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TARGETING AND CIVILIAN RISK MITIGATION: THE ESSENTIAL ROLE OF PRECAUTIONARY MEASURES

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*We must fight the insurgents, and will use the tools at our disposal to both defeat the enemy and protect our forces. But we will not win based on the number of Taliban we kill, but instead on our ability to separate insurgents from the center of gravity—the people. That means we must respect and protect the population from coercion and violence—and operate in a manner which will win their support.*¹

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¹ U.S. DEP'T OF DEF., DIR., TACTICAL DIRECTIVE (6 July 2009). Excerpt from General Stanley McChrystal's 2009 Tactical Directive, issued by him as Commander of North Atlantic Treaty Organization's (NATO) International Security Assistance Force (ISAF), Kabul, Afghanistan [hereinafter McChrystal Tactical Directive].

I. Introduction

International humanitarian law (IHL), or the law of armed conflict (LOAC), is built on a foundation of core principles. It is probably not an overstatement that these principles figure prominently in the opening salvos of any educational or instructional effort related to the law. Be it in a university classroom, a military briefing, an international training program, another educational venue, or even in opinions of international and domestic tribunals adjudicating IHL/LOAC related issues, “the principles” of the law seem to invariably open the discourse.

Law of Armed Conflict principles also guide the interpretation and implementation of the more specific treaty and customary law rules that have been adopted over time, to provide greater clarity in striking the LOAC’s essential balance between necessity and humanity. In addition, the principles fill gaps that exist in the seams between these specific rules. These functions are emphasized in the 2015 U.S. Department of Defense (DoD) *Law of War Manual*, which introduces the reader to LOAC principles with the following paragraphs:

Law of war principles provide the foundation for the specific law of war rules. Legal principles, however, are not as specific as rules, and thus interpretations of how principles apply to a given situation may vary.

Law of war principles: (1) help practitioners interpret and apply specific treaty or customary rules; (2) provide a general guide for conduct during war when no specific rule applies; and (3) work as interdependent and reinforcing parts of a coherent system.²

The multi-faceted function and effect of LOAC principles should come as no surprise. The principles reflect the deep roots of historical and practical tradition upon which the contemporary and much more extensive body of treaty and customary law has been erected. These principles also provide the architectural framework of the LOAC that has, over the past two centuries, been fleshed out with more extensive and explicit rules. Whether the principles are a foundation or a framework, an understanding

² U.S. DEP’T OF DEF., LAW OF WAR MANUAL 51 (2015) [hereinafter DoD LAW OF WAR MANUAL].

of these principles is essential to begin to comprehend the complex relationship between the objectives of armed hostilities, and the internationally mandated regulations intended to mitigate the inevitable suffering produced by such hostilities.

One need only engage in a cursory review of academic texts, military manuals, and other training materials to quickly identify the principles that are commonly categorized as “core,” “foundational,” or “cardinal”: military necessity, humanity, distinction, proportionality, and the prohibition against unnecessary suffering.³ Each of these provides an essential contribution to the regulatory function of the law, and it is therefore equally unsurprising that they are so universally recognized.

What is somewhat perplexing, and in our view unfortunate, is the common (although not universal) absence of “precautionary measures” among the list of core or foundational LOAC principles. Collectively, precautionary measures can and should be regarded as such a principle: the planning and execution of military operations includes an obligation to take constant care, through both active and passive measures, to mitigate the risk to civilians and civilian property arising from military operations. While a “precautions principle” is recognized by the International Committee of the Red Cross (ICRC), it is not typically included in important military manuals such as the DoD *Law of War Manual*. This omission arguably reflects a broader reality: that in the discourse and study of the law, precautionary measures are afforded less significance than the more commonly identified principles listed above. Why is this perplexing? Because, at least in U.S. military practice, there is an overriding emphasis on taking precautions to mitigate the risks of the very military operations that are justified and evaluated, on the basis of the more commonly identified “core” principles, such as necessity and proportionality. Indeed, the precautions principle reflects the sum of all efforts to apply the other “core” principles in good faith. Thus, practitioners and other experts engaged in the difficult business of analyzing and applying the law that regulates the conduct of hostilities—the use of lethal combat power during armed conflict—learn very quickly that the package of obligations falling under the umbrella of “precautions”

³ *Introduction to the Law of Armed Conflict*, INT’L COMM. OF THE RED CROSS 14 (June 2002), https://www.icrc.org/eng/assets/files/other/law1_final.pdf.

is a genuine focal point for civilian risk mitigation in target selection and attack execution.⁴

In a very real sense, an inverse relationship between the theoretical and the practical has evolved. At the theoretical (or academic/scholarly) level, precautionary measures never seem to get the attention they deserve. But at the operational/implementation level, they are, in many ways, more pragmatically significant than other principles routinely considered to be central to the effective regulation of armed conflict. This is why the omission of precautionary measures as a separate core or fundamental IHL/LOAC principle is so unfortunate, and why it is time to elevate the status of the package of measures embodied in the precautions principle to an equally significant status in the IHL/LOAC lexicon.

The practical significance of precautionary measures justifies and indeed necessitates emphasizing precautions as a core or fundamental IHL/LOAC principle. As one of the authors explained in a prior article,⁵ application of the principle of precautions often provides the most effective legal mechanism to advance the underlying humanitarian objective of LOAC regulation of the conduct of hostilities: mitigating risk to individuals not participating in hostilities and to property that is not otherwise a military objective. Of course, achieving that objective begins with a commitment to LOAC principles that are today universally recognized, most notably the principle of distinction.⁶ But in reality,

⁴ See, e.g., Jean-Francois Queguiner, *Precautions Under the Law Governing Hostilities*, 88 INT'L REV. RED CROSS 793, 797-803 (2006), https://www.icrc.org/eng/assets/files/other/irrc_864_queguiner.pdf.

⁵ See Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPP. L. REV. 419 (2014) [hereinafter Corn] (this article builds on the cited article's discussion of precautions and civilian risk mitigation).

⁶ See DOD LAW OF WAR MANUAL, *supra* note 2, at 50-51, 62; United Kingdom Ministry of Defence, Joint Service Publication 383, *The Joint Service Manual of the Law of Armed Conflict* para. 2.5 (2004); Canada, Department of National Defence, Joint Doctrine Manual B-GJ-005-101/FP-021, *Law of Armed Conflict at the Operational and Tactical Levels 2-1, 2-2* (Aug. 13, 2001); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: CHAPTERS 1, 2 (2009), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [hereinafter HENCKAERTS & DOSWALD-BECK] (indicating that distinction is so recognized). The following passage from a seminal opinion of the International Court of Justice highlights the importance of distinction as a key Law of Armed Conflict (LOAC) principle:

After sketching the historical development of the body of rules which originally were called "laws and customs of war" and later came to be termed "international humanitarian law," the Court observes that the

distinction's contribution towards the LOAC's humanitarian objective is in large measure binary: for armed forces committed to compliance with the law, distinction is a predicate—indeed essential—first step in the mosaic of legal and policy considerations in the conduct of hostilities to mitigate civilian risk; and for armed forces or other organized belligerent groups unconcerned with LOAC compliance, disregard of distinction reflects their concept of military operations, in which targeting civilians and civilian objects is considered a method of warfare. In short, an armed force's or armed group's commitment to compliance with distinction is the essential first step that will lead inevitably to implementation of a range of other measures to mitigate risk to civilians and civilian property by distinguishing them from lawful objects of attack, whereas noncompliance with distinction provides the surest proof that an armed force or armed group is not committed to the LOAC and that any claims of its compliance with the LOAC are completely meaningless.

The great challenge of the law today, therefore, tracks along two different paths. At the most basic level, efforts must continue to persuade armed forces and belligerent groups to commit to implementing and complying with distinction. In practice, this means that they must be urged to make tactical and operational decisions that limit the deliberate object of their lethal combat power to lawful military objectives, to distinguish themselves from the civilian population, and to use or damage civilian private property only when justified by imperative military necessity. They also must be encouraged to follow and respect the principle of proportionality, which prohibits any attack where the anticipated collateral damage and incidental injury is assessed as excessive in relation to the anticipated military advantage that will result from the attack. But for

cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; 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. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 94, 97 (July 8).

many armed forces—certainly for any military organization that holds itself out as professional—commitment to these principles is simply axiomatic. Thus, for these forces, the vital alternate vector focuses on enhancing the protective effect of the application of these other principles through the implementation of precautionary measures. The implementation of these measures is essential to mitigate the risk to civilians from striking targets that, when evaluated during the planning phase, met the distinction principle. Mitigating this risk can reduce the complexity of proportionality compliance by reducing civilian exposure to the effects of combat power even before the proportionality of the attack is evaluated.

This article will focus on both the meaning and implementation of precautionary measures. It will begin by discussing the treaty-based implementation of precautions, with a particular focus on the use of warnings as a precautionary measure. It will then briefly consider how expanding the conception of precautionary measures beyond the treaty-based obligations will enhance civilian risk mitigation and contribute to achieving the humanitarian objectives of the LOAC. Finally, this article will explain why precautions are in fact such a vital risk-mitigating tool from a pragmatic operational perspective by focusing on how commanders committed to the LOAC balance of necessity versus humanity will instinctively gravitate to, and embrace, the logic of the precautions principle during the execution of combat operations.

II. Treaty-Based Precautions Dissected

When Additional Protocol I (AP I) was opened for signature in 1977, it sought to significantly improve the protection of civilians from the harmful effects of combat operations. To that end, Part IV of the treaty is devoted to protecting civilians and civilian objects from the consequence of combat operations, and includes a range of treaty rules that provide the foundation for the regulation of lethal combat power.⁷ While many of the treaty's rules may have already applied either as best practices, or from a sense of customary international legal obligation, AP I was the first

⁷ Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Civilian population Section I General Protection against effects of hostilities, June 8, 1977, 1125 UNTS 3 [hereinafter AP I]; see also Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC through an Operational Lens*, 47 TEX. INT'L L.J. 337 (2012).

successful effort to create a positive legal regime to govern this part of armed conflict. Accordingly, a treaty developed to update the Geneva Conventions—four treaties that included almost no regulation of the conduct of hostilities and focused instead on those considered “*hors de combat*”—featured a regulatory framework to protect civilians from the destructive consequences of combat.⁸

Included within this comprehensive regulatory regime were specific rules characterized as “precautionary measures” to mitigate civilian risk by requiring military operational decision-makers to take civilians and civilian objects into account in the planning and execution of both offensive and defensive military operations. These measures were codified in Articles 57 and 58 of AP I.⁹ Article 57 focused on what are best understood as “positive” precautions: measures that are integrated into the attack decision-making process that mitigate the risk of violating the distinction or proportionality obligation.¹⁰ In contrast, Article 58 focused on what are best understood as “passive” precautions, obligating belligerents to mitigate civilian risk by segregating civilians from military objectives and making it easier for an enemy to distinguish combatants from civilians during attacks.¹¹

Because the measures in Article 57 are “positive” in nature, they have tended to be the focus of compliance with the precautions obligation. While this is somewhat under-inclusive and risks diluting the importance of the “passive” precautions obligation established by Article 58, there is no doubt that Article 57 is critical in the scheme of civilian risk mitigation. Article 57, like AP I itself, is binding as a matter of treaty law only during international armed conflicts,¹² and only on parties to AP I—which notably does not include the United States, Israel, and other non-party states.¹³ However, the obligations imposed by this rule are generally

⁸ JEAN PICTET, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 19–21 (Yves Sandoz et al. eds., 1987) [hereinafter API COMMENTARY].

⁹ See AP I, *supra* note 7, arts. 57, 58.

¹⁰ *Protocols I and II Additional to the Geneva Conventions*, INT’L COMM. OF THE RED CROSS (Jan. 1, 2009), <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm>.

¹¹ AP I, *supra* note 7, art. 58; see also M. Sassoli & A. Quintin, *Active and Passive Precautions in Air and Missile Warfare*, 44 ISR. Y.B. HUM. RTS. 69 (2014).

¹² API COMMENTARY, *supra* note 8, at 21.

¹³ See *State Parties to Protocol I*, INT’L COMM. OF THE RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Mar. 14, 2016).

considered incorporated into customary international law binding on all parties, and applicable during any armed conflict.¹⁴

Article 57 provides that:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination

¹⁴ HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 22 (“State practice establishes this rule as a norm of customary international law applicable in both international and non-international conflicts.”).

thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.¹⁵

The list of precautions included in Article 57 must be “unpacked” to appreciate the overall significance of precautions as both a rule and a broader principle. Initially, however, it is important to consider the level of detail included in the article.

The first sentence of Article 57 is perhaps the most compelling expression of a precautions “principle,” a characterization supported by the ICRC Commentary:

This is a general principle which imposes an important duty on belligerents with respect to civilian populations. This provision appropriately supplements the basic rule of Article 48 (Basic rule), which urges Parties to the conflict to always distinguish between the civilian population and combatants, as well as between civilian objectives and military objectives. It is quite clear that by respecting this

¹⁵ AP I, *supra* note 7, art. 57.

obligation the Parties to the conflict will spare the civilian population, civilians and civilian objects. Even though this is only an enunciation of a general principle which is already recognized in customary law, it is good that it is included at the beginning of this article in black and white, as the other paragraphs are devoted to the practical application of this principle¹⁶

The obligation is clear and emphatic: “constant care shall be taken to spare the civilian population, civilians and civilian objects.”¹⁷ Indeed, as emphasized in a prior article,¹⁸ Article 57 is located among the rules related to the planning and execution of attacks—commonly referred to within military circles as the “targeting process.”¹⁹ The locus of Article 57 within treaty rules focused almost exclusively on the regulation of attacks suggests that the precautions obligation may be limited to the employment of lethal combat power. However, the obligation must be conceived more broadly to apply to all military decision-making that may result in an adverse effect on civilians. In short, there is no legal or practical reason the constant care obligation should be applicable only to targeting decisions.

