

January 2007

The ICJ's Uganda Wall: A Barrier to the Principle of Distinction and an Entry Point for Lawfare

Eric Talbot Jensen

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Eric Talbot Jensen, The ICJ's Uganda Wall: A Barrier to the Principle of Distinction and an Entry Point for Lawfare, 35 Denv. J. Int'l L. & Pol'y 241 (2007).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

The ICJ's Uganda Wall: A Barrier to the Principle of Distinction and an Entry Point for Lawfare

Keywords

Military, War and Peace, States, Terrorism, War, International Criminal Law

THE ICJ'S "UGANDA WALL": A BARRIER TO THE PRINCIPLE OF DISTINCTION AND AN ENTRY POINT FOR LAWFARE

ERIC TALBOT JENSEN^a

To determine the magnitude, causes, distribution, risk factors and cumulative burden of injury in a population experiencing armed conflict in northern Uganda since 1986...we took a multistage, stratified, random sampling from the Gulu district...1 of 3 districts in Northern Uganda affected by war since 1986... A similar rural district (Mukono) not affected by war was used for comparison...Of the study population, 14% were injured annually...Only 4.5% of the injured were combatants...The annual mortality of 7.8/1000 in Gulu district is 835% higher than that in Mukono district.¹

The risk to civilians in armed conflict has steadily risen since World War II,² and the United Nations currently estimates that ninety percent of the casualties in modern armed conflict are women and children, presumably civilians.³ This is particularly deplorable given that the 1949 Geneva Convention Relative to the

^a Lieutenant Colonel, Chief, International Law Branch, The Office of The Judge Advocate General, U.S. Army. B.A., Brigham Young University (1989); J.D., University of Notre Dame (1994); LL.M., The Judge Advocate General's Legal Center and School (2001); LL.M. Yale University (2006). The author wishes to thank Professor W. Michael Reisman for his superb instruction and mentorship, and Christian Behrendt, Anthony Buti, and Jason Morgan-Foster for their comments on prior drafts. The views expressed in this article are those of the author and not The Judge Advocate General's Corps, the United States Army, or the Department of Defense.

1. Ronald R. Lett, Olive Chifefe Kobusingye, & Paul Ekwaru, *Burden of Injury During the Complex Political Emergency in Northern Uganda*, 49 CAN. J. OF SURGERY 51, 51 (2006).

2. See, e.g., Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 75 (2005). See also Lett, et al., *supra* note 1, at 51 (stating, "The proportion of civilian war-related deaths has increased from 19% in World War I, 48% in World War II, to more than 80% in the 1990s. Civilians are used as shields to protect the military, abducted, enslaved, tortured, raped and executed.").

3. UNICEF, CHILDREN IN CONFLICT AND EMERGENCIES, http://www.unicef.org/protection/index_armedconflict.html; See also Lisa Avery, *The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War*, 51 LOY. L. REV. 103, 103 (2005) (stating, "During the last decade alone, two million children were killed, another six million were seriously injured or left permanently disabled, and twice that number of children were rendered homeless by the ravages of war.").

Protection of Civilian Persons in Time of War⁴ (GCC) was written in response to the dramatic numbers of civilian casualties in World War II.⁵ There are, undoubtedly, a number of reasons for this increase.⁶ However, one of the most significant reasons for the rise in civilian deaths has been the mingling of combatants⁷ with civilians on the battlefield.⁸

Nowhere has this been more obvious than in the recent conflict in Iraq. Not only have insurgents such as Abu Musab al-Zarqawi specifically targeted civilians,⁹ but they have also refused to distinguish themselves from the civilian population.¹⁰ Rather, they have chosen to blend in with the local populace,

4. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention Relative to the Protection of Civilians].

5. See, e.g., LTC Paul Kantwill & MAJ. Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons": How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 *FORDHAM INT'L L.J.* 681, 725 (2005), and Reynolds, *supra* note 2, at 58; HISTORY LEARNING SITE, CIVILIAN CASUALTIES OF WORLD WAR II, http://www.historylearningsite.co.uk/civilian_casualties_of_world_war.htm (estimating civilian casualties to amount to more than half of the total casualties during WWII).

6. See Judith Graham & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 *COLUM. HUM. RTS. L. REV.* 1, 10-11 (2000) (arguing that the use of indiscriminate weapons such as landmines is a significant factor; and R George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 *WAKE FOREST L. REV.* 129, 131 (2003) (arguing that some weaker foes intentionally target civilians for the sake of military necessity or perceived necessity).

7. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Though there may be a few exceptions, persons on the battlefield can generally be divided into three categories: combatants, noncombatants, and civilians. Combatants are those members of the armed forces that meet the qualifications of Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War); Convention Respecting the Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, § 1, ch. 1, art. 3, Oct. 18, 1907, 1907 U.S.T. LEXIS 29, 1 *Bevans* 631 (Noncombatants are also members of the armed forces under Article 3 of the Annex on Regulations Respecting the Laws and Customs of War on Land to the Hague Convention (IV) respecting the Laws and Customs of War on Land); Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 43, June 8, 1977, 1125 U.N.T.S. 3, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> (Noncombatants include combatants who meet the above definition who are *hors de combat* and other members of the armed forces such as chaplains and medical personnel. Civilians are not covered by the above definitions. However, in many cases, including works and articles cited herein, noncombatants is used more generally to include all who are not combatants).

8. Reynolds, *supra* note 2, at 75-77 (arguing that "concealment warfare," or the mixing of military personnel or targets with civilians, has been partially responsible for this increase).

9. John Ward Anderson & Jonathan Finer, *The Battle for Baghdad's Future; Three Years After Its Fall, Capital Is Pivotal to U.S. Success in Iraq, Officers Say*, *WASH. POST*, Apr. 9, 2006, at A17; Julian E. Barnes, *Sliding Toward an Uncivil War*, *U.S. NEWS & WORLD REPORT*, March 6, 2006, at 14-15; Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 *INT'L LAW.* 733 (2005).

10. See *CNN Live Event: Coalition News Briefing* (CNN television broadcast Apr. 11, 2004) (Transcript No. 041101CN.V54) (BG Kimmitt stating, "At 4:45, while moving from (UNINTELLIGIBLE) to clear an armed enemy—a coalition force was ambushed by enemy elements of unknown size. Reports indicate at least 20 rocket grenades were observed during the course of the

making it much more difficult for coalition and Iraqi military to distinguish between the insurgents and the innocent bystanders.¹¹ The obvious result of such tactics is to increase the danger to civilians. This creates a difficulty for those who are trying to comply with the law of war.

When faced with such opponents, militaries intent on complying with the Law of War struggle between the requirements of distinction and their desire to protect non-combatants, and the practical reality of protecting their force from fighters... who act as combatants when engaging in combat but dissolve into the crowd of non-combatants when faced with opposing military forces.¹²

This intermixing of combatants with civilians while engaging in hostilities violates one of the most fundamental principles of the law of armed conflict: the principle of distinction. This bedrock principle of the law of war requires those involved in conflict to mark themselves so they can be distinguished from those who are not involved in combat. The most common method of compliance is for combatants to wear a uniform, but other methods of setting a combatant apart from a non-combatant are also authorized.¹³ By requiring distinction, both combatants and civilians know who is involved in the combat and who is not. Thus, they can both make informed decisions of how to proceed in a combat environment.

The derogation from the principle of distinction is among the most serious issues facing the law of war today.¹⁴ As combatants relax the requirement obliging them to mark themselves, erosion of this distinction will lead to greater intermixing of combatants with civilians. Increased civilian casualties will inevitably result because of the inability to discern who is "targetable" and who is not. Unfortunately, the current trend in the development of the law of war seriously undermines the principle of distinction by allowing, or even encouraging, would-be fighters to evade distinguishing themselves. Instead, these combatants seek the protections of civilians while not accepting the responsibilities of eschewing combatants' acts. This is a devastating trend that must be reversed or it will result in the destruction of the current law of war.

engagement. Forty to 50 armed individuals were observed, some wearing black pajamas, uniforms, others wearing civilian clothes.").

11. See *CNN Live Sunday: U.S. Helicopter Shot Down in Iraq, Both Pilots Killed; 7 Chinese Citizens Taken Hostage in Iraq* (CNN television broadcast Apr. 11, 2004) (Transcript No. 041104CN.V36) (quoting a military spokesperson as saying:

We are working at a disadvantage...The lack of uniforms, so that you can't define the enemy very well. And the intertwining of the enemy with combatants is very, very difficult. So you've got combatants and non-combatants mixed together intentionally...[I]f you think about just the way that, for instance, the Shi'ias could basically in this area right here, thousands of pilgrims on their way into this region right here, and the militia being able to just take off the black uniforms, and blend right in, into all those pilgrims).

12. Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L. L. 209, 211 (2005).

13. Major William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 106-09 (2003).

14. See George H. Aldrich, *The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT'L. L. 42, 42 (2000) (listing combatant status and protection of civilians as two of the top five areas of the law that need further development in the early 21st century).

This paper will briefly introduce the principle of distinction, reviewing its basis in customary international law and early conventional codifications. The Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (GPI) will then be analyzed and proffered as the beginning of the official derogation from the principle of distinction and the genesis of an increasing disregard of the requirement that combatants distinguish themselves from civilians. Two recent cases from the International Court of Justice (ICJ), the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹⁵ and the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*,¹⁶ will then be discussed and criticized for promoting the same trend, giving official incentive for nations to use non-uniformed insurgents rather than official militaries who would be expected to comply with the law of armed conflict. The significant danger this poses to the law of war in the age of asymmetrical warfare will then be illustrated. Finally, some recommendations will be made as to steps the international community can take to reinstate the principle of distinction and reinvigorate the protections afforded to civilians.

