challenge to the thinking of IHL practitioners today[12] and deserves serious study by current judge advocates. This article seeks to summarize Parks' work to draw lessons from his experience.

> Parks often notes in his published work that lawyers make the mistake of seeing the law through the lens of the conflict at hand rather than broader historical experience across the conflict spectrum.

ACADEMIC PUBLICATIONS

The academic work of Parks generally falls into four categories: (1) historical lessons; (2) means and methods of warfare; (3) IHL pedagogy; and (4) criticism of efforts to change IHL.

Historical Lessons

Because IHL has significant impact on the lives of people, it is important to place it in the frame of real experience, not abstract hypotheticals. Parks emphasizes life experiences, and though his are too numerous to adequately summarize here, he has written on his participation in various operations, including the Vietnam War, the 1986 Libya airstrike,[13] the Gulf War,[14] Afghanistan,[15] and many others.

Means and Methods of Warfare

Parks is best known for his expertise on weapons law, an issue that gained attention during the conflict in Vietnam.[16] The United States received significant international criticism for its use of certain weapons, including napalm, cluster munitions, flechettes, blast munitions, and even the small-caliber M-16 rifle.[17] This criticism led to the promulgation of a DoD directive mandating the legal review of new weapons to ensure compliance with U.S. treaty obligations.[18] This 1974 directive pre-dates the treaty obligation of Article 36 to the First Additional Protocol to the Geneva Conventions (Protocol I) by nearly four years.[19] Today Article 36 obligates 174 States to follow substantially the same requirement as the 1974 directive.[20] Yet very few States are in fact conducting Article 36 reviews.[21]

Some of Parks' weapon reviews have been released to the public,[22] while others have been the catalysts for academic publications:[23]

- **1997:** Parks wrote that use of the shotgun is permitted in war.[24]
- **2003:** Parks addressed controversy over special operators' wearing of non-standard uniforms.[25] On this subject he came to a nuanced conclusion, stating that in unusual circumstances combatants may wear non-standard uniforms or no uniform when justified by military necessity, so long as it is not perfidious.[26]
- **2006:** Parks demonstrated from States' use of the explosive 12.7mm .50-caliber round that the **1868 St. Petersburg Declaration** prohibition of exploding projectiles is obsolete.[27]
- **2010:** Later, Parks used the **2010 Kampala amendments** to the Rome Statute as an opportunity to clarify the law regarding expanding bullets,[28] an issue of significant confusion for decades.

Expanding Bullets

The **1899 Hague Declaration Concerning Expanding Bullets** prohibits the use of "bullets which expand or flatten easily in the human body."[29] The treaty is expressly limited to armed conflict wherein all parties to the conflict are also parties to the treaty.[30] But since that time, States have only rarely used expanding bullets.[31] In 2010, signatory parties to the Rome Statute attempted to make use of expanding bullets a war crime in all conflicts.[32] Parks pointed out that the elements to the offense require the prosecutor to establish the user intended or knew the bullet would "uselessly aggravate suffering or the wounding effect."[33] This element leads into Parks' nuanced understanding. Expanding bullets are not prohibited as a class of weapons. Rather, individual bullets must be analyzed on a case-by-case basis,

to consider whether the projectile may cause unnecessary suffering.[34] Parks acknowledges here that, due to the nature of expanding bullets, they "would be limited to exceptional circumstances which justify pre-planned specific *modi operandi*."[35] However, he is not afraid to say that there is such a thing as necessary suffering to combatants.[36] A trade-off may exist between the protection of civilians and unnecessary suffering to combatants. Where expanding bullets offer increased accuracy, increased stopping power, and reduced risk of over-penetration or ricochet, they may be permitted.[37]

Legal Review of Weapons

In discussing weapons law more generally, Parks explains that legal reviews of weapons usually consider first whether a specific treaty prohibits use of that weapon, and second whether the weapon is prohibited by general considerations, specifically unnecessary suffering or indiscriminate effects. This analysis follows the ICJ's Nuclear Weapons Advisory Opinion.[38]

But understanding of what constitutes unnecessary suffering remains illusory and contentious.

