Bridging the Gap - Succeeding in Both Legitimacy and Effectiveness in Counter-Terrorism

**Part I: Democracies’ Dilemmas When Conducting Low-Intensity Warfare**

**Sample Chapter**

**Chapter 2: The Principles of *Jus in Bello* in Low-Intensity Warfare**

As explained in the previous chapter, the principles and moral justifications for declaring war and the proper conduct therein primarily pertain to a classic war between two sovereign states. When, however, a sovereign state finds itself combatting a non-state actor the use of these principles becomes problematic. In such a war, how should these principles be expressed? Theorists and jurists discuss the theoretical and practical aspects of this issue.

This chapter will introduce and explore the two main principles of *Jus in Bello* – the principle of distinction and the principle of proportionality, discussing their application in instances of low-intensity warfare, and interpreting them within the context of international law (the Geneva Conventions and the First Hague Convention) and Just War Theory. Through this discussion, I hope to demonstrate just how fine the lines between law, philosophy, and morality are.

**The Principle of Distinction**

The purpose of this principle is to minimize collateral damage in war. Distinguishing between combatants and military targets on the one hand and non-combatants and citizens on the other is meant to significantly reduce civilian casualties. Whereas the former category may be attacked the second may not (Kasher, 2010).

The importance of distinguishing between a civilian and a combatant was summarized by former President of the Israeli Supreme Court Aharon Barak, as follows: “the fundamental ruling of humanitarian international law applying to hostilities is ‘that people are entitled in all circumstances, to respect of their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated and shall be protected especially against all acts of violence or threats thereof.’” At the basis of this ruling is a recognition of the value of human life and freedom. He further explained that “this basic obligation is not absolute and is subject to the same oversight and security required as a result of a war. These methods must not harm the core of their rights […] they must be proportional” (*The Public Committee against Torture in Israel et al. v. Government of Israel et al.*, 2005).

International law thus prohibits causing harm to “uninvolved” civilians. The question is: which citizens fall under the protection of this law?

Article 4 of the Geneva Convention IV stipulates that the protection of international law applies to those:

**who at a given moment and, in any manner, whatsoever, find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are (**Convention [IV] Relative to the Protection of Civilian Persons in Time of War, 1949)

In low intensity warfare, as opposed to a conventional war, the principle of distinction becomes more complex, raising a number of dilemmas which will be described below.

In a conventional warfare, two zones are defined: the home front – populated by civilians who are granted immunity from harm; and the battlefield where fighting takes place, a place of soldiers who receive no such immunity during combat and who distinguish themselves from civilians by wearing uniforms (there may, however, be situations in which non-combatants can be found on the battlefield – such as refugees. Likewise, combatants may be found beyond the battlefield such as laborers in an arms factory).

By contrast, *during low intensity warfare, waged against a terror or guerrilla organization, drawing such distinctions becomes far more difficult***.** This is because, one of the main tactics adopted by guerilla fighters is to intentionally blend into the civilian population, making it far more difficult to identify and attack them, and thus, gaining a military advantage over their opponent. This strategy brings a state’s military victory and political-moral victory into direct conflict, forcing it to choose one at the expense of the other. In such circumstances, attacking a military target, such as an arms cache or launching site can often lead to collateral damage to non-combatants. Even if the military objective has been achieved, a strike can cause significant moral and political problems both locally and abroad: Civilians on the opposing side may begin to identify with terrorists and actively resist the state which conducted the strike, blaming it for the deaths of non-combatants. At the same time, the international community may condemn the action making it difficult for a state to act with legitimacy in the international arena.

**Military Targets versus Civilian Targets**

Article 25 of the Hague Conventions of 1899 and 1907 state that: “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited” (Convention [IV] Respecting the Laws and Customs of War on Land, 1899; 1907). Likewise, article 27 states: “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.”

Thus, the bombardment of cities or villages in which innocents are present is prohibited. However, there are exceptions: locations frequented by civilians but currently being used by the enemy to conduct military operations, may be targeted.

Protocol I of the Geneva Conventions expands on this article: Article 51(4) specifies:

Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction (Protocol Additional to the Geneva Conventions of 12 August, 1949, 1977).

Protocol I also enumerates three precautionary measures which must be adopted by attackers in order to properly distinguish between civilians and combatants: first, article 57(2)(A)(1)(2) stipulates that “every measure possible be taken to verify the character of the objective being attacked to ensure that it is not comprised of civilians or civilian objects; likewise, means and methods must be chosen carefully.” Second, Article 57(2)(3) stipulates that attackers must warn the civilian population of the impending attack in order to allow them to distance themselves from the objective. Finally, according to article 51(5)(A), a collection of military and civilian objectives cannot be treated as a single target, in other words, military objectives and civilian objectives must be clearly distinguished from each other. Likewise, article 51(7) prohibits locating military facilities in proximity to the civilian population and also prohibits directing civilians to military facilities in order to use them as human shields.

That being said, and despite the clear requirement of separating between military and civilian objectives, the principle of distinction does not prohibit conducting military operations in an area which includes both military and civilian objectives as long as the actions stand up to the criteria of proportionality (Ben-Naftaly & Shany, 2006).

**Distinction between Combatants and Civilians**

The distinction between civilian and combatant was enshrined in the First Hague Convention and later in Protocol I to the Geneva Conventions.

The Hague Convention provides conditions for being considered a combatant. Article 1 states that combatants are those who:

1. are commanded by a person responsible for his subordinates;

2. have fixed distinctive emblems recognizable at a distance;

3. openly carry arms;

4. conduct their operations in accordance with the laws and customs of war.

*If there is any doubt as to whether an individual constitutes a combatant or a civilian, he or she should be treated as civilian.*

Low-intensity warfare raises a problem: combatants are often guerilla fighters, participating in a national struggle for independence against a foreign occupier and employing the element of surprise as their primary tactic. They cannot always adhere to the requirements of the Hague Convention. Protocol I to the Geneva conventions was meant to address this issue by moderating the responsibility of distinction placed upon soldiers: Article 43 of Protocol I requires that for a person to be considered a combatant he or she must belong to a military unit that is organized, subordinate to a commanding officer, and subordinate to an internal disciplinary system which forces members to comply with international laws of warfare. So far, these requirements are very similar to those appearing in the Third Geneva Convention (The Geneva Convention relative to the Treatment of Prisoners of War, 1929 article 4). However, Protocol I adds an additional article, which has been subject to dispute. Article 44(3) states that the obligation of combatants to distinguish themselves from the civilian population may be dependent on circumstances; if, however, a combatant is unable to distinguish himself from the civilian population he will still retain the status of a combatant – as long as he carries his arms openly while preparing for or engaging in military activity.

This article was fraught with controversy. Some argued that it missed the point of humanitarian law and blurred the line between civilians and combatants, allowing combatants of non-state actors to benefit from the immunity granted to civilians, while benefitting from the rights afforded to prisoners of war. Due to its wording, Israel, the United States and the UK refused to ratify the convention (Ben-Naftaly & Shany, 2006). Article 44(2) has also been the subject of dispute. It states that while all combatants are obliged to obey the rules of international law, violations of the rules do not deprive a combatant of his right to be treated as prisoner of war if he falls into the power of an opposing party.

**Actively participating in acts of terror**

Another challenge when distinguishing between combatants and non-combatants during low-intensity warfare is the active participation of civilians in acts of terror. Are such people to be treated as combatants or civilians? Protocol I of the Geneva Conventions, article 51(1) states that “the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”; 51(2) states that “the civilian population as such, as well as individual civilians, shall not be the object of attack”; and article 51(3) states, “acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”

*The question is how to define “for such time.”*

In a ruling from 2005, pertaining to the legitimacy of Israel’s targeted killings of terrorists, then president of the Israeli supreme court, Aharon Barak, noted the inherent difficulty of determining whether or not a civilian is taking an active part in hostilities. He argued that the following people can be considered directly involved in terror: “a person who collects intelligence on the army, whether on issues regarding the hostilities or beyond those issues; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them [not including selling medical supplies or food], be the distance from the battlefield as it may. All those persons are performing the function of combatants” (*15The Public Committee against Torture in Israel et al. v. Government of Israel et al.*, 2005). In other words, according to Barak, function determines who is considered an active participant in terror.

*In the same ruling, Barak examines* What is the period of time during which one may cause harm to a non-combatant who took - or continues to take - a direct part in acts of terror.

On the one hand, Barak argues that it is prohibited to harm a civilian who directly took part in acts of terror only once or sporadically but now desists from doing so. On the other hand, one cannot make a sweeping prohibition against harming any person who does not fall into the category of a combatant yet takes an active and extensive part in terror activities. Thus, according to Barak each case must be evaluated according to the following four considerations:

1. Well based information is needed in order to identify a person and his activities;
2. A civilian taking a direct part in terror activities cannot be attacked if a less harmful means can be employed (as prescribed by the principle of proportionality).
3. After an attack on a civilian suspected of taking an active part in act of terror, a thorough investigation regarding his identity must be conducted; in cases of error, his family should be compensated.
4. If innocent civilians nearby came to harm, the harm is considered collateral damage which must withstand the proportionality test (*The Public Committee against Torture in Israel et al. v. Government of Israel et al.*, 2005).

As opposed to Barak, Antonio Cassese, an expert in international law, argued that a civilian who actively participates in hostilities loses his immunity as a civilian only during the specific period of time during which he takes an active part in hostilities (for instance, when he is planting a bomb or actively firing a weapon). *The moment a civilian down his weapon he ceases to be a legitimate target for attack.* Thus, according to Cassese, a person who aids in the planning of hostilities or sends others to commit such actions, is not considered a legitimate target.

In his book, *Just and Unjust Wars* (1977), Michael Walzer proposes a hierarchy of distinctions between combatants and civilians and between different types of civilians, in order to determine who may be targeted and when.

1. *A distinction must be drawn between a soldier engaged in combat and a soldier at rest.* The former may be attacked but not the latter.

2. *A distinction must be drawn between a solider and a civilian.* While soldier may be attacked, civilians are protected due to their status.

3. *A distinction must be drawn between different types of civilians* (between those who can be considered combatants and those who cannot) depending on their profession and its contribution to the war effort. For example, someone working in a tank factory should be treated differently than someone working in a food processing plant. The profession of the former can pose a threat to an enemy. The profession of the latter, even if its produces food consumed by the army, does not. Therefore, these civilians are considered innocent, and may not be attacked while engaged in their work.

According to Walzer, only “military necessity” can help determine whether or not civilians involved in military activity can be attacked. Thus, for example, civilians who work in a tank factory may be attacked because they produce and provide equipment which is vital to combat. By contrast, workers, processing and packing army rations, do not pose a threat to their enemies. That being said, even in cases where civilians may be considered a valid target, it should be borne in mind that they are not armed and thus cannot be considered directly involved in hostilities. Therefore, they can only be attacked when they are actually engaged in work, that is, when they are actually participating in activities which can threaten and harm their enemies. Furthermore, even when an attack is allowed, one should first attempt to stop civilian activities or somehow destroy their products by less violent means. Only if this proves impossible, may attack be considered.

Israeli ethical philosopher, and co-author of the IDF’s code of ethics, Asa Kasher and former head of the IDF intelligence directorate, Amos Yadlin (2006) argue that a distinction should be drawn between direct and indirect involvement in hostilities. In order to do so, they formulated a scale of direct involvement in terror based on the immanence of the danger posed by the person involved. They argue that during military activities this scale should be taken into account, as much as possible. According to the scale, people directly involved in terror include: the attacker himself; a driver or guide; the one who dispatches the attacker; people preparing military equipment; a “pharmacist” who provides ingredients for an attack; people planning the attack; people who recruit others to carry out an attack; and people making decisions to carry out an attack.

By contrast, people indirectly involved in terror are those who: develop and operate funding channels that are not vital terror activities; preach in a mosque; make payments to the families of suicide bombers (when such payment are not needed to fund terror attacks); disseminate materials which praise suicide attackers; or participate in the political, social, or religious leadership of an organization with a terror arm (but without direct involvement in attacks).

**The lives of a country’s soldiers versus the lives of civilians on the opposing side**

The difficulty in distinguishing between a civilian and a soldier, and the desire to prevent harm to innocents raises an additional issue: how does one weigh the lives of “our” soldiers against the lives of civilians on the other side? In other words, must an army protect the lives of its soldiers even at the cost of causing harm to the civilian population – or perhaps an army must make efforts to protect the lives of civilians, even if it means placing its soldiers into harm’s way?

