Reflection on the *Jus ad Bellum*, the *Jus in Bello* and the Law on State Responsibility: The Unwillingness and/or Inability to Stop Armed Attacks, Collateral Damage, and Attribution

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§ Introduction

Probably one of the most heavily-debated issues in international law, the right to use force (the *jus ad bellum*) has continually captured the imagination of many commentators; the present writer is no exception to this. Representing an attempt towards contributing to this debate, this paper shall firstly, in section 1, reflect on the right to use force pursuant to the unwillingness and/or inability to stop armed attacks, which represents the militaristic approach towards combatting terrorism.¹

The reading for this paper has shown that the right to use force pursuant to the unwillingness and/or inability to stop armed attacks can be plausibly pegged to different concepts, among which post-9/11 *jus ad bellum* and reprisals (essentially a punishment for previous, wrongful acts).² Also, a third possibility in conceptualising the unwillingness and/or inability to stop armed attacks may also be that it is a form of anticipatory self-defence, seeking to defend against an imminent or perhaps a likely armed attack.

Special attention has been paid in this paper to state practice (prior to and after 9/11, 2001) concerning the unwillingness and/or inability to stop armed attacks, which shows a growing tolerance for forcible responses to private terrorist attacks (see note 29). It is especially in light of this but also in light of the doctrinal support that the present writer contends there is no turning back on the right to use force pursuant to the unwillingness and or inability to stop

armed attacks, even though issues remain that relate to its conceptualization, scope, and general acceptance, as well as issues that relate to sovereignty and attribution.

States continue to justifying recourse to force on the basis of self-defence, which is considered to be subject to an armed attack of a certain intensity that has occurred, and that is attributable to a state according to the agency theory (at least traditionally).

The contrast is between attribution on the basis of the traditional agency-theory, and attribution on the basis of causation-based attribution, which is the more indirect form of responsibility that is favoured by the right to use force on the basis of the unwillingness and/or inability to stop armed attacks. Furthermore, causation-based attribution allows for accountability of actors’ (state and non-state) respective parts in causing an armed attack. Indeed, in cases of the unwillingness and/or inability to stop armed attacks, even though it is likely the armed attack could not have happened without the provision of harbour by a state, the


4 Becker (n3) 43-44


6 Becker (n3) 286-330
primary actor that perpetrated the armed attack is not the state, and the non-state actor perpetrating the armed attack, is usually, neither an agent of the state, nor an extension the state’s will. In short, especially in such cases as described in this paragraph, it seems agency-based attribution does not fully appreciate these facts.\(^7\)

Also, causation-based attribution may allow for attribution that is more in tune with policy-makers and policy-executioners, who tend to appreciate attribution in a less technical manner.\(^8\)

In spite of this, the present writer does not suffer from the illusion that causation-based attribution does not have problems of its own: for one, to what extent does international law accommodate rights and duties of non-state actors; secondly, would causation-based attribution not erode the established law on state responsibility – for the worse? Whilst undoubtedly being questions worth pondering, these questions should not prevent reflection on issues relating to attribution, especially where agency-based attribution does not provide an adequate answer for the initial support for Operation Enduring Freedom;\(^9\) in fact, it seems it is causation-based attribution that provides a plausible legal explanation for such support.\(^10\)

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\(^7\) Becker (n3) 257-286, 362

\(^8\) Becker (n3) 237

After examining the unwillingness and/or inability to stop armed attacks, this paper shall (even though briefly) take a close look in section 2 at IHL rules, purporting to limit collateral damage, thereby also commenting on the interplay between these rules. Realizing that intentionally causing collateral damage may be a matter for international and municipal criminal law, this paper only deals with the non-intentional killing of civilians not directly participating in hostilities, as well as “combatants who are hors de combat, prisoners of war, or the sick, wounded or shipwreck.”

Collateral damage is a sad reality in armed conflicts the world over: indeed, despite the IHL rules that are in place, purporting to limit as much as possibly can casualties of armed conflicts, thousands of people fall victim to collateral damage. A close look at these rules reveals that the broad and fluid nature of military objectives and the somehow enigmatic nature of the principle of proportionality, pose a real problem for the issue of collateral damage.

On a more general note, I must convey that my master’s thesis consists of this paper and the Memorial for the Respondent (Team 355R), the Netherlands National Rounds 2011, Philip C.