But understanding of what constitutes unnecessary suffering remains illusory and contentious. In the late 1970s, many States and non-governmental organizations (NGOs) began a series of attempts to clarify the rule and attach "some flesh to the heretofore bare-bone prohibition."[39] These attempts each failed for various reasons[40] and left States with ambiguity over what constitutes unnecessary suffering.

In 1997, Parks noted "neither superfluous injury nor unnecessary suffering has been defined."[41] The same year the ICJ had only just defined unnecessary suffering[42] as "a harm greater than that unavoidable to achieve legitimate military objectives."[43] But this definition has not proven sufficiently clear for application.[44] Instead Parks proposes a test that asks if "the suffering caused is out of proportion to the military advantage to be gained."[45] Parks' test holds that a weapon is not prohibited unless it causes suffering "clearly disproportionate to the intended objective."[46] This position, embraced by the DoD Manual, provides a workable definition.[47]

Certain Conventional Weapons (CCW)

Parks' work with weapons law allowed him to participate in the drafting of the **CCW** and its protocols over many years. The CCW ultimately led to prohibitions or restrictions on non-detectable fragments,[48] land mines and booby traps,[49] incendiary weapons,[50] blinding lasers,[51] and explosive remnants of war.[52]

Parks describes the prohibition of incendiary weapons as the raison d'être for the CCW, and the third protocol is perhaps the only modern law of war treaty he praises in published work.[53] This is partly because it seeks to protect civilians rather than combatants.[54] **CCW Protocol III** is sometimes misunderstood as a general prohibition on incendiary weapons.[55] In fact, it merely places reasonable restrictions on use, consistent with State practice.[56]

Throughout the CCW and other treaty-making processes, Parks sought to maintain balance between military and humanitarian goals.

Throughout the CCW and other treaty-making processes, Parks sought to maintain balance between military and humanitarian goals. Forming treaties, he argues, is not like litigation.[57] Success is "a matter of finding the balance between legitimate military necessity and…providing protection" for civilians.[58] These ideas remain relevant to modern treaty-making efforts, where some parties aggressively seek to prohibit lethal autonomous weapon systems,[59] the use of explosive weapons in populated areas (EWIPA),[60] the targeting or military use of schools,[61] all uses of nuclear weapons,[62] weapons in space,[63] and others. Parks might respond to these proposed agreements by arguing that if modern-day efforts to alleviate the sufferings of war are to succeed, they should perhaps emphasize compliance with

existing law, rather than creating new rules that present low probability of long-term success.[64]

Advising and Teaching IHL

Far from the UN or even the Pentagon, Parks sees a critical role for lawyers to advise commanders on tactical operations.[65] Lawyers have not always been welcomed to advise on military operations. But the tragedy of **My Lai** was a watershed moment wherein the U.S. identified a need for judge advocates to assist commanders in developing programs that were preventive in nature.[66] As commanders began to use judge advocates more, they often found them to be enablers rather than obstacles to military operations.[67]

> Lawyers have not always been welcomed to advise on military operations.

Since the Vietnam conflict, judge advocates have also increasingly trained tactical forces. Such training is not just calculated to ensure an accurate understanding of the law; it is also to convince forces they *should* follow the law.[68] This is implicitly understood by most IHL instructors, who often begin by attempting to ground IHL in ideas consistent with morality, chivalry, or religion.[69] Parks has no patience for such lofty ideas, all of which he describes as inaccurate, irrelevant, or both.[70]

These ideas received attention in a 2004 International Committee of the Red Cross (ICRC) study of IHL compliance in a publication titled *The Roots of Behaviour in War*.[71] The report concluded that IHL compliance was based primarily on group conformity and obedience to authority.[72] Consequently, the report recommended teaching IHL as a purely legal issue: that is, you must obey the law because it's the law.[73] But the issue was revisited in 2018 through an updated report, *The Roots of Restraint in War*.[74] The updated publication is more nuanced, but it may be seen broadly as a reversal of the 2004 position,[75] emphasizing "a strong moral compass" and correlation between IHL and religious principles.[76]

Though Parks would avoid that approach, he does not embrace a purely legalistic approach, nor does he place humanitarian concerns above military necessity. He too argues, "no program can survive simply because 'it's the law.'"[77] But in his view, "one must accept and acknowledge that war is not nice. It is a very bloody business."[78]

We follow IHL because (1) we are a nation that believes in the rule of law, (2) adherence to the rule of law is what our country expects of us, and (3) following the law is consistent with military efficiency and professionalism.[79]

Criticisms

Another substantial portion of Parks' academic writings may be described as criticisms of new treaties or proposals, particularly the work of the ICRC. For example, in 2010, Parks published a review of the ICRC's Direct Participation in Hostilities Study (DPH Study), subtly titled: "No Mandate, No Expertise, and Legally Incorrect."[80] He was also very critical of the ICRC's Customary International Law (CIL) study, which he described as "a brief for past and future ICRC agenda items."[81]

> The Manual states that many situations require "case-by-case analysis of the specific facts."