We can illustrate this dilemma with a hypothetical case: say that soldiers are being fired upon from a residence, and the soldiers do not know if civilians are present in the building. One option is to fire warning shots or have a sniper try to locate the source of the fire and aim directly at the attacker. The alternative is to request air support and have the building bombed. In the first case, soldiers are risking themselves in order to minimize possible harm to civilians (assuming there are civilians in the building). In the second case, the soldiers minimize possible harm to themselves, but significantly endanger the lives of civilians who may be present in the building. How do the soldiers in this case decide what to do?

Jeff McMahan (2010) argues that in order to provide a comprehensive solution to this issue, and to establish the limits of risks which soldiers are required to take, the principles of Just War Theory must be expanded to include a new principle: just distribution of harm between combatants and civilians. In other words, harm and risk must be distributed between defenders (i.e., soldiers) and potential victims and bystanders.

Addressing the extent to which a country should defend its soldiers as opposed to defending civilians on the other side, McMahan argues that the lives of soldiers have value. That being said, and even though a state has a duty to protects its citizens – including soldiers – this does not give soldiers the right to consistently take less risks at the cost of causing greater harms to civilians on the other side. In addition, McMahan argues that not all combatants have a state to protect them (such as Palestinian combatants).

Kasher and Yadlin (2005a; 2005b) formulate another important scale to determine when the lives of soldiers and innocent civilians take precedence over each other. They argue that it is the prime duty of a democratic state to defend the lives and wellbeing of its citizens. When a citizen enlists in the army, the state is still required to protect his or her life albeit with certain provisions. In other words, a combatant is a civilian in uniform; his or her life is just as important as the life of the civilians on the opposite side. These same provisions allow a state to send soldiers into dangerous situations which may possibly result in their deaths, but which must still be justified with ethical arguments. Kasher and Yadlin maintain that it is important to consider the relationship between a state and soldiers: in a state where many are required by law to serve in the army (such as Israel), soldiers may only be put into danger if no other alternative exists.

Kasher and Yadlin argue that when a state balances its obligation to protects its citizens with protection of human dignity on the other side it must follow a list of priorities which reflects its responsibility to each group:

1. Minimum harm to the lives of citizens of the state who are not participating in the war;
2. Minimum harm to the lives of other people (outside the state) who are not involved in terror, when they are under the effective control of the state;
3. Minimum harm to the lives of the combatants of the state in the course of their combat operations;
4. Minimum harm to the lives of other persons (outside the state) who are not involved in terror, when they are not under the effective control of the state;
5. Minimum harm to the lives of other persons (outside the state) who are indirectly involved in terror acts or activities;
6. As required, the liberties or lives of other people (outside the state) who are directly involved in terror acts or activities, may be violated and harmed.

Thus, Kasher and Yadlin argue that a state is first and foremost responsible to the people under its effective control, and only afterwards for the lives of those outside of this control. In their opinion, the moment people involved in terror decide to hide among those who are not, in a territory not under the state’s effective control, the ensuing dangers are no longer the responsibility of the state and causing collateral damage to innocents is allowed. By contrast, the state *is* responsible for the lives of its own citizens, including soldiers, and therefore they must receive moral precedence (even when fighting takes places in a homogenous area populated by civilians).

Professor of Philosophy, Avishai Margalit and aforementioned author, Michael Walzer (2009) challenge Kasher and Yadlin’s claim that soldiers should receive moral precedence over civilians of the opposite side. They argue that the claim is mistaken; it undermines the fundamental distinction between combatants and non-combatants. The principle of distinction is a means of limiting a war’s scope, a way to avoid total warfare. According to Walzer and Margalit, even in low intensity warfare, in which one of the sides is not a state but, for all intents and purposes, operates like one (such as Hamas), and even if that side adopts terror tactics, the civilians under its control must still be treated as civilians. This status affords them protection, unlike combatants who are legitimate military objectives during a war (among other things, because, regardless of a war’s antecedents or overarching goals, soldiers believe that the cause for which they are fighting is just). Therefore, they argue that soldiers must accept risks upon themselves that are higher than the danger they pose to civilians by their actions. The guiding principle of soldiers must be: “in the presence of noncombatants on the other side, fight with the same care as if one’s own citizens were the noncombatants.” In his book, Walzer (1977) further argues that while Western democratic states may find it politically or morally difficulty to risk the lives of their own soldiers, they nevertheless cannot dispatch soldiers to fight and kill others without exposing them to harm. Before dispatching soldiers to carry out an action, a state must ask itself if the objective justifies the deaths of soldiers. As soon as the answer is yes, it must accept the fact that soldiers may come to harm and be killed. Walzer explains that during warfare (including a war against terror), a moral conflict is created by a commander’s dual responsibility in combat: responsibility for carrying out orders and responsibility to civilians on the opposite side. Walzer sees subordinates as instruments which a commander can use at his discretion to win a victory. However, they are still people whose lives are in his hands and whom he is responsible for. Therefore, soldiers have the right to expect him to protect them. And indeed, a commander is obligated to reduce their exposure to harm and must take precautions not to “waste” their lives. In other words, he must not stubbornly fight battles that he cannot win or seek out victories which will gain little militarily and lose much in terms of soldiers’ lives. On the other hand, a commander is also responsible for the lives of civilians on the other side who may come to harm during the battles fought by his soldiers; he is responsible for the lives of all people effected by his activities and those of his soldiers. Therefore, despite a commander’s obligations to his soldiers, he must sometimes “turn his back” on these obligations and pile more dangers upon them in order to ensure the safety of civilians. How is this conflict resolved? Walzer asserts that when a beleaguered state’s actions endanger civilians, it must do everything in its power to minimize danger, even if this will entail putting the lives of its own soldiers at risk.

Jurist and expert on international law Mordechai Kremnitzer (2009), agrees with Walzer and Margalit that moral privilege should be given to civilians over soldiers. In his opinion, civilians in combat zones must be treated as non-involved, regardless of whether or not the territory is under a state’s effective control. Given that civilians do not choose to be in battle zones, he argues that it is forbidden to cause them harm by virtue of the obligation to protect the sanctity of human life. Moreover, whereas civilians do not pose a threat to soldiers, soldiers both pose a threat to civilians and also choose to be in the battle zone. He further argues that even within the IDF, which has a mandatory draft, individuals can choose whether or not they wish to serve in a combat unit; and if they do decide to do so, they know that there is reasonable danger of being sent into a military operation or even a war.

Walzer (2016) argues that during combat soldiers can draw a distinction between civilians being used as human shields, who have been intentionally exposed to attack by the enemy, and civilians who are not. Since human shields have been recruited by enemy combatants, who have decided to endanger civilians to serve their purposes, their deaths are the responsibility of those who enlisted them. This however is not to say that soldiers are entirely free from responsibility. Walzer explains that they are moral and military agents who can decide how they organize their attack.

Walzer maintains that soldiers are obligated to take “some risk” for political and moral reasons. The moral reason: the moment a soldier chooses to enter in a combat zone, while he knows that he may be harmed he is also armed and knows how to defend himself. This is unlike scared, innocent, and unarmed civilians. The political reason: the aim of those who hide among civilians is to force their opponents to kill large numbers of non-combatants – something which could lead to a premature end of the war instead of victory. He argues that soldiers must fight with moral discipline, which means taking risks to minimize civilian casualties. This will create an effective and vital fighting force, comprised of soldiers inspired by the morality by which they conduct their actions.

Kasher and Yadlin (2014) oppose Walzer’s notion of “some risk.” They explain that Walzer is requiring soldiers to minimize casualties from the other side and also accept upon themselves “some risk.” In their opinion, this requirement fails to delineate the level of risk required to minimize collateral damage. In Walzer’s approach, it is the commander who must determine the nature of “some risk.” How, Kasher and Yadlin ask, can different commanders all decide for themselves what an appropriate level of risk is? They argue that there must be a rule, not subject to personal opinions, which reflects an organized ethical determination based on moral considerations which would obligate all soldiers in all given circumstances.

Likewise, they oppose the responsibility for the harm caused to civilians which Walzer places on the “shoulders” of soldiers: Walzer implies that it is the soldiers who have created the danger posed to civilians (the neighbors of terrorist) in the context of defense operations against acts of terror. Kasher and Yadlin, however, argue that responsibility for harm to civilians is first and foremost placed on the shoulders of terrorists who create a situation in which they can fall into harm’s way. This is because terrorists strike civilian targets while appearing to be civilians; they do not wear uniforms, do not openly carry arms, and operate in the vicinity of their civilian neighbors, putting them at risk, when enemy soldiers are forced to defend themselves. Thus, Kasher and Yadlin maintain that this responsibility should be taken into account when determining the proper behavior of soldiers in such circumstances.

**The Principle of Proportionality**

A war allows causing harm to or killing a combatant. Protocol I of the Geneva Conventions allows the same treatment of civilians who take a direct part in hostilities. However, there is an aspiration to reduce the damage inflicted by war as much as possible. From this desire is born the principle of proportionality. It applies to situations in which an attack is likely to endanger innocent civilians in the vicinity of the target.

The principle of proportionality states that every action taken must be able to justify the humanitarian harm it causes – that is, injuring or killing innocent civilians.

The main problem in implementing this principle lies in the difficulty of being able to foresee whether a given action will be proportional or not.

Unlike a conventional war between two sovereign states, during low-intensity warfare, innocent civilians are at far greater risk. This is because guerilla fighters often intentionally blend into the civilian population, forcing their opponents to contend with a dilemma: should they refrain from attacking a target which poses a threat – or should they proceed and thus risk causing greater harm to innocent civilians, and possibly run the risk of eroding international support? Objectives which are inherently civilian, can sometimes become military targets – for example, if enemy forces take over a school to use it as a military headquarters or as a rocket launching site. The civilian target becomes a military objective which may be attacked. However, the concern of harming innocents still remains (Blank, 2014).

The importance of adhering to the principle of proportionality appears in several articles in Protocol I to the Geneva Conventions. It states that a military operation should not be undertaken unless its value is directly correlated with the expected damage, that is, harm to human interests (such as killing or injuring innocent civilian). If it does not, it is prohibited. Article 51(5) states: “Among others, the following types of attacks are to be considered as indiscriminate: (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Article 57(2)(a)(3) states: “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;” Likewise article 85(3)b-c states that launching an indiscriminate attack, which will cause excessive deaths or injuries to civilians, as well as launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life or injury to civilians – is prohibited and constitutes a grave breach of the protocol. If the action is expected to be directly proportional to the damage, weaponry and tactics must be chosen cautiously as stipulated in article 57(1): “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”

Article 57 (2a) (2) refers to “tak[ing] 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 or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

According to international law expert, Christopher Greenwood, one way to minimize collateral loss of civilian life during a military operation, is to determine whether the same military objective can be achieved with smaller humanitarian damage, that is, by employing other available tactics or weapons (Estreicher, 2011).

Article 57(2 C) raises the importance of giving prior warning: “(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” Moreover, 57(3) explicitly states that “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.”

In the *Public Committee Against Torture in Israel v. State of Israel* (2005) then president of the supreme court, Aharon Barak ruled that the test of proportionality “bears on its shoulders [...] the constitutional conception that the ends do not justify the means. It is an expression of the idea that there is an ethical boundary which a democracy cannot pass, even if the objective it wishes to achieve is worthy.” Despite the understanding that the ends do not justify the means, there are no clear tests to determine if the principle has been breached by one of the two sides. Therefore, both sides of a conflict must exercise wide discretion when implementing it (Shany, 2009).

**Proposals for finding a balance between military necessity and humanitarian harm**

Different philosophers and jurists have different methods for finding this balance.

In his ruling, *Public Committee Against Torture in Israel v. State of Israel* (2005), Barak provides examples to illustrate the proper way to find a balance between possible harm to civilians and projected military benefit: one such example, is the case of a combatant who fires upon soldiers or civilians from his porch. Were these soldiers to simply fire back at him, their action would be considered proportional – even if an innocent civilian bystander was harmed in the process. By contrast, were they to call an airstrike to bombard the house, causing harm to dozens of residents and bystanders, this would not.

Expert of international law, Yuval Shany (2009) also discusses the justification of a military objective. He maintains that the relationship between the military benefit of an attack on the one hand and humanitarian damage on the other requires a comparison of two values which cannot be quantified: human life versus military objectives. Therefore, he argues, that both sides of a conflict must exercise their own wide discretion when implementing the principle.

