interests to do so.

Several former belligerent narratives, for which there is recognition of the distinction principle, support the norm violation framework running through some of the IHL expert responses. Some narratives suggest that civilians were used strategically to exhaust an opponent’s ammunition:

Interviewer: So would [the rebels] have any rules about who they can shoot and who they cannot shoot?

Respondent: No, no they didn’t have that because even the other thing they would do sometimes is, they would attack civilian people because they realized that they were not very good. They were not that competent to us and with us. So one of the other strategies that they were employing is taking civilians and putting them in front. But I think they will tell them that a bullet can’t pass and enter you and so on. Because one thing you have to understand is that the DRC is underdeveloped. The place is still, civilization is still a question, is something to question in Democratic Republic of Congo, especially out of the cities. So there still have a lot of traditional beliefs and so on. So they would put them in front, they make a lot of noise and so on. So now at first, if you didn’t know this is the civilian population, you would shoot at them and then you finish all ammunition. By the time you finish ammunitions and so on, they come and they get a hold of you. So that is the other way a lot of civilians were being killed. A lot of people were being killed there; the rebels would take them and put them in front with drums, clapping hands, ululating. So it was a strategy for them.

Interviewer: The rebels were using civilians?

⁵⁰⁸ Personal Interview (Geneva, November 2009).

⁵⁰⁹ Personal Interview (Geneva, November 2009).

Respondent: They were using them. At the end of the day we had no option but....⁵¹⁰

In the same vein, another Zimbabwean soldier, who acknowledged the obligation to distinguish and who fought in the DRC, justifies the killing of civilians based on prioritizing the soldier's life over the civilians:

... the object in the army when you are at a war, they say defer, and fight to kill, but don't incur casualties on your side. Avoid incurring casualties. So to avoid incurring casualties, we could not just penetrate within the community with rebels. You never know who is who. A weapon can be driven from the house, through the window and kill you. So we harm everything. When those civilians who are innocent get pain, they will say ahh... ahh...ahh... is not good for us, let's get away from these rebels. Then we know the situation is separating itself. But the general view is not that we are mean. Soldiers are meant to kill civilians. You know is very unfortunate that some of these wars that are fought, like in DRC because those are very stupid wars.⁵¹¹

Some IHL respondents also said that belligerents target civilians in order for something to happen, namely greater media attention.⁵¹² Belligerents strive to advance their goals through this increased media attention. Legitimacy, pressure on the opposition, aid and other resources are just a few of the objectives amplified media attention can achieve. A former belligerent respondent, who fought for a nonstate armed group, gave a narrative that demonstrates this rationale:

Respondent: Unfortunately in a guerrilla situation, especially in Africa [inaudible], if you are not well known or well connected, no one is going to write about you. There is no publicity about that, you see. So they will kill you.

Interviewer: Why does it matter if there's publicity?

Respondent: Image. The guerillas are so worried about their image. The international community. That was important because they got their support from the international community.⁵¹³

⁵¹⁰ Interview 09052500 (Dukwi 2009).

⁵¹¹ Interview 09052800 (Dukwi, 2009).

⁵¹² Personal Interview (Geneva, November 2009).

⁵¹³ Interview 09062901 (Dukwi, 2009).

Protected civilians are intentionally killed because commanders order their belligerents to do so:

... more especially the leaders in the military, they know about international law. Usually they will teach the juniors. Now what the juniors do to those on the lower ranks, what they do, it is, they are trying to do what they want. Sometimes if they will do what they are commanded. If they do, maybe take people's animals or chicken for other people, it is the instruction from the above. It will be deliberate only, but otherwise someone who is trained in a military, more especially on the government side, knows the law. Now if this person will be doing something in contrary to the law... you see in military if you are commanded to fire, to fight that's what you have to do. If you are told to stop, you have to stop, you follow instructions. So in most cases you will find that some other things, some other crimes some soldiers will commit, they will be under instruction of their bosses.⁵¹⁴

Ultimately in these excerpts, the reason for the deliberate targeting of civilians is a lack of respect for IHL norms.⁵¹⁵ IHL respondents apply this conclusion to both state and non-state actors. However, as claimed by an IHL respondent, it is actually worse when states lack respect for these norms because it makes it difficult for norm proponents to credibly urge compliance when even states do not comply.⁵¹⁶

CONCLUSION

This chapter reveals that IHL experts and belligerents do not always share an understanding of who is a permissible civilian target during armed conflict. IHL experts continue to debate who falls into this category and how to make those determinations. This disparity also characterizes the narratives of former belligerents. What their narratives indicate is that belligerents justify the deliberate targeting of civilians via compliance with a particular method of distinction, a method

⁵¹⁴ Interview 09060202 (Dukwi, 2009).

⁵¹⁵ Personal Interview (Geneva, November 2009).

⁵¹⁶ Personal Interview (Geneva, November 2009).

of distinction that differs from the Guidance. These narratives also suggest that these distinction methods do not always advance the interests of their armed group. In fact, sometimes compliance undermines those interests, consistent with a norm contestation framework. Finally, the use of differing methods of distinction distorts the attempted balance between belligerent and civilian interests housed in the principle. For instance, some narratives reflect a more expansive view of the distinction principle, as articulated by the Guidance, while at times they reflect a more restrictive version of the principle. The broader version increases the range of situations that could harm civilians (civilians who should be immune are killed); the restrictive version increases the range of situations that could harm belligerents (civilians who could be permissively targeted are not). The next chapter explores some possible reasons why norm contestation occurs as well as its implications.

CHAPTER 7: CONCLUSION

*An important aspect of engagement with legal pluralism is to understand the fault lines between different legal orders in order to avoid any overlap likely to be marred by ambiguity and contestation.*⁵¹⁷

This dissertation sought to determine the validity of a common assumption in many theories of deliberate civilian targeting during armed conflict. This assumption is that key actors in the civilian protection regime share an understanding of permissible civilian targets. Based on this assumption, the literature then offers strong explanations for these violations of IHL and the civilian immunity norm. This study found that such an assumption is not empirically warranted. It found that IHL experts and belligerents currently hold different understandings of who can and cannot be targeted in armed conflict, and thus interpret the distinction principle differently. In other words, respondents disagreed on the constituent elements of the distinction principle. It also found differences present in the histories of various normative traditions and the IHL codification process. However, one commonality within this chronicle of the distinction principle and this study's data is an endorsement of belligerents' obligation to distinguish. These observations are captured in the remarks of a participant in the ICRC workshops to clarify the distinction principle:

Scholars and practitioners universally accept the normative premise that although civilians generally enjoy protection from attack under international humanitarian law (IHL), they lose such protection while directly participating in the hostilities. However, no authoritative guidance has existed on the question of which activities qualify as direct participation (or on how they so qualify)...., or on the related issues of who qualifies as a civilian and how long the loss of protection lasts. Therefore, analysis has tended to be case-by-case and based upon vague and somewhat instinctual criteria; it verged on a "know it when you see it" approach.⁵¹⁸

⁵¹⁷ Dinnen, Sinclair. 2010. "From Ideals to Reality in International Rule of Law Work- the Case of Papua New Guinea." *Journal of International Peacekeeping* 14, 329

⁵¹⁸ Schmitt (2010:699).