I. PRINCIPLE OF DISTINCTION

“At the very heart of the law of armed conflict is the effort to protect non-combatants by insisting on maintaining the distinction between them and combatants.”¹⁷ This principle “prohibits direct attacks on civilians or civilian objects”¹⁸ and is codified in Article 48 of the GPI¹⁹ which states, “In order to

15. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131 (July 9) [hereinafter *Advisory Opinion No. 131*].

16. *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Order of Dec. 19, 2005), available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (last visited Oct. 10, 2007) [hereinafter *Dem. Rep. Congo v. Uganda*].

17. W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852, 856 (2006).

18. Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148 (1999).

19. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), *supra* note 7, at art. 48. (Concerning article 48, the Commentary to GPI states:

The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 (1) and in Geneva from 1864 to 1977 (2) is founded on this rule of customary law. It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles, (3) which had stated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." Admittedly this was concerned with preventing superfluous injury or unnecessary suffering to combatants by prohibiting the use of all explosive projectiles under 400 grammes in weight, and was not aimed at specifically protecting the civilian population. However, in this instrument the immunity of the population was confirmed indirectly);

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Commentary, part IV, § 1, ch. 1, art. 48, para.

ensure respect for and protection of the civilian population and civilian objects, 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."²⁰ However, this principle only attained such general acceptance after a long history of slow evolution in the laws of armed conflict. This evolution began millennia ago and arose out of recognition that regulating conflict, even if only to a limited degree, would have benefits.²¹

Many ancient cultures had rules concerning the conduct of hostilities.²² As these rules evolved through time and culture, their focus was to provide protections for those who were engaged in hostilities and were acceptable only if they provided some military advantage or fulfilled some military purpose.²³ For example, as early as the 5th century B.C., Sun Tzu wrote, "Treat the captives well, and care for them... Generally in war the best policy is to take a state intact; to ruin it is inferior to this."²⁴ Sun Tzu's apparent concern for captives and enemy property and persons was not born from a humanitarian desire to preserve his adversary but as part of the overall goal to conquer that enemy. Contrast Sun Tzu's tactics with that of the Roman armies during the 5th and 6th centuries. Although they had rules about military conduct in war, "Plunder was general; and no distinction was recognized between combatants and noncombatants"²⁵ because the military's need to plunder was too great. Similar approaches were taken by the Babylonians, Hittites, Persians, Greeks, and others.²⁶ Any protections granted to noncombatants and civilians grew generally out of a utilitarian view of warfare and not from an ideological desire to preserve them from the horrors of war.²⁷

During the age of chivalry, the customs and usages of war continued to take a utilitarian view and developed rather intricate rules for plunder²⁸ and siege.²⁹

1863, available at <http://www.icrc.org/ihl.nsf/COM/470-750061?OpenDocument> [hereinafter GPI Commentary.]; see also Ferrell, III, *supra* note 13 (offering an excellent discussion on the practical application of the principle of distinction, and particularly the provisions of GPI, to special operations forces).

20. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), *supra* note 7, at art. 48.

21. *Id.* at Preamble.

22. See, e.g., William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L. J. 639, note 12 (2004).

23. *Id.* at 697-710 (presenting an excellent overview of this concept).

24. SUN TZU, *THE ART OF WAR* 76 (Samuel Griffith trans., Oxford Univ. 1963).

25. Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. Tol. L. Rev. 111, 114 (2001) (giving an excellent overview of the laws of war during the Age of Chivalry).

26. Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 182-85 (2000).

27. See, e.g., David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, THE NAT'L INTEREST, Fall 2003, at 6 (stating, "The reasoning behind the practical nature of both customary law and the Geneva Conventions was obvious: a humanitarian 'law' that impeded the ability of states to defend their vital interests would, in practice, amount to nothing but a series of pious aspirations.").

28. See Wingfield, *supra* note 25 at 115-16 (stating:

To preserve discipline and guarantee a fair distribution, the booty was usually gathered centrally and then distributed after the battle to each soldier in accordance with his rank and merit. The precise

They contained a number of very important rules for relations between fighters, such as ransom³⁰ and parole,³¹ as well as combat rules, such as the distinction between ruses and perfidy.³² As the feudal system gave way to the rise of the nation state, and its dominance as the major player in international relations,³³ knights also gave way to the use of professional armies. While civilians had been incidental to the conflicts up to this point, this transition broadened the scope of who participated in hostilities. As Nathan Canestaro writes:

The erosion of the line between civilians and the professional military began with the fundamental changes in warfare seen in the Napoleonic era. The expanding scale of warfare, the advent of popular revolutions in some European countries, especially France, and repeated clashes between professional soldiers and armed peasantry during the Napoleonic wars, brought commoners into warfare in significant numbers for the first time.³⁴

With this increase in the scope of hostilities, the battlefield was prepared for a renewed focus on the laws governing war, including the consideration of noncombatants and civilians.

By the middle of the 19th century, nations began to codify the rules that had developed up to that point.³⁵ Examples of this include the 1863 Lieber Code,³⁶ the

customs governing the division of spoil varied from country to country, but everywhere this distribution created a legally recognized, heritable, and assignable right of property in the captured objects. Military historians have long admired the close coordination between English naval forces patrolling along the coast of northern France and the English land armies pillaging the interior of the country. The admiration is not misplaced; but it is worth remarking that this fleet not only provided food and supplies to the army. It also acted as a kind of floating safe-deposit box for the troops, who could be sure that their loot would get back to their families in England even if they did not survive the campaign).

29. *Id.* at 117-19 (stating:

A siege began when a herald went forward to demand that a town or castle admit the besieging lord. If the town agreed, this constituted surrender, and the lives and property of the townspeople would be protected. If the town refused to surrender, however, this was regarded by the besieging lord as treason, and from the moment the besieger's guns were fired, the lives and property of all the town's inhabitants were therefore forfeit Strictly speaking, the resulting siege was not an act of war but the enforcement of a judicial sentence against the traitors who had disobeyed their prince's lawful command).

30. *Id.* at 116-17; Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY LAW. 4, 4 (1997) (noting, "The practice of not killing one's captives, however, was rooted in fiscal reasons, not humanitarian reasons.").

31. See Maj. Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 201-08 (June, 1998).

32. *Wingfield*, *supra* note 25, at 131.

33. See Nathan A. Canestaro, "Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT'L L. 73, 83 (2004) (noting, "The principle that the right to wage war is limited to sovereign authority was asserted by the prominent Sixteenth Century legal scholar and father of international law, Hugo Grotius . . .").

34. *Id.* at 84.

35. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 706 (2004) (arguing that the codification of the modern law of armed conflict is a generally western notion).

36. DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF*

1868 Declaration of St. Petersburg,³⁷ the unratified Brussels Conference of 1874,³⁸ the Hague Conventions of 1899 and 1907,³⁹ and the 1909 Naval Conference of London.⁴⁰ These conventions came to be known as the "Hague tradition."⁴¹

The Hague tradition, typified by the 1907 Hague Regulations, became the foundation upon which all modern laws of armed conflict are built,⁴² and they embody concepts still valid today.⁴³ This Hague tradition focused on the

CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3 (3rd ed. 1988) (An analysis of the provisions of the Lieber Code show that it "acknowledge[s] the supremacy of the warrior's utilitarian requirements even though explicitly referring to the need to balance military necessity with humanitarian concerns."); Eric Krauss & Michael Lacey, *Utilitarian vs. Humanitarian: The Battle Over the Law of War*, PARAMETERS, Summer 2002, at 76, available at <http://www.carlisle.army.mil/USAWC/Parameters/02summer/lacey.htm>; Reynolds, *supra* note 2, at 7-8 (writing:

The Lieber Code specifically prohibited the targeting of civilians and civilian objects. It also recognized that collateral damage should be avoided, but was acceptable if it was the result of an attack on a legitimate military objective. The Lieber Code articulates basic principles of the law of war, including the principle of military necessity in Articles 14 and 15. "Military necessity [consists 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." Further, "Military necessity admits of all direction of destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable" Lieber defined the principle of distinction when he stated, "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit").

37. SCHINDLER & TOMAN, *supra* note 36, at 101, available at <http://www.icrc.org/IHL.nsf/FULL/130?OpenDocument> (stating in the preamble, "The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.").

38. *Id.* at 25, available at <http://www.icrc.org/IHL.nsf/FULL/135?OpenDocument> (though civilians are not defined, Article 9 deals with combatants and states:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination 'army'.

39. *Id.* at 63-103.

40. *Id.* at 843.

41. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?* 90 CORNELL L. REV. 97, 108-09 (2004) (stating:

The jus in bello is further subdivided into Geneva law and Hague law. Comprised principally of the four 1949 Geneva Conventions and the two 1977 Additional Protocols, Geneva law is a detailed body of rules concerning the treatment of victims of armed conflict. Embodied principally in the 1899 and 1907 Hague Conventions, Hague law prescribes the acceptable means and methods of warfare, particularly with regard to tactics and general conduct of hostilities. Though Geneva law and Hague law overlap, the terminology distinguishes two distinct regimes: one governing the treatment of persons subject to the enemy's authority (Geneva law), and the other governing the treatment of persons subject to the enemy's lethality (Hague law). International humanitarian law embraces the whole jus in bello, in both its Geneva and Hague dimensions).

42. Christopher L. Blakesly, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1064-65 (2003).

43. Int'l. & Operational Law Dep't, The Judge Advocate General's Legal Center and School, U.S.

combatants and was based on a utilitarian view of warfare not only to provide limited protections for fighters while in battle but also to maintain the warrior ethos of chivalry.⁴⁴ Commenting on the utilitarian nature of the Hague tradition, George Aldrich wrote, "The 1907 Hague Regulations contain very few provisions designed to protect civilians from the effects of hostilities. Aside from the prohibition on the employment of poison or poisoned weapons, which was primarily intended to protect combatants, the only such rules are Articles 25-28."⁴⁵

This era of codification, steeped in the notion of the law of war being a tool for combatants rather than an external limitation, is typified by the statement traditionally attributed to the German Chancellor, Otto von Bismarck: "What leader would allow his country to be destroyed because of international law?"⁴⁶ International law was formed from the combatant's point of view, not the noncombatant.