This balance between military benefit and humanitarian interests (causing foreseeable damage) is especially problematic if different decision makers hail from different backgrounds and subscribe to different sets of values. A committee that examined the NATO bombings of Yugoslavia in 1999 (leading to the deaths of some 500 Yugoslavian civilians, in more than 10,000 attacks) which were meant to force the Serbian government to bring an end to the civil war is Kosovo, and which were undertaken without approval from the UN Security council, also argued that it is unreasonable that commanders, with different doctrinal backgrounds, different military experiences, and different military and national histories, would agree among themselves in situations which are not patently clear. This is the reason why finding a balance between interests cannot be based on the relative weights given to them by commanders in the field; such decisions should be dictated by normative rulings that every “reasonable commander” must follow (Shany, 2009).

In 2002, the State of Israel, conducted an operation against Salah Shehade, head of Hamas’ military arm (the Izz ad-Din al-Qassam Brigades). He was on the top of Israel’s wanted list in the Gaza Strip, responsible for dozens of terror attacks that had led to the injury and death of hundreds of Israeli civilians and expected to plan further attacks in the future. The assassination consisted of dropping a one-ton bomb from an F-16 on the house in which Shahade was hiding. Because Shahade was often near civilians, planned attacks had been canceled several times already. On the day of the attack, the Shabak reported that there was a low probability of civilians being in the house, and the operation received approval. To ensure, with as much certainty as possible, that the attack would not result in extensive collateral damage, it was carried out at night, when the streets were expected to be empty; likewise*,* a single bomb was chosen, minimizing – so it was claimed by experts – the possibility of missing the target and hitting adjacent buildings.

Despite attempts to minimize collateral damage, the intelligence information obtained by the Shabak proved faulty. As a result of the attack, not just Shahade, but also his wife, three of his children and 14 civilians (including children) were killed. Moreover, 100 innocents were wounded, and 30 buildings destroyed (Somfalvi, Bachur & Wakad, 2002). Was this action proportional? Did killing someone like Salah Shahade justify the extensive harm caused to innocents? Israel claimed that the attack was meant to neutralize “a known terrorist, responsible for hundreds of attacks against civilians in the past few years.” It, however, expressed its regret for the harm that befell civilians. Kofi Annan, Secretary General of the United Nations claimed that “Israel has the legal and moral responsibility to take all measures to avoid the loss of innocent life; it clearly failed to do so in using a missile against an apartment building“ (Goldenberg, 2002). He also argued that Israel must desist from such strikes and adhere to international humanitarian law (Somfalvi, Bachur & Wakad, 2002). In other words, in the eyes of the international community, the attack did not stand up to the standards of proportionality

The main difficulty in implementing this principle lies in the difficulty of foreseeing whether a given action will be proportional or not. As can be seen from Barak’s example, and the example of Shahade’s assassination, each case must be judged individually.

The commission which examined the NATO bombings in Yugoslavia proposed a number of tests to help decision makers determine whether an action clearly lies outside of the bounds of proportionality: 1. Can a similar result be obtained from alternative weapons which will not cause as much damage? 2. Was the damage foreseen? 3. Was the breach of the principle of proportionality “clear”? The commission also stated that when examining the legality of weapons or tactics, the requirements of proportionality should be examined based on the number of times in which the weapons or tactics have been used. Likewise, the committee claimed that an additional major problem is the normative vagueness surrounding the issue, that is, the fact that evaluating military benefit is subjective and depends on the system of values to which the evaluator subscribes (Ben-Naftaly & Shany, 2006).

**The lives of soldiers versus the lives of civilians on the opposite side**

“What should be the relationship between the obligation to respect the principle of proportionality and avoid excessive collateral damage, […] while at the same time reducing as much as possible danger to its soldiers” (Ben Naftali& Shani2006, p. 156).

No clear rules in the aforementioned international conventions expressly address whether or not soldiers must expose themselves to great danger in order to uphold the principle of proportionality. Therefore, the issue is subject to interpretation. Article 51(5)(b) of Protocol I states that “the following types of attacks are to be considered as indiscriminate [...] (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The writers of the protocol used the word “excessive” not “disproportional,” to describe the balance between military and humanitarian interests. They were concerned about adopting an overly stringent standard which would pose difficulties for effectively waging warfare (Shany, 2009). In the NATO bombings of Yugoslavia, for example, aerial bombardment was chosen in order to minimize as much as possible military losses, even at the cost of causing greater harm to the civilians on the opposite side. It was called a “zero casualty campaign.” NATO adopted a tactic of bombing from high altitude so that its jets could fly above Serbian anti-aircraft missile range, even though this posed a greater danger to the lives of innocent civilians. The committee which reviewed these bombing did not conclude that high-altitude bombings violated the principle of proportionality (Shany, 2009). This implies that sometimes it is legitimate to choose a combat strategy designed to protect the lives of combatants, even if it causes greater harm to civilians on the other side. The adopted combat strategy should, therefore, be considered carefully.

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**Part II: Democracies vs. Terror and Guerilla Organizations:**

**Case Studies**

**Sample Chapter**

**Chapter 7: Sri Lanka versus the Tamil Tigers in the Fourth Tamil Eelam War**

The present case study examines the war waged between the democratic government of Sri Lanka and a terror organization, The Liberation Tigers of Tamil Eelam (LTTE). The LTTE maintained de facto sovereignty over large swathes of territory in Sri Lanka and aspired to eventually establish an independent state. Against them stood a weakened government of Sri Lanka which, with the rise of the LTTE, had failed to retain military effectiveness or maintain its monopoly on violence.

The FBI has described the LTTE as one of the most brutal terror organizations in the world. By 2006, no less than 32 countries and organizations had added the LTTE to their lists of terror organizations, including India, the United States, the European Union, the United Kingdom, and, of course, Sri Lanka (FBI, 2015; Yass, 2014). Despite the LTTE’s powerful position, the Sri Lankan army succeeded in conducting a comprehensive military campaign which ended with the organization’s complete eradication. To this day, there are no reports of attempts to revive it.

**The important question for our purposes is: how did Sri Lanka achieve this total victory? Additionally, is it possible to eliminate a terror organization that adopts guerrilla tactics and terror while adhering to ethical principles?**

The present case study will help us offer an answer.

**Setting**

We will begin by explaining how the conflict between Sri Lanka’s two major ethnic groups, the Tamil and the Sinhalese, developed. It was this ethnic conflict which ultimately led to the outbreak of the fourth Tamil Eelam War.

Sri Lanka (previously, Ceylon) is an island in the Indian Ocean. The island nation has an area of 65.5 square kilometers and is a social-republican democracy with a low democratic profile. The population of Sri Lanka is comprised of four ethnic groups: the largest is the Sinhalese (literally, “lions” in Sanskrit) the majority of whom follow Thervada Buddhism. They comprise 73.8 percent of the total population and constitute a majority in the island’s southern and western regions. The second largest group is the Tamil, the majority of whom follow Hinduism, and who constitute about 12 per cent of the island’s total population. They are the majority in the country’s northern and eastern regions. Two additional groups are the Muslim moors (9 per cent of the population) and a small population of Indian Tamils, who were brought by the British from southern India to work on the island’s plantations.

From 1989 to 2009, the ruling Sinhalese and the minority Tamils were embroiled in an ethnic conflict. The Tamils were headed by the LTTE which sought to establish an independent Tamil state.

From the 18th to 19th century, Sri Lanka was a British colony. Many Tamils studied in English schools, and therefore, despite their numerical inferiority, were given preference by the British government for jobs in the public sector and were disproportionally represented in local councils.

With the general British withdrawal from southern Asia in 1948, Sri Lanka gained independence. As the island’s ethnic majority, the Sinhalese did not hesitate to wield their power. They sought to establish Buddhism as the country’s national religion, and to institutionalize the ascendancy of Sinhalese culture and language at the expense of the Tamil. Towards this end, the government adopted a series of oppressive and discriminatory policies. For example, the Ceylon Citizenship Act, passed in 1948, stripped Tamil plantation workers from India of their citizenship; they should be considered citizens of India not of Sri Lanka, it was argued. Such measures led to the acute oppression of the Sri Lanka’s Tamil minority, and, for the first time, the Tamils began to consider the possibility of establishing a federal government which would afford the Tamils local autonomy (Yass, 2014; de Silva, 2010).

In 1972, Sri Lanka adopted a new constitution which continued the policy of discrimination against the Tamils. It established Buddhism as the country’s principal religion and Sinhala as the official language.

These measures favoring the Sinhalese, fueled the Tamil desire for autonomy or an independent state, leading, in the seventies, to the rise of radical Tamil groups. Most extreme was the separatist LTTE, a secular, nationalist group established in 1976 by a group of young Tamils led by Velupillai Prabhakaran. The LTTE considered itself the sole representative of the Tamil and employed violent methods to marginalize competing Tamil groups. It demanded the establishment of an independent Tamil state in northern and eastern Sri Lanka, and from its inception, embraced guerilla tactics and terror to this end.

1983 represents a watershed in Tamil-Sinhalese relations; the killing of the 13 Sri Lankan soldiers in the North by a group of the Tamil militants, led to a series of anti-Tamil pogroms known as Black July and open conflict between the LTTE and the government (the first Tamil Eelam War). Hostilities lasted less than a month (July 24 – August 5), during which Sinhalese civilians, aided by the army and police forces, massacred Tamils and destroyed their property; between 300–3,000 Tamils (exact numbers are debated) met their deaths and tens of thousands were left homeless. The violence led to a steep rise in Tamil support for the radical LTTE and other militant groups (Rogers, Spencer & Uyangoda, 1998; Yass, 2014; de Silva, 2010; Battle, 2010;).

Between 1983 and 2008 two more wars broke out, known as the second and third Tamil Eelam wars.

In 2008, in the wake of escalating terror attacks and failed peace talks, Sri Lankan president Mahinda Rajapaks decided to shift strategy. Instead of pursuing a peaceful resolution to the conflict, the government would fight an all-out war against the LTTE in hopes of achieving a decisive military victory (Goodhand, 2011). This marked the beginning of the Fourth Tamil Eelam War, the focus of the present case study.

**Who were the Tamil Tigers?**

**Formation and Goals**

The LTTE, the “Liberation Tigers of Tamil Eelam,” was a separatist organization governed by a secular, nationalist ideology. Established in 1976, it considered itself the rightful representative of the Tamil minority in Sri Lanka and sought to establish an independent state in the country’s northern and eastern regions. From its birth to its demise, the organization was led by one man – Vellupillai Prabhakaran.

**Effective Control over Territory**

The LTTE maintained de facto control over extensive territories in northern and eastern Sri Lank for 30 years (from 1990 until 2009). The territories under its rule constituted a political entity called Tamil Eelam. It had a capital (Killinochi), a flag, a national anthem and an advanced administrative system (including a judiciary), a police force, a prison system, an army, a tax system, banks, a welfare system, and media outlets. LTTE-controlled regions and government-controlled regions were demarcated by a clear physical border, guarded by armed personnel on both sides. To travel from one area of control to another one had to present identification and pay customs duties on imports. In other words, the LTTE maintained effective control over Tamil Eelam (Manhoran, 2006; Secretary General of the United Nations, Experts Panel, 2011; Yass, 2014; Stokke, 2006; de Silva, 2010).

**Character of the Organization and the Resources at its Disposal**

The organization was split into two divisions: a military wing and a subordinate political wing. The activity of both wings was overseen by a governing council comprised of the leaders from each wing. Prabhakaran headed the council.

The political wing was responsible for the administration of the territory under LTTE control. It was entrusted with supplying the needs of the civilian population – in the hope of winning their support as well as to lay the groundwork for the establishment of an independent Tamil state. Other bodies established by the organization included a bank, responsible for the organizations’ financial concerns as well as those of civilian population under its control; a judiciary, with a hierarchical system of local courts headed by a supreme court, all responsible for maintaining social order; a police force (the Tamil Eelam Police); and a socialist education system and support network (e.g., schools, orphanages, hospitals, and support for widows). Citizens in these territories also received civil services from the Sri Lankan government. In other words, two economic-political systems operated in the country’s northern and eastern regions simultaneously (De Clerq, 2004; Stokke, 2006; Reichard, 2011).

The LTTE’s military wing included a ground force, a navy, an air force and an intelligence branch. The ground force was comprised of four major ground brigades, each one comprised of hundreds of troops:

**Charles Anthony Brigade.** Established in 1991, this was the LTTE’s main conventional fighting force. Over the course of the four Tamil Eelam wars, the brigade participated in more than 75 battles against the Sri Lankan army.

**Jeynathan Brigade.** A special unit which also participated in important battles with the Sri Lankan army.

**Imran-Pandiyan Brigade**. The LTTE’s anti-aircraft unit. Established in 1998, it was considered one of the LTTE’s best trained brigades. It had at its disposal rocket propelled grenades and surface to air missiles (including Stinger missiles).