This study also shows that utilitarian reasons cannot account for all the rationales belligerents provide to explain civilian deaths. The analysis of belligerent narratives reveals that belligerents utilize non-utilitarian rationales, consistent with a norm contestation framework, to explain civilian targeting. That is, the targeting of civilians did not always conform to the logic of consequences. This study made these determinations by analyzing instances where belligerents attributed their targeting of civilians to compliance with a distinction principle when such behavior undermined some interest. Yet, behavior adhering to the logic of appropriateness does not always have to diverge from behavior prescribed by the logic of consequences. At times, both logics can suggest similar behavior. However, from a methodological perspective, it is more difficult to attribute behavior to a particular logic when they align in this manner. Thus, this study may underestimate the extent to which a logic of appropriateness governs behavior since it examines instances where the logics call for differing action.

To help account for this observed norm contestation, this chapter will advance three possibilities. These possibilities can serve as a springboard to launch further research on the extent to which lack of intersubjectivity on the distinction principle explains IHL violations. One reason is the ambiguity in the distinction method outlined in Chapters Four and Five, particularly around the phrase “direct participation in hostilities” (DPH). IHL respondents acknowledge that DPH yields multiple interpretations of compliance among belligerents. However, Chapter 6 reveals this is also the case among IHL experts. A second reason for norm contestation is problematic diffusion. While the process of international norm diffusion has been well investigated, comparatively less is known about the domestic norm diffusion process.⁵¹⁹

⁵¹⁹ In addition to the works listed in FN 114 in Chapter 2, see the following for discussions on the domestic norm diffusion process, see Chayes and Chayes (1993); Downs, George W., David M. Roake, and Peter N. Barsoom. 1996. “Is the Good News About Compliance Good News About Cooperation?,” *International Organization* 50:3; Koh, Harold. 1997. “Why do Nations Obey International Law,” 106 *Yale Law Journal* 259.

The distinction method passed on through the international diffusion process might get modified or distorted as it continues its journey through the domestic diffusion process. The result is that those near the end of the chain of diffusion possess a different understanding of the distinction principle than that advocated by norm proponents. Lastly, for reasons provided below, the ICRC occasionally cannot diffuse IHL to belligerents. Under such circumstances, belligerents implement their own understanding of a self-generated obligation to distinguish, shaped by local context.

The chapter then concludes with a discussion of some of the theoretical and policy implications of the findings in this study. For instance, this study's findings challenge scholars to revisit our understandings of how norms influence global political behavior. Particular attention needs to be paid to how scholars think about norm compliance and norm violation when norms are ambiguous. Policymakers need to rethink strategies designed to minimize IHL violations in an environment where norm implementers and norm proponents operate under different understandings of compliance, and when whole categories of actors are excluded from the norm generation and norm clarification processes.

REASONS FOR CONTESTATION

Ambiguity in IHL

Former belligerent narratives suggest that belligerents opted to target some civilians as opposed to others, alluding to their employment of some form of the distinction method. The narratives also imply that in some cases, their use of the distinction principle led to intentional civilian deaths that did not advance some interest. Rather than compliance, these deaths appear

as violations because the belligerent's distinction method differs from that of norm proponents. One reason for this divergence in conceptualizations of the distinction method may be because current IHL and the Guidance are ambiguous.

While several IHL respondents admitted to the lack of clarity and/or consensus in the current manifestation of IHL and the Guidance, some IHL respondents disagreed with this assessment. In fact, one respondent was adamant that the guidelines on how distinction should be conducted are clear.⁵²⁰ If there is any confusion among IHL experts, it is because they did not read the Guidance carefully enough, or they do not possess adequate legal expertise to understand the document or the law.⁵²¹ However, one participant to the Workshops admitted that the Guidance should have been more detailed.⁵²² Even Dr. Nils Melzer, who convened the Workshops and wrote the Guidance, confessed that the Guidance was not exhaustive; it does not end the ambiguity of DPH, but begins the dialogue to clarify it.⁵²³ Thus if IHL experts, Workshop participants and the author of the Guidance agree that the matter of DPH is ambiguous, it does not seem far-fetched to envision belligerents would be confused about how to conduct distinction as well. This confusion can manifest when belligerents try to interpret IHL on their own, or if trainers dispatched to train belligerents on their IHL obligations diffuse different interpretations of the distinction principle, and thus diffuse confusion.

Problematic Diffusion

There can be problems even if IHL has been clearly diffused to military leaders, leading to contestation over distinction methods. Belligerents may be trained to distinguish between

⁵²⁰ Personal Interview (Geneva, 2009).

⁵²¹ Personal Interview (Geneva, 2009).

⁵²² Personal Interview (Geneva, 2009).

⁵²³ Personal Interview (Geneva, 2009).

permissible and impermissible targets, but as in the children's game Telephone, the message gets distorted during the transmission process from military commanders to foot soldiers. This is likely more probable for very precise rules like the Guidance.

The domestic norm implementation process might also color the way civilians are viewed. A narrative from a former belligerent who fought for SWAPO in Namibia captures this point:

Interviewer: Did your training include how to treat civilians during war times?

Respondent: Yes, civilians should be treated well and helped where possible. We also learned that one must be very careful when dealing with civilians because they may be used by enemies.⁵²⁴

This narrative implies that SWAPO training informed belligerents of civilians' protected status while simultaneously warning belligerents to be suspicious of them. It creates a contradictory image of civilians as needing protection but also potentially threatening. Little wonder that this respondent goes on to say,

Our enemies were the colored or black people, armed and in uniform, driving military vehicles. Even those in connection to their dealings, some civilians.⁵²⁵

Furthermore, there may also be problems with monitoring and enforcement. Military commanders may be unable to ensure that those under their command comply with a particular distinction method. This point is illustrated by a Zimbabwean soldier discussing the situation of his allies,

Interviewer: What about the government forces, the DRC government forces, did they have a code of conduct?

Respondent: I think it was supposed to be there but because somehow, administrative issues, I don't think they were really up to date. There was no really follow up and something of that nature. Let me say a follow up and monitoring to see that...because

⁵²⁴ Personal Interview (Dukwi, 2009).