Becker (n3) 214-218, 348-349


1. Reliance on the Unwillingness and/or Inability to Stop Armed Attacks

In examining the unwillingness and/or inability to stop armed attacks, guided by general state practice on this issue, the present writer will comment on instances of reliance on the unwillingness and/or inability to stop armed attacks before and after 9/11, 2001. As there are many other instances in which states have claimed to be acting in self-defence pursuant to the unwillingness and/or inability to stop armed attacks,\textsuperscript{14} including instances of use of force in hot pursuit,\textsuperscript{15} this commentary is by no means meant to be exhaustive; it is nonetheless meant to examine a few instances that were rejected, and a few instances that were supported by the international society, perhaps indicating changed attitudes towards the \textit{jus ad bellum} in relation to the unwillingness and/or inability to stop armed attacks.\textsuperscript{16}

1.1 Reliance on the Unwillingness and Inability to Stop Armed Attacks before 9/11, 2001

\textit{A. Israel’s use of force (1968) in Beirut}

\textsuperscript{14} CJ Tams, ‘The Use of Force against Terrorists’ (2009) 20 EJIL 359, p. 382
\textsuperscript{15} Proulx (n5) 15-116; Tams (n14) 371
\textsuperscript{16} Tams (n14) 380
Justifying its use of force in Beirut, Israel was adamant that the unwillingness and/or inability of Lebanon to stop in particular two members of the Palestinian Liberation Front from travelling from Lebanon with the purpose of attacking an Israeli civil airliner, warranted self-defence. In general, Israel was of the view that self-defence was warranted, for Lebanon had allowed terrorists to use her territory as a base, an act for which Lebanon was responsible, and thus attributable to Lebanon.\footnote{(1968) UNYB 228-232; Becker (n3) 191-193}

Israel’s arguments, both pertaining to self-defence and attribution, did not cut ice with the states addressing the issue. In particular, most of these states (including the United States and France) were of the view that the concerned acts against the Israeli civil airliner were not attributable to Lebanon in light of her efforts in controlling groups such as the fedayeen, and the Security Council as a whole “condemned Israel for its premeditated military action (against the Beirut airport) …,” thus reflecting the view that attribution of private conduct to states, especially in this case where there is little or no evidence of state involvement, was not accepted by all of the states taking part in the Security Council meeting addressing the issue.\footnote{(1968) UNYB 228-232; Becker (n3) 191-193}

\textit{B. Israel’s use of force (1982) against Lebanon}\footnote{O’Brien (n2) 454-460}

A second case of reliance on the unwillingness and inability to stop armed attacks that will be examined here is formed by instances of the use of force by Israel against Lebanon in May and June 1982.\footnote{(1982) UNYB 428-478}

Despite Israel justifying the attacks by essentially claiming that Lebanon was unwilling and/or unable to prevent (armed) attacks committed in Israel by the PLO, and that therefore the
acts perpetrated by the PLO were attributable both to the PLO and Lebanon, the “Security Council in June twice demanded an immediate cessation of all hostilities throughout Lebanon …,”\(^{21}\) and the overwhelming majority of states in both the Security Council and the General Assembly rejected Israel’s assertion that her actions were covered by self-defence.\(^{22}\)

Even though she still argued that the Lebanese Government was responsible, Israel now placed the emphasis on arguing that the acts were attributable to the PLO.\(^{23}\)

Furthermore, Israel was essentially arguing that the unwillingness and/or inability to stop any attack (so not necessarily armed attacks), warrants self-defence. Though, especially when judged against the definition of an armed attack,\(^ \text{24} \) it is difficult to argue that the actions of the Palestinians to which Israel reacted, formed acts of armed force that were of such gravity as to amount to an actual armed attack conducted by regular forces.\(^{25}\)

\textit{C. Use of force by the United States (1998) against Afghanistan}

A third instance of reliance on the unwillingness and inability to stop armed attacks, perhaps revealing changes in attitudes, is the use of force in Afghanistan by the United States in reaction to the bombing of two US embassies in Kenya and Tanzania. Similar to the second instance of use of force described above, the emphasis was placed here on attributing the acts to the accused group.\(^{26}\)