**Leopard Brigade**. The LTTE’s commando unit. It was mainly comprised of child-soldiers, indoctrinated with fanatical loyalty to Prabhakaran and to the Tamil national movement.

**Sea Tigers:** This unit had almost 3,000 naval personnel. It included troops, engineers for vessel maintenance and upkeep, marine communication technicians and a naval intelligence unit. It had between 100–200 sea craft, including submarines (The LTTE was the first non-state organization to develop such advanced naval capabilities). Its navy afforded the LTTE an orderly supply of ammunition, food, money, and troops. It also allowed the LTTE to maintain its power on the ground by forcing the Sri Lankan navy to scatter its forces to protect its ships and pursue enemy vessels, impeding the navy’s ability to attack the LTTE’s ground forces.

**Air Tigers**. This branch had at its disposal 6 light aircraft of Czech make (Zlin Z-143’s), with targeted strike capabilities, as well as a number of helicopters. The branch was developed to counter the extensive aerial bombardment campaigns conducted by the Sri Lankan air force. The LTTE also used its air force to carry out aerial terror strikes against cities under government control, as well as industrial and energy facilities and army bases. These strikes significantly disrupted day-to-day life in Sri Lanka, throughout the civil war.

**Service Intelligence Security Organization Tigers (SISOT).** This branch was responsible for gathering open-source and closed-source intelligence used to support suicide missions and military strikes, identify government agents and “enemies,” assist weapon-buying operations, and to smuggle humans, weapons, and suppliesin and out of Sri Lanka. This was all conducted using a network of agents and informers. who gathered information from a variety of sources.

The military wing also included a woman’s brigade, an orphan’s bridge, a cyber warfare brigade, and an elite, pioneering suicide bombers’ brigade (Black Tiger) which used custom LTTE-made suicide vests to attack military, political, and civilian targets. Finally, as is the practice in conventional armies, the LTTE established troop-training camps. Over the years, the LTTE grew into one of the best organized – and most brutal – terror organizations in the world (Bhattacharji, 2009; Flynn, 2011; Echemendia, 2010; Personal Interview with Sri Lanka’s ambassador to the U.N., November 10, 2012; Reichard, 2011).

This review of the military arm of the LTTE, clearly demonstrates its equivalence to the conventional armies of sovereign states.

**Definition of the LTTE as a Guerrilla Force**

We will now determine whether the LTTE meets the criteria of a guerilla organization, as defined in our introduction.

**Intentional use of violence against military or security personnel for the attainment of military or political objectives.** The LTTE targeted Sri Lankan troops. For example, in 1983, the LTTE attacked a military jeep outside of Jaffna, killing 13 Sri Lankan soldiers. In 1987, the LTTE snuck a vehicle with explosives into a Sri Lankan military base in the North. The explosion, and a subsequent LTTE ground assault, resulted in 40 soldiers dead and 27 wounded.

Likewise, in 1992, the Chief Sri Lankan Navy Commander was killed by an LTTE suicide bomber in Colombo.

**The creation of devoted para-military units comprised of civilians and/or soldiers.** The LTTE was similar to a conventional army. It was comprised of 20,000 Tamil civilians and troops, some of them volunteers, others forcibly enlisted. These troops were willing to sacrifice themselves on behalf of the Tamil cause.

**Use of military tactics while relying on the local, civilian population.**As mentioned, , the LTTE sought to bolster its military operations by winning the moral and material support of the local populace. The LTTE would not have achieved what it did were it not for this civilian backing. In exchange, the LTTE promised defense against the Sri Lankan army and protection of their property and well-being (Hellmann-Rajanayagam, 1994; Reichard, 2011).

**The LTTE, therefore, meets the criteria of a guerilla fighting force.**

**Definition of the LTTE as a Terror Organization**

We will now examine whether the LTTE can be characterized as a terror organization, based on the definition of “terrorism” described in the introduction.

**A form of violent conflict conducted by non-state groups or forces.** The LTTE was an independent organization and did not represent any sovereign state.

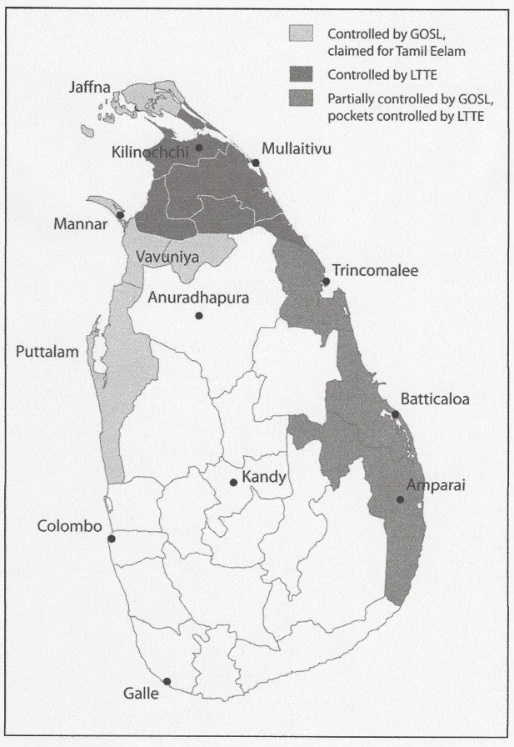
**The intentional use of violent acts (or the threat thereof) against civilians or soldiers outside of combat zones (targeted for their affiliation to a specific population), in order to spread fear and confusion.**The LTTE intentionally used violence against Sinhalese and even Tamil civilians. Beginning in the eighties, the LTTE conducted more than 200 suicide attacks against civilians and political leaders. To this end, the LTTE enlisted female bombers, taking advantage of Sri Lankan ethical norms which forbid touching women. Some of these attacks were directed against moderate Tamil politicians who supported compromise and dialogue. For example, Tamil Parliament Member Neelan Thiruchelvam – who was a supporter of peace negotiations between the Tamils and Sinhalese – was assassinated by the LTTE in 1999. Likewise, the Tamil mayor of Jaffna, Alfred Duriappah, who was suspected of sympathy for the Sinhalese government, was assassinated in 1975. Other targets included foreign leaders, such as former Indian Prime Minister Rajiv Gandhi (assasinated in 1991) and Sinhalese, Sri Lankan politicians, such as President Ranasinghe Premadasa, in 1993, and trade minister C.V. Goonaratne, in 2000 (Yass, 2014; Personal Interview with Sri Lanka’s ambassador to the U.N., November 10, 2012).

**To achieve political goals (national, social-economic, ideological, religious etc.)** The LTTE had a clear political goal: the establishment of an independent Tamil state in north-eastern Sri Lanka.

**The LTTE thus can be defined as a terror organization.**

**The Course of the War**

The Fourth Tamil Eelam war began in 2006 and lasted until 2009. When the war broke out, the LTTE enjoyed effective control over a territory of 15,000 square kilometers.



**Map 1: Division of territory between the LTTE and the Government of Sri Lanka (GOSL) at the outbreak of the Fourth Tamil Eelam War**

**Immediate Cause of War**

On July 21, 2006 the LTTE closed the sluice gates of a water reservoir in eastern Sri Lanka in the Mavil Aru region. The reservoir provided water for drinking and agriculture in the city Trincomalee and its environs in south-eastern Sri Lanka. The closing of the reservoir left 25,486 citizens without water (many of whom were under the government’s control).

**The Goals of the War**

Beyond the immediate need to reconquer the reservoir, the war was defined as a humanitarian rescue operation. The Government of Sri Lanka sought not only to reopen the sluice gates but also to completely destroy the LTTE – and were willing to do so at any price (Smith, 2010). The sluice gates were conquered within a month, on August 10, 2006. The operation, however, continued until the organization was totally defeated.

**Sri Lankan Preparation for War**

The Sri Lankan president appointed himself minister of defense, and appointed his brother (Gotabaya Rajapaksa), who had extensive military experience fighting the LTTE, defense secretary. The size of the army was tripled to 300,000 troops. The defense budget was raised in stages; by 2008, it comprised 20 per cent of the national budget. The government purchased military equipment such as missile launchers, bombs, Kfir helicopters, artillery equipment, MiG-29’s as well as unmanned drones to help minimize civilian casualties (Secretary General of the United Nations, Experts Panel, 2011).

The war encompassed a territory of 7,753 square kilometers and unfolded in three phases.[[1]](#footnote-1)

**Phase 1**: A year-long campaign in eastern Sri Lanka. It began in 2006, in the region of the conquered sluice gates, and spread southward, following the course of the Verugal river and reaching Batticaloa. The campaign drew to a close on July 10, 2007 with the conquest of Batticaloa.

**Phase 2**: A yearlong campaign in northern Sri Lanka. The campaign began in February 2007, west of Vavuniya, and ended in 2009 with the conquest of the LTTE capital, Kilinochchi.

**Phase 3**: A campaign lasting several months also in north Sri Lanka. It began with the conquest of Mullaitivu and ended with the defeat of the LTTE on May 17, 2009.

**Phase 1**

The first phase of the war was a yearlong campaign which lasted from July 28, 2006 until July 10, 2007. The campaign encompassed an area of 6,000 square kilometers and a population of 212,486 civilians.

During the campaign in the East, the Sri Lankan Army and the LTTE engaged each other in the ten major cities controlled by the latter. The Sri Lankan army sought to conquer the cities and liberate their inhabitants.

**The Strategy of the Sri Lankan Army During the First Phase of the War**

Throughout the first phase of the war, the LTTE subjected Sri Lankan soldiers to heavy artillery fire, deterring retaliation by blending into the civilian population (including women and children) and using them as human shields. The Government of Sri Lanka retaliated with aerial bombardments of the LTTE’s weapon caches, bases and troops. At the same time, the Sri Lankan Army launched a coordinated offensive on multiple fronts and with large numbers of soldiers, placing the LTTE at a numerical disadvantage.

Realizing that the fighting was primarily taking place in heavily populated areas, and seeking to minimize danger to civilians, Defense Minister, Mahinda Rajapaksa, decided to abandon the government’s accepted counter-terror strategy and adopt an unprecedented approach. The Sri Lankan army would adopt a tactic by which it would try to force LTTE troops into nearby jungles, allowing the army to continue its offensive in non-populated areas. Likewise, the Sri Lankan army, for the first time in its history, began to implement guerilla tactics. Special forces soldiers were sent deep into LTTE territory, striking enemy positions and gathering intelligence about troop placement, locations of weapon caches, and more. Using this intelligence, the Sri Lankan army was able to carry out precision strikes against strategic targets. The army reported on this change in tactics to the government, so that all levels of the leadership understood the situation (Personal Interview with Sri Lanka’s ambassador to the U.N., November 10, 2012). Nevertheless, in some cases, the Sri Lankan army’s best attempts to avoid civilian casualties, were frustrated by LTTE counter-measures. For example, during a campaign in Sampur, the location of the local LTTE command from August 27, 2006 until September 4, 2006, the LTTE used civilians as human shields. Regardless, the Sri Lankan army launched attacks and bombarded LTTE targets, even when civilians were in the vicinity, arguing that the operation to liberate them from the terror of the LTTE was ultimately in their best interests (Personal Interview with Sri Lanka’s ambassador to the U.N., November 10, 2012; Reichard, 2011).

**Phases 2 and 3**

The campaign in North Sri Lanka was called the Wanni Operation. It began in February 2007 (concurrent with the campaign in the East) and ended in May 2009. The goal of the campaign was to liberate civilians in Sri Lanka from the LTTE. The government characterized the operation as a humanitarian campaign and the most extensive hostage rescue in history. During the campaign, the Sri Lankan army conducted military operations against the LTTE in a number of strategic areas in the North. Targets included Silawathura which would, if conquered, lead to full control over the island’s western shores, preventing the LTTE from launching operations from its bases which dotted the coastline. Likewise, Kilinochchi, the LTTE’s administrative center and capital since 2006, was targeted (Sri Lanka Government, 2011).

#### **Sri Lankan Policy Towards Civilians in Response to LTTE Tactics**

To weaken the LTTE forces, the army conducted extensive aerial bombardments. In December 2008 alone, the army conducted 400 aerial strikes. In addition, the Government of Sri Lanka decided in 2009, in collaboration with the UN Security Council, to make further changes in its military guidelines with the goal of reducing civilian casualties: the government announced, in stages, the establishment of three No Fire Zones in the North. These were territories under government control to which civilians in LTTE controlled territories could escape and be guaranteed safety. From a tactical perspective, the maintenance of No Fire Zones meant that the Sri Lankan ground forces would have to engage the enemy without aerial support or bombardment in these regions.