Concurrent with the codification of the utilitarian law of war in the middle of the 19th century, others began exercising an increasingly prominent voice relating to the laws of armed conflict.⁴⁷ These voices expressed concern for the victims of armed conflict, which were initially combatants, but later included noncombatants and civilians. The founding of the International Committee of the Red Cross (ICRC) after Henri Dunant's experience at the 1859 Battle of Solferino⁴⁸ and the subsequent 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field⁴⁹ with its accompanying Additional Articles of 1868⁵⁰ are examples of the developing movement. This was followed by

ARMY, JA 422, OPERATIONAL LAW HANDBOOK, 12-15 (Derek I. Grimes ed., 2006).

44. See *Wingfield*, *supra* note 25, at 135-36.

45. See Aldrich, *supra* note 14, at 50 (continuing:

Article 25 forbids the bombardment 'of towns, villages, dwellings, or buildings which are undefended.' By undefended, it was clear that the article meant that there were no defending armed forces in the town or other area in question or between it and the attacking force and consequently that it was open for capture by the attacker. It clearly did not apply to towns, villages, and so forth, that were in the hinterland and consequently were not open to immediate capture – or, in 1907, even to bombardment. Essentially, the article was a commonsense prohibition against bombarding something that could be taken without cost to the attacker. Articles 26 and 27 were precautionary measures, and neither suggests that its primary object was to minimize civilian casualties, although they might have provided some beneficial incidental effects for civilians in places under siege or bombardment. Article 28, which prohibits pillage, protects civilians only after the fall of the town or place and was necessary to make clear that the ancient custom permitting pillage of places that had resisted sieges was no longer acceptable).

46. See Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 63-64 (1994).

47. See LOUISE DOSWALD-BECK, *Implementation of International Humanitarian Law in Future Wars*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 42 (Naval War College International Law Studies, vol. 71) (Michael N. Schmitt & Leslie C. Green eds., 1998) (arguing the advance in weapons technology also drove states to try and enact laws to limit warfare).

48. See INTERNATIONAL COMMITTEE OF THE RED CROSS, *From the Battle of Solferino to the Eve of the First World War*, at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNVP> (providing a concise history of Dunant, including the Battle of Solferino).

49. SCHINDLER & TOMAN, *supra* note 36, at 279.

50. *Id.* at 285.

continuing codifications such as the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.⁵¹

These humanitarian efforts focused on greater protections for combatants and became known as the "Geneva tradition"⁵² because the ICRC was headquartered in Geneva, Switzerland, and many of the early conferences were held there. These innovations were welcomed by the combatants and are still accepted as imbedded in the practical realities of warfare.⁵³

WWII exhibited an exponential rise in wartime costs to civilians, both in terms of lives lost and in property damage.⁵⁴ Increasingly lethal technology and weapons led to increasing effects on civilians.⁵⁵ "At the end of the nineteenth century, the overwhelming percentage of those killed or wounded in war were military personnel. Toward the end of the twentieth century, the great majority of persons killed or injured in most international armed conflicts have been civilian non-combatants."⁵⁶ This disturbing direction of warfare heightened the concern for the victims of warfare, particularly after the devastation of WWII.

In the years immediately following the war, a shifting of focus continued to add protections for combatants and noncombatants but also began to intertwine them with protections for civilians.⁵⁷ Codification of this shift began with the four 1949 Geneva Conventions.⁵⁸ While the first three Geneva Conventions⁵⁹ built upon preexisting established principles that survived WWII and were aimed at treatment of members of the armed forces, the Convention (IV) relative to the Protection of Civilian Persons in Time of War⁶⁰ extended certain protections to civilians based on their status as non-participants in the conflict.⁶¹ All four conventions were advances in humanitarian law and proscribed many of the horrors of WWII in order to prevent them from occurring again. In fact, the fourth convention required military commanders to modify operations based solely on their potential effects on the civilians on the battlefield.

Underlying all four conventions was the idea that all persons on the battlefield could be divided into three distinct groups (combatants, noncombatants or

51. *Id.* at 301.

52. See *Wingfield*, *supra* note 25, at 134-35.

53. DOSWALD-BECK, *supra* note 47, at 41.

54. Compare the estimated number of deaths in WWII (<http://www.valourandhorror.com/DB/BACK/Casualties.htm>) with those in WWI (<http://www.vw.cc.va.us/vwhansd/HIS122/WWIcasualties.html>).

55. Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 326 (1951).

56. Aldrich, *supra* note 14, at 48.

57. See Rivkin & Casey, *supra* note 27, at 60-61.

58. Bradford, *supra* note 22, at 765-70.

59. SCHINDLER & TOMAN, *supra* note 36, at 305-425.

60. *Id.* at 427-85.

61. Krauss & Lacey, *supra* note 36, at 77 (noting, "[p]revious conventions had forced the utilitarians to deal with issues such as the treatment of the sick and wounded and prisoners of war . . . [t]he Civilian Convention for the first time placed affirmative obligations . . . to address the food, shelter, and health-care needs of civilians").

civilians), and that it is unlawful to target those who were not combatants.⁶² Although no definition was provided for persons who were not combatants, all who wanted the protections and privileges of prisoners of war were obliged to strictly comply with Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).⁶³ This includes a requirement for all to distinguish themselves from the local populace who were not engaging in combatant activities.

In the two decades that followed the 1949 Geneva Conventions, the global political climate developed into a bi-polar world, with the United States and its North Atlantic Treaty Organization members directly opposing the Soviet Union and its supporting Warsaw Pact members. The most significant aspect of this bi-polar world was the lack of armed conflict between the major powers.⁶⁴ While many conflicts erupted across the globe, they were characterized by struggles for self-determination or other small-scale wars where nations acted as surrogates for the superpowers.⁶⁵ These wars were not characterized by the massing of large, uniformed, state-sponsored armies, but rather by small groups of often unorganized and un-uniformed freedom fighters.⁶⁶

During one such war, the Vietnam War, numerous allegations arose that many of the provisions of the Geneva Conventions were disregarded,⁶⁷ including fighters not distinguishing themselves in the conduct of battle. In response to these violations and in an attempt to update the 1949 Geneva Conventions,⁶⁸ the ICRC led the world⁶⁹ in adopting the 1977 Protocols to the Geneva Conventions.⁷⁰

62. Maj. Charlotte M. Liegl-Paul, *Civilian Prisoners of War: A Proposed Citizen Code of Conduct*, 182 MIL. L. REV. 106, 113 (2004); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8), available at <http://www.icj-cij.org/docket/files/95/7495.pdf> [hereinafter Legality of the Threat Opinion] (holding, "The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following . . . States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets").

63. SCHINDLER & TOMAN, *supra* note 36, at 355-425.

64. See Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 462-65 (2003).

65. See Thomas M. Franck, *The UN and the Protection of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 61 (2001).

66. *Id.* at 60-61.

67. Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805, n.130 (1999) (referencing the alleged American violations of the law of war); Jeffrey F. Addicott & William A. Hudson, *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 174-75 (1993) (referencing the alleged North Vietnamese violations of the law of war); Cf. Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 43 (1995) (stating that law of war violations were not prosecuted during this time period because of the superpower deadlock between the United States and the Soviet Union).

68. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 679 (1994); Aldrich, *supra* note 14, at 45 ("In the years since the Geneva Conventions were concluded in 1949, the world has clearly changed greatly. A majority of the present states did not exist as states in 1949, and many of them gained their independence only after armed struggles against colonial powers.").

69. Lee A. Casey & David B. Rivkin, Jr., *Double-Red-Crossed*, THE NAT'L INT. 63, 67 (2005);

These Protocols, and particularly the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (GPI), accomplished the complete amalgamation of the Hague and Geneva traditions, breaking through that invisible barrier that had seemed to divide the two regulatory streams,⁷¹ but at the expense of the "historic rule" of distinction.⁷²

II. GPI AND THE EROSION OF THE PRINCIPLE OF DISTINCTION

One hundred and sixty-seven states are parties to GPI,⁷³ with an additional five countries that have signed but not yet ratified the text,⁷⁴ including the U.S.⁷⁵ Article 1 of GPI states the coverage of the Protocol:

Art 1. General principles and scope of application....

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁷⁶

The reference to Common Article 2 of the 1949 Geneva Conventions is important in that it limits the application both to whom and when it applies.⁷⁷ Common Article 2 states:

Art 2. In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 46 (1984).

70. SCHINDLER & TOMAN, *supra* note 36, at 551-629.

71. Legality of the Threat Opinion, *supra* note 62, at 256 ("These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.").

72. Reisman, *supra* note 17, at 856-57.

73. International Humanitarian Law –Treaties and Documents, available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

74. *Id.*

75. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (As a signatory, but not party, to the GPI, the U.S. has the obligation to not "defeat the object and purpose" of its provisions).

76. SCHINDLER & TOMAN, *supra* note 36, at 558

77. Murphy, *supra* note 69, at 49.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a Party to the present Convention, the Powers who are Parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.⁷⁸

By their text, the application of the Conventions is limited to High Contracting Parties and to the three specific fact patterns: 1) declared war, 2) any other armed conflict even if the state of war is not recognized, and 3) partial or total occupation. The limit of the scope of the application to "High Contracting Parties" has been overcome by the acceptance of all four Geneva Conventions as customary international law, binding on all nations whether or not they are signatories.⁷⁹ However, the three specific fact patterns have not been expanded by any such generally accepted declaration. Therefore, that portion of the scope of common Article 2 is the substance that is directly incorporated into Article 1, paragraph 3, of GPI, limiting its scope and application.