A broader conception of this “constant care” obligation is consistent with the balance between military necessity and humanity. This balance lies at the very core of the LOAC, and it is essential to the effective implementation of the law that it influence and guide all military decisions, whether or not they involve attacks. This broad conception of the obligation is reflected in both the ICRC Commentary to Article 57,²⁰ and in the DoD *Law of War Manual*.²¹ According to the Commentary, “the term ‘military operations’ should be understood to mean any movements, maneuvers, and other activities whatsoever carried out by the armed forces with a view to combat.”²² The *Manual* echoes this general obligation. The *Manual* provides that, “parties to a conflict must take feasible precautions

¹⁶ API COMMENTARY, *supra* note 8, at 680.

¹⁷ AP I, *supra* note 7, art. 57(1).

¹⁸ See Corn, *supra* note 5.

¹⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-60, THE TARGETING PROCESS para. 1-1 (26 Nov. 2010) [hereinafter FM 3-60]. FM 3-60 has been superseded by Army Techniques Publication (ATP) 3-60, but the core concepts remain the same. U.S. DEP’T OF ARMY, ARMY TECH. PUB. 3-60, TARGETING para. 1-3 (7 May, 2015).

²⁰ API COMMENTARY, *supra* note 8, at 683.

²¹ DoD LAW OF WAR MANUAL, *supra* note 2, at 52–60.

²² API COMMENTARY, *supra* note 8, at 680.

to reduce the risk of harm to the civilian population and other protected persons and objects.”²³ The fact that the *Manual* does not expressly limit this obligation to targeting decisions is important, for it reinforces the inference that the “constant care” obligation extends to every aspect of military operational training, planning, and mission execution.

Constant care is, of course, a quite general obligation. But generality need not dilute its significance. The conduct of military operations involves synchronizing and leveraging combat power—the deliberate application of often lethal capabilities in order to produce maximum effect upon an enemy. The ultimate objective is to dictate conditions of “the fight” in order to impose one’s will upon the enemy, a process that requires every member of a military unit to contend with the inherent brutality of combat. This fundamental nature of military operations is emphasized in the U.S. Army’s most basic soldier training doctrine:

Modern combat is chaotic, intense, and shockingly destructive. In your first battle, you will experience the confusing and often terrifying sights, sounds, smells, and dangers of the battlefield—but you must learn to survive and win despite them.

1. You could face a fierce and relentless enemy.
2. You could be surrounded by destruction and death.
3. Your leaders and fellow soldiers may shout urgent commands and warnings.
4. Rounds might impact near you.
5. The air could be filled with the smell of explosives and propellant.
6. You might hear the screams of a wounded comrade.

However, even in all this confusion and fear, remember that you are not alone. You are part of a well-trained team, backed by the most powerful combined arms force, and the most modern technology in the world. You must keep faith with your fellow Soldiers, remember your training, and do your duty to the best of your ability. If

²³ DOD LAW OF WAR MANUAL, *supra* note 2, at 188.

you do, and you uphold your Warrior Ethos, you can win and return home with honor.²⁴

The brutal reality of warfare necessitates that military personnel be incorporated into a warrior culture. This requires developing within the soldier a “warrior ethos”—an instinct for combat aggressiveness, decisive action, and the willingness to unleash maximum combat power on an opponent to accomplish the military mission.²⁵ Military commanders and the forces they lead will, therefore, pursue a unique “warrior culture” consistent with these needs, a culture described by the U.S. Army as follows:

The Warrior Culture, a shared set of important beliefs, values, and assumptions, is crucial and perishable. Therefore, the Army must continually affirm, develop, and sustain it, as it maintains the nation’s existence. Its martial ethic connects American warriors of today with those whose previous sacrifices allowed our nation to persevere. You, the individual Soldier, are the foundation for the Warrior Culture. As in larger institutions, the Armed Forces use culture, in this case Warrior Culture, to let people know they are part of something bigger than just themselves; they have responsibilities not only to the people around them, but also to those who have gone before and to those who will come after them. The Warrior Culture is a part of who you are, and a custom you can take pride in. Personal courage, loyalty to comrades, and dedication to duty are attributes integral to putting your life on the line.²⁶

But developing an instinct for combat aggression is only one aspect of a credible warrior ethos. Warrior culture, and the ethos it produces, must also embrace humanitarian-based limitations on the use of violence. The “constant care” obligation established by Article 57 should be recognized as a manifestation of this essential humanitarian component to a credible warrior ethos. Truly effective military units are those whose leaders and

²⁴ U.S. DEP’T OF ARMY, TRAINING CIRC. 3-21.75, THE WARRIOR ETHOS AND SOLDIER COMBAT SKILLS xiii (12 Aug. 2013) [hereinafter TC 3-21.57].

²⁵ U.S. ARMY RESEARCH INST. FOR THE BEHAVIORAL AND SOC. SCI., RESEARCH REPORT NO. 1827, WARRIOR ETHOS: ANALYSIS OF THE CONCEPT AND INITIAL DEVELOPMENT OF APPLICATIONS 1 (2004).

²⁶ TC 3-21.75, *supra* note 24, para. 1-6.

members embrace the obligation to constantly endeavor to mitigate risk to civilians, the wounded and others *hors de combat*, and to civilian property and protected objects, while leveraging the lethal combat power with which they have been entrusted. The very general “constant care” obligation codified by Article 57 manifests this important component of the “ethical warrior,” which is an aspect of the warrior culture emphasized by former U.S. Army Chief of Staff General Eric Shinseki:

Every organization has an internal culture and ethos. A true Warrior Ethos must underpin the Army’s enduring traditions and values. It must drive a personal commitment to excellence and ethical mission accomplishment to make our Soldiers different from all others in the world. This ethos must be a fundamental characteristic of the U.S. Army as Soldiers imbued with an ethically grounded Warrior Ethos who clearly symbolize the Army’s unwavering commitment to the nation we serve. The Army has always embraced this ethos but the demands of Transformation will require a renewed effort to ensure all Soldiers truly understand and embody this Warrior Ethos.²⁷

The ethical component of the warrior ethos is the doctrinal link to the LOAC “constant care” obligation, and reflects the importance of limits on the violence and destruction of war. Thus, the very notion of the professional warrior embraces the objectives inherent in the LOAC. As the same Army training manual cited above notes,

The conduct of armed hostilities on land is regulated by FM 27-10 and the Law of Land Warfare. Their purpose is to diminish the evils of war by protecting combatants *and* noncombatants from unnecessary suffering, and by safe guarding certain fundamental human rights of those who fall into the hands of the enemy, particularly enemy prisoners of war (EPWs), detainees, wounded and sick, and civilians. Every [s]oldier adheres to these laws, and

²⁷ *Introduction to the Warrior Ethos*, MISS. COLL. ROTC, http://www.mc.edu/rotc/files/5813/1471/5888/MSL_101_Values__Ethics_Sect_01_Intro_to_the_Warrior_Ethos.pdf (last visited Mar. 14, 2016).

ensures that his subordinates adhere to them as well, during the conduct of their duties.²⁸

As this paragraph emphasizes, the warrior culture is essential to develop a warrior ethos, and an ethical foundation is essential to that ethos. Respect for LOAC obligations is the essential touchstone for that ethical foundation.

The “constant care” obligation therefore serves a vital balancing function, reminding commanders and the soldiers they lead that the warrior instinct of aggression and decisive action must always be tempered by a genuine commitment to mitigate risk to civilians, the wounded, and others *hors de combat*. This overarching influence on training for, planning, and executing combat operations is an essential foundation for civilian risk mitigation. Accordingly, greater clarity on how this “constant care” obligation should be implemented at the tactical and operational level will contribute to both the humanitarian objectives of the LOAC and the development of an ethically sound warrior ethos. Accordingly, it is important to understand how Article 57 quickly transitions from the general to the specific pursuant to the LOAC and in military practice.

III. Precautions in the Target Planning Process: A Natural Counterweight to Military Necessity

Humanitarian obligations always limit the use of lethal combat power, no matter what the context. Distinction permits deliberate attack only against lawful targets; proportionality prohibits such attacks when the anticipated risk to civilians and/or their property is assessed as excessive in relation to the anticipated military advantage; and unnecessary suffering prohibits the use of weapons and tactics that the international community has determined would inflict unnecessary suffering on combatants, such as denial of quarter or the use of weapons that produce fragments that cannot be detected with x-rays.²⁹ It is, however, obvious that the protective impact of these rules will be substantially influenced by the circumstances surrounding the attack decision and the precautions taken to assess the risk of violating these principles. Deliberate/planned targeting decisions will obviously involve greater opportunity to assess LOAC compliance than time-sensitive attack decisions, but such

²⁸ *Id.* (emphasis added).

²⁹ See HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rules 46, 79.

compliance must be assessed in all cases. Other factors, such as the nature of the enemy (whether or not the enemy distinguishes himself from the civilian population), the sophistication of friendly intelligence, surveillance, reconnaissance assets, and the training and experience of the decision-makers will also impact their ability to implement LOAC requirements.

Precautionary measures, if properly implemented as a priority in the planning of attacks and other military operations involving combat power, can play a vital part in civilian risk mitigation during all hostilities, and hold promise to enhance the ability of armed forces to ensure they give full humanitarian effect to other core LOAC principles. Civilian risk mitigation begins with implementation of the distinction obligation, AP I's "Basic Rule."³⁰ With commitment to the distinction obligation as a requisite foundation, civilian risk mitigation then turns on implementing feasible precautionary measures, and, once implemented, refraining from any attack expected to cause indiscriminate effects or otherwise violate the "proportionality" principle. While proportionality considerations certainly play an important humanitarian role in the targeting planning and execution process, precautionary measures bridge the conceptual borderline between distinction and proportionality. In practice, implementing feasible precautions as a second step in the targeting legality assessment will often mitigate the complexity of the proportionality assessment as a final step in this assessment by ensuring that all measures are taken so that attacks are only conducted when the risk to civilians are minimized and hence, the proportionality balance will tip decisively in favor of the "concrete and direct military advantage anticipated" to be gained from the attack.

The precautions obligation applies to all targeting decisions involving risk to civilians (there is no obligation to consider such measures where an attack will not place civilians or civilian objects at risk, although such operations are increasingly rare).³¹ However, as with the principles of distinction and proportionality, the circumstances of an attack will impact the extent to which such measures will influence attack decisions. Precautions related to time-sensitive attacks can be expected to be *ad hoc* and generally cursory, as the soldiers engaged in the attack will rarely have the opportunity to consider and/or implement extensive precautions.

³⁰ API COMMENTARY, *supra* note 8, at 680.

³¹ FM 3-60, *supra* note 19, para. 2-87.

However, it is important to recognize that the precautions obligation is not insignificant, even in the case of a time-sensitive attack. Instead, the “constant care” obligation demands that soldiers be trained and directed to instinctively endeavor to mitigate civilian risk in *all* situations, not just those allowing for deliberative decision-making processes.³² This is accomplished by training that emphasizes the need to verify the nature of potential targets as effectively as the circumstances permit, limiting the effects of attack as much as possible to the intended target or targets, and foregoing attacks to prevent civilian casualties when doing so is consistent with the dictates of mission accomplishment and/or required by the LOAC.³³

It is, however, in the deliberate targeting process where precautions hold the greatest potential for civilian risk mitigation. It is, therefore, unsurprising that both Article 57 and the DoD *Law of War Manual* discussion of precautions focus principally on the deliberate/planned targeting context. Indeed, Article 57’s enumerated precautionary obligations are directed toward “those who plan or decide upon attacks.”³⁴ While in theory, every soldier who engages a target is planning and deciding upon an attack, the enumerated precautionary measures in Article 57 seem weighted heavily towards a deliberate target/attack planning process. This is unsurprising, for it is logical to expect a better “payoff” from precautions during the deliberate targeting process, where commanders and their operational planners develop courses of action designed to maximize the effect of combat power by synchronizing the full range of available battle operating systems. The deliberative nature of this process affords these operational planners and decision-makers the opportunity to integrate feasible civilian risk mitigation measures into their plans.

³² AP I COMMENTARY, *supra* note 8, at 679 (“On the level of the ‘*jus in bello*,’ Article 49 ‘Definition of attacks and scope of application’ defines attacks as covering both offensive and defensive acts, i.e., all combat activity. All these considerations mean that Article 57 applies to all attacks, whether they are acts of aggression or a response to aggression. The fact that a Party considers itself to be the victim of aggression does not exempt it from any of the precautions to be taken in pursuance of this article.”).

³³ *See, e.g., Teaching File*, ICRC RES. CEN. (June 30, 2002), <https://www.icrc.org/eng/resources/documents/misc/5p8ex4.htm>; *see also* Geoffrey S. Corn, et. al., *Belligerent Targeting and the Invalidity of the Least Harmful Means Rule*, 89 INT’L L. STUD. 536 (2013) (explaining the difference between policy-based limitations on lethal force authority directed against enemy belligerents and the LOAC authority to engage such belligerents).

³⁴ AP I, *supra* note 7, art. 57(2)(a).