The first No Fire Zone (NFZ) was established in January 2009, to the north-east of Visuamadu. The army’s strategy was to try to extract civilians from adjacent LTTE regions and transfer them to the NFZ under Sri Lankan control. The army informed civilians of the policy by setting up loud-speakers along the NFZ border; dropping fliers which included maps of the region, from the air; and broadcasting radio announcements, informing civilians how to safely make passage into regions under government control. 20,000 civilians managed to escape to first NFZ, safely making their wayinto Sri Lankan controlled territories.

The success of the operation alerted the LTTE to the inherent “dangers” of losing civilians which meant the loss of human shields. The LTTE, therefore, endeavored to keep civilians within its territory as hostages, at all costs. Civilians who sought to escape were shot and LTTE’s operatives were sent to detonate bombs from within groups of civilians. This made it difficult for civilians to make their way to areas under Sri Lankan government control. In addition, at one point, the LTTE forcibly moved civilians away from the No Fire Zone to Puthumathalan, a minute coastal strip surrounded by water. This, they hoped, would make it easier to prevent civilians from escaping. As soon as the Government of Sri Lanka realized what was happening, it declared Puthumathalan, which had been conquered a few days prior, the second No Fire Zone on February 11, 2009.

The third zone, declared on May 8, 2009, was Vellamullivaikkal (Shashikumar, 2014; United Nations, 2009).

**LTTE Policy towards Civilians**

At the beginning of the second phase of the war, LTTE leader Prabhakaran understood that he had underestimated the Sri Lankan army and realized that the LTTE’s military wing could not prevail using old strategies. Therefore, beginning in January and until May 2009 when the LTTE was finally defeated, Prabhakaran actively prevented citizens, even women and children, to leave the territories under his control. Those who tried to escape were shot. Prabhakaran adopted a tactic of taking civilians with him during a withdrawal, using them as human shields. Likewise, he dispatched suicide bombers and gunmen to areas considered safe for transit. This resulted in the deaths and injuries of civilians and security personnel alike.

For example, with the conquest of Kilinochchi by the Sri Lankan army on January 2, 2009, the remaining LTTE troops evacuated approximately 15,000 people to Puthumathalan which had been declared a No Fire Zone. They took with them a large number of civilians to serve as human shields and to prevent them from escaping to government-controlled territories.

When Sri Lankan forces approached Puthumathalan, the LTTE withdrew to Vellamullivaikkal and again brought civilian hostages with it. At this point, civilians and combatants were trapped in a lagoon, a small coastal strip 12 kilometers long stretching from Puthumathalan to Vellamullivaikkal, which was, as mentioned, declared an NFZ. LTTE built a three-kilometer earth wall, or bundh, between two points within this NFZ (Puthumatallan and Ampalavanpokkanai). The majority of civilians serving as human shields was positioned behind the bundh. 

**The End of the War**

On the night of April 18, a rescue operation began when the Sri-Lanken forces waded through the lagoon, advancing deep into enemy lines. The moment the forces reached the bundh they engaged the LTTE guard positions. The LTTE offered stiff resistance, firing mortars and heavy artillery. Covering fire allowed the civilians to rush over to government-controlled territory secured by Division 55. Checkpoints were set up to screen the escaping civilians and to ensure that LTTE suicide bombers didn’t cross over in the melee.

In April 2009, the Sri Lankan army was able to liberate 300,000 civilians from LTTE control, transferring them to a refugee camp established in Vavuniya (Sri Lanka Government 2011:54-56; Shashikumar 19 NOV, 2014(.

On May 13, 2009, two weeks after the conquest of Puthumathalan, the UN security Council demanded the LTTE lay down arms. At the same time, it demanded that the Government of Sri Lanka take measures to avoid violating international law (by bombarding areas with high concentrations of civilians) and to assist the liberation of citizens trapped in combat zones. The next day, Vellamullivaikkal fell into Sri Lankan hands.

The final engagement of the war took place in May 2009 at Mullaitvu, the last city to be liberated from the LTTE, and the last refuge of the Tamil Tiger leader, Vellupillai Prabhakaran. The government hoped that his capture or death would spell the end of the war. On May 16, the army overran the last rebel strongholds.

On May 17, General Sarath Fonseka declared a military victory against the Tamil Tigers. On that day, almost 263,000 civilians were liberated (Shashikumar, 2014). On May 18, 2009, Prabhakaran was killed on the battlefield with another 250 people – some civilians, others combatants – during an escape attempt. As the government had surmised, his death marked the end of the Tamil Tigers as a military force. During a military parade held in the Sri Lankan capital, Colombo, on June 3, President Mahinda Rajpaksa declared the war against the LTTE to be over (Shashikumar 2014; Sri Lanka Government, 2011).

An internal report, published by the Sri Lankan government, reported the number of combatants killed on both sides. Between July 2006 and May 2009, 5,556 Sri Lankan soldiers were killed, 28,414 wounded, and 169 declared missing in action. According to the same report, the LTTE lost 22,247 combatants, 11,812 of whom were identified by name (the identification was based on uniforms or dog-tags, as well as intercepted radio communiques) (Sri Lanka Government, 2011; Shashikumar, 2014).

**Analysis of the Ethical Issues Raised during the War**

**Principle of Distinction**

UN reports attest to the many civilians killed during the war. During the relatively short period from January 20 until April 24, 2009, 6,432 civilians were killed and 13,946 wounded. Responsibility for some of these casualties could be attributed to the Sri Lankan army firing on civilian targets.

According to the report published by the UN Human Rights Council, on February 1 and 2, 2009 the Sri Lankan army unleashed no less than four barrages of heavy weapons fire against Puthukkudiyiruppu hospital, which although being held by LTTE fighters also contained civilians. These attacks led to the deaths of at least nine people and resulted in at least 20 wounded. (It is unclear how many were combatants and how many civilians) (United Nations Security Council, 2001, p. 8).

The Sri Lankan army was also accused of using heavy weapons indiscriminately in No Fire Zones with many civilians. The UN Human Rights Council claimed that not long after the establishment of the NFZ’s, the Sri Lankan army began shelling them, ignoring the demands of the UN and human rights groups. These bombings led to the deaths of hundreds of civilians every day.

A testimony supporting these allegations, was provided by a pastor who survived the attack of Mullaittivu and described his experiences. He claimed that after having reached the coastal strip, he, four other pastors, and sixty orphans dug a bunker to protect themselves from the heavy fire. According to him, the fire was directed at civilians and combatants without distinction. Later he and the civilians in the bunker were able to establish telephone contact with a soldier in the Sri Lankan army. The soldier instructed them to emerge from the bunker the moment they saw Sri Lankan soldiers approaching, identifying themselves by waving a white flag. They followed instructions: as soon as they heard soldiers approaching, some of the adults and children emerged from the bunker with a white flag and ran towards them. The soldiers, however, ordered them to halt, firing warning shots; it seems they were afraid that LTTE fighters were hiding among the civilians. This concern was not entirely unjustified; as the pastor explained, some troops had indeed blown themselves up among the civilians. The civilians quickly scrambled back to the bunker. The soldiers continued to fire at them and threw grenades into the bunker for an entire night. The civilians cried all night and called for help. In the morning, the pastor decided to confront the soldiers, and, with another pastor, emerged from the bunker with a white flag. He explained to the 15 soldiers, who were veiled in black masks, that they were civilians. The soldiers instructed them to lie down in from of them, mentioning that they had received orders to shoot and kill any survivors. After pleading for mercy, they strip searched the remaining civilians for explosives, including some children. Another pastor was struck in the chest by the soldiers, fell to the ground, and died later that day (Jon, 2011; Yass, 2014).

American Secretary of Stage, Hillary Clinton, expressed her deep disappointment at the behavior of the Sri Lankan Government. She argued that in its efforts to defeat the LTTE with heavy-handed bombardment and offensives, the government was subjecting civilians to unimaginable horrors One example of the use of heavy fire against civilians took place between April 12 and 14, on the Sri Lankan New Year. The Sri Lankan army declared a humanitarian ceasefire in honor of the holiday and made preparations to receive civilian refugees fleeing the No Fire Zones. Unfortunately, the civilians were joined by LTTE fighters. The LTTE fighters began to indiscriminately open fire, and the Sri Lankan army returned fire from the air, land, and sea, harming civilians in the process.

Another incident took place on June 3, 2009, the day on which the president of Sri Lanka declared the LTTE to be defeated. Thousands of Tamils, civilians as well as LTTE fighters (some of them political leaders of the organization), coordinated their official surrender. They were to leave the combat zone, accompanied by the UN ambassador to Sri Lanka and Dutch journalist for the *Sunday Times*, Marie Colvin, who had been asked by the LTTE to serve as a mediator. The president of Sri Lanka personally accepted their surrender. According to a UN human rights organization, the Tamils left the battle zone waving white flags, but were fired upon by the army (Jon, 2011; Personal Interview with Sri Lanka’s ambassador to the U.N., November 10, 2012).

The Government of Sri Lanka claimed that during the war it had been careful to distinguish between combatants and civilians and between valid military targets and civilian targets. which it had kept off-limits. The Sri Lankan Defense Minister, and Air-Force commander characterized the government’s policy as one which sought “zero civilian casualties.” The government even claimed to have adopted a particularly strict policy, going above and beyond the principle of proportionality (that collateral damage to civilians is acceptable if the value of a military target is especially high): before a bombardment, they would take extra measures to ensure that no civilians were present. The infantry, air force, and navy were all given explicit orders to avoid civilian casualties. The army even appointed teams responsible for confirming information received from intelligence and confirming the precision of targets, ensuring that only LTTE facilities or troops would be attacked. When infantry forces had identified and reported on the presence of armed combatants, reconnaissance drones were dispatched to inspect the area (both during the day and at night). Aerial photographs (both of the target and of the region as a whole) were used to ensure that the targets did in fact belong to the LTTE, that no civilians were present, and that none of the targets were protected areas such as hospitals, temples, or schools. Only after it had been ascertained that no mistakes had been made, did the head of the air force himself issue an order to conduct a bombing raid. Even so, the weapons used were strictly picked to fit the size of the target and avoid collateral damage. Moreover, higher-ups in the air force reported that drones were used in real time, so that infantry commanders, pilots, and higher ups in the air force, responsible for an operation and seated at army headquarters, could observe targets and issue orders to prevent civilian casualties. The Commander of the Air Force recounted that, in some cases although an LTTE training ground had been identified, he personally countermanded orders for a bombing run due to the proximity of civilians. He also claimed that the results of every bombing run were photographed and subjected to inspection (Secretary General of the United Nations, Experts Panel, 2011; Sri Lanka Government, 2011; Personal Interview with Sri Lanka’s ambassador to the U.N., November 10, 2012).