\(^{21}\) (1982) UNYB 428, 450
\(^{22}\) (1982) UNYB 428-434, 435-478; Becker (n3) 193-195
\(^{23}\) (1982) UNYB 428-434; Becker (n3) 193-195
\(^{24}\) Article 51 UN Charter; Nicaragua case (n3), para 75-86, 109-115, 194-195; Oil Platforms (n3), para 51; Legal Consequences of the Construction of a Wall (n3), para 139; C Constantine, ‘Force by Armed Groups as Armed Attack and the Broadening of Self-Defence’ (2008) NILR 159, p. 168.
\(^{25}\) (1982) UNYB 431-434, 437
\(^{26}\) Becker (n3) 204-205
Though, in stark contrast to the first two instances of reliance on the unwillingness and/or inability to stop armed attacks, as well as being condemned by several states (even if only because of the unilateral nature of the use of force and the evidentiary basis for the use of force), this use of force against Afghanistan was ignored and supported by several others; also, both the General Assembly and the Security Council took no official action on the matter.\(^{27}\)

Another contrast with the previous two instances of reliance on the unwillingness and/or inability to stop armed attacks, was that the bombings of the two embassies was indeed seen as an armed attack against the United States,\(^{28}\) a plausible conclusion in light of the definition of an armed attack (see note 24).

In conclusion, even though sweeping conclusions are difficult to draw “in general terms, State practice prior to September 11\(^{th}\) indicates a growing tolerance for forcible responses to private terrorist attacks. Reactions have often referred to the necessity or proportionality of forcible counter-terrorist action, rather than the legal authority, in principle to engage in it.”\(^{29}\)

So whilst unwillingness and/or inability to stop armed attack is generally not seen as establishing responsibility,\(^{30}\) in cases where it leads to armed attacks\(^^{31}\) against others states, or in


\(^{28}\) Lobel (n27) 543

\(^{29}\) Becker (n3) 206, 208; TM Franck, Recourse to Force State Action Against Threats and Armed Attacks (CUP, Cambridge 2002) 64-68

\(^{30}\) Some commentators disagree though: see for instance Proulx (n5) 118-127 and Travatio & Altenburg (n1) 111
cases where it can be demonstrated that an imminent armed attack was inevitable, states are willing to accept the use of force against armed attacks committed by non-state actors, where the use of force adheres to necessity and proportionality.

1.2 Reliance on the Unwillingness and Inability to Stop Armed Attacks after 9/11, 2001

A. The case of Operation Enduring Freedom

In justifying her use of force in Operation Enduring Freedom, as far as the United States was concerned, self-defence was permissible against, among others, states that were unwilling and/or unable to stop armed attacks against the United States.

Attribution of these acts cannot be said to be on the basis of the traditional approach: in fact, it is contended the Taliban was not involved in perpetrating the terrorist attacks of 9/11, 2001, and that the Taliban issued a fatwa ordering Osama bin Laden to leave the country, after which they declared to be willing to prosecute him under Islamic law; also, the Taliban took

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31 The documents studied reveal states generally do not speak in such legalistic terms though, suggesting that serious, significant attacks may also be viewed as warranting self-defence.
32 Russia justified its use of force in Georgia on the basis of the unwillingness and/or inability to stop armed attacks; however, Russia had credibility problems given the general Russia-Georgia relations and in light of the fact that Georgia has been taking steps to combat terrorism: see (2002) UNYB 395-396 and C Gray, *International Law and the Use of Force* (2nd edn OUP, New York 2004) 189-190
33 Becker (n3) 206, 208
35 *Proulx* (n5) 114; also see notes 3 & 4
steps towards possible extradition of Osama bin Laden. So it seems Operation Enduring Freedom was less about attributing acts to the Taliban, but more about the use of force on the basis of the unwillingness and/or inability to stop armed attacks.

B. Use of force by Israel (July 2006) against Lebanon

The immediate cause of hostilities seems to be that Hezbollah had launched hundreds of rockets from Lebanon into Israel, as well as an attack on a post of the Israeli Defence Force, whereby three Israeli soldiers were killed, and two wounded. Though, also here, as far as Israel was concerned, the more remote but actual cause was that Lebanon had allowed her “sovereign territory to become a base from which Hizbollah terrorists could launch attacks against Israeli civilians.”

In reaction, apart from imposing a sea and an air blockade and destroying much of Lebanese infrastructure, Israel carried out ground, air, and sea attacks in Lebanon, whereby over a thousand Lebanese civilians were killed, thousands wounded, and over a million displaced. Israel justified her actions as a “direct response to an act of war from Lebanon,” even though “it was clear that the Lebanese Government had no advance knowledge of” Hezbollah attacks into Israel, and even though the concerned acts by Hezbollah could not be attributed to Lebanon.