Paragraph 4 of GPI, however, appears to expand the reach of the Protocol despite the language of paragraph 3.⁸⁰ In stating that "[t]he situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," the article establishes a potential overlap between the two paragraphs and the simultaneously promulgated Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (GPII).⁸¹

GPII's scope and application is stated in Article 1:

Art 1. Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such

78. SCHINDLER & TOMAN, *supra* note 36, at 361-62.

79. See Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 50 (1999).

80. Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 598 (1983); Murphy, *supra* note 69, at 49-50.

81. SCHINDLER & TOMAN, *supra* note 36, at 558.

control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.⁸²

If the apparent division between the two Protocols is intended to be international versus non-international armed conflicts as the titles suggest, the scope of GPII was seriously eroded at inception by the expansion of GPI to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," conflicts that are the prototype for non-international, or internal, armed conflicts.⁸³ Further, similar to GPI, the statement that GPII "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application" seems to be clear until the succeeding reference to Article 1 of GPI.

The United States strongly objects to this expansion of the coverage of the law of armed conflict and provides that as one of the reasons it refuses to ratify GPI.⁸⁴ In his Letter of Transmittal to the Senate, President Ronald Reagan stated:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology.⁸⁵

This is important to the present discussion because it was this expansion coupled with the desire to cover fighters engaged in "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" that has led to

82. *Id.* at 621.

83. *Id.* at 558. *But see* GPI Commentary, *supra* note 19, at para. 86-87, 90 (arguing that Common Article 2 initially contemplated inclusion of such conflicts, wars of liberation are really of an international character, and that wars of national liberation should be covered by the laws of armed conflict because of their characteristics, such as the intensity of the conflict).

84. *See* Remarks of Judge Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 463-71 (1987); Michael Lacey, *Passage of Amended Protocol II*, 2000 ARMY LAW. 7, n.3 (2000).

85. Ronald Reagan, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal*, 81 AM. J. INT'L L. 910, 911 (1987).

GPI's derogation from the principle of distinction.⁸⁶ By including those types of conflicts, which were traditionally not covered by the laws of combatant status, they included many fighters who traditionally do not comply with the requirements of combatant status.

Against the backdrop of expanded coverage, the Protocol then redefines the requirements for combatant status. After discussing a state's armed force in Article 43, GPI Article 44 provides:

Article 44—Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the

86. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol on the Protection of Victims of International Armed Conflict].

case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.⁸⁷

Article 44 was one of the most controversial provisions of the drafting convention,⁸⁸ and rightly so. It represents a significant change to the law of war. By reducing the requirement to participate in hostilities as a combatant to merely requiring an attacker to carry his arms openly,⁸⁹ the Protocol strikes a blow to the rule that has become the bedrock principle of civilian protection. As Professor Michael Reisman writes, "Article 44 constitutes a considerable relaxation, for at least one side to a conflict, of the historic requirement, as well as of the sanction that functioned as an enforcement mechanism. This change was not accomplished inadvertently."⁹⁰

87. *Id.* at art. 44.

88. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 para. 1684 (J. Pictet et al. eds., 1987), available at <http://www.icrc.org/ihl.nsf/COM/470-750004?OpenDocument> [hereinafter Pictet, COMMENTARY].

89. See Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Article 4 of the GPW sets out the requirements for irregular forces to be given combatant status and prisoner of war privileges); Sofaer, *supra* note 84 at 466-67 (asserting that the provisions of article 44 undermine the protection for civilians and provide support for terrorist activities); John C. Yoo & James C. Ho, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists*, 44 VA. J. INT'L L. 207, 225-28 (2003) (discussing article 44 and arguing that it dilutes the protections to civilians by encouraging unlawful combatants such as terrorists to engage in hostilities without complying with the traditional requirements of article 4 of the GPW); But see Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. LAW 721, 741-43 (2001) (arguing that the protections for civilians is still the main focus of the Protocol despite the expansion of the term combatant).

90. Reisman, *supra* note 17, at 858.

The target of this relaxation was “guerilla warfare,” a “modern battlefield... phenomenon” which can not be ignored.⁹¹ Pictet states in his commentary:

Guerrilla fighters will not simply disappear by putting them outside the law applicable in armed conflict, on the basis that they are incapable of complying with the traditional rules of such law. Neither would this encourage them to at least comply with those rules which they are in a position to comply with, as this would not benefit them in any way.⁹²

This argument makes a mockery of paragraph 3’s recounting of the basis for the principle of distinction: “the protection of the civilian population from the effects of hostilities.”⁹³ While it may widen the scope of those who are classified as combatants, it fatally blurs the distinction between combatants and civilians.

Specifically, by allowing battlefield fighters to attack without wearing a uniform or other distinguishing element, GPI has completely undermined the reciprocal underpinnings of the principle.

The venerable requirement imposed on combatants that, to be lawful, they must wear uniforms and bear arms openly is an indispensable and easily implemented and policed means for protecting noncombatants. Without these distinctive insignia, belligerents cannot distinguish adversaries from civilians, with predictable results.⁹⁴

The predictable results include increased civilian casualties, as has been so clearly illustrated by recent events in Iraq.⁹⁵ In a conflict where soldiers are incapable of discerning between civilians and illegal fighters, “They must decide either not to shoot those who appear to be noncombatants and risk being killed, or attempt to distinguish between combatants and noncombatants, and in doing so, knowingly accept the risk of killing noncombatants for self-preservation.”⁹⁶

91. Pictet, COMMENTARY, *supra* note 88, para. 1684.

92. *Id.* But see Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 19–20 (2004) (arguing that the delegates to the 1949 Geneva Conventions did not want to grant combatant protections to groups fighting against their own government).

93. Protocol on the Protection of Victims of International Armed Conflict, at art. 44, para. 3.

94. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L. L. 852, 856 (2006); See also Derek Jinks, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Protective Parity and the Laws of War*, 79 NOTRE DAME L. REV. 1493, 1497 (2004) (stating:

the protection of noncombatants from attack is predicated on a clear distinction between combatants and noncombatants. If attacking forces cannot distinguish between enemy soldiers and civilians, this type of rule cannot work well....It is the goal of protecting innocent civilians that requires a sharp line between combatants and noncombatants).

95. Glenn Kutler, *Iraq Coalition Casualty Count*, iCasualties.org, <http://icasualties.org/oif/IraqiDeaths.aspx> (last visited July 28, 2007) (where claims of civilian deaths in Iraq are tracked and estimated. These large numbers of civilian deaths is attributable at least in part, if not in large part, to the intermixing of unlawful combatants with civilians); *CNN Live Event, supra* note 10; *CNN Live Sunday, supra* note 11.

96. Jensen, *supra* note 12, at 224; Mark D. Maxwell, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?* 9/1/04 MIL. REV. 17, at 23 (“Absent this ability

President Reagan recognized this and stated in his Letter of Transmittal to GPI that it:

would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form.⁹⁷

Not content to stop at paragraph 3 with its dangerously relaxed provisions for combatant status, the Protocol explicitly confirms the disadvantage to uniformed militaries in paragraph 7 by requiring them to continue to fight in the traditional methods despite being faced with foes who do not.⁹⁸ It does not take much military savvy as an insurgent leader to figure out how to take advantage of a legal system where only one side is required to mark themselves as combatants and the other side has the opportunity to hide amongst those it is illegal for the uniformed armies to kill.

Thanks at least in part to the natural results of Protocol I's derogation from the combatant status requirements, Gabriel Swiney states, "[T]he Principle of Distinction is violated across the world, often openly so, and that problem is getting worse. Something must be done."⁹⁹ Something has been done. Two recent cases have been taken to the International Court of Justice (ICJ) giving this international adjudicative body a chance to reestablish the sanctity of the principle of distinction and halt or even reverse the path of erosion begun by GPI. Unfortunately, the ICJ did the exact opposite and turned a perverse authorization to conduct military operations from amongst the noncombatant population into an illicit incentive to do so.

to distinguish between lawful and unlawful combatants, an enemy might well be left with one of two targeting choices: do not engage any civilians, even though some are engaging its forces, or engage every enemy civilian on the battlefield. The latter choice will likely prevail."); Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 335 (1951) (arguing this as a reason why the existence of a *levee en masse* will likely force the invader to treat all civilians as hostile).

97. Ronald Reagan, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal*, 81 AM. J. INT'L L. 910, 911 (1987); Pictet, COMMENTARY, *supra* note 88, para. 1679 (Coming close to admitting the danger to civilians of this situation in the Commentary where he writes that "distinction between combatants and non-combatants may be more difficult as a result, but not to the point of becoming impossible.").

98. See Ferrell, *supra* note 13, at 105 (writing:

[T]he [law of war] places a duty on parties to a conflict to distinguish combatants from civilians. This is a reciprocal duty, requiring all parties to distinguish among enemy combatants and civilians when conducting military operations and to ensure a party's own armed forces are distinguishable from enemy combatants and civilians.

99. Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733 (2005) (arguing then for replacing the principle of distinction with the Principle of Culpability which is based on each individual's actions rather than his status as a noncombatant.).