A deliberate targeting process will focus heavily on the effects that can be produced by the carefully “tailored” leverage of lethal combat power.³⁵ Distinction and proportionality, as noted above, provide the starting points for LOAC implementation in this deliberative process by forces committed to fulfilling LOAC obligations. However, because the nature of precautionary measures is more naturally linked to the process of tailoring combat power to satisfy mission essential objectives, these measures “fit” more naturally within the deliberate targeting process. Each of the specific obligations codified in Article 57 illustrate this logical “fit.”

A. Information and Situational Awareness

The first enumerated precautionary measure imposed by Article 57 is the requirement that targeting decision makers “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives”³⁶ The focus of this precautionary measure is information and situational awareness, which is obviously an essential predicate to good-faith implementation of the distinction obligation.

Maximizing situational awareness—friendly forces, enemy forces, civilians, wounded and other *hors de combat*, and the surrounding environment—is a central component in the military decision-making process.³⁷ Commanders devote substantial resources to gathering information, processing the information into actionable intelligence, and constantly updating the information and the intelligence produced from it.³⁸ Indeed, an essential aspect of the targeting process is focusing intelligence, surveillance, reconnaissance (ISR) and target acquisition resources to satisfy the commander’s intelligence and information requirements.³⁹ This is only logical; maximizing the effects of combat power necessitates maximizing the accuracy of situational awareness. Commanders have no legitimate interest in wasting resources on targets whose attack will not make a meaningful contribution to mission

³⁵ Corn & Corn, *supra* note 7, at 349-353.

³⁶ *Id.* art. 57(2)(a)(i).

³⁷ JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS II-1 (11 Aug. 2011), http://www.dtic.mil/doctrine/new_pubs/jp3_0.pdf [hereinafter JP 3-0].

³⁸ *Id.*

³⁹ FM 3-60, *supra* note 19, paras. 2-27–2-30.

accomplishment, and therefore, should constantly endeavor to direct attacks only towards lawful military objectives.

The Article 57 “target verification” obligation is obviously intended to mitigate civilian risk, and not intended to enhance the effectiveness of attacks or military operations. However, both of these outcomes are inextricably linked: maximizing situational awareness in order to enhance the effects of combat power directed against lawful targets inherently mitigates the risk that the effects of an attack will be inadvertently directed against civilians or their property. Commanders therefore have a natural incentive to implement this obligation, and ensure “information maximization” is a central component of their targeting process.

Demanding that commanders act only on completely accurate information is, however, unrealistic; even the very best efforts to gather tactical and operational information cannot be expected to produce perfection in the information gathering process. The LOAC recognizes this reality, and seeks to balance the obligation to gather information with practical limitations on information access, which is reflected in the standard for assessing compliance: the axiom that operational decision-makers must be judged based on the information reasonably available to the commander at the time of the attack decision.⁴⁰ This is reflected in the feasibility qualifier incorporated into Article 57 and emphasized in the *DoD Law of War Manual*.⁴¹

What is or is not feasible in relation to information gathering and assessment, as with other enumerated precautions, is therefore a vitally important consideration. Unfortunately, it is impossible to provide anything close to an objective definition of feasibility in relation to any precautionary obligation, as what is or is not feasible is inherently contextual.⁴² The contextual nature of this qualifier need not, however, completely nullify the obligation. Instead, the assessment of feasibility

⁴⁰ See *DoD LAW OF WAR MANUAL*, *supra* note 2, at 192–93, para. 5.4.2; *see also* YORAM DINSTEIN, *CONDUCT OF HOSTILITIES UNDER THE LAW OF INT’L ARMED CONFLICT* 122–23 (Cambridge, 2nd ed. 2004) (addressing the subjective component to the proportionality equation).

⁴¹ AP I, *supra* note 7, art. 57(2) (a); *DoD LAW OF WAR MANUAL*, *supra* note 2, at 237–41.

⁴² *See, e.g.*, Theo Boutruche, *Expert Opinion on the Meaning and Scope of Feasible Precautions Under International Humanitarian Law and Related Assessment of the Conduct of the Parties to the Gaza Conflict in the Context of the Operation “Protective Edge”* 15, *GLOBAL ASSETS* (2015), <http://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--expert-opinions/precautions-under-international-humanitarian-law-of-the-operation-protective-edge.pdf>.

must be guided by the logic underlying the qualification, which is that commanders cannot be held to a standard of completely accurate situational awareness in all circumstances. Such a requirement would be inherently inconsistent with the realities of warfare, the chaos of combat, enemy efforts to conceal its activities, assets, vulnerabilities, and intentions, enemy deception, and the limits of available friendly ISR assets. Instead, commanders are expected to develop and maintain the most accurate situational awareness possible in the context of these many influences.

The ICRC Commentary to Article 57 purports to acknowledge the inherent limitations on situational awareness, but suggests an extremely demanding test for compliance with Article 57 even in light of these limitations:

Admittedly, those who plan or decide upon such an attack will base their decision on information given them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature. However, this does not detract from their responsibility, and in case of doubt, even if there is only slight doubt, they must call for additional information and if need be give orders for further reconnaissance to those of their subordinates and those responsible for supportive weapons (particularly artillery and air force) whose business this is, and who are answerable to them. In the case of long-distance attacks, information will be obtained in particular from aerial reconnaissance and from intelligence units, which will of course attempt to gather information about enemy military objectives by various means. The evaluation of the information obtained must include a serious check of its accuracy, particularly as there is nothing to prevent the enemy from setting up fake military objectives or camouflaging the true ones. In fact it is clear that no responsible military commander would wish to attack objectives which were of no military interest. In this respect humanitarian interests and military interests coincide.⁴³

⁴³ API COMMENTARY, *supra* note 8, at 680–81.

Whether it is an accurate statement of military practice that even “slight doubt” requires delaying an attack in favor of making efforts to gather additional information is debatable. Like any information-gathering effort, elimination of all doubt as to the true nature of a proposed target seems to create an unrealistic expectation of tactical and operational decision-makers struggling to apply the law in good faith, in the midst of the often chaotic situations of conflict. What is realistic is an expectation that doubt must be balanced against the perceived urgency of attack necessity, and the opportunity to gather additional information under the circumstances prevailing at the time. However, what seems indisputable is that commanders should constantly endeavor to develop the most accurate intelligence possible under the circumstances and within the time available, not only for humanitarian reasons, but to maximize the effects of their combat power consistent with the realities of the hostilities.

Unlike Article 57, the DoD *Law of War Manual* emphasizes the “good faith” foundation for all exercises of operational and tactical judgment and uses the term “available” to qualify the situational awareness obligation.⁴⁴ Specifically, the DoD *Law of War Manual* provides:

Assessing Information in Conducting Attacks. Persons who plan, authorize, or make other decisions in conducting attacks must make the judgments required by the law of war in good faith and on the basis of information available to them at the time. For example, a commander must, on the basis of available information, determine in good faith that a target is a military objective before authorizing an attack. Similarly, the expected incidental damage to civilians or civilian objects must be assessed in good faith, given the information available to the commander at the time.

In making the judgments that are required by the law of war rules governing attacks, persons may rely on information obtained from other sources, including human intelligence or other sources of information. For example, in a long-distance attack, a commander may rely on information obtained from aerial reconnaissance and

⁴⁴ DoD LAW OF WAR MANUAL, *supra* note 2, at 192–93.

intelligence units in determining whether to conduct an attack.⁴⁵

Does use of the term “available” information indicate a dilution of the situational awareness obligation by Article 57? Does it endorse a purely subjective test of reasonableness, whereby a commander’s subjective belief that a target qualifies as lawful should be considered conclusive because he made that judgment based on the information, “available” to him? Does the DoD *Law of War Manual* relieve commanders of an obligation to seek additional information related to potential targets because they may simply rely on whatever limited information is “available” at the time of a decision.⁴⁶ Such a superficial reading of the *Manual* is implausible, as it would amount to an endorsement of willful blindness.⁴⁷ More importantly, this reading lacks any meaningful foundation in operational practice and ignores the tactical and operational value of maximum situational awareness. Indeed, interpreting the *Manual* to endorse this type of willful blindness in the target assessment process verges on the absurd for two reasons. First, a willful blindness approach to the target information gathering would be fundamentally inconsistent with the overall obligation to take “constant care” to mitigate risk to civilians and their property. As a result, this interpretation of the DoD *Law of War Manual* disconnects the information obligation from the broader “constant care” obligation on which it is based.

Commanders employ combat power to impose their will on an enemy, and as a result the ultimate operational goal of such employment is to maximize the effects of combat power. Given that combat power is limited, information is essential to deciding where best to apply limited resources to achieve tactical and strategic goals, and any competent commander will approach the targeting process with a voracious appetite for constantly evolving information to be sure his or her combat assets are used in the most effective manner possible.

⁴⁵ DoD LAW OF WAR MANUAL, *supra* note 2, at 196.

⁴⁶ For a critical analysis of the standard to be applied when evaluating the sufficiency of military commanders’ claims of compliance with targeting standards, see Kristen Dorman, *Proportionality and Distinction in the International Criminal Tribunal for the Former Yugoslavia*, 12 AUSTL. INT’L L. J. 83, 92 (2005).

⁴⁷ Indeed, such a reading would be inconsistent with the “good faith” assessment required by the *Manual* language quoted in the text.

Commanders understand that information is the life-blood of tactical success and operational dominance.⁴⁸ Information is the tool that enables the commander to anticipate the enemy's decision-cycle, set the tempo of the battle, and seize and retain initiative—central tenets to successful military operations.⁴⁹ A “willful blindness” approach is fundamentally inconsistent with the central role of information dominance in the process of employing combat power. It is information dominance that ultimately sets the conditions for achieving operational success, which is truly all about initiative and imposing conditions on an opponent. This relationship between maximizing situational awareness and success in battle is reflected in the following extract from the U.S. Army's primary doctrinal statement on the role of landpower:

Joint doctrine discusses traditional war as a confrontation between nation-states or coalitions of nation-states. This confrontation typically involves small-scale to large-scale, force-on-force military operations in which enemies use various conventional military capabilities against each other. Landpower normally solidifies the outcome, even when it is not the definitive instrument. Landpower is the ability—by threat, force, or occupation—to *gain, sustain, and exploit control over land, resources, and people*. Landpower is at the very heart of unified land operations. Landpower includes the ability to—

- Impose the Nation's will on an enemy, by force if necessary.
- Engage to influence, shape, prevent, and deter in an operational environment.
- Establish and maintain a stable environment that sets the conditions for political and economic development.
- Address the consequences of catastrophic events—both natural and man-made—to restore infrastructure and reestablish basic civil services.
- Support and provide a base from which joint forces can influence and dominate the air and

⁴⁸ JP 3-0, *supra* note 37, II-1.

⁴⁹ *Id.* III-20-22.

maritime domains of an operational environment.⁵⁰

A doctrinal endorsement of situational “willful blindness” cannot, therefore, be squared with the true nature of military operational doctrine or practice. And, as the DoD *Law of War Manual* emphasizes, the meaning of “available” information must be framed by the expectation that commanders will implement their obligations in good faith, an expectation that frames all other aspects of precautions.⁵¹ Good faith implementation of both LOAC obligations and the responsibility to lead forces in combat translates into the imperative that subordinates at every level be inculcated with an appreciation for the value of timely and accurate intelligence. They must also appreciate how information ultimately contributes to the efficient and effective use of finite combat resources. Developing this understanding and the corresponding commitment to constant efforts to enhance situational awareness will inevitably contribute to the mitigation of civilian risk by decreasing the likelihood of poorly informed attack decisions that endanger civilians. This is simply an essential aspect of mission accomplishment.

Attacks cannot, of course, be delayed indefinitely in order to gather additional information, and even an expansive Commentary interpretation of Article 57 does not require endless delay. Commanders must at some point “cut off” the information input. But, the instinct to demand the very best situational awareness should align the humanitarian objectives of Article 57 with the operational imperative to continue to gather information right up to the point of attack execution, and in many situations commanders will continue to adjust attack options, where possible, after initiating an attack, by relying on real-time ISR. When commanders or those executing an attack receive information, even during the execution process, that alters the threat picture sufficiently to call the validity of the attack into question—either from a legal or operational perspective—the only militarily logical response is to forego the attack.

B. Civilian Protection in the Targeting Decision Cycle

⁵⁰ NORMAN M. WADE, *THE ARMY OPERATIONS & DOCTRINE SMARTBOOK* 1–13 (5th ed. 2015).

⁵¹ *DOD LAW OF WAR MANUAL*, *supra* note 2, 192–93.

Article 57 obligates those planning and executing target decisions to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”⁵² Accordingly, once the best available information has resulted in the determination that a lawful target should be attacked, the next step in the precautions process is to develop a tactical execution plan that will produce the desired operational effect while at the same time mitigating civilian risk.

Assessing various attack options and selecting the option that produces the best tactical and legal outcome is central to target decision-making, especially in the deliberate/pre-planned targeting process. Commanders rely extensively on expertise from staff principals and subordinate commanders to produce the most tactically desirable outcomes.⁵³ Inputs into this process range from mission-essential tasks, intelligence, logistics, capabilities of available combat systems, non-kinetic alternatives (such as electronic warfare and deception), risk assessment, legal requirements, rules of engagement, demands for future operations, and more.⁵⁴

Article 57(2)(a)(ii) requires that commanders inject another consideration into this process: civilian risk mitigation.⁵⁵ According to the ICRC Commentary, this provision of Article 57 was focused primarily on ensuring that commanders integrate “proportionality” considerations into the attack planning process.⁵⁶ However, the text of the sub-paragraph (“with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”) is broader than proportionality, given Article 57’s reference to both “avoiding” and “minimizing” civilian risk. In other words, the broadest and most logical reading of this obligation is that impact on civilians resulting from various courses of action must be included among the range

⁵² AP I, *supra* note 7, art. 57(2)(a)(ii).