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36 Ruys & Verhoeven (n3) 313-314; Becker (n3) 213, 228
37 Presidential Address to the Nation (n9); Letter of John Negroponte (n34)
38 (2006) UNYB 574-575, 579
39 (2006) UNYB 498, 566, 574
40 UNSC 5488th Meeting (13 July 2006) UN Doc S/PV.5488, p.7
41 (2006) UNYB 498, 574
42 (2006) UNYB 575
43 (2006) UNYB 576
44 Tams (n14) 379
Whilst acknowledging Israel’s right to self-defence, the UN Secretary-General, the G-8, the majority of states\(^\text{45}\) taking part in the concerned Security Council meeting, among which Russia,\(^\text{46}\) the United Kingdom,\(^\text{47}\) France,\(^\text{48}\) Japan,\(^\text{49}\) Greece,\(^\text{50}\) Denmark,\(^\text{51}\) Congo,\(^\text{52}\) and Argentina,\(^\text{53}\) cautioned that Israeli military actions were disproportionate.\(^\text{54}\)

**C. Jus ad bellum and the unwillingness and/or inability to stop armed attacks after 9/11, 2001**

Can we conclude on the basis of the above, as well as on the basis of general state practice that the right to use force pursuant to the unwillingness and/or inability to stop armed attacks, has become part of the *jus ad bellum*?

The present writer contends there is no turning back on the right to use force pursuant to the unwillingness and or inability to stop armed attacks. However, technically speaking, even though state practice indicates a growing tolerance for forcible responses to private terrorist attacks (see note 29), unless one is willing to support the formation of instant custom, consistent and general state practice as well as *opinio juris*, may require a few more classic examples of the use of force in cases of unwillingness and/or inability to stop armed attacks.\(^\text{55}\)

\(^{45}\) (2006) UNYB 576; *Tams* (n14) 379

\(^{46}\) UNSC 5489th Meeting (14 July 2006) UN Doc S/PV.5489, p.7

\(^{47}\) Ibid 12

\(^{48}\) Ibid 17

\(^{49}\) Ibid 12

\(^{50}\) Ibid 17

\(^{51}\) Ibid 15

\(^{52}\) Ibid 13

\(^{53}\) Ibid 9

\(^{54}\) (2006) UNYB 575-577

\(^{55}\) *Gray* (n32) 160
Furthermore, subject to conditions such as proportionality and necessity, there is doctrinal and public support for a right to use force pursuant to the unwillingness and/or inability to stop armed attacks,\textsuperscript{56} including non-attributable armed attacks perpetrated by non-state actors.\textsuperscript{57}

Perhaps trying to mitigate possible intrusion on state sovereignty, noteworthy is that in cases of unwillingness and/or inability to stop armed attacks, a link is sought with the role of the harbouring state.\textsuperscript{58} For instance, in combination with the unwillingness and/or inability to stop armed attacks, in justifying Operation Enduring Freedom, the United States also relied on “passive support provided by the Taliban government to the perpetrators of the 9/11 attacks.”\textsuperscript{59}

Apart from concerns that state sovereignty might pose a problem, a link with the harbouring state is also justified in light of the following: the duty to protect state B from


\textsuperscript{58} Antonopoulos (n3) 169; Rays & Verhoeven (n3) 293, 310-312, 318

\textsuperscript{59} Rays & Verhoeven (n3) 312; also, the Taliban was regarded as a de facto regime with international legal status: Becker (n3) 230-231
attacks\textsuperscript{60} (originating from state A) by private individuals is seen as a duty that “must be exercised due diligently” and which therefore “does not require the absolute prevention of actions of the private individuals.”\textsuperscript{61} So where state A or a de facto regime would have due diligently fulfilled this duty to protect state B from armed attacks origination from state A, including the willingness to cooperate with state B in cases of inability to stop armed attacks, the use of force may not be necessary.

\textit{D. Attribution and the unwillingness and/or inability to stop armed attacks}

The unwillingness and/or inability to stop armed attacks is difficult to attribute to a state because of lack of effective\textsuperscript{62} or overall control\textsuperscript{63} by state organs and or persons exercising governmental authority. This difficulty has led commentators to propose other, less stringent thresholds of attribution, including different forms of complicity\textsuperscript{64} such as substantial involvement.\textsuperscript{65}

