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# Chapter X

## Sacrificial Violence and Targeting in International Humanitarian Law

*Gregor Noll*

### 1. Introduction

In general terms, international humanitarian law (IHL) does not prohibit military action resulting in a loss of civilian life. So long as its rules on the protection of civilians and their property are followed, the incidental cause of civilian loss is legal. Why is this? The not so naïve answer is that contemporary military operations would be made too difficult if attempted under legal norms that left no room for civilian casualties. Such severe constraints were as undesirable for states developing *ius in bello* throughout history as the total absence of constraints. That apart, incidental and lawful civilian losses within the framework of IHL could be seen as being indispensable signs in a symbolic order restraining violent conflicts within communities. The purpose of this discussion is to seek to outline how this possibility might perhaps be researched in a future, more comprehensive work. In selecting the concept of targeting as an area of interest, I believe that I am close to an archetypical norm on the curbing of violence in relation to the laws of war. What follows will outline two distinct steps.

First, I shall explore the central norms on targeting in contemporary IHL, as the ultimate point of a historically grown body of thought on the lawful killing of certain civilians. This reading of the law emphasises its central ambiguities, and tries to lay bare the chains of equivalence between military objective and civilian death that it constructs. A central concern is the open question of the civil-political objective to be pursued through IHL-abiding war. All this will be done in the consecutive Section 2.

Second, to argue that casualties are perceived as being necessary preconditions for peace in an international community, I introduce a theory explaining how the causation of *incidental* death of civilians, rather than the wilful death of enemy combatants, plays a pacifying role in the symbolic order of international law. I wish to examine targeting norms as part of a contemporary victimisation ritual, offering the civilian casualty in exchange for divine appeasement of an international community. This approach draws on the work of René Girard, explaining how communal violence is contained through ritual acts of sacrificial killings. This projection of Girardian theory on IHL norms will be effected in Section 3. A brief conclusion will be drawn in Section 4.

## 2. Lawful Sacrifice: Civilian Casualties and the Laws of War

In the general history of the state, warfare techniques moved from armies confronting one another in a delimited battlefield to ever-present conflict in diversified forms, carried deep into the urban hinterland of warring parties. In statistical terms, internal conflicts have become more frequent, and all types of armed conflict were to become proportionally more lethal for civilians. At the beginning of the 20<sup>th</sup> Century, some 90 per cent of conflict losses were of combatants. This number dropped to 50 per cent in the second world war, and is now down to 20 per cent.<sup>1</sup>

Confronted by such statistics, laymen might well be excused for doubting the mitigating effects of IHL. A frequent and familiar response by IHL lawyers is to point to poor implementation<sup>2</sup>, to mourn the absence of powerful monitoring mechanisms,<sup>3</sup> or to call for additional norms to catch up with new warfare technologies. At the other end of the spectrum, critical legal scholars have indicted IHL for complicity in the atrocious conduct of warfare. The latter argument is paradigmatically stated in frequently quoted and rather defeatist articles by af Jochnick and Normand<sup>4</sup>:

“A critical understanding of international law compels a re-evaluation of the role of law in deterring wartime atrocities. By endorsing military necessity without substantive limitations, the laws of war ask only that belligerents act in accord with military self-interest. Belligerents who meet this hollow requirement receive in return a powerful rhetorical tool to protect their controversial conduct from humanitarian challenges.”<sup>5</sup>

Neither can a future IHL escape its atrocious implications:

“[T]he capacity of the laws of war to subvert their own humane rhetoric carries an implicit warning for future attempts to control wars: the promotion of supposedly humane laws may serve the purpose of unrestrained violence rather than of humanity.”