⁵³ See COL. EDWARD T. BOHNEMANN, MCTP TRENDS IN A DECISIVE ACTION WARFIGHTER EXERCISE 8–9 (2014), [http://usacac.army.mil/sites/default/files/documents/cact/FINAL%20MCTP%20Trends%20in%20a%20Decisive%20Action%20WFX%20\(EDITED%2014%20January%202015\).pdf](http://usacac.army.mil/sites/default/files/documents/cact/FINAL%20MCTP%20Trends%20in%20a%20Decisive%20Action%20WFX%20(EDITED%2014%20January%202015).pdf).

⁵⁴ See JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 19–20 (2004), <http://archive.defense.gov/news/Mar2005/d2000318nms.pdf>.

⁵⁵ AP I COMMENTARY, *supra* note 8, at 682 (“This sub-paragraph deals with the choice of means and methods of attack to be used so as to prevent loss or damage to the population.”).

⁵⁶ *Id.* at 682–83.

of operational and tactical considerations already integrated into the attack decision-making process.

For the U.S. military, civilian risk considerations is reflected by the recent inclusion of “civilians” into the METT-T equation.⁵⁷ This equation, referring to, “Mission, Enemy, Terrain and Weather, Troops and Support Available, and Time Available,” is the traditional mnemonic used to identify the relevant factors impacting mission and course of action planning.⁵⁸ Today, the mnemonic includes a “C,” referring to civilian considerations.⁵⁹ Accordingly, core doctrinal methodology applicable to all military planning now requires commanders to constantly incorporate civilian risk mitigation into attack course of action assessment. This is reflected in the Army Doctrinal Reference Publication, ADRP 3-0, *Unified Land Operations*:

Mission Variables

Upon receipt of a warning order or mission, Army leaders filter relevant information categorized by the operational variables into the categories of the mission variables used during mission analysis. They use the mission variables to refine their understanding of the situation. The mission variables consist of mission, enemy, terrain and weather, troops and support available, time available, and civil considerations (METT-TC). Incorporating the analysis of the operational variables with METT-TC ensures Army leaders consider the best available relevant information about conditions that pertain to the mission.⁶⁰

For the civilian consideration component of METT-TC to have significance, it is necessary that commanders and their planners constantly factor civilian risk mitigation into course of action development efforts. Article 57’s “feasible precautions” obligation reflects this necessity, and should be understood as complementary to the civilian consideration component of METT-TC. Careful targeting analysis will often reveal that it is possible to select alternate attack options, adjust selected attack

⁵⁷ JAMES W. WILLIAMS, A HISTORY OF ARMY AVIATION: FROM ITS BEGINNINGS TO THE WAR ON TERROR 277 (2005).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ U.S. DEP’T OF ARMY, ARMY DOCTRINE REF. PUB. 3-0, UNIFIED LAND OPERATIONS para. 1-10 (May 2012), http://fas.org/irp/doddir/army/adrp3_0.pdf [hereinafter ADRP 3-0].

options, or take other measures such as issuing warnings that will reduce civilian risk without compromising the commander's desired operational effect. In any event, the doctrinal change expressly adopting "civilians" as part of the planning factors means that the commander is obligated to consider implementing such "precautions" in the targeting process whenever the anticipated consequences of an attack place civilians or civilian property at risk (no consideration is required when there is no such risk).

However, this obligation is not absolute, but is instead qualified by feasibility considerations. Of course, where a commander is simply incapable of adopting an alternate course of action (for example when he does not have resources or time available to do so), the alternate cannot be considered feasible. On this point, there is little dispute. What is often disputed is whether increased risk to friendly forces is a consideration rendering an alternate course of action not feasible.⁶¹ One point is clear, however: where a commander is able to select an attack option that will produce the desired operational effect while mitigating civilian risk, without exposing friendly forces to increased enemy risk, he must do so pursuant to Article 57. And, because doing so will in no way degrade the contribution of the attack on mission accomplishment, selection is also mandated by the civilian consideration of METT-TC.

Thus, two aspects of this "feasible precautions" obligation emerge from these authorities. First, where a commander can produce "equivalent effects" *after* implementing precautionary measures that mitigate civilian risk, he must do so. Second, there is no *obligation* for commanders to implement precautionary measures when doing so will degrade the operational effect of an attack that could otherwise be achieved in a manner consistent with the other key principles of the LOAC (e.g., proportionality and distinction) without implementing the precaution.

Ultimately, the objectives of Article 57 are completely aligned with operational and tactical logic: develop attack options that maximize the disabling effect on the enemy while mitigating risk to friendly forces and civilians alike. Failing to consider civilian risk mitigation in selecting among courses of action in the attack planning process is, therefore, inconsistent with both the LOAC's humanitarian objectives and U.S. military doctrine; indeed, excluding this consideration risks distorting

⁶¹ See Reuven Ziegler & Shai Otzari, *Do Soldiers' Lives Matter? A View from Proportionality*, 45 ISR. L. REV. 53, 56-58 (2012).

outcomes in a way that undermines both humanitarian and legitimate military goals. Again, consider how Army doctrine emphasizes securing operational advantages that mitigate, among other things, civilian risk:

The dynamic relationships among friendly forces, enemy forces, and the other variables of an operational environment (PMESII-PT [political, military, economic, social, information, infrastructure, physical environment, time] and METT-TC) make land operations exceedingly difficult to understand and visualize. Understanding each of these parts separately is important but not sufficient to understand the relationships among them. Friendly forces compete with enemy forces to attain operational advantages within an operational environment. These advantages facilitate Army forces closing with and destroying the enemy with minimal losses to friendly forces as well as civilians and their property.⁶²

Civilian risk mitigation cannot, however, depend exclusively on the planning process. Even the best efforts to ascertain the true nature of a target and select the most civilian risk-averse tactic for attacking the target cannot guarantee absolute accuracy. In many situations, new and/or better information will arise during the attack execution phase itself. Obviously, the “constant care” obligation must also consider how such information must impact the ultimate attack decision.

C. Attack Suspension

A natural corollary to the information/situational awareness obligation is what is best understood as the “attack suspension” obligation. Specifically, Article 57(2)(b) provides that “an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to

⁶² ADRP 3-0, *supra* note 60, para. 1-41. Several Joint publications note that assessment of PMESII is critical to understanding the operational environment. *See, e.g.*, JOINT CHIEFS OF STAFF, JOINT PUB. 3-24, COUNTERINSURGENCY I-4 (22 Nov. 2013); JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING 3-9 (11 Aug. 2011).

the concrete and direct military advantage anticipated.”⁶³ The obvious objective of this rule is to prohibit those executing an attack from adopting an attitude of willful blindness towards evolving information simply because execution of the attack has been ordered.

Willful blindness in relation to battlefield or tactical information is not only operationally derelict, but is also incompatible with the “constant care” obligation. No matter where or when in the attack cycle new information becomes available that calls into question the legality of an initiated attack, those executing an attack must consider this information and, where they are able, modify or suspend the attack if the information indicates that key principles, like proportionality, otherwise would be violated. Article 57’s attack suspension rule imposes an explicit obligation against completing an initiated attack based solely on the pre-attack assessment, when new information undermines the factual predicate for that assessment.⁶⁴ Instead, the individual in control of the attack must remain cognizant of the reality that in the chaotic and fluid situations of battle, new information may arise even moments before attack culmination.

Neither Article 57 nor the DoD *Law of War Manual* indicates the quantity or quality of information that would necessitate suspending or canceling an attack. Any attempt to do so would be foolish and probably futile, as no two attack situations are alike. Information is obviously central to this obligation, and it would be illogical to assume that this “suspension/cancelation” obligation somehow supersedes the “feasible information collection” obligation that applies during attack planning. Accordingly, these obligations function in a complementary manner: even during attack execution, commanders and their subordinates executing the commander’s orders must continue to gather information related to the nominated or intended target in order to modify or suspend an initiated attack when the factual predicate for the operational and legal assessments that led to ordering the attack change.

Normally, the level of information gathering that is feasible during the attack-execution phase will not be analogous to that which is feasible during the attack-planning phase. There may, of course, be exceptions—situations where the attacking forces may actually be in a position to gather

⁶³ AP I, *supra* note 7, art. 57(2)(b).

⁶⁴ *Id.*

more accurate information than was available during the planning process. For example, a pilot operating a Remotely Piloted Vehicle armed with precision strike munitions will often be capable of gathering and assessing substantial real-time information up to the point of, and even during, the attack.⁶⁵ Or, perhaps a raid into an alleged enemy base camp will result in recognizing that one of the buildings nominated for attack is occupied by civilians, and not belligerents, and therefore is protected from attack under the LOAC.

Ultimately, while no two situations are identical, this rule forecloses a “because we started, we always have a right to finish” mentality in relation to attack operations. Instead, it reinforces each individual combatant’s obligation to mitigate civilian risk at every stage of the planning and execution process. Individuals on the verge of completing an attack are entrusted with the responsibility and duty to exercise initiative to suspend or cancel an attack inconsistent with the expectations established by the information relied upon to launch the attack. This obligation applies to both the commander who ordered the attack and the subordinates entrusted with the responsibility to execute that order. The alternative is simply incompatible with the notion of the “ethically grounded” warrior discussed above: no soldier should feel justified in culminating an attack against what was originally assessed as a lawful target but later discovered to be anything but. Allowing such outcomes would transform the attack from justified to unjustified violence, even in the context of war.

There is, however, an important caution that must be associated with this obligation: the test of compliance is one of reasonable judgment, not absolute accuracy.⁶⁶ Compliance with precautionary obligations cannot be based on information that was unavailable at the time of decision.⁶⁷ The importance of this principle of compliance assessment is perhaps most significant in relation to the attack suspension/cancellation obligation. It is an unfortunate reality of war that there will be many situations where attacks should have and would have been suspended or cancelled had the attacking commander or combatant known more about the situation. Article 57 does not condemn such attacks even when they result in tragic

⁶⁵ *Domestic Unmanned Aerial Vehicles (UAVs) and Drones*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/privacy/drones/>.

⁶⁶ See Geoffrey S. Corn, *Unarmed But How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT’L SECURITY L. POL’Y 257 (2008), <http://www.sevenhorizons.org/docs/cornunarmedbuthowdangerous.pdf>.

⁶⁷ See *id.*

consequences to civilians so long as the facts known to those planning and executing the attack at the time the attack was planned and executed supported their assessment that the attack complied with the LOAC. A violation only occurs when the reasonably available or actually known information at the time the attack was planned and executed indicated that proceeding with the attack would be inconsistent with applicable LOAC principles and rules. And, as noted above, gathering and processing additional information will frequently be most difficult during the attack execution, and thus this difficulty must be considered in *post hoc* assessments of compliance.

D. Warnings

Providing advance warnings to civilians in order to mitigate the risk of attack is one of the most potentially effective, yet commonly debated precautionary measures. Article 57 of AP I specifically requires that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”⁶⁸ Israel’s recent operations in Gaza and the Israeli Defense Force’s (IDF’s) extensive efforts to provide such warnings triggered substantial debate on the nature of this obligation.⁶⁹ Some worry that the IDF created an unrealistically high bar on when and how to provide warnings; others criticized the IDF because the warnings did not produce their intended effects, while others debated whether the extent of warnings were the result of policy decisions, and not legal obligation.⁷⁰ All these reactions reflect the continuing uncertainty about the obligation imposed by Article 57’s warnings rule.

At the outset, it is essential to note the sub-paragraph of Article 57 dealing with warnings includes a unique qualifier: “unless circumstances

⁶⁸ AP I, *supra* note 7, art. 57(2)(c).

⁶⁹ *Legal Framework Applicable to Aerial Strikes against Terrorists*, IDF MAG CORPS, <http://www.law.idf.il/592-6584-en/Patzar.aspx> (last visited Mar. 8, 2016) (Many of the precautions taken by the Israeli Defense Force (IDF) reflect policy considerations and exceed that which is legally required. Since such policy practices are not legally obligated, they may change from time-to-time and from one front to another. For example, Israel’s use in the Gaza Strip of non-lethal warning shots to the roofs of buildings which constitute military targets, prior to conducting aerial strikes part of a precautionary procedure known as “knocking on the roof,” is not legally obligated and derives from the unique characteristics of this front, which are not applicable in other fronts. *Id.*

⁷⁰ Steven Erlanger & Fares Akram, *Israel Warns Gaza Targets by Phone and Leaflet* N.Y. TIMES, July 9, 2015, at A8, [hereinafter Erlanger].

do not permit.”⁷¹ While the warning rule is commonly summarized as an obligation to provide “feasible warnings,”⁷² this is textually inaccurate, and indeed it is possible to interpret “circumstances do not permit” as suggesting a greater obligation than “feasible,” in that it might require warnings whenever it is physically possible to do so.

Does the warning requirement apply whenever a commander has the capacity to issue the warning? Given the importance of minimizing the risk of civilian casualties and the potential contribution that warnings could make to achieve this effect, coupled with the language used in Article 57 (“shall be given”), such an interpretation is plausible. On the other hand, such a broad interpretation would create an almost absolute requirement to issue warnings regardless of the tactical compromise that may result, as there will be few, if any, situations when providing a warning would not be possible. For example, in almost any situation a warning could be relayed by use of a bull-horn, or even yelling, towards a group of civilians, or by “buzzing” a town before launching an air attack. If the rule intends that the obligation to warn could be excused only in the rarest situations, however, why would the rule be qualified at all?