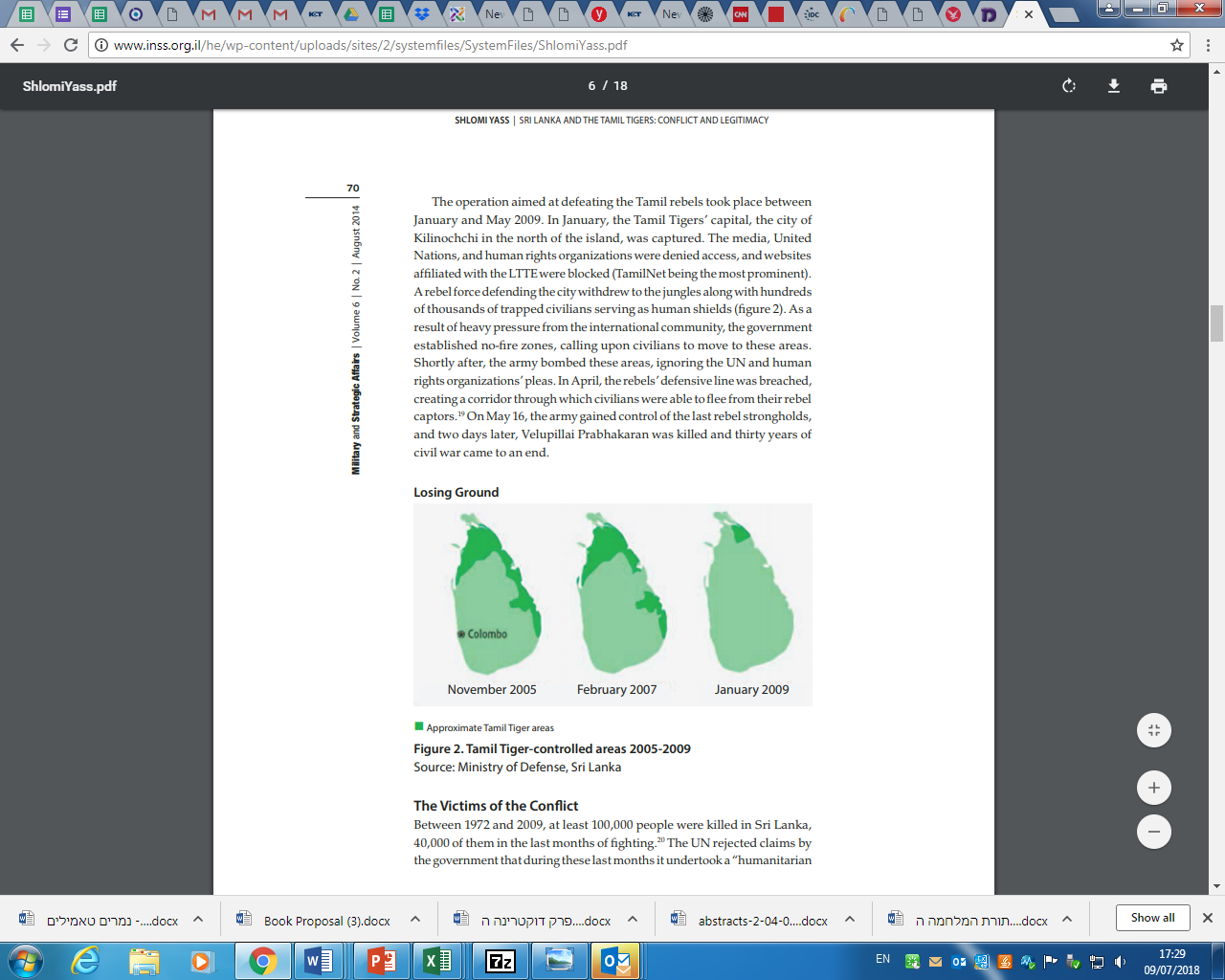
The Defense Minister further claimed that the army never intentionally fired on NFZ’s, and only retaliated when shot at by LTTE fighters. The Sri Lankan soldiers, he explained, approached the borders of NFZ’s at great personal risk, having received no authorization to use anything but their personal firearms, in order to prevent danger to civilians. This greatly extended the time it took to accomplish missions and led to high casualties among soldiers. According to Sri Lankan statistics, during this period (between March and May 2009), 1,212 soldiers were killed, 6,447 wounded and 10 declared missing in action.

During the war, Indian Foreign Minister, Pranab Mukherjee, stressed Sri Lanka’s responsibility to defend its citizens under LTTE control. He therefore, condemned the army for firing at civilian targets. However, he also condemned the LTTE practice of embedding fighters among the civilian population, calling upon them to desist from using non-combatants as human shields.

A resident of Kilinochchi attested to the difficulty of distinguishing between combatants and civilians. He explained that the LTTE fighters wore civilian clothes and blended into the general populace (Pallistar & Chamberlain, 2009; Sri Lanka Government, 2011).

According to the Government of Sri Lanka, the difficulty in distinguishing between civilians and combatants only became harder as the fighting progressed during the last months of the war and as the NFZ’s shrunk.[[2]](#footnote-2) On January 21, the decisive phase of the war, these territories amounted to 35.5 square kilometers with 303,000 civilians. By May 2009, this number was 100,000 but forced into a space of a few square kilometers – severely complicating warfare and posing a challenge to the army’s ability to distinguish between LTTE troops and civilians. [[3]](#footnote-3)

In response to Hillary Clinton’s accusation, the Sri Lankan army cited a soldier who testified at a commission of inquiry established by the Government of Sri Lanka. According to his account, soldiers refrained from returning fire at LTTE troops because they were surrounded by civilians and concentrated in a very small area. From a humanitarian perspective, the government claimed that it actively facilitated the wellbeing of trapped civilians. For example, it allowed representatives of the Red Cross and the Catholic Charity Caritas to enter the combat zone and provide trapped Tamil civilians with assistance (Pallistar & Chamberlain, 2009; Jon, 2011; Retnayaka, 2009).



**Map 2: The progressive conquest of territories under LTTE control, as the government pushed their forces into increasingly smaller territories (Yass, 2014).**

**Analysis of the War According to Kasher and Yadlin's Doctrine**

This section is devoted to the discussion and analysis of the Fourth Tamil Eelam war in light of Kasher and Yadlin’s doctrine [[4]](#footnote-5)

**Principle B.1: The Principle of Military Necessity[[5]](#footnote-7)**

1. Purpose Condition: *Fulfilled.* Over the course of the operation, the army carried out airstrikes in order to weaken the LTTE and thus deliver the prime objective of the operation – the release of hundreds of thousands of Sri Lankan and Tamil civilians who were held hostage by the organization in northern Sri Lanka.
2. Relative Effectiveness Condition: *Fulfilled.* All military actions (excluding bombings), such as those carried out by the infantry, posed great danger to the soldiers, the distinction between combatants and civilians being extremely blurred. According to various testimonies, combatants were well hidden and intermixed with the civilians, who served as human shields: they hid in public facilities such as schools, mosques, hospitals; used civilian attire the better to blend in; and more. In some cases, suicide bombers were concealed among the civilians, detonating themselves in order to harm civilians and soldiers.
3. Minimizing Collateral Damage Condition: *Fulfilled.* The Sri Lankan government employed three strategies in order to minimize damage: 1. By declaring three NFZs in the area of the operation (northern Sri Lanka) – zones that were out-of-bounds for airstrikes and restricted to ground warfare only. The army notified civilians about these zones by dropping leaflets and via radio announcements. 2. Upon identifying combatants, the infantry surveyed the area with drones and relied on aerial photographs in order to verify identification; that there were no civilians in the vicinity; and that there were no protected facilities such as hospitals, mosques, churches, or schools. Only then would the air force commander issue the order to strike. 3. The type of weapon employed was adjusted according to the nature of the target.
4. Proportionality Condition: *Unclear.* Conflicting accounts by the Sri Lankan army, LTTE combatants, and the UN Human Rights Council render it difficult to arrive at a decisive judgment in this case. There is no doubt that civilians suffered greatly due to bombings by the Sri Lankan army, as the army bombed areas in which Sri Lankan citizens served as human shields. Moreover, the army was accused by the UN Human Rights Council of the indiscriminate use of heavy artillery within the NFZs. Due to the great number of civilians within these zones, hundreds of civilians were killed daily. On the other hand, the Sri Lankan army ascribed high military value to these bombings, as they significantly weakened the organization and could well have facilitated its defeat. Therefore, from the point of view of the Sri Lankan army the bombings contributed greatly to its military objective, notwithstanding collateral damage to life and property. According to Sri Lanka’s ambassador to the UN, the army targeted LTTE combatants even when they were in close vicinity to civilians, arguing that civilians used as human shields lose their immunity (Sri Lanka ambassador to the UN, personal communication, November 10, 2012). Since the principle of military necessity considers not just the measures required to “achieve victory” (military benefit) but also the resultant damage, there is, in my opinion, reason to morally question the fulfillment of the proportionality condition, especially considering the excessive harm inflicted on civilians.
5. Fairness (or universalizability) condition: *Fulfilled.* In all comparable situations airstrikes are tolerated.

**Principle B.2: The Principle of Distinction**

**(C) Presumption of Direct Involvement in Terror**

(C.1) The Presumption: *Unclear.* Specific actions, each warranting separate deliberation, were not analyzed in the present case. However, there is evidence to support that Tamil combatants were dedicated to the organization and its objectives, and it is therefore reasonable to assume that they were directly involved in terrorist activities over a significant length of time.

(C.2) Validity of Presumption: *Not fulfilled.* There is no indication that appropriate measures were taken in order to collect evidence possibly acquitting suspected Tamil combatants of terrorist involvement.

(C.3) Significance of Presumption: *Not fulfilled.* In the attempt to eradicate the LTTE, most of the Sri Lankan army’s military actions against the organization’s combatants (likely including combatants who answered to all of the presumption criteria), were carried out in a highly dense environment. Hence, there was high risk of harming uninvolved civilians.

**Principle B3: The Principle of Military Proportionality**

*Components of military benefit:*

(f.1) “The extent of the danger posed by acts or activities of terror”: The LTTE is a brutal organization. It did not hesitate to harm civilians, including women and children, even when these were Tamil citizens whom it purportedly represented. The extent of the danger posed to civilians that were held hostage was great, for the combatants used them as human shields so as to avoid harm to themselves. They likewise did not hesitate to kill those civilians who tried to escape, following a better-dead-than-free approach.

(f.2) “The extent of a person’s involvement in acts or activities of terror, in accordance with the Principle of Distinction (B.2)”: according to the testimonies of military personnel, soldiers opened fire on combatants or fired back when attacked. In light of the doctrine’s principle of distinction (B.2), therefore, direct involvement in terror may be attributed to the persons targeted by the airstrikes. It is difficult to determine the immediacy of the danger posed by the individuals involved based on existing evidence. However, it appears that the majority of attacks targeted combatants, as well as those providing arms at a given time. That is, such persons as referred to in the doctrine under B.1 to B.5, including those posing immediate danger; those providing immediate assistance to persons posing immediate danger; those dispatching persons posing immediate danger; those preparing the weaponry; as well as those providing the vital means for carrying out the terrorist attack.

(f.3) “The extent to which the danger posed by the act or activity of a person directly involved in terror is immediate”: it seems that the overarching pattern was of airstrikes targeting sources of shooting. There is ample reason to assume that the combatants who had opened fire would not have hesitated to shoot soldiers or civilians thereafter.

(f.5) “The extent to which the influence of a person directly involved in an act or activity of terror on its performance or continuation is exclusive”; (f.6) “The extent to which it is difficult to intercept a person directly involved in in an act or activity of terror, because the window of opportunities of whereabouts knowledge is usually not widely open”: over the course of the operation it was difficult to accurately intercept a specific person, for the combat environment was heterogeneous and dense, consisting of trained combatants and civilians, with difficulty distinguishing between the two groups. Additional circumstances further aggravated this difficulty, particularly incidents where LTTE combatants retreated into highly constricted areas, taking hostages with them. For example, upon retreating into Vellamullivaikkal, the combatants and civilians were confined to a strip merely 12 km long. Furthermore, the NFZs shrunk considerably towards the final months of engagement. By the end of the war in May 2009, 100,000 people were cramped into an area of a few square kilometers.

*Military benefit is weighted against collateral damage:*

(g.) “The extent of the danger posed by the military act or activity to persons who are not involved in terror at all or not directly involved in terror”: according to military and government officials, the Sri Lankan army opted for a policy of “zero civilian casualties,” attempting to identify combatants with the utmost accuracy, while ensuring that no civilians were in the vicinity. The commander of the air force claimed that on a number of occasions, due to the presence of civilians, he had instructed not to bomb what were clearly LTTE training facilities. Nevertheless, as the operation was conducted within highly dense areas where combatants and civilians were in close vicinity, it posed a grave danger to civilians.

As stated in the doctrine, “The combination of military benefit considerations and collateral damage considerations will depend on the circumstances”:

(h.1) “*Circumstances of certain military benefit*: A high value of one or more of the military benefit parameters (f.1)—(f.6) creates a military necessity for an immediate act, even if the value of the collateral damage parameter is similarly high”: *Fulfilled.* The value of parameter f.1 – “the extent of the danger posed to civilians by acts or activities of terror” – was high. Hence, immediate military intervention was called for, even if the risk of harm to life was comparably high.

(h.2) “*Circumstances of probable military benefit*: When the value of a military benefit parameter is not high, then the lower is its probability, the more significant is the collateral damage parameter.” This clause is redundant in this case, as the parameter indicating certain military benefit had a high value.

(h.3) “*Circumstances of postponement*”: this clause explicates when postponement is required but does not apply in this case.

(h.4) “*Circumstances of development*: Military acts or activities when the collateral damage parameter is of a high value should be followed by attempts to develop new types of weaponry or methods of warfare.” *Not Fulfilled.* The present case posed considerable danger to civilians, notwithstanding the Sri Lankan army’s claim that the choice of weapon took into consideration the nature of the target. The number of civilians at risk due to the attacks warranted the pursuit of yet more advanced methods of combat. Targeted killings, for example, employing advanced weaponry, could potentially reduce harm to life (putting aside the moral dilemma associated with this method). The Sri Lankan army, however, while aspiring to carry out targeted killings, did not possess the required technological capabilities (Sri Lankan ambassador to the UN, personal communication, November 10, 2012).