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- 1 M. Kaldor, *New and Old Wars. Organized Violence in a Global Era*, 2<sup>nd</sup> ed., (Polity Press, Cambridge, 2006), p. 107.
  - 2 See, e.g., D. Fleck, “International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law”, 11 *Journal of Conflict and Security Law* (2006) 179–199.
  - 3 See e.g., N. Quevinet, “The Varvarin Case: Excerpts of the Judgment of the Civil Court of Bonn of 10 December 2003, Case No. 1 O 361/02”, 3 *Journal of Military Ethics* (2004) 178–180, describing how victims of a NATO air raid were denied the right to sue Germany on the basis of IHL norms as paradigmatic of the lack of redress in IHL.
  - 4 C. af Jochnick and R. Normand, “The Legitimation of Violence: A Critical History of the Laws of War” 35 *Harvard International Law Journal* (1994) pp. 49–95 and “The Legitimation of Violence: A Critical Analysis of the Gulf War” 35 *Harvard International Law Journal* (1994) pp. 387–416. See also T. W. Smith, “The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence”, 46 *International Studies Quarterly* (2002) pp. 355–374, critiquing recent warfare from a similar position as Jochnick and Normand.
  - 5 C. af Jochnik and R. Normand, “The Legitimation of Violence: A Critical History of the Laws of War” 35 *Harvard International Law Journal* (1994) pp. 49–95, p. 58.

Here, the authors rather overstate their point. Accepting that IHL cloaks military necessity and an economy of force<sup>6</sup>, violence remains subjected to this necessity and economy. It can therefore hardly be 'unrestrained' behind the IHL veil.

Mégret casts it as a codification of colonial politics.<sup>7</sup> Drawing *inter alia* on the historical example of Japan, he concludes that the laws of war live off exclusionary dynamics severing 'civilized' Europeans and 'non-civilized' colonial peoples.

"The laws of war... can be seen as having been historically one – in fact probably one of the foremost – instruments of forced socialization of non-Western nations into the international community, one whereby non-Western peoples have been called upon to wage war on the West's terms, by adopting Western military mores (thus almost inevitably reinforcing Western supremacy)."<sup>8</sup>

Ultimately, the postcolonial and CLS critiques rest on ideas of political domination. True to their roots in American CLS, af Jochnick and Normand point out the importance of IHL in mustering 'the public support for war'.<sup>9</sup> The laws of war ultimately impede the proper functioning of participatory democracy at the domestic level. The ideas of true democracy and humanity beyond the ruses of IHL hover over their work. Mégret, however, avoids unmasking and idealising. Rather, the original sin of the coloniser has infested history, and the colonial encounter "reverberate[s] through and inform[s] our understanding of the categories of international humanitarian law".<sup>10</sup> af Jochnick and Normand's critique projects powerful elites deceiving the demos supposed to control the last empire. Mégret's story, though, is different. An historical process of exploitation has migrated into the body of law and is constantly restaged in them. There is, so it seems, simply no cognitive alternative for those living after the colonial encounter.

It is exactly this point that I believe needs to be further researched, even beyond the postcolonial frame. As affirmed in IHL doctrine, the purpose of IHL is not to minimise civilian casualties. How exactly does the law condition our cognition of violence? Omitting the benevolence of traditional readings, one might say that IHL purports to regulate how death and injury is lawfully caused. How does IHL train and socialise us to injure and kill in the 'right' way? As I shall attempt to demonstrate, does this mean first and foremost to injure and kill with a salvaging 'right intent'? In the following, I will examine certain norms of IHL in an attempt to substantiate that they form a system regulating lawful casualties, produced with the 'right' intent.

Historically, the restraining force of IHL sprang from two principles. As described by the then UK Parliamentary Under-Secretary of State, Ministry of Defence, in the context of the 1991 Gulf War: "The Hague Regulations of 1907 and customary international law do ... incorporate the twin principles of distinction

6 af Jochnick and Normand, *supra* note 4, p. 54.

7 F. Mégret, "From 'Savage' to 'Unlawful Combatants': a Postcolonial Look at International Humanitarian Law's 'Other'", in Anne Orford, *International Law and its Others*, Cambridge University Press, Cambridge 2006, pp. 265–317.

8 *Supra*, p. 308.

9 af Jochnick and Normand, *supra* note 4, p. 59.