⁵²⁵ Personal Interview (Dukwi, 2009).

you can imagine a situation whereby soldiers can spend about six months, no pay or something like that. You see? I don't really think there was...you know, anything, any measures being put in place to make sure they were behaving accordingly.⁵²⁶

The narrative of a Namibian fighter makes the same point:

You know, sometimes, if you have a large number of soldiers, you will, which you cannot control, more especially the troops themselves, they are very difficult to handle. You know sometimes they would do things beyond control, not that it is a command from the high top, they can do their own.⁵²⁷

Lack of Diffusion

The previous explanations for contestation assumed belligerents are cognizant of some form of institutionalized rules governing armed conflict. However, not all belligerents may be aware of the version endorsed by the international community. For instance, only one belligerent, who fought for a state actor, made a reference to the Geneva Conventions; none mentioned the APs. The lack of diffusion of the IHL distinction method might contribute to lack of intersubjectivity on permissible targets. As mentioned previously, one of the reasons why the monitoring, circulating and promoting of IHL primarily rests with the ICRC is to enhance consistency in the understanding and implementation of IHL among disperse actors.⁵²⁸ Yet regarding nonstate actors, the ICRC may not always be able to disseminate its understanding of IHL. This is because fulfilling its mission entails meeting multiple objectives that can conflict with each other. According to the ICRC,

The *raison d'être* of the ICRC is to ensure respect, through its neutral and independent humanitarian work, for the lives, dignity and physical and mental well-being of victims of armed conflict and other situations of violence. All of the ICRC's work is geared towards meeting this fundamental objective and strives to full this ideal.⁵²⁹

⁵²⁶ Interview 09052500 (Dukwi, 2009).

⁵²⁷ Interview 09052702 (Dukwi, 2009).

⁵²⁸ Finnemore (1993:593).

⁵²⁹ International Committee for the Red Cross.2009. The ICRC: Its Mission and Work. Geneva: ICRC. 6.

Additionally,

The ICRC's work developed along two lines. The first of these is operational, i.e. helping victims of armed conflict and other situations of violence. The second involves developing and promoting international humanitarian law and humanitarian principles.⁵³⁰

Trying to promote IHL through diffusion may undermine its ability to provide humanitarian aid to affected civilians. Armed groups may condition ICRC access to victims on the ICRC not investigating their belligerents' behavior in armed conflict or telling them how to conduct hostilities. A belligerent respondent offers an example:

Interviewer: Would the Red Cross ask, how come so many people died?

Respondent: ...Who do you ask... who... the situation will be tense, very tense that... even yourself, to say let me go and talk to you... you won't ... That [it] is safe to be quiet rather than talking.⁵³¹

When such a clash occurs, the ICRC may prioritize aiding victims for a couple of reasons. First, the ICRC is dependent on these groups for access to humanitarian victims. This dependency is also the reason for the ICRC's controversial confidentiality policy, as explained by ICRC President Jakob Kellenberger,

Access to every person in every conflict zone who needs protection or help, everywhere in the world, is our *raison d'être*. One thing is clear: if parties to a conflict see us leaking what we know to the outside world, the chances of our operating effectively will shrink dramatically.⁵³²

Thus, the ICRC may cease its IHL promotion activities if they threaten access to victims in more immediate need of humanitarian assistance.

⁵³⁰ International Committee for the Red Cross. 2009. The ICRC: Its Mission and Work. Geneva: ICRC. 6.

⁵³¹ Interview 09052800 (Dukwi 2009).

⁵³² Bucher, Andreas. 2005 "Being Hard on Yourself." *FACTS*. July 21.
<http://www.icrc.org/web/eng/siteeng0.nsf/html/kellenberger-interview-210705> (March 31, 2010).

A second reason why the ICRC may not diffuse IHL obligations to nonstate armed groups is because national authorities may object to its relations with these groups.⁵³³ State authorities object on the grounds that such ICRC engagements serve to legitimize groups that either do not deserve such recognition, or that such legitimacy may corrode their own power.⁵³⁴ Much as is the case for nonstate actors, the ICRC depends on approval from state authorities to operate in a given territory. As David Forsythe writes, the ICRC is

conscious of its need for cooperation from public authorities and therefore [is] careful not to proceed beyond the realm of their consent... In reality, the ICRC has a foot in two worlds – the world of state approval and the world of civil society initiative. Because of the organization’s dual nature, there is a tension in ICRC actions between deferring to state views on military and political necessity, and pressing states in a timely fashion to do more for human dignity. Managing that tension wisely is the crux of humanitarian politics and diplomacy by the ICRC.⁵³⁵

Thus, state preferences can affect the execution of ICRC’s mission with nonstate actors.

Thirdly, diffusion may not occur out of concern for the safety of ICRC staff.

Understandably, the ICRC prioritizes the wellbeing of its staff over all other concerns. Security issues when engaging with nonstate actors stem from their lack of awareness of the ICRC and its role in the protection regime.⁵³⁶ Yet, even awareness of ICRC’s role does not always assure the safety of its staff. If the ICRC feels engagement with a nonstate actor threatens staff security, it will opt to not engage with that actor.

Regardless of the reason for lack of IHL diffusion, the results of this disengagement may thwart ICRC’s humanitarian objectives. Civilians deemed to be protected by norm proponents may lose the protections of the civilian immunity norm because belligerents may be unaware that

⁵³³ Document on file with author.

⁵³⁴ Document on file with author.

⁵³⁵ Forsythe, David P. 2007. “The ICRC: a Unique Humanitarian Protagonist.” *International Review of the Red Cross* 89:865, 78. [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-865-p63/\\$File/irrc-865-Forsythe.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-865-p63/$File/irrc-865-Forsythe.pdf) (March 31, 2010).

⁵³⁶ Document on file with author.

such targets are impermissible. The following narrative of a UNITA fighter illuminates this point:

Respondent: ...[the MPLA] didn't learn about [IHL]. If they could have learned about it, they were not suppose to be killing like the way they were killing.

Interviewer: So [you] think that if they received that training then they wouldn't have killed civilians?

Respondent: ...if they could have learned, they were not going to kill the civilians.⁵³⁷

Here the respondent claims that civilians, who he perceived as impermissible targets, were killed because belligerents did not receive training on who they can and cannot kill during armed conflict. A SWAPO fighter's narrative echoes these sentiments:

Interviewer: Do you think the government soldiers knew about international law which doesn't allow a fighter or soldier to kill a civilian?

Respondent: I think they knew about it because they were sometimes not killing.⁵³⁸

Finally, an example from a Zimbabwean soldier,

Interviewer: How could we help those soldiers understand that they have to act a certain way... they shouldn't victimize civilians?