III. THE ICJ INCENTIVIZES THE USE OF FORCES THAT DO NOT DISTINGUISH THEMSELVES

The ICJ was established at the San Francisco Conference of 1945¹⁰⁰ to be the “principal judicial organ” of the United Nations.¹⁰¹ Its jurisdiction is non-compulsory¹⁰² but limited to state parties¹⁰³ except for specific exceptions such as a request for an advisory opinion from the General Assembly.¹⁰⁴ It was just such a request from the General Assembly that precipitated the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, known as the Wall Advisory Opinion.¹⁰⁵

A. The Wall Advisory Opinion

In the Wall Advisory Opinion, the General Assembly asked the Court to provide an advisory opinion on the issue of:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?¹⁰⁶

The question resulted from the construction of a large wall,¹⁰⁷ or fence as the Israeli Supreme Court called it,¹⁰⁸ that meandered through the occupied territory of the West Bank.¹⁰⁹ The ICJ determined that the wall was illegal for a number of reasons,¹¹⁰ with one of its major objections being that the path of construction

100. Int'l Court of Justice, *The Court*, <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm> (for a short history of the ICJ).

101. *See* U.N. Charter, art. 92.

102. *See* STATUTE OF THE INT'L COURT OF JUSTICE, art. 36, 3 Bevens 1179; 59 Stat. 1031, T.S. No. 993.

103. *See id.* at art. 34.

104. *Id.* at arts. 65-68; U.N. Charter, art. 96

105. *See* Advisory Opinion No. 131, *supra* note 15.

106. *Id.* at para. 66.

107. This is the term used by the ICJ. *See* Karin Calvo-Goller, *Jurisdiction and Justiciability: More Than a Huge Imbalance: The ICJ's Advisory Opinion on the Legal Consequences of the Construction of the Barrier*, 38 ISR. L. REV. 165, 168-89 (2005) (arguing that the use of the term Wall illustrates the ICJ's purposeful misconstruing of the case); Emanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT'L L.J. 569, 571 (2005) (arguing that the Courts use of “this particular loaded term . . . would most likely cause people - even if unfamiliar with the issue - to feel a sense of aversion and antipathy towards a structure of this kind because of the immediate negative connotations of the expression.”).

108. H.C.J. 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC 1 (Barak, C.J.) (The Israeli Supreme Court used the term “fence”); *Cf.* Joshua Kleinfeld, *The Legal Status of the Barrier Between Israel and the Occupied Territory: For International Law, Against the International Court* (on file with author) (discussing the prejudging nature of the title given to the construction).

109. *See* Kleinfeld, *supra* note 108 (The facts concerning the actual location of the wall at various periods is a matter of dispute).

110. *Id.* (analyzing the ICJ decision with some dissatisfaction for various reasons) ; *See also*,

appeared to be an attempt to illegally take Palestinian lands or at least prejudge any future negotiations on where the permanent boundary should be.¹¹¹

In response to allegations of illegality, Israel argued that the fence was a self-defense measure under Article 51 of the UN Charter,¹¹² which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."¹¹³

The Israeli permanent representative to the UN General Assembly, Ambassador Dan Gillerman, stated prior to the ICJ case:

[A] security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilian areas. The fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter. International law and Security Council resolutions, including resolutions 1368 (2001) and 1373 (2001), have clearly recognized the right of States to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.¹¹⁴

It was Israel's contention that the fence was legal as a measure of self-defense and that it represented a humane and proportionate response to the terror attacks. The ICJ disagreed.

In response to Israel's Article 51 claim, the Court said:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a

Alberto De Puy, *Bringing Down the Barrier: A Comparative Analysis of the ICJ Advisory Opinion and the High Court of Justice of Israel's Ruling on Israel's Construction of a Barrier in the Occupied Territories*, 13 TUL. J. INT'L & COMP. L. 275 (2005); Karin Calvo-Goller, *Jurisdiction and Justiciability: More Than a Huge Imbalance: The ICJ's Advisory Opinion on the Legal Consequences of the Construction of the Barrier*, 38 ISR. L. REV. 165 (2005); Rebecca Kahan, *Building a Protective Wall Around Terrorist—How the International Court of Justice's Ruling in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT'L L.J. 827 (2005); Sean D. Murphy, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Territories: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005); Emanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT'L L.J. 569 (2005).

111. Advisory Opinion No. 131, *supra* note 15, at para. 121. See also U.N. GA Press Release GA/10179, *General Assembly, in Resumed Emergency Session, Demands Israel Stop Construction of Wall, Calls on Both Parties to Fulfill Road Map Obligations* (Oct. 21, 2003); De Puy, *supra* note 110, at 297-99.

112. *Id.* at para. 116, 138.

113. U.N. Charter art. 51.

114. Sean D. Murphy, *AGORA: ICJ Advisory opinion on Construction of a Wall in the Occupied Palestinian Territory: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?*, 99 AM. J. INT'L L. 62, 62 (2003) (quoting U.N. GAOR, Emergency Special Sess., 21st mtg. at 6, U.N. Doc. A/ES-10/PV.21 (Oct. 20, 2003)).

foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368(2001) and 1373(2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.¹¹⁵

The fact that Israel has been subject to serious terror attacks is not in dispute. However, the Court declined to recognize those attacks as justification for Israel's actions.¹¹⁶ Rather, the Court held that the right to respond in self-defense only arises when state action is involved. This restrictive reading of self-defense has been met with significant disagreement,¹¹⁷ including among several of the Court's own Judges.¹¹⁸

115. Advisory Opinion No. 131, *supra* note 15, at para. 139.

116. *See* Murphy, *supra* note 114, at 71-75.;

117. Murphy, *supra* note 114, at 62-63 (providing a detailed analysis of why the court erred in its analysis of article 51 by limiting armed attacks to states and stating eloquently:

The position taken by the Court with respect to the *jus ad bellum* is startling in its brevity and, upon analysis, unsatisfactory. At best, the position represents imprecise drafting, and thus calls into question whether the advisory opinion process necessarily helps the Court "to develop its jurisprudence and to contribute to the progress of international law." At worst, the position conflicts with the language of the UN Charter, its *travaux préparatoires*, the practice of states and international organizations, and common sense. In addition to the lack of analytical reasoning, the Court's unwillingness to pursue an inquiry into the facts underlying Israel's legal position highlights a disquieting aspect of the Court's institutional capabilities: an apparent inability to grapple with complex fact patterns associated with armed conflict. Overall, the Court's style in addressing the *jus ad bellum* reflects an *ipse dixit* approach to judicial reasoning; the Court apparently expects others to accept an important interpretation of the law and facts simply because the Court says it is so).

118. *See* Advisory Opinion No. 131, *supra* note 15, at para. 33 (separate opinion of Judge Higgins) (Writing:

I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment, I.C.J. Reports 1986, p. 14)*. It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity "because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces" (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250-251));

Advisory Opinion No. 131, *supra* note 15, at para. 6 (separate opinion of Judge Burgenthal) (writing "the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State."); Advisory Opinion No. 131, *supra* note 15, at para.

After analyzing the Court's decision in the Wall Advisory Opinion, Professor Sean Murphy concludes:

[T]he upshot of the Court's present jurisprudence appears to be that under the UN Charter, (1) a state may provide weapons, logistical support, and safe haven to a terrorist group; (2) that group may then inflict violence of any level of gravity on another state, even with weapons of mass destruction; (3) the second state has no right to respond in self-defense against the first state because the first state's provision of such assistance is not an "armed attack" within the meaning of Article 51; and (4) the second state has no right to respond in self-defense against the terrorist group because its conduct cannot be imputed to the first state, absent a showing that the first state "sent" the terrorist group on its mission. Such a legal construct, if intended, seems unlikely to endure.¹¹⁹

Professor Murphy's sobering assessment of the impact of the Court's decision is even more worrisome when its consequences to the principle of distinction are considered.

Imbedded in the Court's exposition of the right of self-defense is a crucial point concerning the principle of distinction and its continuing derogation. As mentioned above, the principle of distinction is designed to separate combatants from non-combatants in an effort to preserve the noncombatant population by disqualifying them as targets. In exchange for this willingness to be marked as a target (and meet the other qualifications of combatant status), combatants receive many benefits.¹²⁰ The greatest of these benefits is combatant immunity, which grants immunity for warlike acts, as long as fighters comply with the laws of war. Ideally, these incentives would be sufficient to entice those who want to engage in battlefield activities to legitimize themselves by meeting the requirements of GPW Article 4, including distinguishing themselves from the noncombatant populace. This can be done, in part, by becoming a member of a state's armed forces with its requirements of distinction, or otherwise clearly distinguishing oneself as part of an organized fighting group. Of course, the drawback to this commitment to distinction is that a fighter can no longer blend into the civilian noncombatant population and attack with some level of anonymity.

Even if the incentives were insufficient to entice individuals, the reciprocal benefits that would accrue to states from having all fighters clearly distinguished and subsequently eligible for combatant privileges should convince states to comply with the requirements of marking their forces. The argument is that as nations fight in compliance with the laws of war, honoring the principle of distinction not only benefits its uniformed armed forces by clearly identifying the

35 (separate opinion of Judge Kooijmans) (While not agreeing that Israel could invoke article 51 based on the fact that the terrorist activities come from within Israel, writes that Security Council Resolutions 1368 and 1373 provide a basis for Israel's argument).

119. Murphy, *supra* note 114, at 66.

120. See generally Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 7 (discussing the methods and means of warfare and the treatment of prisoners).

enemy, but also preserves its noncombatant civilian population. However, the ICJ's decision in the Wall Advisory Opinion has now tacitly removed that incentive both from states and from fighters who want to commit combatant acts from a position that gives them the cover of civilians.

The ICJ's decision gives states less incentive to use their armed forces when attacking another nation because unless the attacks can be attributed to a state, the target state does not attain the right to respond in self-defense. In other words, a state now has to balance the benefits it will gain from attacking with clearly marked armed forces against the benefits it will accrue if it opts to work clandestinely¹²¹ through non-uniformed forces that it can support from a distance and still accomplish its goals but that it also knows will not give the target state the right to respond in self-defense. If a state thinks it can act through some armed rebel group and accomplish its aggressive purposes without having to fear military retribution, it will most certainly be more tempted to act. The inevitable result will be states making the decision to use armed rebels rather than uniformed state forces. This decision will undermine the principle of distinction by placing more fighters on the battlefield who may or may not decide to distinguish themselves from the local population.