10 Mégret, *supra* note 7, p. 269.

between military and civilian objects, and of proportionality so far as the risk of collateral civilian damage from an attack on a military objective is concerned".<sup>11</sup> The 1977 Protocol I Additional to the Geneva Conventions (API) contains a number of interlocking norms specifying these obligations in treaty law. With its 167 ratifications, the Protocol has become a commonly used point of reference, although states contributing decisively to the development of practice in contemporary warfare have not ratified it.<sup>12</sup>

The norms in question are contained in Part 4, Section 1. When read in sequence suggested below, they identify step-by-step those ways where lawful victims are cognisable.<sup>13</sup> Here are the single steps determining a class of victims whose injury is legal under API.

### 2.1 *A Distinct Intent*

The first step pivots on Article 48, positing the "basic rule" that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives". Article 51.1 adds that the "civilian population as such, as well as individual civilians, shall not be the object of attacks". Article 51.4 adds a prohibition on indiscriminate attacks, and further provisions exemplify or flesh out the implications of the basic rule.

A strange couplet of concepts operates in the civilian-military dichotomy drawn up in these norms. 'Civilian' qualifies the term 'objects' (here to be understood as 'something material that may be perceived by the senses' or 'the end point of' attack<sup>14</sup>). By contrast, the adjective 'military' does not qualify an object, but an 'objective', alluding either to a 'strategic position to be attained' or a 'purpose to be achieved by a military operation'<sup>15</sup>. This terminological nuance is of some significance, which the ICRC Commentary apprehensively negates.<sup>16</sup> While making civilians the end point of attack is expressly prohibited, the law remains silent on the potential *civilian objective* pursued by an attack. That is, none of the named rules explicitly or implicitly proscribe attacks that may serve a civilian purpose to be achieved. What if something

<sup>11</sup> UK House of Lords Debates, vol. 531, *WA* 43: 22 July 1991.

<sup>12</sup> ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 21-Jan-2008*, <[http://www.icrc.org/IHL.nsf/\(SPF\)/party main treaties/\\$File/IHL and other related Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party%20main%20treaties/$File/IHL%20and%20other%20related%20Treaties.pdf)> (visited on 10 February 2008). Note the important exceptions of states as the US, Turkey, India, Iran and Iraq, which have not ratified API.

<sup>13</sup> See e.g., Schmitt's description of the relationship between the principle of proportionality and the prohibition on attacks against other than military objectives: "It is important to understand that the proportionality principle is a restriction on attacks that is additional to the principle limiting them to combatants and military objectives." M. Schmitt, "Precision Attack and International Humanitarian Law", 87 *International Review of the Red Cross* (2005) pp. 457–8.

<sup>14</sup> Search result for the term 'object', *Merriam Webster Dictionary* contained in the *Encyclopaedia Britannica Online*, Academic Edition (visited on 16 February 2008).

<sup>15</sup> Search result for the term 'objective', *Merriam Webster Dictionary* contained in the *Encyclopaedia Britannica Online*, Academic Edition (visited on 16 February 2008).

beyond the body of the civilian casualty were to be intended as the end point of attack? Certainly, Article 51.2 proscribes “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population”. But what if the sense of terror is merely a secondary purpose, or indeed has no purpose at all? What if the objective were a change in cognition by the body politic of the demos?<sup>17</sup>

## 2.2 *The Nodal Point: Military Advantage*

In the second step, this group of lawful casualties is further fixated through the concept of ‘military objective’. Article 52.2 reads as follows:

“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>18</sup>

The wording of the definition of military objects in API is not congruent with the approach taken by all states. While the US Army and Air Force reflect the Additional Protocol I wording, the Navy and Department of Defence documents substitute ‘enemy’s war-fighting or war-sustaining capability’ for ‘military action’.<sup>19</sup> It has been pointed out, and refuted, that this might broaden the category of military objects. We believe that it is sufficient for our argument to take issue with the allegedly more restrictive position of the quoted definition in Article 52.2.