Respondent: Yes, I think will try to find some means to educate such kind people. Talk to governments, talk to the army people, ask them to have some talks. Conduct some talks with their people. I am sure governments do accept that. If it is anything to do with codes of conduct, lawlessness, keeping the law and things like that, the responsibilities, yes the responsibilities of armies and so on and of governments. I think they should be able to, accept that anybody who intends to educate their personnel for a good cause is actually...should actually be welcomed. Yes, yes I think that will be good. It will be a good thing to try and make sure because some armies, maybe don't even realize that they should educate their soldiers sometimes. They just think as long as you are a soldier, as long as we have soldiers, that's the end of it. If you are in a war, once you win the battle or the war, that is it, you see? Yes, but if we can have some people coming in, more organization visiting and making some programs to try and talk to the army personnel. Educate them, lessons, and so on, just about code of conduct as such and the Geneva

⁵³⁷ Interview 09060801 (Dukwi, 2009).

⁵³⁸ Interview 09062901(Dukwi, 2009).

Conference thing. Whatever the decisions. The rules that came about after the Geneva Conference thing really should be stressed with all army personnel everywhere. Yes that will be very important. That will be very, very, very important.⁵³⁹

That lack of diffusion plays a part in deliberate civilian targeting is not lost upon IHL respondents. For instance, some respondents stated that belligerents deliberately kill protected civilians out of ignorance of the ICRC mandated distinction method.⁵⁴⁰

Local Contexts

Ambiguity in the IHL, problematic IHL diffusion, or lack of diffusion of the norm proponents' version of the distinction principle all likely enable conflict dynamics to influence how belligerents determine permissible targets. Essentially, the particular characteristics of each conflict can guide belligerents in their attempts to comply with the distinction principle they claim to espouse when IHL is unclear or has not been diffused to them. That context drives belligerent consideration of targets was acknowledged by several IHL experts, although they did not attribute it to the reasons just stated.⁵⁴¹ For instance, Dr. Melzer said at the 2009 American Society for International Law conference that DPH can vary by type of conflict.⁵⁴² An IHL respondent expressed similar sentiments: "any culture has different understandings of civilian."⁵⁴³ He explained that, in some conflicts, belligerents target entire ethnic groups because they consider them as part of the armed forces; in essence, their ethnic identity serves to indicate their legitimacy as targets. Another respondent said that Nepal has five different ways of

⁵³⁹ Interview 09052500 (Dukwi, 2009).

⁵⁴⁰ Personal Interview (Geneva, November 2009).

⁵⁴¹ Personal Interview (Geneva, November 2009).

⁵⁴² Public statement made at ASIL conference (Washington D.C. 2008)

⁵⁴³ Personal Interview (Geneva, November 2009).

expressing childhood, compared to a more monolithic conceptualization in other societies.⁵⁴⁴

This reflects a more complex understanding of childhood, enabling some of the armed groups within Nepal to sanction the use of child soldiers.

Not only does the concept of civilian vary by geographic context, it varies by temporal context as well.⁵⁴⁵ Over time, the permissible target conceptualization may change, but not always in a linear fashion. The changes in perception can shift back and forth, depending on how the conflict unfolds. As one IHL respondent told me, the concept of Vietnamese permissible target changed over time for the U.S. military during the Vietnam War.⁵⁴⁶ A certain perception of who could be targeted influenced U.S. action prior to My Lai; it changed after the massacre became known to military officials.

Former belligerent respondent narratives provide some backing for the contention that distinction methods, particularly those that are self-generated, may be context driven. Where child belligerents tended to be of a certain age, respondents considered children of that age suspicious, regardless of whether they were actually engaged in hostilities. Children outside of that age range were seen with less suspicion. Narratives described the assumption that men of a certain age and physical condition to be belligerents and were thus targeted. Meanwhile, narratives recounted the sparing of women, even if females fought in the conflict. This was the case as long as the women did not overtly conform to the image of a belligerent. Pants, just like health, became gendered indicators for belligerency.

⁵⁴⁴ Personal Interview (Geneva, November 2009).

⁵⁴⁵ Personal Interview (Geneva, November 2009).

⁵⁴⁶ Personal Interview (Geneva, November 2009).

HINTS OF NORM CONTESTATION BEYOND THIS STUDY

There are hints that norm contestation can be used to understand violations of the civilian immunity norm beyond this study. One such hint can be found in a study conducted by researchers at the Uppsala Conflict Data Program (UCDP) employing the Uppsala One-Sided Violence Dataset. Before delving into the findings of this study, a brief description of the dataset is in order.

The researchers who compiled the Uppsala One-Sided Violence Dataset define civilians as “those who do not engage in armed conflict.”⁵⁴⁷ Intentionality is

based on the *stated intention of the parties* (which is usually military). Exceptions to this rule are made in rare cases where the nature of the incident stretches the credulity of claims that the targets were military; such incidents are marked by a highly disproportionate ratio of military to civilian fatalities. When there is no stated intention, a judgment is made by a regional expert, based on a number of criteria, such as past behavior of the parties.⁵⁴⁸

The dataset records these civilian deaths globally for the years 1989-2007. The researchers compiled their data first through the use of VRA Technology to generate an automated data search of news reports from the Factiva news database.⁵⁴⁹ The parameters of the search were to retrieve all news reports containing information on individuals killed or injured.⁵⁵⁰ With their search results in hand, each report was then hand coded into an events dataset.⁵⁵¹ Coders also assessed the independence and transparency of each news story, making attempts to trace reports

⁵⁴⁷ Email correspondence, Uppsala Conflict Dataset Project Leader (4/28/06).

⁵⁴⁸ Email correspondence, Uppsala Conflict Dataset Project Leader (4/28/06).

⁵⁴⁹ Kreutz, Joakim and Kristine Eck. 2005. “UCDP One Sided Violence Codebook: Version 1.0” http://www.pcr.uu.se/publications/UCDP_pub/One-sided%20violence%20Dataset%20Codebook.pdf, (April 4, 2010).

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

back to their primary source when possible.⁵⁵² News reports were also supplemented with case level data when it was available.⁵⁵³ The data was then organized into a matrix divided by country, actor, year and fatality figures.

What this description reveals is that the dataset tracks the number of civilians (at least how the UCDP defines them) intentionally killed by both nonstate and state actors on a global perspective. While the dataset imposes a singular, UCDP derived definition of civilian when coding civilian deaths, that definition approximates the one utilized by the Guidance.

A study using this dataset found that nonstate actors generally tend to intentionally kill more civilians than state actors (see figure below⁵⁵⁴).⁵⁵⁵ It also found that in territorial conflicts, nonstate actors intentionally killed six times more civilians than state actors.⁵⁵⁶ Kristine Eck and Lisa Hultman suggest it could

be the case that this violence has to do with group identity. In ethnic-based territorial conflicts (which the majority are), rebels may adopt an ethnic cleansing-like strategy of attacking civilians who belong to other ethnic groups in order to assert their dominance in the area.⁵⁵⁷

⁵⁵² Ibid.