While this unfortunate result of the Court's decision may not further affect the complex situation in Israel and Palestine,¹²² the Court should be prescient enough to project the impact of its rulings on other evident scenarios. In the end, there has

121. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para 195 (June 27) (Holding:

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.)

See Michael N. Schmitt, *The Rule of Law in Conflict and Post-Conflict Situations: U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737, 751 (2004) (discussing the meaning of the Nicaragua case: "only attacks of a particular scale and of certain effects are 'armed attacks' justifying a military response in self-defense."). *But see* Advisory Opinion No. 131, *supra* note 15, at note 15 (making no mention of the scale of the attacks as a criterion for invoking self defense).

122. See *Lebanese talk show discusses UN team investigating Al-Hariri death*, BBC WORLDWIDE MONITORING, Sep. 10, 2005; *Italy, United States Reaffirm Solidarity Against Terror*, STATE NEWS SERVICE, July 13, 2005 (Israel faces both uniformed and non-uniformed armed groups that act along a spectrum of almost full state sponsorship to only limited financial or ideological backing. It is unclear that this situation will change drastically as a result of the ICJ's ruling).

been little direct impact on the situation in Israel as a result of the ICJ ruling,¹²³ but the effects of the Court's narrow construction of armed attack have already eroded the principle of distinction. This is exactly the opposite direction international law should be moving.¹²⁴

Despite Professor Murphy's caution to the Court,¹²⁵ it has taken one more step down the path of undermining the principle of distinction, the step from tacitly approving to explicitly encouraging states to use armed militant groups who shun the rules of distinction and purposefully practice illegal battlefield tactics. This step occurred in the Case Concerning Armed Activities on the Territory of the Congo,¹²⁶ otherwise known as *Congo v. Uganda*.

B. Congo v. Uganda

The Case Concerning Armed Activities on the Territory of the Congo¹²⁷ arose from incidents that occurred between Uganda and the Democratic Republic of the Congo (DRC) from the late 1990s through 2004. In its application, the DRC alleged:

acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity. . . . Such armed aggression by Ugandan troops on Congolese territory has involved *inter alia* violation of the sovereignty and territorial integrity of the Democratic Republic of the Congo, violations of international humanitarian law and massive human rights violations.¹²⁸

In the counterclaims and defenses, Uganda alleged, among other things, that it was acting in self-defense in compliance with Article 51 of the UN Charter.

123. Press Release, General Assembly Emergency Session Overwhelmingly Demands Israel's Compliance with International Court of Justice Advisory Opinion, U.N. DOC. GA/10248 (July 20, 2004). See Fr. Robert L. Araujo, S.J., *Implementation of the ICJ Advisory Opinion – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [do not] Make Good Neighbors?*, 22 B.U. INT'L L.J. 349, 387-96 (2004) (explaining the discussions concerning the General Assembly resolution, issued as a result of the Advisory Opinion, which was approved by a vote of 150 for, 6 against, and 10 abstaining).

124. Jensen, *supra* note 12, at 226.

125. Murphy, *supra* note 114, at 76 (writing:

The Court would do well to heed these concerns. Its docket currently includes cases relevant to the *jus ad bellum*, such as those brought by the Democratic Republic of the Congo against Rwanda and Uganda. They are opportunities for the Court not only to decide concrete cases, but to help clarify in a cogent and thoughtful way the status of international law in its most critical area. States are willing to yield power to an international court of fifteen individuals only when they believe that the court's findings reflect higher levels of deliberation than are found within any one state's machinery. Findings that lack deep levels of reasoning, that fail to take account of and rebut divergent lines of thinking, are not salutary for any court, let alone one that holds itself up as the "supreme arbiter of international legality.").

126. Dem. Rep. Congo v. Uganda, *supra* note 16.

127. *Id.*

128. Application Instituting Proceedings, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) (filed in the Registry of the Court June 23, 1999), available at http://www.icj-cij.org/icjwww/idocket/ico/icoapplication/ico_iapplication_19990623.pdf.

Uganda claimed that their forces were initially in the DRC at the invitation of then-president Joseph Kabila in order to control “anti government rebels who were active along the Congo-Uganda border, carrying out in particular cross-border attacks against Uganda.”¹²⁹

Although President Kabila subsequently removed this consent,¹³⁰ Uganda claimed that the cross-border attacks by armed rebels continued and that Uganda was required to take armed actions in self defense into the DRC to prevent these armed attacks.¹³¹ Uganda further claimed that this intervention was warranted as the rebels “fled back to the DRC,”¹³² and that the DRC was unable to stop the attacks.¹³³ The situation left Uganda with no other option than to suffer the attacks or to act in self-defense. A document produced by the Ugandan High Command lists the five stated reasons justifying its actions in self-defense:

1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
2. To enable UPDF neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5. To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces.”¹³⁴

Given the purposes of this paper, only the fourth reason need be considered here.¹³⁵

129. Dem. Rep. of Congo v. Uganda, *supra* note 16, para. 45.

130. *Id.* at para. 53.

131. *Id.* at para. 92.

132. *Id.* at para. 109.

133. See Michael N. Schmitt, *The Rule of Law in Conflict and Post-Conflict Situations: U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737, 760 (2004) (arguing that where a state is unable or unwilling to prevent attacks from its territory, the attacked state “may non-consensually cross the border for the sole purpose of conducting counterterrorist operations, withdrawing as soon as it eradicates the terrorist threat.”).

134. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 109.

135. See Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT'L L. 207, 217-221 (2002) (Paragraph 2 appears to give rise to a claim of anticipatory self-defense under customary international law). *But see* Dem. Rep. Congo v. Uganda, *supra* note 16, para. 143 (Uganda never made the claim of anticipatory defense. In any case, such a claim may not have mattered as the ICJ, in a broad statement, proclaimed, “The Court first observes that the objectives of Operation ‘Safe Haven’, as stated in the Ugandan High Command document, were not consonant with the concept of self-defence as understood in international law.”).

The fourth reason alleges actual attacks across the border by armed insurgents that resulted in death or injury to Ugandans.¹³⁶ The importance of this allegation is that it raised an issue for the ICJ's consideration that they did not face previously, at least according to Judge Kooijman's separate opinion, in the Wall Advisory Opinion.¹³⁷ If Judge Kooijmans was right, the ICJ's decision in the Wall Advisory Opinion can be read as claiming that these attacks were not armed attacks because they were internal to Israel, coming from within its controlled territory. Therefore, they did not justify a response in self-defense under Article 51 of the UN Charter. No such claim of internal attacks is made here. Rather, the fourth justification in the High Command document alleges attacks by armed rebels that originated from the DRC.

Uganda argued that during the period of 1998 to 2003, "the changed policies of President Kabila had meant that co-operation in controlling insurgency in the border areas had been replaced by 'stepped-up crossed-border attacks against Uganda by the ADF which was being re-supplied and re-equipped by the Sudan and the DRC government.'"¹³⁸ The DRC admitted that these attacks had taken place but claimed that the ADF alone was responsible. The Court also acknowledged that the attacks took place and took notice of an independent report that "seem[s] to suggest some Sudanese support for the ADF's activities. It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border... However, the Court does not find this evidence weighty and convincing."¹³⁹

Though not explicitly stated, it appears the Court is not swayed by this information because it is only looking for evidence of armed attacks tied to a nation state. In concluding the section of the opinion concerned with the use of force, the Court states:

It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate

136. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 143.

137. Advisory Opinion No. 131, *supra* note 15, para. 36 (separate opinion of Judge Kooijmans) (stating:

The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self defence can be found in the second part of paragraph 139. The right of self defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 and 1373 refer to acts of international terrorism as constituting a threat to international peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 and 1373 and that consequently Article 51 of the Charter cannot be invoked by Israel).

138. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 120.

139. *Id.* at para. 51.

from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate.¹⁴⁰

By determining that attacks occurred by armed rebels across the border from the DRC into Uganda, and then finding that because there was no "satisfactory proof of the involvement" of the DRC or any other "state," no right to self-defence accrued to Uganda, the Court has taken the bad ruling in the Wall Advisory Opinion and advanced it one step further. By refusing "to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces," the Court has ignored the reality of the situation. Further, the Court not only passed up a chance to right a ship that was heading the wrong direction, but has instead added hurricane-force winds to the sails, as recognized by ICJ Judges Kooijmans and Simma.¹⁴¹

140. *Id.* at para. 53.

141. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 27 (separate opinion of Judge Kooijmans) (stating:

The Court seems to take the view that Uganda would have only been entitled to self-defence *against the DRC* since the right of self-defence is conditional on an attack being attributable, either directly or indirectly, *to a State* . . . But, as I already pointed out in my separate opinion to the 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Article 51 merely "conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years". I also observed that this interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State).

Judge Kooijmans proposes an alternative based on his belief of current international law and grounded in the realities of the current world. He writes:

If the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence. If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is

This holding has the effect of encouraging every government that has aggressive designs on its neighbor to covertly create, train, and supply non-uniformed, armed rebels within its territory because even if the support meets the "direct or indirect involvement" standard first articulated in Nicaragua.¹⁴² The current Court's unwillingness to address the quantum of attack necessary to trigger the right to self-defense is a step backward from the standard of "acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack"¹⁴³ pronounced in Nicaragua. In other words, by making discernable "direct or indirect" involvement by a state a necessary "precondition" to the use of force in self-defense, the Court has given aggressive states a clear incentive to support, even encourage, attacks by armed rebel groups because they will not invoke the targeted state's right to respond in self-defense against either the rebels or the supporting state.