Within that norm, civilians are defined by reference to combatants, and civilian objects are defined solely by not being military objectives. The wording of Article 52.2

16 The ICRC Commentary first explores the English and French meaning of the terms ‘object/objet’ and ‘objective/objectif’ in paras 2007–2010. While the results are analogous to mine, the Commentary draws a manifestly absurd conclusion in para 2010: “There is, however, no doubt that in this article both the English and French texts intended tangible and visible things by the word ‘objective’, and not the general objective (in the sense of aim or purpose) of a military operation; therefore the extended meaning given by the Dictionnaire Robert is not included in this article.” Y. Sandoz, C. Swinarski & B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949*, (ICRC, Geneva, 1987).

17 Morale bombing debates in and after the second world war or regime change intervention campaigns, for all their difference in operational terms, provide examples of this desire.

18 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter API), 8 June 1977, contained in D. Schindler/J. Toman, *The Laws of Armed Conflicts* (Fourth Rev. and Completed Ed., 2004), p. 651.

19 See *The Military Commander and The Law*, 8th ed. (Maxwell AFB, AFJAGS Press, 2006) p. 614 <<http://milcom.jag.af.mil/milcom2006-complete.pdf>>; *The Law of Land Warfare*, FM 27-10 (1976) ch. 2, para. 40 c <<http://atiam.train.army.mil/portal/atia/adlsc/view/public/296783-1/fm/27-10/Ch2.htm#s4>>, *United States Commander's Handbook on the Law of Naval Operations*, 21 NWP 1-14M (October 1995) para. 8.1.1, at 8-1 <[www.nwc.navy.mil/ILD/NWP%201-14M.htm](http://www.nwc.navy.mil/ILD/NWP%201-14M.htm)>; *Department of Defence Military Commission Instruction No. 2*, 30 April 2003, para. 5 D 3 <[www.dod.gov/news/May2003/d20030430milcominstno2](http://www.dod.gov/news/May2003/d20030430milcominstno2)> (visited on 26 February 2008).

relates a 'military objective' to objects which 'make a contribution to military action' and whose destruction would offer 'a definite military advantage'.<sup>20</sup> Accordingly, we have reached the point where the body of IHL norms on civilian protection seemingly culminates.<sup>21</sup>

The interpretive openness of these terms rebounds on the negatively defined categories of 'civilian objects'. It emerges at this point that the concept of 'civilian objects' fatally trails the concept of 'military advantage'. When read in conjunction with the principle of distinction and its ancillary norms, this rule does not in itself take a stand on the inflicting of harm on civilians, so long as such harm is the consequence of an attack pursuant to military advantage.

In this way, any person deciding on targeting is taught cognitively to organise the territory and population as extensions of military advantage. Lawful violence may harm civilians and civilian objects to the extent that they are cognitively subsumable under military objectives. The extent to which the person in question could describe enemy territory and population in terms of military advantage would determine the extent of lawful targeting choices at the disposal of that person.<sup>22</sup>

IHL lives off the idea that military objectives may be clearly and distinctively separated from civil-political objectives. Since industrialisation has subjected the whole of a territory and its population into the war fighting effort, this idea is no longer tenable. If the drafters of the 1977 API nonetheless used a conceptualisation of warfare adapted to the pre-industrial battlefield, this must embody particular reasons. One would be outright manipulation in the veiling of the confluence of military and civil-political objectives. I do not believe that such a blatant exercise of manipulation would have gone unnoticed by drafters and the international public. Therefore, I would rather consider that a double reference to the normative power of military advantage and to international law (as enacted in Article 52.2) was deemed intuitively plausible by both drafters and public. This sense of plausibility needs to be properly understood, unless we wish to remain subjected to the sacrificial order of IHL.

### 2.3 *The Sacrificial Logic of Proportionality*

The third step introduces a norm making it necessary to establish that an attack will not cause excessive incidental loss. Article 51.1.b proscribes as indiscriminate 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".<sup>23</sup>

20 This raises the question of whether military advantage is tactical only (which would restrict the extent of lawful civilian losses) or strategic (which would expand the extent of lawful civilian losses).

21 Further references to military advantage, albeit with different adjectives, are in Articles 51.5.b and 57.2.a.iii and b. The ICRC Commentary states that "[t]he documents of the Diplomatic Conference do not contain any indication about the reasons why different expressions were preferred. One is therefore left to analyze the meaning of the words used" (para. 2027).