⁵⁵³ Ibid.

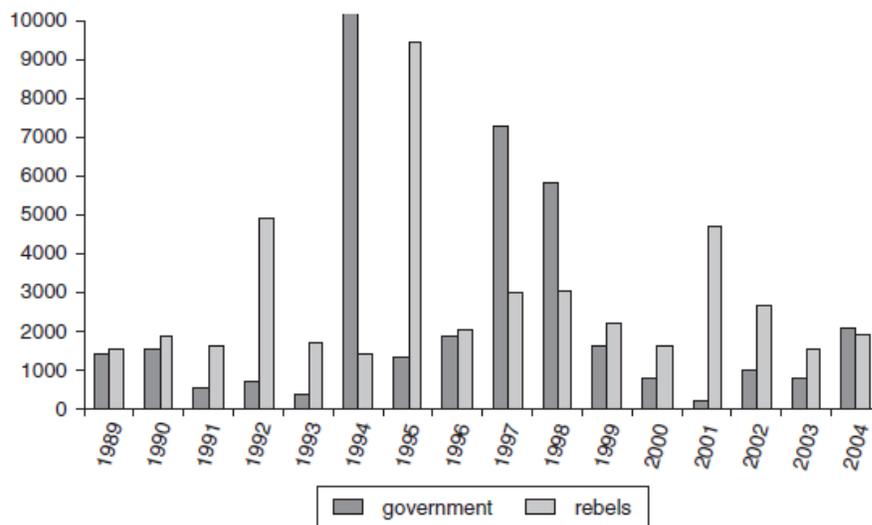
⁵⁵⁴ Eck and Hultman (2007:207)

⁵⁵⁵ Eck and Hultman (2007: 239).

⁵⁵⁶ Eck and Hultman (2007: 239).

⁵⁵⁷ Id.

Figure 3 Annual One-Sided Fatalities by Actor, 1989–2004.



At 500,399, the value for government 1994 is above the ceiling of the figure.

Figure 7.1 Annual One Sided Fatalities by Actor, 1989-2004

While that may be true, contestation may offer additional insights into why nonstate actors intentionally kill civilians more so than state actors. As discussed above, there are several reasons why norm contestation might be more pronounced among nonstate belligerents than state belligerents. If so, that these findings occur across time and space intimate that contestation may possess utility beyond the scope of this study.

THEORETICAL AND POLICY IMPLICATIONS

This study's findings offer several contributions to theoretical and policy oriented discussion on civilian targeting. Firstly, scholars need to pay more attention to the ways in which key actors understand their normative obligations, particularly its constitutive elements. The lack of

intersubjectivity on permissible civilian targets between norm proponents and the belligerents creates a situation in which belligerents complying with their version of the distinction principle appear to norm proponents as violators of that very principle. Per norm contestation, civilian deaths do not always arise not from pursuing particular interests, but even in contradiction to those interests. Thus, considering how ambiguous norms can give rise to variations in normative obligations provides fresh insights into possible reasons why norms are not followed. Viewing it from this lens paints a more complex picture of norm violation.

Secondly, scholars should expend more of their analytical expertise on the process of domestic norm implementation. While the process of international norm diffusion has been well investigated, comparatively less is known about the domestic norm diffusion process.⁵⁵⁸ Yet, this process plays a crucial part in international norm compliance. Consequently, understanding its mechanics and challenges can also help to illuminate why norm violations occur.

Thirdly, this study reveals how combat experience can shape how belligerents view non-belligerents as well as what they consider as threatening behavior in the specific context of the civilian immunity norm. For instance, age helps to define protective status and target legitimacy. These age-based impacts are not uniform across conflicts or even actors. Children are a case in point. Former belligerent narratives suggest that belligerent behavior toward children depends on whether they conceptualize them as threatening and non-threatening. The determination stems from the role children have played in a belligerent's conflict. These views sometimes differ from how IHL experts consider children in the context of the civilian protection regime.

⁵⁵⁸ In addition to the works listed in FN 114 in Chapter 2, see the following for discussions on the domestic norm diffusion process, see Chayes, Abram and Antonia Handler Chayes.1993. "On Compliance," *International Organization* 47:2; Downs, George W., David M. Rocke, and Peter N. Barsoom.1996. "Is the Good News About Compliance Good News About Cooperation?," *International Organization* 50:3; Koh, Harold.1997. "Why do Nations Obey International Law," 106 *Yale Law Journal* 259.

And both sets of views differ from the ICRC's guidelines on how to interpret permissible civilian targets under IHL. Ambiguity in the civilian immunity norm magnifies these variations.

From a policy standpoint, the findings from this study indicate that norm proponents should undertake enhanced efforts to disseminate IHL to nonstate belligerents. As Eck and Hultman's study demonstrates, nonstate belligerents commit more frequent attacks on civilians than government forces.⁵⁵⁹ My study suggests that sometimes those attacks occur due to contestation. That is, belligerents may attack protected civilians because they are considered permissible targets. Belligerents who operate under this framework should be the focus of dissemination and training activities because their efforts to comply (even if erroneous) with the distinction principle indicate a willingness to comply with rules. Thus, it is possible that by altering their understanding of what is considered compliance so that it approximates the norm proponents' view, fewer protected civilians may be targeted.

Furthermore, nonstate belligerents need to be included in the IHL decision-making process. For instance, no nonstate armed groups were represented in the ICRC Workshops on DPH. This is surprising because it would seem any effort to strengthen compliance with IHL would include such actors. Firstly, many current conflicts include nonstate belligerents. This fact alone should have warranted them an invitation to participate in these discussions. Additionally, nonstate belligerents have been accused of some of the most heinous violations of IHL. Therefore, giving nonstate belligerents a seat at the table enables norm proponents to glean why these violations occur, informing policies to prevent such violations. Furthermore, nonstate belligerents are beholden to any Workshop recommendations adopted by states that possess jurisdiction over them. Thus, not only would it seem conducive to norm compliance to include those subject to the law to participate in discussions on how it should be implemented, but it might also increase

⁵⁵⁹ Eck and Hultman (2007)

the chances of these participants taking ownership of those rules, thus also possibly increasing compliance with those rules.

States might strongly resist such moves, but norm proponents must overcome this resistance if they want to make IHL more effective. Many current conflicts involve nonstate belligerents who commit IHL violations. Some of these belligerents argue that they do not need to heed law they did not draft or follow interpretations that differ from their own. Involving them in the drafting of new laws and interpretation of existing law removes this excuse. It also increases the chance of belligerents being invested in the process of making IHL more effective. Engaging nonstate belligerents also enables norm enforcers to better understand why the distinction principle is violated.