**Principle B.4: The Principle of Low Probabilities**

(p.2) “*Uncertain Intelligence*: Under conditions of uncertain intelligence, the data regarding the severity of the threat under consideration will determine the threshold probability, above which the threat is to be considered as if it were a certain one.” The Sri Lankan army and government claimed that the intelligence force was continuously involved in determining, with the highest possible certainty, whether a given person was a legitimate target or not. In addition, teams appointed by the army were tasked with reviewing the intelligence a second time and confirming precise targets, ensuring that only LTTE facilities or combatants were harmed. However, airstrikes appear to have been aimed in the direction of civilians (like human shields) and civilian targets, such as a hospital and a school. Therefore, I believe this principle is not applicable in this case.

(p.3) “*Maximin Scenario*: Under conditions of low probability intelligence or where probabilities cannot be determined regarding a threat or danger, considerations will be made in accordance with the Maximin Principle [comparing the worst possible outcomes].” The information I have pertaining to the present case is not sufficient to determine whether airstrikes were the preferred course of action due to their efficiency alone. According to the Secretary of Defense, an alternative option that was pursued – albeit only for two months – was to let infantry soldiers approach the borders of the NFZs in order to assist civilians to cross the border into Sri Lankan-controlled territories. This was done on the ground in order to avoid harm to civilians, even though it posed danger to the soldiers. The action took long to complete and resulted in many casualties (1,212 soldiers killed and 6,447 injured). Considering it was employed for only two months, this was likely not the preferred course of action. A UN report found that harm to civilians during the operation was caused mostly by the bombing of civilian facilities by the army. The UN argued that the army knew of the whereabouts of these facilities, but the army maintained that the bombings came in response to shooting. Statements asserting that soldiers have a right to protect their own lives, or that a soldier may shoot back when shot at, even if the shooting originates from a civilian facility and when a counter-attack would potentially harm civilians – testify to the preferences of the army.

**Principle B.5: The principle of Time Span Considerations**

It is difficult to determine compliance with this principle. Many interventions planned by the Sri Lankan army, including attempts to avoid harm to civilians, changed their course midway due to the brutality of the LTTE and its attempt to harm civilians, including Tamils. This was the case both with active measures such as bombings (meant to prevent short-term danger), and passive measures, such as ceasefires in response to specific developments (meant to impact global public opinion). For example, during bombings LTTE combatants fled while dragging civilians along with them, so as to use them as human shields. In addition, they assimilated themselves into groups of civilians making their way to government-controlled territories, in some cases detonating themselves in their midst.

**Principle B.6: The Principle of Professional Understanding**

The political echelon instructed the military echelon to distinguish clearly between LTTE terrorists and Tamil civilians, and accordingly the operation had a humanitarian emphasis. The Sri Lankan army tried to evacuate civilians from LTTE-controlled territories for this purpose. One of the adopted measures was a change of strategy – the army was now attempting to drive the LTTE into the jungles, in order to avoid engagement in a populated area. Military officials communicated the change of strategy to the political echelon, so that all involved would have the same understanding of the situation (Sri Lanka ambassador to the UN, personal communication, November 10, 2012).

**Principle C.1: The Principle of Permanent Notice**

*Fulfilled.* Based on an analysis of how the war unfolded and information disclosed by various political and military bodies, it appears that no prior warning was given to the local population regarding military attacks. However, proportionality considerations pose the question of whether a warning would compromise actions with high military value. If that is the case, it is justifiable not to give prior warning and to risk collateral damage. In the present case, which saw Tamil Tigers recurrently holding civilians hostage and hiding among them in order to harm as many civilians and soldiers as possible, there is a sound basis to believe that prior warning could have resulted in yet greater damage.

**Principle C.2 The Principle of Compensation**

*Not Fulfilled.* Based on close inspection of the war, no attempt was made to minimize damage to property, nor was there any effort to clarify the nature of the military action and its potential damage to property to the civilians residing near the Tamil Tigers. Likewise, there is no evidence that the people whose property was damaged received due compensation.

**Principle C.3 The Principle of Operational Deterrence**

(s.1) Goal and evaluation: *Fulfilled.* The Sri Lankan army sought to deter LTTE combatants from targeting civilians and the army. Deterrence mostly took the form of airstrikes following LTTE attacks. Airstrikes were undertaken also in response to light shooting from the LTTE. For example, in April 2009 the Sri Lankan army declared a ceasefire in honor of the Sri Lankan New Year, planning to take in civilians fleeing the NFZs into government-controlled territories. LTTE combatants assimilated themselves into the civilian population and began shooting in all directions upon leaving the NFZs. Had the army’s sole objective been to cause the combatants to desist, it would likely have shot back on the ground. However, the army opened fire from land, air, and sea, indicating that deterrence formed an additional objective to self-defense. The message conveyed was that shooting would be met with severe pushback.

(s.2) Clarified Aspect: *Not Fulfilled.* The deterrence aspect of operation Wanni was not clarified in retrospect, as stipulated.

(s.3) Collateral Damage: *Not Fulfilled*. During a military operation whose objective is to deter and prevent combatants from committing future acts of terror, harming of life is justified only as the result of preventive measures, and not of deterrence alone. As shown, operation Wanni included widescale bombings that were almost certain to harm civilians. For example, shooting towards civilian populations on the premise that suicide bombers often hid among them. The aim was to deter the combatants, but as it was not known whether suicide bombers were indeed present, not all incidents can be considered preventive. In addition, artillery fire from air, sea, and land towards NFZs, as described in clause s.1, was purely for the sake of deterrence, considering the army did not settle for targeted, preventive shooting. Therefore, the actions taken by the Sri Lankan army do not comply with the moral standard set by this principle.

**Summary**

After the war, the Sri Lankan ambassador to the UN argued that the war should be understood in light of LTTE activity, their control over large swathes of territory, and their brutal practices. The Government of Sri Lanka understood guaranteeing the safety and wellbeing of all its citizens, from North to South, to be its highest priority. The government likewise sought to allow Sri Lanka to rejoin the international-community as a strong and independent state. To this end, gaining full control over the entire country and rebuilding the Sri Lankan nation by reinforcing the state and restoring its security, tourism, capital, industries and private and public sectors was paramount (Kohona, 2010).

**An analysis of this case study yields several important insights:**

1. The difficulty of contending with the LTTE, a terrorist organization which employed guerilla warfare, is manifest. The LTTE was characterized by its brutal methods, especially its willingness to exploit civilians under its control. As far as the LTTE was concerned, Tamil citizens were a tool, a means to an end, a pawn in its attempts to achieve its goals.
2. We can see how a democratic state can also adopt guerilla tactics: the Sri Lankan army deployed small teams of trained soldiers across enemy lines, to target leaders, gather vital intelligence and help destroy the organization from within (for example during the fighting in eastern Sri Lanka, during the first phase of the war). These units were mobile and highly durable, and their deployment forced LTTE troops and commanders to seek shelter far from the front line. This left troops without direct command, allowing the Sri Lankan army to conquer LTTE controlled territories with relative speed.
3. Despite its claims to the contrary, the Sri Lankan government seems to have prioritized the lives of its soldiers over the lives of civilians. It did so to contend with the LTTE tactic of blending into the civilian population to mount attacks against Sri Lankan soldiers. Soldiers had no alternative but to defend themselves at the expense of Sri Lankan civilians.
4. The Sri Lankan government and army tried to protect the wellbeing of all civilians (regardless of ethnic affiliation) during the fighting. It did not, however, do everything in its power to adhere to the principles of international law (or Just War Theory) – specifically, the principles of distinction and proportionality: it fired upon human shields, targeted civilian buildings such as hospitals, and even bombarded No Fire Zones.

Sri Lanka is the only country in the world to successfully eradicate a terror organization. To do this, it was forced to adopt measures that did not always concord with ethical principles. This provides us the answer to the important question raised at the beginning of this chapter – is it possible to completely eliminate a guerilla fighting force or terror organization while adhering to ethical principles? The answer, it seems, is that it is far from simple. Combatting a terror organization of this kind with military effectiveness while, at the same time, maintaining one’s moral character, is a formidable challenge.

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**Part III: How to Engage in Terror and Guerilla Warfare Successfully While Gaining Greater International Legitimacy**

**Sample Chapter**

**Chapter 9: Universal Ethical Doctrine for Fighting Terrorism**

In this chapter, I will propose a universal doctrine – based on Just War Theory and international law – to be used when waging war against terror organizations. This doctrine only addresses actions undertaken during a war (*jus in bello*) and not the actual decision to go to war (*jus ad bellum*). The form of the proposed doctrine is based on the previous sections of this book: the first part, which discussed the dilemmas facing democracies engaged in low-intensity warfare, specifically the ethical doctrine formulated by Kasher & Yadlin (2005), as well as the second part comprised of specific case studies. It is meant to be as practical, universal and applicable as possible.

On the one hand, it is designed to afford democratic state sufficient latitude to effectively combat terror organizations, providing relevant principles to this end. These principles allow for a more extensive exercise of power than allowed by those currently enshrined in law and existing doctrines which are better suited to combat between two sovereign states. In parallel, the present doctrine is meant to help a country gain international legitimacy for its actions. Despite the relatively broad latitude in allows, the doctrine is ethical and legal, and thus allows a country to maintain its moral and democratic resilience. Thus, when combined with the existing body of international law, this doctrine can serve as a unified code of conduct for waging wars against terror organizations.

At the basis of the doctrine lies deontological conception of ethics. According to this view, moral value of an action is evaluated in terms of the initial moral intention of the person performing the action, as opposed to its actual results (even if the results produced or advanced the greatest common good). According to such an approach, when determining whether or not to undertake a given action, one must first evaluate its importance, function, and contribution. Immanuel Kant, one of the chief proponents of this ethical approach, argued that an action is moral if the *intention* of the one performing the action is good (Freeman, 2001).

We can illustrate this with an example: say that a certain action resulted in the deaths of three innocent people. To determine the morality of the action, we would need to look at the initial ethical intention, that is, the basis for performing the action, and not the result – in this case the death of non-combatants.

Another ethical foundational principle lying at the basis of this doctrine is universalizability. In other words, any moral judgment rendered must be applicable to all equivalent cases (Frey, 2001; Silvers, 2001). Therefore, every principle included in this doctrine must be one that can be followed by any democratic country, regardless of its democratic profile. This is so the doctrine will be applicable to any democratic country facing such a war, whatever it may be.

**Ethical Doctrine for Fighting Terrorism**

## **Principle A: The Principle of Military Necessity**

1. **Target Condition**: the action is undertaken to protect the lives of a country’s citizens from acts of terror, by virtue of a country’s right to self-defense.
2. **Relative Effectiveness Condition**: any alternative (including abstaining from action altogether) would pose a greater, concrete danger to the lives of a country’s civilians and soldiers (if they are conscripts).
3. **Minimizing Collateral Damage Condition**: When an action is undertaken, efforts should be made to minimize any harm to civilians who are not directly involved in terror, in order to protect the sanctity of life and human dignity.
4. **Universality Condition**: The justification for performing an action must be applicable to all parallel cases.

*About article 2*. If the soldiers in question serve in a conscripted army – i.e., they were obligated by law to draft (as is the case in the Israeli army, for instance). the state, having sent them into danger, must do everything in its power to protect their lives. By contrast, if the soldiers belong to a professional-volunteer army (such as the United States Armed Forces), then they have chosen this profession, knowing ahead of time the dangers it could entail. In such a case, an action which exposes them to greater danger, if required (to minimize danger to civilians on the opposing side), is allowed.

# **Principle B: The Principle of Distinction**

**(A) A Country’s Obligation to Ppersons Based on Territorial Affiliation and Level of Involvement in Terror**

Articles are listed in descending level of importance.

(A.1) A state’s obligation towards people who are under its effective control and who are not involved in terrorism at all;

(A.2) A state’s obligation towards people who are *not* under its effective control and are not involved in terrorism at all;

(A.3) A state’s obligations towards people who are under its effective control and are *indirectly* involved in terrorism;

(A.4) A state’s obligation towards people who are *not* under its effective control and are *indirectly* involved in terrorism;

(A.5) A state’s obligation towards people who are under its effective control and are *directly* involved in terrorism;

(A.6) A state’s obligations towards people who are *not* under its effective control and are *directly* involved in terrorism;

A state acting to discharge its obligation to protects its citizens from acts of terror must protect human dignity by recognizing the value of human life and freedom. It must, therefore, take into account as much as possible, the distinction between different groups of people that are not its citizens or residents, and must determine the amount of culpability it bears for the fates of the people in each group.