22 The obligation on the attacker to embark on this cognitive process is further bolstered by the prohibition on indiscriminate attacks in Article 51.4 API.



Article 57.2.a.iii reflects this principle when obliging the attacker to take precautions:

“With respect to attacks, the following precautions shall be taken:

...

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”

This rule expressed in these two norms is often referred to as the principle of proportionality. This is odd, since the law itself does not use the term. Certainly nothing within the wording of the quoted piece commands a balancing on a gradually escalating scale between military advantage and civilian loss to take place. Rather, the rule opens latitude for non-excessive civilian casualties and merely prohibits attacks that are likely to exceed its imagined limit. This latitude is where sacrifice occurs – beyond this, it is murder.

The ICRC Commentary reflects the critique levelled against the principle of proportionality at the Diplomatic Conference deliberating the final text of API, or on later occasions: “The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance.” The wording of the two proportionality norms would support this critique. As illustrated earlier, neither is there any ceiling for civilian casualties elsewhere in API. Surprisingly, the authors of the ICRC Commentary make a bizarre claim on the tenability of the critique related in this quote:

“This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 ‘(Basic rule)’ and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.”<sup>23</sup>

Nothing in the wording of Articles 48 and 51.1 and 2 mandates such a conclusion. It is utterly strange that the authors of the well-respected Commentary lend themselves to this formulation, unless one chooses to understand it as a plea and not as an inter-

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23 In recasting this rule as an indictable war crime, Article 8(2)(b)(iv) of the ICC Statute modifies ‘excessive’ with the adjective ‘clearly’ and ‘military advantage’ with ‘overall’. It could be the case that the drafters of the ICC believed that these clarifications mirrored the common interpretation of the proportionality principle as expressed in API. Or they might have consciously heightened the conceptual thresholds of API for pragmatic reasons. It has been contended that an analogous rule exists in customary law. ICRC Study..... pp. 46–50. Rule 14 states: ‘Launching 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, is prohibited.’

24 ICRC Commentary, *supra* note 16, para. 1980. Regrettably, the Commentary does not relate the sources of this critique.

pretation of valid law. This veiling of the options opened by the law has a distinct function, which we shall revert to later.

But how are we to make sense of the cognitive operation prescribed in Articles 51.1.b and 57.2.a.iii? When pondering the relationship between anticipated civilian casualties and anticipated military advantage, IHL scholars have noted the incommensurability of the two categories.<sup>25</sup> If we accept that military objectives ultimately serve the achievement of a civilian objective, then the two categories indeed are commensurable in their contribution to the achievement of that civilian objective.<sup>26</sup> Civilian casualties are excessive when they negatively affect military advantage. This is the case when the extent of civilian casualties is such as to counter the achievement of a civilian objective. As the achievement of military objectives ultimately is a means to the goal of achieving a civilian objective, any action detracting from the achievement of a civilian objective also detracts from the achievement of military objectives. Therefore, civilian loss and military gain have become commensurable. Civilian losses are excessive when they detract from the achievement of a civilian objective.

Here, then, is the chain of equivalence constructed so far, setting out the rule according to which civilians may be lawfully killed: anticipated military advantage can be projected onto an object, thereby making it cognisable as a military objective, which may then be lawfully attacked regardless of civilian casualties, so long as the latter remain within a limit determined by the value of military advantage anticipated. Military advantage is affected negatively by civilian casualties if the latter negatively affect the civil-political objective of warfare. Staging an attack that must be anticipated to negatively affect the civil-political objective of warfare due to the extent of civilian casualties is thus prohibited by Articles 51.1.b and 57.2.a.iii.

This puts further emphasis on the issue of the civil-political objective of warfare.