Norm enforcers also need to undertake a more bottom up approach to understanding deliberate civilian targeting, rather than the top down approach currently utilized. As one IHL respondent told me,

with the ICRC, it's one way communication; we decide what's relevant. What sources, what data... we make up our own conclusion... we don't really consider local context.⁵⁶⁰

As argued here, local contexts can impact the constitution of permissible civilian targets. Norm proponents must be cognizant of this effect. They must customize their strategies to take into account each conflict's particular dynamics. As the same respondent advised, the ICRC should approach the conflict in the Democratic Republic of Congo differently than the conflict in Columbia. Despite the realization of individual ICRC delegates that contexts shapes belligerent understandings of their IHL obligations, the ICRC as an organization fails to share this observation. Instead of a bottom up approach that includes all belligerents, including nonstate belligerents, in the discussion, it opts for a top down approach. While this may serve

⁵⁶⁰ Personal Interview (Geneva, November 2009).

efficiency's needs, employing one standard approach to address IHL violations will not yield desired results as conflicts differ significantly.

Additionally, IHL needs to be further clarified. ICRC's efforts to clarify DPH are a step in the right direction, but need to be continued. As indicated here, there is still disagreement among relevant parties on what specific acts fall under the umbrella of DPH, notably among IHL experts. Since this phrase carries great significance to both civilians and belligerents, efforts to provide clarity on the matter must persist.

CONCLUSION

All the former belligerents interviewed in this study claimed compliance with a distinction principle, albeit in forms that do not always follow norm proponent understandings.

Consequently, despite their stated compliance with a particular version of the distinction principle, such behavior would appear as norm violations when norm proponents evaluate these actions against their own interpretation of the distinction principle. Former belligerents were not the only ones who expressed a lack of consensus on who may be a permissible target. IHL experts, including ICRC delegates, also failed to offer a unified articulation of the distinction principle; they varyingly identified a permissible civilian target. This occurred even after the conclusion of ICRC Workshops to clarify the parameters of DPH. This dissonance mirrors the lack of consensus at the close of these Workshops which the ICRC acknowledges in the Guidance: "The Interpretive Guidance... does not necessarily reflect a unanimous view or *majority* opinion of the experts (emphasis added)."⁵⁶¹

⁵⁶¹ International Committee for the Red Cross. 2009. Interpretative Guidance on the Notion of Direct Participation in Hostilities. Geneva: ICRC. 9.

The Guidance not only fails to reflect the majority of opinion of those in attendance in the ICRC workshops, it does not take into account the perspectives of some of the most relevant actors in armed conflict. According to one participant, many of those present were drawn from the legal community and humanitarian experts.⁵⁶² As discussed above, nonstate armed groups did not attend the ICRC workshops. Furthermore, delegates representing different states' air forces had a disproportionate presence compared to the other branches of state armed forces.

In essence, similar problems that hindered the clarification of permissible targets during the AP I negotiating process appeared during the ICRC's most recent attempts to settle this issue: all relevant parties did not participate in the deliberations and those that did participate could not reach a consensus on what constitutes a permissible civilian target. What this discussion reveals is that despite the global community's efforts to clarify this critical IHL concept, it failed to do so.

Yet, scholars and practitioners fail to appreciate the significance that multiple interpretations of the distinction principle exert on IHL compliance. This is so even when IHL respondents acknowledge that various distinctions methods operate in conflict settings, as indicated by an ICRC delegate:

Armed groups may define civilian in a way we don't like... Palestinian groups would have considered Jewish settlers as legitimate targets... all people have an idea of what's fair in war... [These ideas] may not fly with the international system...⁵⁶³

Rather, scholars and practitioners place a premium on other explanations for the violation of the distinction principle. According to the ICRC,

While ICRC delegates are certainly of the opinion that the distinction is often less than clear-cut, they believe that violations of IHL are more often the result of a deliberate intention to attack the civilian population rather than of any objective difficulty in distinguishing the one

⁵⁶² Personal Interview (Geneva, November 2009).

⁵⁶³ Personal Interview (Geneva, November 2009).

from the other. The 2 problems need to be separated. In certain cases, civilians are perceived as having forfeited their civilian status because, unwillingly or not, they are contributing to the enemy's war effort. The IHL distinction between civilians and combatants is then replaced by a distinction between guilty and innocent.⁵⁶⁴

The number of people victimized by the scourge of warfare is far too high for the matters raised here to be overlooked. Millions of people have been intentionally killed in armed conflict. The consequences of these violations of international humanitarian law do not end at their deaths. For the grieving families who lost loved ones, for dependent relatives who lost a source of support, for societies that lost a contributing member, the impacts are felt long after these victims have been put to rest. It is the unfortunate case that belligerents do intentionally target those they know are protected by international humanitarian law. However, hopefully, it is also shown here that sometimes these deaths occur when belligerents comply with an interpretation of law that differs from the law's enforcers. In such cases, concerted international activity to address these differences in understanding might help reduce civilian casualties. Such attention is worthwhile even if the number of civilians saved is small.

⁵⁶⁴ Munoz-Rojas, Daniel and Jean-Jacque Fresard. 2005. "The Roots of Behavior in War: Understanding and Preventing IHL Violations." Geneva: ICRC. 13

APPENDIX I
LIST OF ABBREVIATIONS

1. AP- 1977 Additional Protocol(s) to the 1949 Geneva Conventions
2. CIA- Central Intelligence Agency
3. DPH- direct participation in hostilities
4. DRC- Democratic Republic of Congo
5. Guidance- ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law
6. HRW- Human Rights Watch
7. IBC- Iraq Body Count
8. ICRC- International Committee for the Red Cross
9. IHL- International humanitarian law
10. MPLA- Movimento Popular de Libertação de Angola
11. QDAP- University of Pittsburgh's Qualitative Data Analysis Program
12. SADF- South African Defense Force
13. SWAPO- South West Africa People's Organization
14. UCDP- Uppsala Conflict Data Program
15. UN- United Nations
16. UNHCR- United Nations High Commissioner for Refugees
17. UNICEF- United Nations International Children's Emergency Fund
18. UNITA- União Nacional para a Independência Total de Angola
19. UNOSRSG- United Nations Office of the Special Representative of the Secretary General

APPENDIX II IMPORTANT LEGAL AND SOCIAL SCIENCE TERMS

- **Civilian immunity norm-** a norm which governs belligerent behavior toward those whom it protects, conventionally designated as “civilians,” during armed conflict. It contains three principles, of which the most relevant to this study is the distinction principle.
- **Constitutive effects of norms-** inform actors on how to see others which then enable a norm to exert its regulative effects

- **Distinction principle-** the principle which requires belligerents to distinguish between permissible and impermissible targets during armed conflict. It is one principle contained in the civilian immunity norm and is codified in the 1977 Additional Protocols to the 1949 Geneva Conventions.