As a continuation of the Wall Advisory Opinion, this decision has devastating effects on the principle of distinction. By prohibiting a response in self-defense to external armed rebel attacks, regardless of the quantum, the Court encourages rogue states to carry out their illegal aggressive designs through un-uniformed, armed rebels who are virtually indistinguishable from the local population save for actually shooting their weapons in the attack. Because of the Court's regrettable decision, these rogue actors now see a way to orchestrate large scale armed violence without creating a right of self-defense for their victims and simultaneously increasing the survivability of their attackers by clothing them in the protections of civilians. This is truly a catastrophic development given modern battlefield tendencies.

As recognized by the Security Council in their resolutions 1368 and 1373,¹⁴⁴ the world is not the same place it was prior to September 11, 2001. Since those attacks, the major threats to international peace and security have not centered in only state actors, but also in non-state actors, many of whom have an international reach.¹⁴⁵ The standard for the exercise of self-defense by a state ought to be

no attacker State, and the Charter does not so require).

See also Dem. Rep. Congo v. Uganda, *supra* note 16, para. 13 (separate opinion of Judge Simma) (concurring with Judge Kooijmans' understanding of current international law and writing:

I also subscribe to Judge Kooijmans' opinion that the lawfulness of the conduct of the attacked State in the face of such an armed attack by a non-State group must be put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality?).

142. See Murphy, *supra* note 114, at 65-66.

143. Nicar. v. U.S., *supra* note 121, para. 103-104; Dem. Rep. Congo v. Uganda, *supra* note 16 (separate opinion of Judge Simma).

144. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/Res/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/Res/1373 (Sept. 28, 2001). See also Vincent-Joel Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615, 627 (2005) (arguing that the international community is moving to a system where states are held indirectly liable for the actions of entities within their borders).

145. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 8-13 (September, 2002), available at <http://www.whitehouse.gov/nsc/nss/2006>.

“armed attack,” from whatever source it springs. Only under this standard can states adequately protect themselves against modern threats.¹⁴⁶

More importantly for this paper, utilizing this standard of armed attack, regardless of whether it is state sponsored or not, will also reverse the continuing trend of incentivizing states to “use” forces other than their nation’s uniformed forces who do not feel compelled to distinguish themselves from the local populace in order to avoid giving rise to the right of self-defense. This trend began two decades ago with the Nicaragua decision,¹⁴⁷ but the ICJ has taken a definite turn in the wrong direction with their decision in the Wall Advisory Opinion and digressed even further with the recent Congo v. Uganda case. It is not coincidental that during this same time period since Nicaragua, there has been a rise in the use of law of war provisions as a tool against legally compliant nations in battle. This type of warfare is known as lawfare.¹⁴⁸

IV. THE EROSION OF THE PRINCIPLE OF DISTINCTION AND THE RISE OF LAWFARE

Modern warfare is no longer typified by the arrangement of major armies along a two dimensional battle line.¹⁴⁹ In fact, modern warfare has even moved beyond the concept of three-dimensional “air land battle”¹⁵⁰ to the 360-degree concept of the common operational environment¹⁵¹ where attacks can come from any direction and from any source. This new battlespace concept is intricately entwined with the concept of asymmetrical warfare.

Asymmetrical warfare describes the modern reality that wars are not being fought between equal or nearly equal armies on a defined battlefield. As now Major General (MG) Charles Dunlap, Jr.¹⁵² writes, “In broad terms, ‘asymmetrical’ warfare describes strategies that seek to avoid an opponent’s

146. See Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH J. INT'L L. 513, 540-44 (2003) (arguing this point specifically in connection with defending against cross border attacks from non-state actors that amount to armed attack).

147. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 21 (separate opinion Judge Kooijmans).

148. See *Lawfare, The Latest in Asymmetries*, Council on Foreign Relations, Mar. 18, 2003, <http://www.cfr.org/publication.html?id=5772> (defining lawfare as “a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.”).

149. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 730 (2004) (“[E]ven the battles of the nineteenth century rarely fit this paradigm, and modern conflict fits this paradigm still less well.”); Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733, 743 (2005) (“Wars between powerful states, those conflicts that prompted the development of humanitarian law, are increasingly rare. Instead of large-scale combat between organized militaries, modern warfare is becoming asymmetrical. Insurgencies, not armies, are the norm.”).

150. See John J. Romjue, *The Evolution of the AirLand Battle Concept*, AIR U. REV. (1984), available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1984/may-jun/romjue.html>.

151. See *The Contemporary Operational Environment (COE)*, OPERATION ENDURING FREEDOM TACTICS, TECHNIQUES AND PROCEDURES HANDBOOK NO. 02-8, STRATEGYPAGE.COM, available at <http://www.strategypage.com/articles/operationenduringfreedom/chap1.asp> (last visited Apr. 2, 2006).

152. See Official Website of the United States Air Force, <http://www.af.mil/bios/bio.asp?bioID=5293>

(Showing that at the time of this writing, MG Charles Dunlap, Jr. had recently been promoted to the rank of Major General and assigned as Deputy Judge Advocate General of the Air Force).

strengths; it is an approach that focuses whatever may be one sides comparative advantages against their enemy's relative weaknesses."¹⁵³ In this type of conflict, the disadvantaged party is unlikely to succeed by squaring off with its opponent in a typical force on force military struggle. Instead, the disadvantaged party must seek to use the comparatively low-tech tools at its disposal to gain the comparative advantage.¹⁵⁴ One of the most tempting and potentially successful low-tech tools in this fight is international law, particularly the principle of distinction.¹⁵⁵

The use of law as a tool of warfare is not inherently good or bad. The laws of war have generally had a mitigating effect on warfare. But, like any tool of warfare, "it is how the law is used that defines its nature and value."¹⁵⁶ As David Rivken and Lee Casey argue, "international law may become one of the most potent weapons ever deployed."¹⁵⁷ In this form of warfare, a group or state that is facing a nation committed to comply with the laws of war will choose to openly violate the law not only for the tactical advantage gained but for the strategic benefit that arises.¹⁵⁸ The compliant nation, still committed to law of war compliance, is thus disadvantaged.

This form of asymmetrical warfare has come to be known as "lawfare," or "the use of law as a weapon of war."¹⁵⁹ It takes many forms but is always pointed at striking where a more superior but legally bound military force is more constrained than a less superior but legally unconstrained force.¹⁶⁰ The recent war in Iraq illustrates many examples of this,¹⁶¹ including attacking from protected

153. Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 USAFA J. Leg. Stud. 71, 72 (1997/1998). See also W. Chadwick Austin and Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 293-94, 301-02 (2006).

154. Michael N. Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction*, 1, 2, 12-13, Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative Briefing Paper (2003), reprinted in INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY'S CONFLICTS: CHANGES AND CHALLENGES (Lausanne: Editions Interuniversitaires Suisses, Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005), available at <http://www.michaelschmitt.org/Publications.html>.

155. See Michael N. Schmitt, *The Principle of Discrimination in the 21st Century*, 2 YALE HUM. RTS. & DEV. L.J. 143, 157 (1999) (discussing the effects of technology on the principle of distinction and arguing that as the gap widens between the "haves and have-nots," the asymmetrical disadvantage of the have-nots will tempt them to abandon the principle of distinction).

156. Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1, 7 (2006).

157. Colonel Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 4, 5 (2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (last visited June 28, 2004).

158. See Reynolds, *supra* note 2, at 102-03 (stating, "[P]ublic support can be lost based on the number of civilian casualties. A March, 2003 Gallup poll indicates 57 percent of those surveyed would oppose a war in Iraq because 'many innocent Iraqi citizens would die.'").

159. See Dunlap, Jr., *supra* note 157; Schmitt *supra* note 154, at 17. See also Austin & Kolenc, *supra* note 153, at 306-310.

160. See William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L. J. 639, 673-74 (2004).

161. See *Announcing the Inaugural Combined Arms Center Commanding General's 2006 Special*

places and using protected places or objects as weapons storage sites,¹⁶² fighting without wearing a proper uniform,¹⁶³ using human shields to protect military targets,¹⁶⁴ using protected symbols to gain military advantage,¹⁶⁵ and murdering of prisoners or others who deserve protection.¹⁶⁶ In each of these cases, an inferior force used the superior force's commitment to adhere to the law of war to its tactical advantage.

Unfortunately, the most typical and also most damaging form of lawfare in recent conflicts has been the decision of disadvantaged combatants to not distinguish themselves from the local populace.¹⁶⁷ And it appears that this trend is on the rise, even amongst major military powers.¹⁶⁸ As MG Dunlap has written, "If international law is to remain a viable force for good in military interventions, lawfare practitioners cannot be permitted to commandeer it for malevolent purposes."¹⁶⁹ Regrettably, the aforementioned ICJ decisions have made it much easier for practitioners of lawfare to use the law of war against compliant nations. Rebecca Kahan highlights this point: "For years, the international community has embraced the idea that targeting civilians violates principles of international

Topics Writing Competition: "Countering Insurgency," HEADQUARTERS GAZETTE (Society for Military History, Leavenworth, KS), Winter 2006, at 12, available at <http://leavenworth-net.com/lchs/12658%Headquarters.pdf> (highlighting the U.S. Army's recognition of the seriousness of the use of lawfare in Iraq. In a recent announcement from the Combined Arms Center at Ft. Leavenworth, Kansas, the Military Review is sponsoring a writing competition seeking articles specifically on issues dealing with counter insurgency, including "lawfare." The announcement begins by stating that "The Army absolutely needs to understand more about counterinsurgency—nothing less than the future of the civilized world may depend on it.").