### 3. The Civil-Political Objective of Sacrificial Appeasement

Wars are fought not for the sake of fighting, but of winning them. Without any doubt, the historical compromise inscribed into IHL norms reflects the pursuit of a double objective: as little violence so as not to cause a momentary excess of suffering, and as much violence, so as not to cause the protraction of suffering. This is the required context for tackling and pursuing civil-political objectives. It is an issue discussed in a confusing manner by IHL lawyers, often by drawing on the historical example of morale bombing during the second world war. On this point there exists a curious degree of disagreement and miscommunication among experts of IHL. W. Hays Parks is perhaps representative in his desire to outlaw morale bombing 'as such'<sup>27</sup> while retaining latitude for affecting the will of the enemy government or population:

25 See, e.g., Schmitt, *supra* note 13, p. 457, asking the rhetorical question "how does one compare dissimilar values (civilian harm and military gain) at all, let alone over time in different combat situations and across cultures?"

26 The assumption of a civilian objective also makes good the strange conceptual asymmetry of the rule of distinction, as explained in Section 2.1 above.

27 W. Hays Parks, 'Asymmetry and the Identification of Legitimate Military Objectives', in W. Heintschel von Heinegg, and Epping, (eds.) *International Humanitarian Law Facing New Challenges Symposium in Honour of Knut Ipsen*, Springer 2007, pp. 65–116, p. 116.

“Wars are fought to change the will of others. Except in the most dictatorial societies, the will of the nation is affected by the will not only of its military but that of its civilian population. Attack of enemy military objectives has the collateral effect of affecting the will of the national leadership, the military and the civilian population. Nothing in the law of war prohibits influencing each ancillary to attack of objects meeting the definition of military objective contained in Article 52(2), of Additional Protocol I.”<sup>28</sup>

This boils down to the conclusion that morale bombing is acceptable as an ancillary to targeting in conformity with IHL, but not as an end in itself. Again, everything seems to hinge on the right intent of the commander.

At most, we may infer from the Hays Parks quote that the civil-political objective of the war is negatively defined in IHL rules. The cognitive structures in central norms on civilian protection are in themselves not sufficient to cogently explain what function civilian casualties possess in the process of violent appeasement. This obscurity can only be addressed by a theory explaining how casualties are related to the civil-political objective of winning a war. If we understand rational war fighting bound by IHL as a means of keeping the use of violence as short and controlled as possible, a vista to such a theory opens. Based upon a survey of anthropological literature, French philosopher and literary critic René Girard has analysed such ‘curative and preventative procedures’ against unfettered violence as being

“imbued with religious concepts – both the rudimentary sacrificial rites and the more advanced judicial forms. Religion in its broadest sense, then, must be another term for that obscurity that surrounds man’s efforts to defend himself by curative or preventative means against violence.”<sup>29</sup>

This obscurity perseveres in the contemporary age of secularisation, and can be tracked in the functioning of legal institutions:

“It is that enigmatic quality that pervades the judicial system when that system replaces sacrifice. This obscurity coincides with the transcendental effectiveness of a violence that is holy, legal, and legitimate successfully opposed to a violence that is unjust, illegal, and illegitimate.”<sup>30</sup>

I would like to emphasise two aspects, which shall prove relevant for the question raised in this article. First, Girard speaks of *violence*<sup>31</sup>; and, more particular, of violence

28 *Supra*, p. 115.

29 R. Girard, *Violence and the Sacred* (John Hopkins University Press, Baltimore, 1977), p. 24.

30 *Ibid.*

31 More than a century ago, Sorel remarked that the “problems of violence still remain very obscure”, which can be taken as an involuntary confirmation that the central condition for the functioning of generative violence thrived in 1906, as well as in 1969, when Arendt approvingly quoted Sorel. G. Sorel, *Reflections on Violence*, “Introduction to the First Publication” (New York: 1906, 1961), 60, as quoted in Arendt, *On Violence* (Harcourt & Brace San Diego, 1969) p. 35.

as a way of keeping man's violence within bounds. This suggests that bounded violence is to be distinguished from violence bounding it. Projected back upon my argument, it implies that the obscurity of IHL rules should be seen not merely as products of inconsistent drafting, but as productive sites in a transcendental order producing the right form of violence in warfare. This violence would then be capable of subduing an everlasting and anarchic violence, of terminating the war and bringing forth peace.