- **Grounded theory-** “the discovery of theory from data systematically obtained from social science research” (Glaser and Strauss 2006:2)

- **Historiography-** “the writing of history based on a selective, critical reading of sources that synthesizes particular bits of information into a narrative description or analysis of a subject” (Thies 2002: 351)

- **International humanitarian law-** the body of law which regulates the conduct of hostilities
- **Intersubjectivity-** shared understandings between actors in a regime as to what is considered appropriate behavior for those actors under conditions regulated by the regime

- **Logic of appropriateness-** according to March and Olsen, a logic of appropriateness posits that actors act “in accordance with rules and practices that are socially constructed, publicly known, anticipated, and accepted” (1998:952)
- **Logic of consequences-** according to March and Olsen, a logic of consequences posits that “action by individuals, organizations, or states is driven by calculation of its consequences as measured against prior preferences” (1998:950)

- **Norms-** “standards of behavior defined in terms of rights and obligations” (Krasner 1982: 185)
- **One sided violence-** “The use of armed force by the government of a state or by a formally organized group against civilians which results in at least 25 deaths in a year. Extrajudicial killings in custody are excluded.” Uppsala Conflict Data Program (Date of retrieval: 2010/07/30) UCDP Database: www.ucdp.uu.se/database, Uppsala University
- **Regimes-** “principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue area” (Krasner 1982: 185)
- **Regulative effects of norms-** provide actors guidance on how to act in a given situation and essentially constrain actors
- **Social facts-** “things like money, sovereignty and rights, which have no material reality but exist only because people collectively believe they exist and act accordingly” (Finnemore and Sikkink 2001: 393)

APPENDIX III CODEBOOK

- 1) **Civilians~Protection** – References to armies protecting civilians. This can include references to how “true” civilians are identified, how they are treated, as well as the rationale behind protecting them (e.g., winning over civilian support or future soldiers).
- 2) **Enemy Treatment** – References to how “the enemy” is treated. Bear in mind that while the term “enemy” certainly applies to soldiers who are part of or associated with an opposing side and/or militia, it also can apply to villagers who support an opposing side, and people who spy (either as part of an opposing army or on behalf of an opposing army). Also, keep in mind that “treatment” includes actions other than killing.
- 3) **International Community** – Any references to the International Community. This includes its involvement and response (or lack thereof) (to violence in general, violence against civilians in particular, the breaking of international law). This code also includes references to any influence the International Community might have (or not have) over the different parties engaged in warfare. Other ideas might include ways by which the International Community’s effectiveness might be strengthened, as well as any violence or retaliation directed against the International Community. Apply this code to references of peacekeepers and their peacekeeping attempts.
- 4) **Law** – References to laws/mandates (international law, UN) that cover warfare and/or protection/treatment of civilians
- 5) **Personal information** – References to the interviewee’s demographic information; e.g., age, family, rank, where he fought, how he came to fight, reasons for fighting, when he started/stopped fighting, the side for which he fought, etc. **NOTE:** Be sure to add a comment naming the side for which the interviewee fought.
- 6) **Recruitment~Civilians** – References to soldiers recruiting civilians for any reason
- 7) **Recruitment~Youth** – Specific references to soldiers recruiting youth into the army. This can include references to their roles in the army once they've been recruited.
- 8) **Refraining from Engaging with Civilians** – References to any reasons that belligerents might choose specifically *not* to engage in violence/hostilities/conflict with civilians. Be on the look-out for references to the international community, as it’s possible that various actors in the international community are able to influence belligerents to modify their targeting decisions.

- 9) **Training** – References to the interviewee's training, such as his trainers, duration of training, location of training, type/forms, and skills. Also includes references to how soldiers are trained to treat civilians and civil rights. **NOTE:** If the interviewee mentions having been trained by particular organizations such as the Red Cross or the International Committee of the Red Cross (ICRC), be sure to add a comment naming the organization.
- 10) **Targets~Illegitimate** –References to targets for lethal action that are considered to be illegitimate *from the interviewee's point of view*. **NOTE:** If the target in question is identified as a civilian, be sure to add a comment indicating this. Targets include soldiers/fighters and non-soldiers/fighters, as well as enemies/non-enemies.
- 11) **Targets~Legitimate** – References to targets for lethal action that are considered to be legitimate *from the interviewee's point of view*. **NOTE:** If the target in question is identified as a civilian, be sure to add a comment indicating this. Targets include soldiers/fighters and non-soldiers/fighters, as well as enemies/non-enemies.
- 12) **Target Characteristics~Illegitimate** – References to the characteristics of those targets for lethal action that are considered to be illegitimate *from the interviewee's point of view*, as well as the reasons a target might be considered illegitimate (e.g., someone being caught in crossfire). **NOTE:** If the target in question is identified as a civilian, be sure to add a comment indicating this. Targets include soldiers/fighters and non-soldiers/fighters, as well as enemies/non-enemies.
- 13) **Target Characteristics~Legitimate** – References to the characteristics of those targets for lethal action that are considered to be legitimate *from the interviewee's point of view*, as well as the reasons a target might be considered legitimate (e.g., someone identified as/considered to be a spy). **NOTE:** If the target in question is identified as a civilian, be sure to add a comment indicating this. Targets include soldiers/fighters and non-soldiers/fighters, as well as enemies/non-enemies.
- 14) **Treatment of Women** – Specific references to the ways in which women/females are treated. This includes violence of any kind (physical, incl. kidnapping; sexual; psychological), as well as the roles to which women are subjugated once they are in captivity or “under control.”

APPENDIX IV
INTERVIEW PROTOCOL FOR FORMER BELLIGERENTS

I am doing a series of interviews on armed conflict and would like your help with that. This study aims to understand what is considered acceptable conduct in the course of an armed conflict. The interview will take about 45 minutes.

Any information that is obtained in connection with this study and that can be identified with you will remain confidential. You will not be identified or quoted by name in written documents that result from this work. Your identity will be kept confidential by assigning you a number, and only numbers rather than names will appear on transcripts.

If you have questions about this study, please feel free to contact Betsy Jose-Thota at the University of Pittsburgh by email at betcyjt@gmail.com or by phone: 832-202-6692.

Let me begin by asking you some questions about yourself to make sure that I am talking to all kinds of people. If you don't want to answer, feel free to tell me so and we will move on to the next question. You can also stop the interview at any time.

1. What is your age?
2. How many years of school have you had?
3. What is your current family situation (married, single, live together with someone in a permanent relationship, divorced or separated, spouse of missing person, widow(er)).
4. Do you have children? If so, how many?
5. How long have you been a fighter?
6. For which side did you fight?
7. Are there certain rules fighters must follow during armed conflict? What are some of these rules?
8. Who told you about these rules?
9. Are there certain people fighters are not supposed to target in armed conflict? Who are these people and why can't they be targeted?
10. Do fighters make in effort to follow this rule?
11. Do fighters target those they are not supposed to? Why?
12. How can we make sure fighters follow the rules?