\textsuperscript{60} As derived from various international obligations, worded in among others UNGA Res 2625 (24 October 1970) UN Doc A/RES/2625 (XXV), p. 123; UNGA Res 42/159 (7 December 1987) UN Doc A/RES/42/159; Corfu Channel Case (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4, p.4, p. 22; UNSC Res 1373 (28 September 2001) UN Doc S/Res/1373; \textit{Legal Consequences of the Construction of a Wall} (n3), para 139; UNGA Res 56/1 (18 September 2001) UN Doc A/Res/56/1; UNSC Res 1368 (12 September 2001) UN Doc S/Res/1368; \textit{Becker} (n3) 118-133

\textsuperscript{61} \textit{Ruys & Verhoeven} (n3) 306; \textit{Becker} (n3) 131-133, 140-146, 152; \textit{Proulx} (n5) 142, 146-147; \textit{Dinstein} (n57) 244

\textsuperscript{62} \textit{Cassese} (n3) 248-249; \textit{Nicaragua case} (n3), para 75-86, 109-115; Commentary to Article 8 DARS UN Doc A/RES/56/10 (n3)

\textsuperscript{63} \textit{Becker} (n3) 170-171; \textit{Prosecutor v Dusko Tadic} (n3), para 120-122

\textsuperscript{64} \textit{Tams} (n14) 385-386

\textsuperscript{65} \textit{Nicaragua case} (n3) (Dissenting Opinion of Judge Schwebel), para 154-200; \textit{Ruys & Verhoeven} (n3) 316-317
Although not amounting to attribution as required by the traditional approach (see notes 3 and 4), apart from attributing the armed attack to the actual perpetrators, an attempt is made to also attribute the perpetrated armed attack to the harbouring state, suggesting reservation on the part of states as to the exact scope of attribution in the post 9/11 era. In any case, attribution on the basis of the unwillingness and/or inability to stop armed attacks does not require an agency link with the state; the unwillingness and/or inability to stop armed attacks in itself suffices for attribution.

Though, one has to wonder whether this is a fair approach to the use of force, which is supposed to be a matter of last resort and thus only meant to be employed defensively. To my mind, whilst state A may be unwilling but able to stop armed attacks against state B, state C may be willing but unable to stop armed attacks against state D. In any case, state practice studied for this paper, including the use of force by the United States (1998) against Afghanistan, has shown that the use of force is sometimes limited to the actual perpetrators, thereby sparing the state and her infrastructure as much as possible. Especially in this case where the legal contours of a right to use force on the basis of the unwillingness and/or inability to stop armed attacks is still ill-defined, the present writer posits that the use of force should be limited to the actual perpetrators of the armed attack.

Still concerning attribution, one possibility, perhaps one for the future in light of the requirements to which Article 55 is subjected, could be the *lex specialis* of Article 55 Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

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66 Ruys & Verhoeven (n3) 300; Commentary to Article 55 DARS UN Doc A/RES/56/10 (n3)
67 Legal Consequences of the Construction of a Wall (n3) (Separate Opinion of Judge Kooijmans), para 35; U.N. Doc. A/RES/56/83 (n3)
2. Collateral Damage and IHL Principles

Rules concerning distinction, military necessity proportionality and humanity, purport to regulate the issue of collateral damage in armed conflicts.

On the one hand, two of the above-mentioned principles tend to have a restricting effect on generating collateral damage: humanity involving the avoidance of unnecessary military actions that would cause suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military objectives, and distinction involving sparing civilians as well as civilian

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68 See section I, subsection B, sub-subsection 2 Memorial for the Respondent (Team 355R), the Netherlands National Rounds 2011, Philip C. Jessup International Law Moot Court Competition

In relation to non-international armed conflicts, see also Article 7 (concerning the humane treatment of the wounded, sick, and shipwrecked), Article 13 (concerning distinction) Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (concluded 08 June 1977, entered into force 7 December 1978) 1125 UNTS

In relation to international armed conflicts, see for example Article 10 (concerning the humane treatment of the wounded, sick, and shipwrecked), Article 35 (concerning the prohibition of methods and means of warfare that are of a nature to cause superfluous injury or unnecessary suffering), Article 41 (concerning the non-targeting of those rendered hors de combat), Article 48, 51, and 52 (concerning among others the non-targeting of civilians and civilian objects) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (concluded 08 June 1977, entered into force 7 December 1978) 1125 UNTS

objects,\textsuperscript{70} taking necessary precautions to avoid loss of civilian life,\textsuperscript{71} and using only weapons that are capable of distinguishing between civilian and military targets.\textsuperscript{72}

However, on the other hand, the problems relating to collateral damage are somehow aggravated by the perspectives of military necessity and proportionality, perspectives through which collateral damage is predominantly viewed.\textsuperscript{73}