In reality, the text of Article 57 does not support an overly broad interpretation. First, because the rule imposes an obligation to provide an “effective” advance warning, Article 57 does not appear to require a warning if the only warning possible would be ineffective. Second, the phrase “circumstances do not permit” is susceptible to an interpretation that would limit the warning requirement. Specifically, the use of the word “circumstances” suggests that the obligation to give warnings is situational, based on the particular circumstances at the time. Thus, under some circumstances, a commander might not be able to give a warning, while in other circumstances, he or she might.

Parsing the meaning of “circumstances do not permit” is challenging. The explanation of this qualifier in the ICRC Commentary only provides limited help. The Commentary references loss of necessary surprise in relation to an attack as the motive for including the qualifier in the rule.⁷³ As a threshold matter, this indicates that the word “circumstances” as used in Article 57 is not intended to be interpreted as applicable only in “lack of physical capacity to warn” situations or in situations when a warning

⁷¹ AP I, *supra* note 7, art. 57(2)(c).

⁷² *See, e.g.*, WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 128–29 (2012).

⁷³ AP I COMMENTARY, *supra* note 8, at 686.

would be ineffective, as such an interpretation would render the qualification superfluous. Instead, this qualification to the obligation to warn must be measured by the operational and tactical circumstances the commander is facing. Certainly, allowing a commander to forego issuing warnings that would compromise tactical effectiveness makes sense and is consistent with military logic, thereby enhancing the credibility of the rule. On the other hand, the Commentary's explanation is of limited utility as virtually any warning will produce some degradation of tactical advantage. Perhaps a more sensible interpretation would be to limit the qualifier to circumstances involving "surprise" attacks, where the lack of warning is part of the tactical basis for the attack. Alternatively, it may be that the qualifier applies whenever the warning will result in some degradation, and cede some advantage to an enemy that would materially compromise mission success, and outweigh the advantage that warnings might offer to the attacker as a means to reduce risk of violating other limitations in Article 57 of AP I.

The Department of Defense's *Law of War Manual* echoes the Commentary in suggesting that the "unless circumstances do not permit" qualifier applies to attacks requiring surprise.⁷⁴ However, the *Manual* also suggests that "exploiting the element of surprise in order to provide for mission accomplishment and preserving the security of the attacking force" is not the only situation in which a warning is not required,⁷⁵ although the *Manual* does not provide insight into other justifications for not giving warnings.

There is merit to the *Manual's* broader conception of this qualifier. From an operational perspective, it seems illogical to limit the "unless circumstances do not permit" qualifier to preserving the element of surprise in an attack. Advance warning of any attack could enable the enemy to more efficiently prepare its defense against the attack, ceding an advantage to the enemy. However, because giving any warning will arguably have some negative effect on an attacking force, allowing *any* loss of tactical effectiveness to justify dispensing with the warning requirement is overbroad. It would result in an exception that swallows the rule.

If the warning requirement is to have any meaning, it must therefore be understood as a presumptive requirement, imposing a burden on the

⁷⁴ DoD LAW OF WAR MANUAL, *supra* note 2, at 200, 238–39.

⁷⁵ *Id.* at 238.

commander to provide warnings absent legitimate military reasons to forego warnings. Such an approach weighs heavily in favor of issuing warnings, and militates against dispensing with warnings for any loss of tactical advantage, however slight. Rather, using loss of surprise as a point of analogy, warnings should be required unless providing them will jeopardize mission success in the same way that loss of surprise would jeopardize a surprise attack. Ultimately, warnings should be dispensed with only when the commander assesses that issuing them will negate the anticipated success of a course of action. This is a high bar, requiring a good deal of understanding of the tactical basis for the attack and an ability to assess the extent of any loss of tactical advantage. The ability to apply this standard effectively will depend on the commander's good-faith commitment to civilian risk mitigation and willingness to take on tactical risk in order to improve the prospects for successful civilian risk mitigation.

Perhaps the most important consequence of this conception of precautions is that it should influence the way commanders and other operational decision-makers are trained. These individuals, entrusted with substantial lethal combat power, should be instructed to assume that warnings to civilians are required when they have the capacity to provide them. This obligation should yield only in the face of good faith determinations that the benefits of giving warnings is outweighed by degradation of tactical and operational effects of an anticipated military action. Further, commanders must ensure that warnings are "effective."⁷⁶ Thus, for example, critics of Operation Protective Edge have asserted that the IDF failed to comply with the "effective" requirement.⁷⁷

The International Committee of the Red Cross's Commentary to Article 57 provides little guidance on the term "effectiveness" but does offer the following insight into the Commentary's discussion of ruses: "[E]ven though ruses of war are not prohibited . . . , they would be unacceptable if they were to deceive the population and nullify the proper function of warnings, which is to give civilians the chance to protect themselves."⁷⁸ This reference to the "proper function of warnings" as being "to give civilians the chance to protect themselves," suggests that to

⁷⁶ See, e.g., Erlanger, *supra* note 70 (asserting that some observers criticize the warnings provided by the IDF during Operation Protective Edge in Gaza as ineffective).

⁷⁷ *Id.*

⁷⁸ API COMMENTARY, *supra* note 8, at 687.

be effective, a warning must give civilians that *chance*, even though the warning does not necessarily guarantee that outcome.

Some critics of the IDF's efforts to warn in Operation Protective Edge look to the outcome of the IDF's attacks to determine whether the warnings given were effective.⁷⁹ This is an unworkable and illogical interpretation of the "effective" requirement, as it subjects commanders to a *post hoc* outcome-based standard. Commanders must be judged prospectively on the good faith and reasonable efforts they made to provide civilians an opportunity to avoid the effects of an attack, as best as possible, under the circumstances as these circumstances presented themselves, before and at the time the attack was launched.

A *post hoc* assessment of effectiveness undermines the very core of the "precautions" principle, which is to require a good faith assessment of civilian risk mitigation opportunities prior to an attack. The enumerated requirements of Article 57 can only incentivize civilian risk mitigation by focusing upon good faith compliance with the "constant care" civilian risk mitigation obligation in planning and execution of attacks. Assessing the "effective" element of the warnings obligation on the basis of the outcome of an attack renders warning irrelevant, since the commander will be judged based on the results of the attack and not based on whether warnings were given. This would be unfortunate, for it will foreclose any incentive to explore possible evolutions and improvements in warnings techniques that might prove highly beneficial to civilians and civilian property in the future.

Compliance with the effective warning requirement must be assessed by asking whether a commander who employs a particular warning did so based on a credible expectation that it *would* be effective. A warning should only be condemned where it was clear, given the circumstances ruling prior to or at the time of the attack, that the warning would provide civilians a meaningful opportunity to avoid the harmful effects of an attack. Such a prospective assessment of compliance with the warnings

⁷⁹ See, e.g., *Israel/Gaza conflict: Questions and Answers*, AMNESTY INT'L (July 25, 2014), <https://www.amnesty.org/en/latest/news/2014/07/israelgaza-conflict-questions-and-answers/>; *Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians*, HUMAN RIGHTS WATCH (July 15, 2014), <https://www.hrw.org/news/2014/07/15/israel/palestine-unlawful-israeli-airstrikes-kill-civilians> [hereinafter HUMAN RIGHTS WATCH]; *50 Days of Death & Destruction: Israel's "Operation Protective Edge"*, INST. FOR MIDDLE EAST UNDERSTANDING (Sept. 10, 2014), <http://imeu.org/article/50-days-of-death-destruction-israels-operation-protective-edge>.

requirement will encourage commanders to develop innovative warning techniques that are effective while discarding those that do not work. But “effective” need not be synonymous with actual effects; reasonable expectation of effect is the more logical basis for assessing effectiveness.

The Israeli Defense Forces’ use of the so-called “roof knock” illustrates the risk of retrospective, effects-based assessment of compliance with the warning requirement. In Operation Protective Edge, the IDF employed a technique of striking residential buildings assessed as lawful military objectives with a low yield warhead prior to launching the much more destructive actual attack. The expectation was that these “roof knocks” would compel civilians in the building to immediately evacuate in order to reduce the risk they would be killed or injured by the actual attack.⁸⁰ In some cases, however, it was reported that residents confused the warning attack with the actual attack, and were thereby lulled into a false sense of safety in the buildings.⁸¹ Other reports indicated that the time lapse between the warning strike and the actual attack was insufficient to allow for a complete evacuation.⁸² As a result, there were alleged incidents where the warning strike did not produce the intended risk mitigation effect.⁸³

Condemning IDF commanders for use of this innovative warning technique creates a genuine risk that they will develop an indifference to improved warning techniques in future operations. Indeed, instead of encouraging them to continue to seek innovative warning techniques, this “effects based” criticism will create greater incentive for commanders to look for justifications for not utilizing warnings. Even if the “roof knock”

⁸⁰ JINSA-COMMISSIONED GAZA CONFLICT TASK FORCE, 2014 GAZA WAR ASSESSMENT: THE NEW FACE OF CONFLICT 10–11, 11–12 (2015) [hereinafter JINSA Report].

⁸¹ U.N. Human Rights Council, *Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict*, ¶42, U.N. Doc. A/HRC/29/52 (June 24, 2015) [hereinafter A/HCR/29/52]; U.N. Human Rights Council, *Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict*, ¶ 236, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015) [hereinafter A/HCR/29/CRP.4]; HUMAN RIGHTS WATCH, *supra* note 79 (Patrons at the Fun Time Beach Café assumed that a nearby small-missile impact was a mistake and returned to the shelter of the café, which was subsequently hit by a larger-precision strike.).

⁸² A/HCR/29/52, *supra* note 81, ¶ 42; A/HCR/29/CRP.4, *supra* note 81, ¶ 237; HUMAN RIGHTS WATCH, *supra* note 79 (The Ghafour family sought shelter in an adjacent home because they could not clear their block in under five minutes.); *Israel: Targeting Civilian Homes for Alleged Military Purposes Is a War Crime*, EURO-MEDITERRANEAN HUMAN RIGHTS MONITOR (July 14, 2014), <http://www.euromid.org/en/article/550/Israel:-Targeting-civilian-homes-for-alleged-military-purposes-is-a-war-crime>.

⁸³ See A/HCR/29/52, *supra* note 81, ¶42; A/HCR/29/CRP.4, *supra* note 81, ¶¶ 235–42.

technique did not work in all cases, IDF commanders deserve praise for seeking innovative methods to provide effective warning. Any shortcomings in the outcome of these efforts should be carefully assessed to enable them to improve the technique in the future but should not be used to condemn the IDF or its commanders for a failure to comply with Article 57 of AP I.

E. The “Least Risk” Rule

Another important enumerated precautionary measure within Article 57 is the “least harmful target” rule: “when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”⁸⁴

One aspect of this provision is uncontroversial: it applies only when a commander has more than one option to achieve the same or similar military advantage.⁸⁵ Where a commander only has one option available, this rule of precaution is obviously inapplicable. But in those situations where the commander is presented with two or more potential options, any one of which will produce the desired “effect” on the enemy, this risk mitigation rule comes into play. For example, if the desired “effect” is to deprive an enemy headquarters of power, an attack on any number of potential targets in the chain of power delivery might produce the effect. Thus, under those circumstances, a commander should choose the option that is most likely to knock out the enemy’s power with the least impact on civilians and civilian objects.

Where multiple target options are viable, the least risky option rule imposes a logical obligation on the attacking commander to select the option that poses the least risk to civilians and/or civilian objects. This obligation is consistent with both the “constant care” imperative and the underlying LOAC balance between necessity and humanity. Indeed, it also is consistent with military practice, in which harmful effects on civilians is properly understood to have a negative impact on mission accomplishment.⁸⁶ In fact, selecting the least risk target option should be an instinctual decision criterion for any credible commander—why would

⁸⁴ API, *supra* note 7, art. 57(3).

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, McChrystal Tactical Directive, *supra* note 1.

anyone choose the option that creates *greater* risk to civilians and civilian property if such risk can be avoided or minimized with no detriment to mission accomplishment? The only answer would be that the commander who does not choose the least risky option may be using the attack as a pretext to inflict unlawful and illegitimate harm on civilians and/or their property. In the modern era, such a choice would clearly be inconsistent with the most basic conception of humanitarian regulation.

Unfortunately, if a commander is *so* indifferent towards the potential suffering of civilians as to deliberately select an attack option that exacerbates civilian risk when a less risky option is viable, it is unlikely that a positive rule of international law will avert this negative humanitarian consequence. Ultimately, however, the “least risk” rule, like all other aspects of the LOAC, is premised on the assumption that commanders will endeavor in good faith to achieve the humanitarian objectives of the law. Thus, assessing the scope and effect of this rule must begin with the assumption that the commander implementing it will approach the targeting decision with a good faith commitment to feasible civilian risk mitigation.

What is far more complex for any such commander is assessing what qualifies as the same or similar military advantage in weighing various tactical options. The ICRC Commentary provides almost no insight into how military advantage should be weighted between multiple viable attack options. It is clear, however, that the rule does not impose an absolute requirement to select the attack option that minimizes civilian risk in all situations. When the least risky option fails to produce the tactical or operational advantage that will result from an option that creates greater civilian risk, the comparison between the two does not fall within the scope of the rule. In such situations, the commander is free, as a matter of law,⁸⁷ to select the option that results in greater civilian risk so long as that risk comports with other LOAC obligations (such as precautionary warnings and proportionality).