INTERVIEW PROTOCOL FOR IHL EXPERTS

This research study aims to understand what is considered acceptable conduct in the course of an armed conflict. For this reason, I am doing a series of interviews on armed conflict with humanitarian practitioners. The interview will take about 45 minutes.

There are no foreseeable risks associated with this project, nor are there any direct benefits to you. All responses will be kept under lock and key. Any information that is obtained in connection with this study and that can be identified with you will remain confidential. You will not be identified or quoted by name in written documents that result from this work. Your identity will be kept confidential by assigning you a number, and only numbers rather than names will appear on transcripts.

If you have questions about this study, please feel free to contact Betsy Jose-Thota at the University of Pittsburgh by email at betcyjt@gmail.com or by phone: 832-202-6692.

Let me begin by asking you about some of the work that the ICRC does. If you don't want to answer, feel free to tell me so and we will move on to the next question. You can also stop the interview at any time.

1. One of the ICRC's responsibilities is to disseminate international humanitarian law. Can you tell me how the ICRC does this with regards to belligerents?
2. What are some problems ICRC faces when conducting these activities? How could they be improved?
3. Does the ICRC conduct these activities with both state and non-state belligerents? Does the ICRC conduct them similarly when working with these groups?
4. International humanitarian law regulates the conduct of hostilities during armed conflict. Yet, often there are many violations of international humanitarian law, such as the targeting of protected people. Who is considered a legitimate civilian target?
5. Do you think the various types of belligerents share this understanding of legitimate targets? Why or why not?
6. Why do you think that civilians continue to be targeted?
7. How can the deliberate targeting of civilians be stopped?

APPENDIX V
DATA SUMMARY- NORM FRAMEWORKS

	09052500	09052500's Opponent	09061100	09061100's Opponent	09061502's opponent	09061101	09062901	09052800	09060803
Group	Zimbabwe Army	rebels	ZAPO/ ZANF	Rhodesian Army	Rhodesian Army	ZAPO/ ZANU	ZAPO	Rhodesian Army	SADF
Conflict Location	Democratic Republic of Congo	Democratic Republic of Congo	Zimbabwe	Zimbabwe	Zimbabwe	Zimbabwe	Zimbabwe	Zimbabwe	Namibia
Nationality	Zimbabwe		Angola			Zimbabwe	Zimbabwe		Namibia
Contestation						x		x	x
Diffusion		x	x	x	x	x	x	x	x
Violation	x	x	x	x	x		x	x	

	09062400	09060300's opponent	09060400	09060400's opponent	09060202	09060202's opponent	09060801	09052702	09052702's opponent	009062401
Group	Angola	MPLA	UNITA	MPLA	UNITA	MPLA	UNITA	SADF	SWAPO	UNITA
Conflict Location	UNITA	Angola	Angola	Angola	Angola	Angola	Angola	Angola	Angola	Angola
Nationality	Angola		Angola		Angola		Angola	Namibia		Angola
Contestation	x	x	x	X		x	x	x		x
Diffusion	x	x	x	X	x	x	x	x	x	
Violation				X	x				x	

Appendix VI Kappa Scores

All current quotations (362). Quotation-Filter: All

HU: Jose-Thota_Rounds 1-4_Merge_031710 (older codes removed)
 File: [T:ThotaRounds...Thota_Rounds 1-4_Merge_031710 (older codes removed).hpr6]
 Edited by: David
 Date/Time: 03/17/2010 04:38:36 PM

Code	Elana	Taichi	Exact Match	Overlap	Kappa	Kappa (inc. Overlap)
Civilians~Protection	5	6	3	2	0.38	0.75
Enemy Treatment	50	54	17	21	0.20	0.55
Identification of Enemies	52	47	13	20	0.15	0.49
International Community	23	16	10	11	0.34	0.93
Law	4	5	3	1	0.50	0.67
Other	5	9	0	0	0.00	0.00
Personal information	23	25	10	12	0.26	0.63
Recruitment	22	12	3	9	0.10	0.42
Refraining from Engaging with Civilians	20	13	6	2	0.22	0.30
Targets~Illegitimate	5	8	1	1	0.08	0.17
Targets~Legitimate	58	55	27	25	0.31	0.67
Treatment of Women	12	9	3	8	0.17	0.78
Totals	279	259	96	112	0.23	0.53

All current quotations (183). Quotation-Filter: All

HU: Jose-Thota_Round 5_Merge_022610
 File: [T:Thota55 AnalysisThota_Round 5_Merge_022610.hpr6]
 Edited by: David
 Date/Time: 02/26/2010 03:24:17 PM

Code	Elana	Taichi	Exact Match	Overlap	Kappa	Kappa (inc. Overlap)
Civilians~Protection	3	2	2	0	0.67	0.67
Enemy Treatment	20	23	6	8	0.16	0.43
Identification of Enemies	28	21	9	10	0.23	0.55
International Community	17	13	5	9	0.20	0.76
Law	13	16	8	4	0.38	0.62
Other	1	5	0	0	0.00	0.00
Personal information	11	7	5	2	0.38	0.62
Recruitment	5	8	2	2	0.18	0.45
Refraining from Engaging with Civilians	12	5	1	3	0.06	0.31
Targets~Illegitimate	8	7	2	4	0.15	0.54
Targets~Legitimate	24	32	7	18	0.14	0.71
Treatment of Women	3	5	1	4	0.14	1.14
Totals	145	144	48	64	0.23	0.57

All current quotations (153). Quotation-Filter: All

HU: Jose-Thota_Round 6_Merge_030510
 File: [T:Thota66 AnalysisThota_Round 6_Merge_030510.hpr6]
 Edited by: David
 Date/Time: 03/05/2010 04:24:44 PM

Code	Elana	Taichi	Exact Match	Overlap	Kappa	Kappa (inc. Overlap)
Civilians~Protection	6	9	4	2	0.36	0.64
Enemy Treatment	17	36	10	9	0.23	0.56
Identification of Enemies	16	33	7	18	0.17	0.90
International Community	7	11	1	10	0.06	1.00
Law	3	3	0	3	0.00	1.00
Other	0	4	0	0	0.00	0.00
Personal information	5	5	3	2	0.43	0.71
Recruitment	6	10	2	3	0.14	0.43
Refraining from Engaging with Civilians	10	4	3	0	0.27	0.27
Targets~Illegitimate	2	2	0	2	0.00	0.75
Targets~Legitimate	17	25	8	12	0.24	0.76
Treatment of Women	3	7	0	5	0.00	0.80
Totals	92	149	38	66	0.16	0.65

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