Second, Girard emphasises the role of obscurity and enigma, and links it to the law. Obscurity possesses a distinct function in his analysis of violence, and Girard finds it to be present even in cases where violence could be successfully established as 'holy, legal and legitimate', thereby attaining 'transcendental effectiveness'. As IHL represents a 'curative and preventative means', it falls neatly within the Girardian use of the term 'religion'. Provocative to some, this could be discarded as a definitional caprice, were it not for the suggestion that religion puts obscurity into productive use. If we follow Girard, and read IHL as religion, its incompleteness, its obscurity turns into a necessary precondition for the law's 'transcendental effectiveness' in containing violence. That suggestion would be difficult to accept for lawyers used to thinking in terms of predictability.

So what is Girard's point? A foundational assumption in his work is that we are driven by a desire of that which our fellow humans desire. This *mimetic desire* spreads, spawns rivalry, conflict and, ultimately, violence. The use of violence does not end the cycle of desire, though. Rather, it sets off retributive violence, which triggers further retribution, and so forth. In the long run, this *contagious* violence will threaten the continued existence of a community. In *Violence and the Sacred*, Girard explores a coping mechanism. By directing intra-community violence onto a surrogate victim and sacrificing him or her, this threat is externalised, eliminated with the victim, and the community emerges reappeased. It would be a mistake, though, to project this back upon IHL by understanding one warring state as a Girardian community, and its enemy as a potential sacrificial victim. This would not take into account the centrality of distinguishing between enemy combatants and enemy civilians, and the importance of killing members of the 'right' category. Rather, one should see the warring states as members of a community of states, which has drawn up treaties to regulate and fortify their communal affairs. The appeasement produced by the sacrifice of a surrogate victim is beneficial not only for the victorious state, but also for its subdued enemy, because both are saved from a perpetuating and unfettered violence.

Girard describes this victim as a *scapegoat*, who is a replacement for the potential victims of retributive violence, and innocent in the sense that he or she bears no responsibility for the escalating violence.<sup>32</sup> The residual group of civilians that may be lawfully killed under IHL are a materialisation of the scapegoating mechanism in IHL. Civilian casualties are characterised by their innocence, that is, their political

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32 "[S]ociety is seeking to deflect upon a relatively indifferent victim, a "sacrificeable" victim, the violence that would otherwise be vented on its own members, the people it most desires to protect." Girard, *Violence and the Sacred*, p. 4. "The celebrants" of the sacrificial process "do not and must not comprehend the true role of the sacrificial act. The theological basis of the sacrifice has a crucial role in fostering this misunderstanding. It is the god who supposedly demands the victims; he alone, in principle, who savors the smoke from the altars and requisitions the slaughtered flesh. It is to appease his anger that the killing goes on, that the victims multiply." Girard, *supra* note 29, p. 7.

incapacity, as Helen M. Kinsella has argued in an impressive genealogy of the conception of civilians in IHL.<sup>33</sup> They are outsiders in the community of states, because their fate does not affect the civil-political objective of warfare – that is, appeasement.

The ‘vitality as an institution’ of sacrificial mechanism, Girard believes, “depends on its ability to conceal the displacement upon which the rite is based”<sup>34</sup> – that is, the displacement of violence from the real victims of retributive violence to the scapegoat victim. The impulse of jurists to ‘fill out the void’ left by the letter of the law (exemplified in the excess of the ICRC Commentary discussed in Section 2.3 above) or by conjuring *lex ferenda* might be one of the collusive strategies covering up the displacement upon which the rite is based. Filling out the void is the lawyer’s contribution to the act of scapegoating. This displacement is the source of the “obscurity that surrounds man’s efforts to defend himself by curative or preventative means against violence” discussed above.

It provides the link to religion, and the concept of the *sacred*, which Girard forges into a centrepiece of his theory. The scapegoat, the sacrificial victim, appears to be simultaneously the cause and resolution of conflict, and his killing leads to the ‘miraculous consequence’ of peace. How can this be?