A potential for achieving greater military advantage does not mean that the commander *must* or even *should* select an attack option that creates greater civilian risk, however. Indeed, it will often be the case that the commander decides to accept a compromise of tactical or operational advantage in order to mitigate civilian risk even when doing so is not required as a matter of law. This is a common aspect of rules of

⁸⁷ AP I, *supra* note 7, art. 57(3).

engagement (“ROE”) that impose restrictions on the use of combat power above and beyond those required by the LOAC. The reasons for such policy-based ROE restrictions are multi-faceted, and ROE restrictions are often adopted in hopes of avoiding alienation of the civilian population. However, in such situations, an ROE-based decision to forego an attack, even if motivated by an effort to mitigate civilian risk, is not legally mandated. This fact is an important aspect of contemporary military operations, and the difference between legal and policy-based courses of action should be constantly emphasized. Failing to do so risks creating a false expectation that the overriding consideration in selecting among attack options is civilian risk and that commanders must always select attack options that create the least risk to civilians and their property even if such options are tactically inferior.

Ultimately, the law mandates selection of the least risk option only when multiple attack options offer the same or similar military advantage.⁸⁸ Military advantage is, however, a complex and multi-faceted concept, and involves a range of considerations. The complexity of defining and comparing military advantage, coupled with the increasingly common but erroneous assertion that Article 57 always requires selection of the least risk option, may explain why the DoD *Law of War Manual* indicates that the United States does not consider Article 57(3) of AP I to be “customary international law.”⁸⁹ In support of this assertion, the *Manual* cites the 1991 *U.S. Comments on the International Committee of the Red Cross’s Memorandum on the Applicability of International Humanitarian Law in the Gulf Region*, which noted that the rule is relevant only when options are available and only when a choice is consistent with mission accomplishment and friendly force risk mitigation.⁹⁰

This is an unfortunately cryptic justification for rejecting the customary nature of Article 57(3). It would have been more credible to emphasize the true nature of the obligation (i.e., to choose the least risk option only where there are options to achieve the same or similar military advantage) and the difficulty of making qualitative comparisons of military advantage. But the fact remains that where there are at least two attack options that will produce the same or similar military advantage, civilian risk mitigation becomes the decisive selection criteria.⁹¹ Indeed, it

⁸⁸ *Id.*

⁸⁹ DoD LAW OF WAR MANUAL, *supra* note 2, at 241 n. 303.

⁹⁰ *Id.*

⁹¹ AP I, *supra* note 7, art. 57(3).

would arguably be difficult to identify examples from U.S. practice where the “least risk” criteria was applied on this basis.

It is therefore relatively clear that the key consideration related to implementing this obligation is a comparison of the available courses of action and the military advantage associated with each of them. Perhaps the most complex and controversial aspect of this consideration is the role of friendly risk mitigation, that is, the impact of an attack on the military capacity of the attacker and its allies. The 1991 U.S. Comments cited above (and referred to in the DoD *Law of War Manual*) indicate that a military advantage should not be considered to be the “same or similar” when the friendly risk inherent in one attack option is greater than another attack option.⁹² In other words, protecting friendly forces from enemy countermeasures, or the exposure of friendly forces to risk, is a consideration that the United States believes should influence the comparison of the military advantage derived from alternate attack options.⁹³ There are critics who strongly reject the notion that friendly risk or “force protection” is a valid consideration in weighing and comparing multiple attack options.⁹⁴

The term “force protection” is misleading and operationally unsound as a description of what is at issue in assessing friendly risk.⁹⁵ Friendly risk in the context of an attack means the impact of the attack (and any countermeasures in response to the attack) upon the capacity of friendly forces to continue to fight; by contrast, force protection refers to a range of passive and active measures to protect the force from avoidable risk. In U.S. military doctrine, force protection specifically exempts considerations of the risk of exposing friendly forces from hostile actions in “actions to defeat the enemy” (which would include attacks). The Department of Defense defines force protection as

⁹² See *supra* note 79, and accompanying text.

⁹³ JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, MULTINATIONAL OPERATIONS, III-11 (16 July 2013), http://www.dtic.mil/doctrine/new_pubs/jp3_16.pdf.

⁹⁴ Ziv Bohrer & Mark Osiel, *Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties v. Safeguarding Soldiers*, 46 VAND. J. TRANSNAT'L L. 747, 747–51 (2013) [hereinafter Bohrer & Osiel]; Ziv Bohrer & Mark Osiel, *Proportionality in War: Protecting Soldiers From Enemy Captivity, and Israel's Operation Cast Lead—“The Soldiers Are Everyone's Children”* 22 S. CAL. INTERDISC. L.J. 637, 680–89 (2013); UNIV. CTR. FOR INT'L HUMANITARIAN LAW GENEVA, EXPERT MEETING “TARGETING MILITARY OBJECTIVES” 17–19 (2005).

⁹⁵ U.S. DEP'T OF ARMY, ARMY DOCTRINE REF. PUB. 3-37, PROTECTION (31 Aug. 2012), http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adrp3_37.pdf.

Preventive measures taken to mitigate hostile actions against Department of Defense personnel (to include family members), resources, facilities, and critical information. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease.⁹⁶

Unlike force protection, preserving combat capability is a distinct tactical and operational imperative.⁹⁷ Commanders plan and execute operations in with the goal of imposing their will on the enemy through the most efficient and effective use of finite resources.⁹⁸ Preserving combat capability and minimizing the loss of friendly resources is a central

⁹⁶ *Id.* at v.

⁹⁷ U.S. military doctrine on joint operations includes “protection” as a joint operational function. Joint functions are defined as follows:

Joint functions are related capabilities and activities grouped together to help JFCs integrate, synchronize, and direct joint operations. Functions that are common to joint operations at all levels of war fall into six basic groups—command and control, intelligence, fires, movement and maneuver, protection, and sustainment.

JP 3-0, *supra* note 37, at xiv. While U.S. doctrine utilizes the term, “protection”, the definition of the term indicates that this joint function is focused not only on “force protection” in the limited sense explained above, but more broadly on capacity preservation:

The protection function focuses on preserving the joint force’s fighting potential in four primary ways. One way uses active defensive measures that protect the joint force, its information, its bases, necessary infrastructure, and LOCs from an enemy attack. Another way uses passive defensive measures that make friendly forces, systems, and facilities difficult to locate, strike, and destroy. Equally important is the application of technology and procedures to reduce the risk of fratricide. Finally, emergency management and response reduce the loss of personnel and capabilities due to accidents, health threats, and natural disasters. As the JFC’s mission requires, the protection function also extends beyond force protection to encompass protection of US noncombatants; the forces, systems, and civil infrastructure of friendly nations; and inter-organizational partners. Protection capabilities apply domestically in the context of HD, CS, and emergency preparedness.

Id. at III-29.

⁹⁸ See generally U.S. DEP’T OF THE ARMY DOCTRINAL PUBLICATION 3-90, OFFENSE AND DEFENSE, para. 2 (Aug. 2012), http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adrp3_90.pdf.

component of mission accomplishment, and may at times be decisive.⁹⁹ The history of warfare is replete with examples of the vital role capacity preservation plays in mission accomplishment.¹⁰⁰

Every commander should plan and execute operations in a manner that mitigates the risk to friendly forces and preserves combat capability. Mitigation of friendly risk is not inconsistent with the LOAC obligations to endeavor to mitigate civilian risk, and indeed, friendly risk is a valid factor to consider when assessing military advantage to be gained from various attack options. Core Army warfighting doctrine emphasizes the unquestioned operational assumption that preserving friendly warfighting capability is itself a military advantage:

Friendly forces compete with enemy forces to attain operational advantages within an operational environment. These advantages facilitate Army forces closing with and destroying the enemy *with minimal losses to friendly forces* as well as civilians and their property.¹⁰¹

Ultimately, it is operationally counter-intuitive to interpret the law as requiring a loss of combat power to advance humanitarian protection. Such an interpretation not only distorts the balance between military necessity and humanity, but it also provides an unjustified windfall to the enemy.

⁹⁹ See *supra* note 95.

¹⁰⁰ One particularly compelling example of the importance of friendly risk considerations is the role personnel and equipment attrition played on U.K. capabilities during the Falklands War. See *The Atlantic Conveyor #Falklands30*, THINK DEFENSE (Apr. 3, 2012), <http://www.thinkdefence.co.uk/2012/04/the-atlantic-conveyor-falklands30/> (discussing the loss of the Atlantic Conveyor to Argentine attack and the impact on subsequent U.K. operations in the Falklands); Argentine air attacks produced substantial U.K. logistics degradation, most significantly the loss of almost all heavy lift helicopters. *Id.* As a result, the artillery resupply rate during the final attack on Port Stanley was strained. *Id.* While it is impossible to assess the impact that losing indirect fire support from artillery would have had on the outcome of the battle for Port Stanley—the battle that resulted in Argentine capitulation—it is certainly plausible that had Argentine forces resisted for several hours longer and realized their U.K. enemy lost or was losing fire support capability, they may have been far less inclined to capitulate when they did. *Id.*; see also PETER PARET, *MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE* 810 (1986).

¹⁰¹ ADRP 3-0, *supra* note 60, at 1–7 (emphasis added).

Some criticize consideration of friendly risk as an aspect of military advantage by asserting that it values the lives of friendly forces over civilians.¹⁰² While this may be an unfortunate outcome, it is not the motive. Instead, it is the preservation of operational capacity—which must be justified by military necessity—that allows for, if not demands, that risk to friendly forces is an aspect of the military advantage assessment. Indeed, it is hard to imagine a more necessary measure for bringing about the prompt submission of an enemy than preserving the resources needed to militarily dominate the enemy.

Accordingly, “same or similar” military advantage is best understood as a military advantage that will be achieved with analogous expenditure of finite resources among multiple alternative attack options. Even with such a definition, however, any assessment of compliance with this “lesser of two evils” obligation must acknowledge some rational margin of appreciation. Like any other operational judgment, assessing what qualifies as the “same or similar” military advantage during the conduct of hostilities will be influenced by a wide array of considerations and pressures. These considerations must be factored into any *post hoc* critique of compliance.

F. “Passive Precautionary” Measures

As should be apparent, the civilian risk mitigation effect of the range of precautionary measures enumerated in Article 57 all complement the principle of distinction. However, the protective effect of the distinction obligation, and the supplemental protection afforded by Article 57 precautions, is often substantially diluted by enemy tactics that increase risk to civilians. The AP I appears to recognize this relationship between “active and passive” distinction by including passive measures intended to enhance clarity in the targeting decision-making process by enhancing the attacking force’s ability to implement active distinction. These measures are commonly referred to as, “passive precautions.”¹⁰³

Article 58 of AP I provides for these passive precautions. They provide a critical component in the precautions equation. The essence of

¹⁰² Bohrer & Osiel, *supra* note 94, at 752.

¹⁰³ API COMMENTARY, *supra* note 8, at 692 (From the beginning of its work the ICRC has felt the need to lay down provisions for “passive” precautions, apart from active precautions, if the civilian population is to be adequately protected.).

Article 58 is the obligation to refrain from defensive tactics that unnecessarily increases civilian risk by exposing civilians to the harmful consequences of combat operations. Thus, forces that anticipate they will be attacked must consider measures to mitigate civilian risk by avoiding, whenever feasible, comingling military objectives with the civilian population.¹⁰⁴

The International Committee of the Red Cross Commentary characterizes Article 58 precautions as “passive precautions,” because they are not part of the target selection and engagement process, but instead are measures taken in anticipation of being attacked.¹⁰⁵ In essence, these “passive precautions” are distinction and proportionality “enablers,” obligating those expecting to be attacked to take affirmative measures to enhance, or at least not intentionally disrupt, the attacking force’s ability to comply with these two essential civilian risk mitigation principles. This would include any situation where friendly forces prepare counter-measures against enemy attack: if the force is concerned enough about such an attack to prepare such counter-measures, it assumes a corresponding obligation to take measures to protect civilians and civilian objects from the risk of injury or damage that could result from the attack or the counter-measures.

Like Article 57, Article 58 includes enumerated measures to facilitate the distinction process and thereby enhance civilian protection.¹⁰⁶ Unlike Article 57, Article 58 does not specifically include a statement of a “constant care” obligation.¹⁰⁷ Nevertheless, it would be completely illogical to suggest that this overarching humanitarian obligation is only applicable to attacking forces and not forces anticipating being attacked. Accordingly, the enumerated provisions of Article 58 ought not be considered the exclusive list of passive measures to mitigate civilian risk, but only illustrative, and “constant care” should be considered to be part of the passive precautions obligation.

There are three compelling reasons why the “constant care” obligation must apply to all belligerents, regardless of whether they are attacking or

¹⁰⁴ AP I, *supra* note 7, art. 58.

¹⁰⁵ API COMMENTARY, *supra* note 8, at 692.

¹⁰⁶ *Id.*

¹⁰⁷ Compare API, *supra* note 8, art. 57(1) (“In the conduct of military operations, *constant care* shall be taken to spare the civilian population, civilians and civilian objects.”) (emphasis added) with API, *supra* note 8, art. 58 (lacking the “constant care” provision).

being attacked. First, attempting to draw any line between an “attacking” and “defending” force is often difficult, if not arbitrary, and does not necessarily accord with actual operational art. In many situations, military units will engage in a range of operational actions that involve elements of both “attack” and “defense,” or some other mission that does not neatly fit within this dichotomy. Second, as noted above, the “constant care” obligation is a mandate to implement the core LOAC balance itself: to offset the civilian suffering produced by the necessary brutality of war through constant efforts to mitigate civilian risk whenever, wherever, and however operationally feasible. Limiting the obligation to only the attacking force would undermine this objective.