Military necessity prescribes that in pursuit of military objectives,\textsuperscript{74} only force permitted by IHL should be used. Concerning military objectives in particular, even though “…there must exist a proximate nexus to war-fighting” for an object to qualify as military objective,”\textsuperscript{75} the present writer posits that the broad description of military objectives poses a problem for collateral damage of human life: indeed, as far as “objects are concerned, military objectives are limited to those objects which by their nature, location, purpose (concerned with intended future use of an object) or use make an effective contribution to military action and

\textsuperscript{71} UNGA Res 2675 (9 December 1970) UN Doc A/RES/2675 (XXV)
\textsuperscript{72} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 1996, p. 226, para 78; Prosecutor v “Dule” (n11), para 100-127
\textsuperscript{73} T Stein, ‘Collateral Damage, Proportionality and Individual International Criminal Responsibility’ in Wolff Heintschel von Heinegg & Volker Epping (eds), International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen (Springer-Verlag, Berlin Heidelberg 2007) 157, p.157-158; Obote-Odara (n12) 789; Article 51 Protocol I (n68)
\textsuperscript{75} Y Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2\textsuperscript{nd} edn CUP, Cambridge 2010) 95-96
whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”  

As to the other problematic principle, proportionality only requires that belligerents balance (on a case by case basis) 

harm to civilians against the military advantage that would result from military operations.  

In this regard, the wording of Articles 51(5)(b), 57(2)(a)(iii), and 57(2)(b), affirming that an attack is considered as indiscriminate and should be cancelled when it 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 (not to be confused with extensive according to Dinstein) in relation to the concrete and direct military advantage anticipated, seem to be closer to the reality of collateral damage than the principles of distinction and humanity suggest.  

The present writer is of the view that the broad description of military objectives, in combination with the principle of proportionality that basically only prohibits civilian losses that would be excessive in relation to the concrete and direct military advantage anticipated, in  

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76 Article 52 (2) Protocol I (n68); Dinstein (n75) 89-120; ICRC, ‘Rule 10. Civilians Objects’ Loss of Protection from Attack’ (Customary IHL) < http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule10> (accessed 2 January, 2011); Customary IHL Rule 8 (n74)  


78 Dinstein (n77) 212-213  


80 Dinstein (n75) 132-133; ‘International Criminal Tribunal for the Former Yugoslavia’ (2004) 43 ILM 794, paragraph 58
combination with the fact that there is “no fixed borderline between civilian objects and military objectives”\(^{81}\) does not hold significant guarantees against collateral damage, even in light of other IHL rules.\(^{82}\)

Of particular concern are the fluid nature of military objectives and the entanglement of military and civilian activities, a common feature of urban warfare.\(^{83}\) To complicate matters even further, collateral damage should be judged in light of initial anticipation and not subsequent outcome.\(^{84}\)

So basically, subject to among others Article 57 and 58 First Protocol Geneva Conventions, civilians have to live with the unsettling thought that civilian casualties are a reality of armed conflicts, as long as these casualties “are not excessive in light of the concrete and direct military advantage anticipated.”\(^{85}\)

Lastly, seemingly complicated as these rules are even for a graduate in international public law, the present writer wonders whether the draftsmen of the IHL rules purporting to regulate collateral damage, put themselves in the shoes of the subjective belligerent at the front, who is sometimes faced with a split-second decision of life and death.

§ Conclusion

\(^{81}\) Dinstein (n75) 94, 97-99  
\(^{82}\) Protocol I (n68)  
\(^{83}\) Dinstein (n75) 109  
\(^{84}\) Dinstein (n77) 215  
\(^{85}\) Protocol I (n68); Dinstein (n77) 214-216
Looking ahead, the future looks promising for the right to use force on the basis of the unwillingness and or inability to stop armed attacks. State practice in particular but also doctrinal support warrant the position that there is no turning back on the right to use force pursuant to the unwillingness and or inability to stop armed attacks, even though significant issues remain that relate to conceptualization, scope, and general acceptance, as well as issues that relate to sovereignty and attribution. In short, even though the contour of this concerned right is visible, it is as yet clearly amorphous.

As to the issue of collateral damage to civilian life however, the future does not at all look promising. A close look at these rules revealed that the broad and fluid nature of military objectives and the somehow enigmatic nature of the principle of proportionality, pose a real problem for the issue of collateral damage. Unfortunately, this shall remain the case as long as the issue of collateral damage is viewed predominantly through the perspectives of military necessity and proportionality.