162. See Tony Perry & Rick Loomis, *Mosque Targeted in Fallouja Fighting*, L.A. TIMES, April 27, 2004, at A1.

163. See *Coalition Forces Continue Advance Toward Baghdad*, CNN LIVE EVENT/SPECIAL, March 24, 2003.

164. See *The Rules of War are Foreign to Saddam*, OTTAWA CITIZEN, March 25, 2003; David Blair, *Human Shields Disillusioned with Saddam, Leave Iraq after Dubious Postings*, NATIONAL POST (CANADA), March 4, 2003, available at <http://www.FPinfomart.ca>.

165. Rivkin & Casey, *supra* note 27, at 65.

166. See Robert H. Reid, *South Korean Hostage Beheaded in Iraq*, TORONTO STAR, June 23, 2004, at A1, available at WL 6081419; See also Michael Sirak, *Legal Armed Conflict*, JANE'S DEFENSE WEEKLY, Jan. 14, 2004, at 27 (listing a number of violations of the law of war committed by Iraqi military and paramilitary forces).

167. See Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733, 735 (2005) (stating, "[t]he Principle of Distinction is violated across the world, often openly so, and that problem is getting worse." The author then argues for replacing the principle of distinction with the Principle of Culpability which is based on each individual's actions rather than his status as a noncombatant).

168. See Col Wang Xiangsui, Chinese Air Force, as quoted by John Pomfret in *China Ponders New Rules of 'Unrestricted Warfare'*, WASH. POST, Aug. 9, 1999, at 1, quoted in Dunlap, *supra* note 158, at 36 (where a senior member of the Chinese Air Force recently stated "War has rules, but those rules are set by the West . . . if you use those rules, then weak countries have no chance . . . We are a weak country, so do we need to fight according to your rules? No.").

169. Dunlap, *supra* note 157, at 36; See also Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1, 16 (2006) (arguing that strategic lawyering can be a force to fight the effects of lawfare).

law.”¹⁷⁰ She then contrasts the actions of those who practice lawfare; “terrorist organizations have adopted this strategy [of violating international law] as part of their policy.”¹⁷¹ The fact that terrorists and others find sympathy for the use of their tactics from the ICJ and others only emboldens them. It also emboldens state leaders who cannot otherwise use the military instrument in their aggressive designs for fear of military retribution.

As a result of the Wall and Uganda decisions by the ICJ, state leaders have incentive to “use” other armed groups to accomplish their military attacks on neighbors rather than their official uniformed armed forces because the latter would trigger the target nation’s right of self-defense. On the other hand, if they maintain their support to armed groups below a standard that the ICJ will attribute to the state, the state can effectively work toward the destabilization of a neighboring country without fear of a legal response in self-defense. If an illegal response does come, the nation cannot only respond in self-defense, though the original aggressor, but also claim to be the legally compliant state. The clear result of this is more fighters on the battlefields of the world who are not distinguished or distinguishable from the local populace. This can only result in more civilian casualties and greater derogation from the laws of war.

V. THE NEED FOR A RETAINING WALL TO STOP THE EROSION

The erosion of the principle of distinction poses a danger too great for the international community to sit idly. Steps must be taken to incentivize all battlefield fighters to comply with the laws of war, particularly with those rules that distinguish them from the local populace. Some such incentives have already been proposed.¹⁷² However, incentives on an individual basis need to be augmented by institutional incentives that remove the incentives of states to derogate from this fundamental rule.

The first remedial action that must be taken is for the ICJ to reverse its misapplication of the concept of armed attack. Regardless of whether customary international law ever recognized armed attack as restricted only to states, it does not and should not now.¹⁷³ As clearly implied by the UN Security Council in resolutions 1368 and 1373¹⁷⁴ and confirmed by Judges Kooijmans and Simma in their separate opinions,¹⁷⁵ armed attacks invoke a state’s right of self defense

170. Kahan, *supra* note 110, at 827-28.

171. *Id.*

172. See generally Jensen, *supra* note 12 (proposing five incentives to encourage combatants to distinguish themselves from civilians).

173. See Schmitt, *supra* note 146, at 536-540.

174. See Kathleen Renee Cronin-Furman, *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship*, 106 COLUM. L. REV. 435, 463 (2006) (arguing that the conflict between the ICJ and Security Council is not new and that “[t]he ICJ’s failure to conform its reasoning to international political realities, as evinced in the Wall Opinion, seriously threatens the ICJ’s credibility.” The author proposes, “According to the Security Council’s pronouncements primacy in the consideration of customary law would be an effective way to resolve this issue. It would preserve the ICJ’s judicial discretion while at the same time recognizing the Security Council’s paramount importance to the maintenance of international peace and security.”).

175. See *Dem. Rep. Congo v. Uganda*, *supra* note 16 (separate opinions of Judge Simma and Judge

whether they are generated by a state or not. Armed attack should be understood as a quantum requirement, not a source requirement.¹⁷⁶ Any other reading would incentivize the use of irregulars to do what regular forces could not, striking at the heart of the fundamental principle of distinction in international law and significantly degrade fundamental protections currently afforded to civilians.

Secondly, the Security Council must issue a more explicit and definitive statement on the quantum nature of armed attack. As the Security Council is increasingly confronted with threats to international peace and security by the onslaught of terrorism and similar multinational non-state actors, it is in the Security Council's interest, and the interest of all United Nations' member states, to have a definitive statement on this issue. As such, the Security Council should recognize a state's inherent right to defend itself against attack so long as the response is proportional and necessary. The Security Council could easily reconfirm these bedrock principles and apply them in the light of the current international system.

Finally, organizations such as the ICRC that identify protection of noncombatants and civilians as part of their charter¹⁷⁷ ought to encourage the enactment of laws that will advance this vital interest. As Professor Reisman has pointed out,¹⁷⁸ those who have advocated for GPI should now reflect on its results. In an effort to give protections to certain battlefield actors, they have dramatically degraded the principle of distinction. A better approach is to insure that noncombatants and civilians are protected, even if it means that some battlefield actors who choose to participate without meeting the requirements of GPW Article 4, are not given combatant privileges. It is not an overly arduous requirement that all battlefield actors distinguish themselves to be viewable at a distance in some way. This does not even require a uniform, merely a distinguishing marking that sets battlefield fighters apart from civilians.¹⁷⁹ The ICRC should take the lead on revisiting this issue amongst NGOs and work toward reestablishing the safety wall around civilians as opposed to eroding those protections.

While these three recommendations will certainly not prevent any future civilian casualties, they would help establish a clear legal standard for state actions that would remove the existing incentives to "use" armed groups to avoid giving

Kooijmans).

176. See Schmitt, *supra* note 121, at 750-52 (discussing the effects basis for understanding the right of self-defense in the ICJ's decision in Nicaragua).

177. See the ICRC Mission Statement, available at <http://www.icrc.org/HOME.NSF/060a34982cae624ec12566fe00326312/125ffe2d4c7f68acc1256ae300394f6e?OpenDocument>, which states:

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

178. Reisman, *supra* note 17, at 856.

179. Ferrell, *supra* note 13, at 106-09.

rise to the right of self-defense. Such a move would enhance the principle of distinction and reinvigorate the protections provided to civilians on the battlefield.

VI. CONCLUSION

The recent erosion of the principle of distinction has certainly been one of the factors leading to an increasing number of noncombatant deaths on modern battlefields. The international law principle that makes this conduct illegal is firmly rooted in the law of war but has been weakened by provisions of GPI that are designed to provide greater protections to battlefield fighters. As history has borne out, trying to widen the group who gain combatant protections has inevitably weakened the protections provided for noncombatants and civilians and brought more innocent bystanders within the hostile fire of warring parties.

The recent decisions of the ICJ have taken this derogatory step even further. In the Wall Advisory Opinion, the ICJ held that "numerous indiscriminate and deadly acts of violence against its civilian population"¹⁸⁰ by a non-state actor from within its own territory did not give Israel the right to respond in self-defense, even if that response was non-lethal. The ICJ went a step further in the Congo v. Uganda ruling when it immunized any action from raising the right of self-defense, regardless of the scale, as long as it was committed by a non-state entity or group. This holding gives tremendous incentive to states that are aggressive toward their neighbors to support and even assist armed groups who are carrying out significant attacks, attacks which would give rise to the right of self-defense if done by government armed forces.

These decisions, taken despite prior UN Security Council resolutions proclaiming otherwise, dramatically erode the principle of distinction. They not only remove the incentive to comply with the law of war, but they actually give a disincentive to do so because it gives the target state a legal right to respond with proportional armed force. The result will be fewer and fewer marked combatants on modern battlefields and greater and greater civilian casualties who get inadvertently mixed in with those who are engaging in hostilities by relying on the protections of the noncombatant identity to pursue their militant goals.

These unfortunate erosions of the law of war aggravate the asymmetrical warfare approach of lawfare, or using the law of war as a weapon against a compliant enemy. Lawfare is a growing methodology to warfare, contemplated not only by small nations and groups, but also by large armies. Sadly, the ICJ's decisions add a false legal gloss to these actions. If this trend is allowed to continue, the principle of distinction will soon dwindle into a meaningless rule.

The Security Council must take the lead on more clearly and explicitly stating the quantum nature of armed conflict rather than reliance on the source of the action for qualification. The ICJ must follow the Security Council's lead and reverse the direction in which the Court is heading by redefining armed attack to be an effects-based test, rather than a claim that can only be invoked if the attacker is a state actor. Finally, the ICRC must take the lead in reevaluating its advocacy

180. Advisory Opinion No. 131, *supra* note 15, at para. 141.

of a principle that supplies greater protections to all battlefield fighters but has the practical effect of endangering civilians. The principle of distinction must remain the foundational principle of the law of war. The Israeli Wall must be torn down and the entry point for lawfare blocked. In its place, a bridge should be built, allowing civilians to cross back into a realm where they are protected and their safety is legally enshrined.