“If it is true that the community has everything to fear from the sacred, it is equally true that the community owes its every existence to the sacred. For in perceiving itself as uniquely situated outside the sphere of the sacred, the community assumes that it has been engendered by it; the act of generative violence that created the community is attributed not to men, but to the sacred itself. Having brought the community into existence, the sacred brings about its own expulsion and withdraws from the scene, thereby releasing the community from its direct contact. ... A total separation of the community and the sacred would be fully as dangerous as a fusion of the two. Too great a separation can result in a massive onslaught of the sacred, a fatal backlash; then, too, there is always the risk that men will neglect or even forget how to implement the preventive measures taught them by the sacred itself as a defense against its own violence.”<sup>35</sup>

33 “To be innocent in war, in the terms set by the laws of war, is to be deficient or lacking in a multitude of ways that in the end, implicitly, if not explicitly, cites an incapacity for politics. Indeed, the ‘harmlessness’ of the civilian in the 1949 IV Convention and Additional Protocol I continues to cite this incapacity if, attending to Carl Schmitt, we identify harmlessness with nonpolitical. Accordingly, the rights and protections offered cannot be, as Jacques Rancière refers in regard to human rights, ‘experienced as political capacities.’ 112 Indeed, what I illustrated is that it is *not* political capacities which inform the extension of rights and protections of international humanitarian law, but is instead a celebration of Christian mercy, charity, and love, and a valorization of suffering, distress, and weakness. Equally significant, an incapacity for politics is also, at least for Aristotle, an incapacity to become fully human. This is not benign, for it shows how the rights and protections of international humanitarian law are genealogically derived from or grounded in what some might call ‘subhumanity’. What this portends is that international humanitarian law requires and produces ‘subhumanity’ as the predicate for extending recognition of its rights or offering its protections.” H. M. Kinsella, “Gendering Grotius: Sex and Sex Differences in the Laws of War”, 34 *Political Theory* 2006 pp. 161–191, p. 185.

34 Girard, *supra* note 29, p. 285.

35 Girard, *supra* note 29, p. 282.

For this reason, Girard's theory is a theory of generative violence, a violence engendering the community, and, in the moment of crisis, re-engendering it miraculously through the sacrificial act.<sup>36</sup> To conceal the displacement of the victim role is essential for its functioning. This displacement is effectively hidden by the sacrificial rite, and integrated into belief structures, into ideas of a divine visitation of the community.<sup>37</sup> The habit of describing the dead civilian scapegoat as a 'casualty' bears witness to how the sacrificial rite of targeting clears involved individuals of responsibility and allocates it with the divine instead. This is an essential precondition for appeasement, both according to the logic of the sacred described by Girard, and the logic of an economy of warfare. The suffering of the scapegoat casualty is valorised. In constructing a chain of equivalence between that scapegoat casualty and military advantage is precisely what IHL sets out to achieve.

#### 4. Conclusions

IHL is a body of norms offering violent ways of preventing and curing violence. I have attempted to understand the objective of IHL in a novel way, drawing on its political-theological core. In a divine economy of force, it entreats the sacred to annihilate an innocent, politically incapacitated civilian casualty in exchange for the cessation of violence and the secured existence of the community of state sovereigns. Those hoping for a more human IHL should perhaps hope for a less divine one instead.

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36 "Polarized by the sacrificial killing, violence is appeased. It subsides. We might say that it is expelled from the community and becomes part of the divine substance, from which it is completely indistinguishable, for each successive sacrifice evokes in diminishing degree the immense calm produced by the act of generative unanimity, by the initial appearance of the god. Just as the human body is a machine for transforming food into flesh and blood, generative unanimity is a process for changing bad violence into stability and fecundity." Girard, *supra* note 29, pp. 280–281.

37 "All sacrificial rites are based on two substitutions. The first is provided by generative violence, which substitutes a single victim for all the members of the community. The second, the only strictly ritualistic substitution, is that of a victim for the surrogate victim. As we know, it is essential that the victim be drawn from outside the community. The surrogate victim, by contrast, is a member of the community. Ritual sacrifice is defined as an inexact imitation of the generative act." Girard, *supra* note 29, p. 284.