1. **Different types of direct and indirect involvement in terrorism**

A state which wishes to discharge its duty to protect its citizens from acts of terror, while at the same time preserving human dignity, must answer the following question: what is the time frame in which a civilian takes direct part in hostilities?. To do this, it must draw a distinction – before undertaking any action – between the different functions filled by people involved in terrorism, i.e., the distinction between direct and indirect involvement. This is regardless of their proximity to the area in which the action takes place.

The different types of involvement in terrorism are listed in descending order of the immediacy of the threat they pose. This distinction helps a state decide when it has moral justification for targeting a specific person in order to prevent an act of terror.

(B.1) People who pose an immediate danger (such as a terrorist wearing a suicide belt, or a member of a rocket-launching team);

(B.2) People who provide immediate assistance to people who pose an immediate danger (such as a driver, or a guide);

(B.3) People who are responsible for dispatching terrorists who pose an immediate danger;

(B.4) People who prepare and develop weaponry (such as an “engineer” who makes a suicide belt or builds a homemade rocket);

(B.5) People who provide means that are vital to carrying out a violent act (such as a “pharmacist,” or an intelligence operative).

(B.6) People who plan the practical details or conceive the operational idea of a violent act;

(B.7) People who give a terrorist the order to perform a violent act;

(B.8) Belonging to the political, social, or religious leadership of an organization which has a terrorist arm, *including*involvement, whether directly or indirectly, in decision-making pertaining to acts of violence;

***All of these articles apply to direct involvement in terrorism. Any person who is not involved in terrorism in one of the aforementioned ways, is considered indirectly involved in terrorism if he or she is responsible for:***

(B.9) Developing and implementing financial channels which are not crucial to terrorism or do not assist it directly (such as an organization’s financier);

(B.10) Delivering a religious sermon, which praises suicide bombers but does not otherwise assist acts of terror;

(B.11) Disseminating pamphlets or posters which praise acts of terror but do not otherwise assist acts of terror;

(B.12) Participation in the political, social, or religious leadership of an organization with a military-terror arm, but **without** being directly or indirectly in decision-making pertaining to acts of violence.

1. **Obligations of State Towards Groups of People According to Territorial Affiliation**

A state wishing to discharge its duty to protects its citizens from acts of terror must also protect human dignity by recognizing the value of each individual human and by recognizing the sanctity and freedom of life. It must, therefore, draw a distinction between different groups of people that are not its citizens or residents, and must determine the amount of culpability it bears for each one of these groups.

(C.1\*) Minimizing damage to the citizens (and residents) of the state, including to soldiers who are not actively engaged in combat;

(C.2\*) Minimizing collateral damage to people (outside of the state’s boundaries) who are not involved in terrorism and who are under the country’s effective control;

(C.3\*) Minimizing casualties among members of the state’s armed forces (assuming it is a conscripted army) during combat;

(C.4\*) Minimizing collateral damage to people (outside of the state’s boundaries) not involved in terrorism who are *not*under the country’s effective control;

(C.5\*) Minimizing casualties to members of a state’s armed forces (in a professional-volunteer army) during combat;

(C.6\*) Minimizing collateral damage (outside of the state’s boundaries) to people indirectly involved in acts of terror;

(C.7\*) Causing harm to people (outside of the state’s boundaries) who are directly involved in acts of terror;

The prevailing conception maintains that a soldier can be subjected to harm in order to protect civilians on the opposing side. The logic is that soldiers, unlike civilians, have willingly accepted upon themselves such a risk. The present doctrine, by contrast, takes into account the fact that that terrorists intentionally hide among civilian populations creating a more complex combat situation: soldiers are far more likely to come to harm if they make efforts to minimize casualties to civilians on the other side. In such cases, this doctrine argues, the responsibility for harming civilians lies on the terrorists who have put them in danger.

Additionally, this doctrine treats a soldier as a civilian in uniform. His or her life is just as important as the lives of civilians on the opposing side and the state is obligated to make efforts to protect them. However, there is an important qualification: soldiers have the right to moral precedence over civilians of the opposing side only if they serve in a conscripted army. If, however, they serve in a professional (volunteer) army, they do not have the right to moral precedence over civilians on the other side. Such soldiers have volunteered to serve their country and understand the risks this entails.

### **Principle C: The Principle of Proportionality**

A state aspiring to protect human dignity, when making a decision whether or not to undertake a certain course of action, must find a balance between defending its citizens from acts of terror and reducing collateral damage to the opposing side. It must, therefore, weigh the expected military value of an action against the possibility of collateral damage.

**Components of Military Benefit**

(C.1) The immediacy of the danger expected by an immanent terror attack (such as one posed by a team currently engaged in launching rockets at civilian targets, or a planned attack against a civilian target in the near future);

(C.2) The value of and expected long-term benefit from the action (such as an intelligence mission, an offensive campaign, or preventing an attempt to kidnap a soldier);

(C.3) What attempts have been made to achieve the same result with alternative methods?

*If the action in question targets people (such as a targeted killing), then the following parameters must also be considered:*

(C.4) The target’s level of involvement in terror activities in accordance with the Principle of Distinction (Principle 2);

(C.5) The level of danger expected by the act of terror performed by a person directly involved in terror for the long term;

(C.6) The intelligence difficulties of finding this person (in other words, if a person is not targeted now, how difficult will it be for intelligence to find him or her again?).

**The Possibility of Collateral Damage**

(C.7) the expected harm a military action will have on the lives of people who are not involved in terror at all, or are only involved indirectly;

(C.8) If the tactic or weapon is likely to cause extensive collateral damage, decision makers should examine whether this type of weapon or tactic has been previously used against the same population and evaluate the results.

*Considerations of military benefit versus danger of collateral damage will be calculated based on circumstances:*

(C.9) Military benefit will take precedence if at least two of the parameters of military benefit are high (C1–C6). In such a case, immediate military action is necessary, even if the values of human collateral damage are equally high.

(C.10) Danger of collateral damage will take precedence when the parameter of military benefit is less probable; in such a case, greater weight should be given to the value of the risk of collateral damage.

(C.11) The need for postponement: when the values of military-benefit parameters are low, and the value of the collateral-damage parameter is not nil, then there is no military need to undertake immediate action and the operation should be postponed.

(C.12) Need for development: military activities which will cause extensive collateral damage, should be followed by attempts to develop new weapons, tactics or procedures in order to minimize collateral damage in the future.

In order to compare military benefit to the expected level of collateral damage, other parameters must also be taken into account. Articles (C.1) through (C.3) only address actions in general, regardless of the immediacy of a terror threat. An immanent act of terror is a stronger reason for undertaking certain military actions; the extent to which an action is valuable (C.3), that is, weighing the added value attained from successfully carrying out the action must be weighed against the risks the army is willing to take as well as the risk to human life on the other side. For example, if the threat is an attempt to kidnap a soldier, a commander may use heavier fire, because the kidnapping, if successful, will certainly lead to excessive demands from the terror organization (such as prisoner releases). A successful kidnapping would also encourage acts of terror and further kidnapping attempts in the future. Another example is the possibility of neutralizing a prominent leader of the military arm of a terror organization, responsible for numerous attacks in the past, and who will plan further attacks in the future – here also, a commander may use extensive force.

Thus, whereas article (C1) addresses a case of an act of terror which will *not* take place in the immediate future, (C.2) addresses a case of a target with high military value whose successful neutralization will have long-terms significance. For example, preventing an attempt by terror groups to use nuclear weapons would allow for the use of heavy fire.

Likewise, an army must examine its own procedures and determine if sufficient attempts have been made to carry out the action through different means which would result in a lower level of collateral damage (C.3). Articles (C.3) – (C.6) address actions which are meant to target terrorists. Here the importance of carrying out an action must be evaluated based on the danger posed by the terrorist – what harm can this person cause the citizens of the state in the short and long-term and how difficult will it be to locate him or her in the future? We can once against use the example mentioned in article (C.2) – the value of the action: catching a prominent leader of the military arm of a terror organization, responsible for many terror attacks and who will plan further attacks in the future. We would also examine the difficulty, from an intelligence standpoint, of finding this person again (C.6). If it would be impossible to find this person again, or even take a long time, a commander may use heavier fire, than in a case where the person could easily be found again.

Articles (C.1) – (C.6) should be weighed against articles (C.7) – (C.8), in other words, the expected threat to civilians on the other side should be determined. Likewise, it should be examined whether the same weapons which are to be used now have been used in the past (such as a bomb with a certain blast range). That is, we should ask: has the country learned from its actions in the past or will it continue to repeat mistakes? For example, in the Second Lebanon War, the IDF acted against Hamas operatives armed with anti-tank missiles who constituted a threat to Israeli forces. The response was strong and included the use of mortar fire and phosphorous rounds in Jabalia refugee camp in Gaza. The collateral damage was greater than expected: 35 were killed and 40 wounded. The IDF, evaluated the case, reached conclusions, and articulated a stricter safety range when using phosphorous shells in an area with a high civilian density and with sensitive facilities. If an action is undertaken, and a commander decides to use phosphorous rounds, he or she must check whether this type of weapon has been used in the past and examine the results. Were they to examine the case of Jabalia, they would see that consequences were severe; shelling caused extensive collateral damage. This being case, it would have to be determined whether the current action adheres to the safety range as established by the IDF or not. In this context, it should be emphasized that the question is whether the weapon or tactic has been previously used against the *same population*; different combat zones have different conditions. For example, the Gaza Strip (the arena of conflict between Hamas and Israel) is more densely populated than South Lebanon (the arena of conflict between Hezbollah and Israel). Therefore, the safety range required for the use of phosphorous rounds in the former would not necessarily be identical to the range required when using the same weaponry in the latter.

Articles (C.9) – (C.11) take into account the need to find a balance between considerations of military benefit and considerations of collateral damage.

Articles (C.12) emphasizes the need to develop innovative procedures and weapons which will provide better results in cases where collateral damage is likely.

### **Principle D: Principle of Prior Notice**

When military maneuvers are carried out in areas where collateral damage to civilians not involved in terror is a possibility, timely notice about impending attacks must be delivered. This affords civilians the opportunity to distance themselves from the area. This can be accomplished by leaflets, text-messages, radio broadcasts, dialogue with local leaders etc. That being said, there are cases in which a state may consider not giving prior notice:

* For example, a country can consider not delivering notice before an action undertaken as an act of self-defense against an imminent threat posed by terrorists (such as a response to protracted rocket fire at civilian targets, constituting an immediate threat);
* Likewise, this can be considered before an attack with an especially high military value, aimed at preventing an act of terror in the short term, when commanders on the ground maintain that giving notice will ruin the element of surprise and frustrate attempts at prevention.
* Finally, not giving notice can also be considered if there is a possibility that it would actually pose a greater danger to the civilian population. For example, in the case of Sri Lanka in its war against the LTTE, prior notice could lead to civilians being taken as hostages and being used as human shields (something that could happen even without a warning). Alternatively, the LTTE would have suicide bombers hide among civilians fleeing in response to the warning.

### **Principle E: Principle of Offensive Deterrence**

(E.1) **The goal**. The purpose of offensive deterrence is to prevent future terror attacks by convincing terrorists that they will suffer from a costly response, and that the state is capable of and committed to carrying out its threats.

(E.2) **Danger of collateral damage**. When carrying out a military action intended to dissuade terrorists from continuing hostile activity against the state (purely for purposes of deterrence) it is absolutely forbidden to cause harm to civilians not directly involved in the terror activity. By contrast, when undertaking an action based on considerations of military necessity (such as prevention) where the element of deterrence is merely a side-effect, civilians not directly involved in terror may be allowed to come to harm.

### **Principle F: Principle of Professional Expertise**

Every military action must be carried out with the highest standards of professionalism with the purpose of preventing future terror attacks – not in order to exact revenge. Therefore, senior commanders are entrusted with clarifying to commanders on the ground the ethical dimensions of every action.

To ensure that an action is as moral as possible, it is important that all levels in the chain of command properly understand, as much as possible, the holistic conception lying at the basis of the counter-terrorism measures being implemented.

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1. While the present case study will provide an overview of the strategy adopted by the Sri Lankan army in the first phase of the war, it will only analyze in detail the second and third phases. [↑](#footnote-ref-1)
2. See Map 2. [↑](#footnote-ref-2)
3. The regions of Mannar, Mullaittivu, Vavuniya and Kilinochchi. [↑](#footnote-ref-3)
4. In the Sri Lankan case only widescale military actions will be analyzed, as there is no available information regarding more localized actions. [↑](#footnote-ref-5)
5. The analysis is ordered according to the layout of the doctrine and not the chronological sequence of events, correlating to the original letters/numbers. [↑](#footnote-ref-7)