Finally, exempting forces anticipating attacks from the “constant care” obligation would inevitably dilute the efficacy of civilian risk mitigation efforts by the attacking force. Unless defending forces are also obligated to constantly endeavor to enhance the efficacy of distinction, the law would allow—and perhaps even encourage—the defending force to use, as a defensive measure, actions that expose civilians and their property to unnecessary risk. Article 58 unquestionably validates this latter concern, requiring

[t]he Parties to the conflict shall, to the maximum extent feasible:

- (a) without prejudice to Article 49 of the Fourth Convention [establishing limits on the deportation or transfer of civilians in occupied areas], endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.¹⁰⁸

The thrust of Article 58 seems clear: enhance civilian risk mitigation efforts by, in essence, facilitating the attacking force’s ability to comply with the principle of distinction.

¹⁰⁸ *Id.*

Whether by evacuating civilians from an area where an attack is expected, or by refraining from locating military objectives in the midst of civilian populations (which would include transforming those areas into military objectives), the defending force's compliance with Article 58 will inevitably enhance the attacking force's ability to distinguish between military objectives and civilians and civilian objects. Perhaps more importantly, the defending force's failure to take such measures will force the attacking force to engage the enemy in the midst of civilians and their property, inevitably exacerbating civilian risk by complicating the attacking force's implementation of the distinction principle and the attacking force's ability to make reliable proportionality judgments. As a result, absent passive precautions, there will be an increased probability that attacks will produce unavoidable civilian casualties and destruction of civilian property. Even when such outcomes would be lawful if the attacking force applied the principles of proportionality and distinction as best it could under the circumstances, they are nonetheless tragic because the loss to civilians and civilian property may have been avoidable if passive precautionary measures had been applied by the defending forces.

There is, of course, a natural tension between military considerations related to effective defense and preparation to repulse an attack and implementation of these "passive precautions." Article 58 recognizes and accounts for this tension with its own feasibility qualifier. It is therefore logical that Article 58 was neither intended to, nor should in practice, provide an attacking force with an unfair tactical advantage by depriving a defending force of the ability to exploit advantages inherent in the area of operations. On the other hand, passive precautions may seem counterintuitive from a military perspective if by facilitating an attacking force's implementation of the distinction obligation, the defender necessarily renders its own forces and positions easier to target and therefore easier to destroy.

Use of built-up areas to impede an anticipated attack can be a highly effective tactic, and has frequently been used during conflicts.¹⁰⁹ This tactic will almost always increase risk to civilians, and almost automatically increase risk to civilian property. Nonetheless, Article 58 does not prohibit such tactics. The ICRC Commentary acknowledges this, and recognizes the relationship between military necessity and the scope

¹⁰⁹ Alexandre Vautraver, *Military Operations in Urban Areas*, INT'L REV. RED CROSS (June 2010), <https://www.icrc.org/eng/resources/international-review/review-878-urban-violence/review-878-all.pdf>.

of the Article 58 obligation, noting that “a Party to the conflict cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary.”¹¹⁰

But there is a marked difference between making your forces “conspicuous” and mitigating *unnecessary* civilian risk by avoiding co-mingling. This is particularly important in relation to the defensive use of urban terrain or other built-up civilian areas. It is probably impossible to identify situations where the exploitation of civilian populated areas is *per se* unlawful, and extremely difficult to condemn such tactics on a case-by-case basis. However, such tactics should be considered in the broader context of a military organization’s overall commitment to LOAC compliance. This will often provide a useful indicator of whether co-mingling military assets with civilians and civilian property was legitimate and justifiable, or instead an effort to counter enemy combat power by deliberately complicating judgments on the legality of attacks. Assessing compliance with “passive precautions” should focus on whether a force defending itself from attacks in an urban environment or near civilians and civilian objects, or planning such a defense, had alternative viable options available. Where it is apparent that those planning the defense against attacks were aware such options existed, one could infer that the defending force has engaged in unlawful co-mingling of civilians with combatants in violation of Article 58.¹¹¹

Ultimately, what Article 58 demands is not that forces never operate in urban areas or near civilians or civilian property, or never transform civilian property into military objectives. Instead, it demands that they do so only when such actions are justified by genuine military necessity.¹¹² Such military necessity would not include *exploiting* the presumptive protection of civilians or civilian property to impede an enemy attack or gain a tactical or strategic advantage. Accordingly, commanders are expected to avoid locating military assets in the midst of civilians or civilian property to the extent feasible, but may nonetheless do so if it is based on a legitimate military requirement.¹¹³

¹¹⁰ API COMMENTARY, *supra* note 8, at 693.

¹¹¹ *See, e.g.*, JINSA REPORT, *supra* note 80 (assessing Hamas tactics of embedding vital military assets in civilian areas).

¹¹² API COMMENTARY, *supra* note 8, at 693–94.

¹¹³ DOD LAW OF WAR MANUAL, *supra* note 2, at 189–91, 248 (“ [I]f a commander determines that taking a precaution would result in operational risk (i.e., a risk of failing to accomplish the mission) or an increased risk of harm to their own forces, then the precaution would not be feasible and would not be required.”).

There are two additional important considerations related to implementation of the “passive precautions” obligation. First, as Article 58 indicates, the specific obligations imposed by Article 58 are not exclusive. Instead, commanders must consider other “passive precautions” that will mitigate risk to civilians and their property.¹¹⁴ One such measure seems almost obvious: the requirement that belligerents—whether state or non-state—take some measures to effectively distinguish themselves from the civilian population by wearing a distinctive uniform or emblem.¹¹⁵ Indeed, failing to implement this most basic, “passive precaution” creates immense risk to the civilian population by inevitably causing the other side’s forces from questioning whether any civilian can be presumed to be inoffensive and therefore entitled to protection. When this risk is created deliberately in an effort to impede attack by forces committed to compliance with the distinction obligation, it is even more problematic, as it calls into question the value of such compliance and undermines the position of those advocating restraint based on the LOAC.

Second, the extent to which a military force implements these passive precautions in no way releases an attacking force from compliance with its precautionary obligations. Even if a failure to implement passive precautions is attributed to a deliberate attempt to use civilians or civilian property to gain an illicit tactical and/or strategic advantage, the attacking force remains obligated to do everything inherent in the constant care rule to minimize civilian risk.¹¹⁶ This is an essential aspect of civilian risk mitigation, and it prevents “double victimization” of civilians—a victim of the defending enemy who is deliberately exploiting the presence of civilians to defend against attacks, and a victim of the attacking force who may claim an exemption from its “constant care” obligation due to illicit enemy tactics. In fact, while Article 51 of AP I explicitly prohibits exploitation of civilians in an effort to render a military objective immune from attack or to impede enemy operations, it also explicitly establishes that even in the case of such exploitation, the attacking force remains

¹¹⁴ AP I, *supra* note 7, art. 58(c) (“take the other necessary precautions . . .”).

¹¹⁵ *Id.* art. 44(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.”).

¹¹⁶ See JINSA REPORT, *supra* note 80, at 7 (finding despite clear evidence of Hamas’s use of civilians and urban terrain as a force equalizer, the IDF was still obligated to follow precautionary measures.).

bound by its civilian risk mitigation obligations, specifically linking this rule to Article 57:

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, *including the obligation to take the precautionary measures provided for in Article 57*.¹¹⁷

III. Back to the Beginning: A Precautions Rule, Principle, or Process?

Identifying the line between “principle” and “rule” can be perplexing. In LOAC parlance, both terms are often used interchangeably to identify the same obligation. For example, it is common to reference both the proportionality “rule” and the proportionality “principle.” Such conflation

¹¹⁷ AP I, *supra* note 7, art. 51(7)–(8) (emphasis added). While an attacking force is never relieved of its obligation to comply with Article 57, it is an open question whether (i) a defending enemy’s failure to comply with Article 58 influences how far the attacking force must comply with its Article 57 obligations, or (b) whether such failure should properly influence the assessment of lawful targets and the reasonableness of attacks that mistakenly target civilians and/or civilian objects. This is an especially complex and important issue when the failure to comply suggests a deliberate and illicit effort by the defending force to exploit the presence of civilians and civilian property to gain a tactical advantage (e.g., by complicating the attackers’ decision-making and assessment of LOAC compliance.) It would be fundamentally inconsistent with Article 57 to suggest that such abusive conduct by a defending force deprives the defender’s civilian population of the presumption of protection. However, it would also defy military common sense to refuse to acknowledge that by making the distinction between civilian and belligerent more complicated, the defender’s conduct dilutes the civilian risk mitigation effect of the distinction and proportionality obligations. A comprehensive treatment of this issue is well beyond the scope of this article. However, this will remain a central issue in relation to assessing reasonableness in judgments about attacks against this type of enemy, and should be the focus of substantial inquiry.

is, however, misleading. A rule should be understood as relatively precise, applicable only to the specific contexts incorporated into its organic terms. A principle, in contrast, should be understood as a more general source of guidance, extending across a spectrum of activities to provide direction in the implementation of specific rules and to guide decision-making where regulatory gaps exist.

Definitions of these two terms confirm the difference between them. A “rule” is commonly defined as, “an authoritative, prescribed direction for conduct, especially one of the regulations governing procedure in a legislative body or a regulation observed by the players in a game, sport, or contest.”¹¹⁸ In contrast, a “principle” is commonly defined as “a moral rule or belief that helps you know what is right and wrong and that influences your actions.”¹¹⁹ These two definitions confirm that the notion of “principle” is much broader in scope and effect than a rule. Principles, in essence, provide a foundation for regulation through more precise and specific rules, a relationship that seems central to the understanding of LOAC principles.

A broad conception of LOAC principles was recognized by the International Court of Justice (ICJ) when it considered the legality of the use or threatened use of nuclear weapons.¹²⁰ In that seminal decision, the ICJ addressed what it considered to be the international legal foundation for conflict regulation, what it characterized as “cardinal principles.”¹²¹ The term “cardinal” reinforces the broad scope that should be accorded to a “principle,” as it suggests that the LOAC principles included within that characterization function like cardinal directions of a compass. Military manuals and other sources of LOAC authority such as scholarly works use similar characterizations: “core” principles, “fundamental” principles, “foundational” principles.¹²² All of these characterizations share a common thread: LOAC principles provide essential guidance for the more precise regulation provided by specific rules, and fill gaps that may arise as the result of the under-inclusiveness of these rules.

¹¹⁸ *Rule*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/rule> (last visited Sept. 27, 2015).

¹¹⁹ *Principle*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/principle> (last visited Sept. 27, 2015).

¹²⁰ *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), <http://www.icj-cij.org/docket/files/95/7495.pdf>.

¹²¹ *Id.* at 257.

¹²² *E.g.*, DoD LAW OF WAR MANUAL, *supra* note 2, 50–70 (addressing principles); JOINT SERVICES MANUAL OF THE LAW OF ARMED CONFLICT, UNITED KINGDOM (2004).

Curiously, there seems to be nothing close to a consensus that a general precautions obligation falls within the category of “core” or “cardinal” LOAC principles. In fact, quite the opposite seems to be suggested by a review of authoritative sources, including the ICJ’s nuclear weapons opinion.¹²³ These sources routinely include, among LOAC principles, military necessity, distinction, proportionality, and the prohibition against unnecessary suffering, but tend to omit precautions.

This common omission probably reflects an understanding of precautions as a rule-based obligation, limited to the enumerated measures in Articles 57 and 58. But, this more limited or restrictive understanding of the scope and effect of precautions is unfortunate, for it fails to effectively recognize the overarching nature of the “constant care” obligation to mitigate civilian risk.¹²⁴ In contrast, elevating the precautionary measures to that of a core or cardinal LOAC principle alongside the other widely acknowledged principles will ultimately enhance civilian risk mitigation by emphasizing that “constant care” is expected at all times.

As treaty rules of international law, Articles 57 and 58 are obviously binding on states party to AP I. Furthermore, the precautionary measures enumerated in these articles are widely regarded as rules of customary international law, binding *any* party to *any* armed conflict.¹²⁵ Considered more broadly, the overall precautions obligation is of great significance in the mosaic of civilian risk mitigation. Indeed, one reason the precautions obligation holds such potential as a measure to mitigate civilian suffering is because it has elements of not just a rule, but a broader guiding principle that permeates the regulation of hostilities.

Why will treating precautions as a principle as opposed to a rule produce less civilian risk? Articles 57 and 58 define “constant care” as a rule implemented by specific enumerated measures, which is generally tracked by the DoD *Law of War Manual*.¹²⁶ This is certainly not insignificant. However, these measures are focused almost exclusively on attacks (precautions in the attack and against attacks), and as a result the

¹²³ *See id.*

¹²⁴ *See* Corn, *supra* note 5.

¹²⁵ HENCKAERTS & DOSWALD-BECK, *supra* note 6, at 51, 68.

¹²⁶ DoD LAW OF WAR MANUAL, *supra* note 2, at 192.

notion of precautionary measures is not instinctively integrated into other aspects of military operations. But the “constant care” obligation can, and should, inform every aspect of these operations, influencing everything from training to personnel staffing. Such a conception of the precautions obligation would provide a foundation for greater commitment to balancing military necessity with civilian risk mitigation, the ultimate humanitarian objective of the LOAC. In short, Articles 57 and 58 are rules that reflect a broader “constant care” principle. Articles 57 and 58 should not be seen as the limit of the principle.

To illustrate this difference in scope and effect, consider a hypothetical policy debate over the legality of authorizing military personnel to infiltrate enemy positions wearing civilian clothing. If these forces are instructed to don a distinctive emblem recognizable at a distance prior to engaging in any hostilities against enemy personnel, it may be asserted that the *infiltration* in civilian clothing is not prohibited by the LOAC, but that instead it merely exposes the operatives to the risk of criminal sanction under the domestic law of the enemy state should they be captured. Uncertainty as to the relationship between operating in civilian clothing and the war crime of perfidy may contribute to arguments in favor of operating in civilian clothing. While there seems to be little doubt that *fighting* in civilian clothing would qualify as perfidy, it is less clear that any use of civilian clothing falls within this scope of this LOAC prohibition.

It is unlikely that the precautions *rule* as articulated in Articles 57 and 58 would have any influence on the legal analysis associated with resolving the issue of wearing civilian clothing in order to infiltrate. Nothing about this tactic involves a lethal targeting judgment with the potential to place civilians at risk. Accordingly, Article 57’s enumerated obligations related to warnings, timing of attack, and choice of means or method of attack are inapposite. However, “constant care,” if understood and applied as a general principle, and not merely a rule, could be relevant. As a general or overarching principle, the operational decision-making process would be constantly animated by an effort to mitigate risk to civilians whenever feasible. Accordingly, it would be necessary to consider whether the use of this tactic, even if not expressly prohibited by a LOAC rule, would increase risk to civilians and whether that risk that could be mitigated by refraining from the tactic.

On the question of wearing uniforms in a particular operation, one would need to consider the possibility that allowing members of the armed

forces to cloak themselves in civilian appearance in this operation undermines the protection of the distinction principle by diluting confidence in the objective indicia of combatant versus civilian status. Once the enemy even suspects the use of such tactics, civilians are inevitably subjected to a greater risk of mistaken attack. Indeed, under the precautions principle, planners would bear a heavy burden to show that uniforms or other distinctive markings are not required, since the use of uniforms and distinctive emblems in military operations is a key LOAC requirement. The fact that uniforms or other distinctive markings make military forces more easily identifiable is the very reason they are required, as they facilitate distinction and reduce civilian risk. A precautions-based analysis would require an assessment of the impact on civilian risk that may arise as a result of any deviation from this key norm even if the deviation arises outside the scope of an attack.¹²⁷

There are other situations where application of a precautions principle would have a more pervasive—and therefore more protective—effect than a strictly rule-based application. For example, conceptualizing precautions as a principle instead of a rule will encourage integration of the “constant care” requirement into every aspect of military preparation, planning, execution, and even post-hoc assessment of military operations. In this sense, a “precautions principle” produces a strong humanitarian-driven counter-balance to the principle of military necessity: while necessity allows consideration of measures to bring about prompt submission of the enemy to accomplish the mission to be given considerable weight in military operations, a precautions principle requires constant consideration of concrete measures to mitigate the risk to civilians that those operations may create.

Admittedly, drawing a distinction between a rule and a principle is susceptible to criticism as an exercise in semantics. After all, even if considered as a rule, Article 57 could be interpreted quite expansively to extend beyond merely attacks to include tactical decisions such as the one highlighted above. But in the realm of conflict regulation, semantics matter. Law of armed conflict principles are understood as the foundation of conflict regulation, producing a powerful influence on military professionals in their thinking about the conduct of military operations. In essence, principles produce a more pervasive influence on the processes that influence LOAC compliance in military activities. This alone

¹²⁷ *But see* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4:2 CHI. J. INT'L L. 493 (2003).

provides a compelling justification for characterizing the precautions obligation as a principle rather than a rule.

IV. The Value of a Greater Objectivity in Civilian Risk Mitigation

Determining the applicability of LOAC obligations and how they impact the planning and execution of military operations is an obvious first step for mitigating civilian risk associated with armed conflict. However, effective implementation of the applicable principles and rules remains an enduring challenge that is often exacerbated by the range of situational variables that are an inherent aspect of military operations. Like other LOAC principles and rules that regulate the conduct of hostilities, precautions are intended to produce a rational balance between military necessity and humanity, specifically by mitigating civilian risk. However, the efficacy of all of these rules and principles is contingent on good faith implementation. For military forces committed to LOAC compliance, the logical symmetry between the law and tactical and operational practice will enhance support among operators for implementing the LOAC in all military operations.

The “contextual” or “situational” component of effective LOAC implementation is especially significant in relation to the principles and rules regulating the employment of lethal combat power: the targeting process. Implementing the principles of distinction and proportionality, and compliance with the more specific rules of military objective and the prohibition against indiscriminate attacks, is a constant challenge in any armed conflict, and especially challenging in conflicts against hybrid or unconventional enemies. This complexity illustrates how seemingly simple principles and rules in the abstract become far more complex in the context of actual operations. “Reasonableness” is the ultimate touchstone for compliance with these core LOAC principles and rules.¹²⁸ However, what is or is not reasonable is based on the situation informing each relevant decision. In the realm of targeting judgments, this includes a wide array of METT-TC factors. Thus, when implementing (and in many cases assessing compliance with) LOAC targeting law, context is essential.

¹²⁸ *Command Knowledge: The Line of Fire in the IHL Principle of Proportionality*, HARV. LAW, <http://pilac.law.harvard.edu/commanding-knowledge-the-line-of-fire-in-the-ihl-principle-of-proportionality/> (last visited Mar. 30, 2016).

This “contextual reasonableness” standard is central to legitimate LOAC compliance assessments; no commander can credibly be subjected to an “after the fact” assessment based on facts and circumstances that were not reasonably available to the commander at the time of the judgment. While this canon of LOAC implementation justifiably provides a fair margin of appreciation for operational decision-makers,¹²⁹ it also injects a substantial level of subjectivity into the implementation process.

A. Operational and Legal Symmetry: the Precautions Advantage

Effective LOAC implementation, and the civilian risk mitigation it produces, will almost inevitably be enhanced when the nature of a LOAC principle or rule is aligned with military operational logic. This aspect of LOAC implementation favors a more pervasive commitment to a “precautions principle,” as the nature of most of the precautionary measures enumerated in Articles 57 and 58 results in an instinctive alignment with the military decision-making process for those planning or executing military operations. Because these measures, when translated into operational practice, involve concrete steps that commanders, planners and operators can implement at each step of a military operation, they hold tremendous potential for enhancing civilian risk mitigation and overall LOAC compliance.¹³⁰

In this regard, it is essential to recognize that precautionary measures are inherently process-oriented, process that is central to planning and executing military operations. This is especially significant in relation to deliberate targeting, where commanders rely on subordinates to develop and implement processes to maximize the effective employment of combat power in a manner consistent with the LOAC. Consideration of precautionary measures—both passive and active—during this decision making process is both feasible and logical. To ensure LOAC compliance, commanders and planning staffs must be encouraged to integrate into their decision-making processes, considerations related to gathering better

¹²⁹ Michael N. Schmitt & J. J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37:1 U. PA. J. INT'L L. 53, 124–25 (2015).

¹³⁰ See Corn, *supra* note 5. Of course, proportionality and distinction are linked with precautions, but precautions provide the guidance that military personnel need to implement these broad principles in actual operations. Further, because the measures enumerated in Articles 57 and 58 are not exclusive, the “constant care” theme of precautions encourages creativity at all levels of military operations to ensure LOAC compliance. See AP I, *supra* note 7

intelligence regarding presence of civilians in relation to enemy and friendly forces, the impact on civilians of attack timing and weaponeering, and the possible mitigation of civilian risk through evacuations and warnings.

These type of precautionary considerations are relatively concrete and less amorphous than the assessments of military advantage or excessiveness of incidental civilian losses that are required in a proportionality analysis. Indeed, by implementing precautions that reduce civilian risk, the proportionality assessment may become easier. Most of these precautionary measures involve assessing various tactical options and selecting the option that produces the desired military advantage while mitigating civilian risk. This is a natural aspect of course of action development and selection.¹³¹

Feasibility is, of course, a major aspect of precautions implementation, and inevitably injects an element of contextual judgment into this process. However, greater emphasis on precautions may reduce the complexity of feasibility judgments by encouraging commanders to constantly seek to develop multiple attack options, enabling them to more readily assess which option will produce required effects while mitigating civilian risk. Elevating the significance of precautions may lead to greater emphasis on precautionary *efforts* as an indicator of systemic LOAC compliance, which in turn will provide a powerful incentive for commanders and all military forces to increase efforts to develop and implement precautions. Ultimately, precautions must be understood as a procedural mechanism enhancing the effect of the substantive principles of distinction and proportionality. Fully integrating precautions considerations into the *process* of target selection and engagement will improve distinction and mitigate the complexity of proportionality judgments.

B. Thinking Deep: The Hybridization of Precautionary Process and Substantive Proportionality

As noted throughout this article, the precautionary measures enumerated in Articles 57 and 58 are neither intended to be, nor should be, considered exclusive. Instead, the “constant care” obligation requires

¹³¹ U.S. DEP’T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS, 5-12-5-13 (31 May 1997).

commanders and subordinates alike to constantly endeavor to identify other precautionary measures that contribute to civilian risk mitigation.

One such measure is the use of proportionality thresholds. Through ROE, commanders designate levels of approval for authorizing attacks based on levels of anticipated civilian casualties.¹³² Subordinate commanders are thereby only permitted to make proportionality decisions within the range of their limited anticipated civilian casualty authority; when anticipated casualties exceed their designated limit, the targeting decision must be elevated to a higher level of command.¹³³

This practice of aligning levels of command with permissible proportionality judgments is a procedural mechanism intended to enhance the efficacy of proportionality compliance.¹³⁴ But it is also unquestionably a precautionary measure: by imposing anticipated casualty limits on each progressively lower level of command, this procedure provides increased levels of command judgment, staff input, situational perspective, and deliberation time in relation to the increasing risk to the civilian population. While it is clear that the proportionality rule does not require use of such “anticipated casualty” limitations on attack authority,¹³⁵ use of this procedure reflects a commitment to the “constant care” obligation.

This hybridization of a precautionary process and proportionality compliance is the type of creative civilian risk mitigation that should be encouraged. But it also involves a certain degree of risk. Imposing authorization limits based on anticipated civilian casualties may lead to a misunderstanding that the law prohibits any attack creating a risk of casualties beyond the designated number. This is inaccurate; limiting authority to make proportionality judgments to certain levels of command based on anticipated casualty thresholds does not indicate that exceeding that threshold violates the proportionality principle. Instead, it indicates that the nature of the risk to the civilian population warrants increased scrutiny and a greater degree of command judgment.

Such practices should be encouraged and rewarded, but must also be clearly understood for what they are. If commanders believe that policy-based procedural precautions could ultimately become legally obligatory

¹³² See Corn, *supra* note 5.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

in all situations, there is a risk they will be reticent to use them. On the other hand, if commanders or their subordinates believe that such levels are already legal obligations, they may become confused as to what the law requires, which either will undermine their confidence in the compatibility of the law with military requirements or create a misapprehension about the potential legal liability associated with targeting.

V. Conclusion

Precautionary measures, which are measures intended to advance the obligation to take “constant care” to mitigate risk of military operations on civilians and civilian objects, hold tremendous promise to achieve the LOAC’s primary objective of balancing military necessity with humanity. As such, they deserve greater stature in the lexicon of LOAC obligations, not just as rules, but as a core, stand-alone principle. Training commanders and their subordinates to constantly seek tactics, techniques, and procedures to mitigate civilian risk in a way that does not compromise legitimate military interests is central to developing ethically grounded warriors. Ultimately, inculcating the warrior with a deep and genuine commitment to mitigating the suffering of war is vital to LOAC implementation.

Precautionary measures feature prominently in the new DoD *Law of War Manual*. However, like Articles 57 and 58 in AP I, they appear to be conceived as rules limited in applicability to the lethal targeting process. While this is a logical focal point for precautions, there is no reason why the overall “constant care” obligation should be so limited. Precautionary measures should be conceived as a much broader obligation, influencing every aspect of operational training, planning, execution, assessment, and accountability in military operations.

It seems relatively clear that the nature of modern warfare will demand such an expansive conception of precautions, as well as a continuing commitment to “grow” ethically grounded warriors, and both military leaders and those interested in contributing to the credible evolution of the LOAC must recognize the inherent link between precautionary measures and LOAC compliance. Precautionary measures are increasingly central to successful combat operations and other military actions at the tactical, operational, and strategic level. Creativity in civilian risk mitigation efforts must be both encouraged and rewarded, even when these efforts do

not produce the ideal outcomes they were intended to achieve. Given the inherent value of these measures to ensuring LOAC compliance, precautions should become a core principle under the LOAC, and not simply a matter of policy or “best practice.” If precautions are elevated to the status of a legal principle, all the processes applicable to military operations—including training, planning, combat operations and post-operations assessment—will require civilian risk mitigation measures. These measures, which are rationally aligned with the military decision-making process, in turn will ensure that LOAC compliance is deeply embedded in the mindset of all warriors, as a matter of military ethics, professionalism, and law. By the same token, it would be understood that commanders, planners, and operators who seek in good faith to fully comply with this principle, have met their obligations under the LOAC even where, notwithstanding their compliance efforts, military operations result in unintended harm to civilians and civilian objects.