On the DPH Study, Parks was one of several experts invited to participate, only to later withdraw and request to have his name removed from the publication.[82] The U.S. position on the ICRC DPH Study is partially clarified by the DoD Manual, which rejects many of the ICRC's concepts.[83] But the Manual states that many situations require "case-by-case analysis of the specific facts."[84] This approach of "I know it when I see it," is common of the DoD Manual, which seeks operational flexibility. Many young judge advocates quickly refer to the Manual on a broad range of issues, perhaps without understanding the history behind it. Parks began working on the DoD Manual in 1996.[85] He retired in 2010, at which time the Manual was on the proverbial "one-yard line."[86] A series of changes followed his departure,

and consequently, Parks has directed his criticism even to the Manual we have today. His criticism is not so substantial as to question its accuracy. But it causes the reader to infer that Parks may point to today's judge advocates and say we lack a broad understanding of the law of war; that our limited experience may be an obstacle in a future "total war."[87]

For Air Force judge advocates today, Parks' *magnum opus* is his 1990 article from the *Air Force Law Review*: "Air Wars and the Laws of War" (hereinafter *Air Wars*). The article provides a 225-page historical analysis of the law before and during World War II [88] and flows into what can only be described as harsh criticism of the First Additional Protocol to the Geneva Conventions (Protocol I).[89] *Air Wars* is extremely well-researched[90] and clever.[91] His narrative shows that the law of war before World War II was primitive, particularly regarding air warfare.[92] In the wake of World War II, a series of treaties created clear restrictions that were pragmatic and balanced, largely because, according to Parks, the drafters were experienced in war.[93] Such balance stands in stark contrast to Protocol I.

In the wake of World War II, a series of treaties created clear restrictions that were pragmatic and balanced, largely because, according to Parks, the drafters were experienced in war.

The U.S. signed Protocol I in December, 1977, then delayed submitting the treaty to the Senate for ratification. [94] Parks was then working as the Head of the Law of War Branch for The Judge Advocate General of the Navy.[95] He became the Special Assistant to The Judge Advocate General of the Army for Law of War Matters in July, 1979,[96] and thereafter played a significant role in the internal review of Protocol I, including a comprehensive review that led to a formal Joint Chiefs of Staff recommendation in 1985 not to ratify.[97] The following year the White House decided it would not present Protocol I to the Senate.[98]

Parks' criticisms of Protocol I are too numerous and too detailed to provide an adequate review here. Striking right at the foundation, Parks argues that the primary motive of States in creating Protocol I was a desire of inferior military powers, supported by misguided NGOs, to use the law as a "vehicle for the conventional disarmament of the superpowers."[99] Parks tells of a draft rule proposed by Togo at the first Protocol I Diplomatic Conference, wherein a nation with an air force would not be permitted to use it in an armed conflict with a nation without an air force.[100] At the time, Togo's air force was obsolete to the point of non-existence.[101] Similarly, he quotes Jean Pictet of the ICRC, who reportedly became frustrated with the U.S. delegation and shouted, "if we cannot outlaw war, we will make it too complex for the commander to fight!"[102] Among Park's many substantive objections to Protocol I, two are worth noting here: (1) Article 51 and direct participation in hostilities, and (2) proportionality.

Direct Participation in Hostilities

Article 51(2) states that civilians shall not be the object of attack "unless and for such time as they take a direct part in hostilities."[103] Parks' objection to this "revolving door"[104] has echoed through the decades. He argues that Article 51 is a departure from customary international law,[105] is absurd in application, and results in more risk to civilians.[106] Parks gives a hypothetical to demonstrate his points:

> A civilian is driving a military truck filled with ammunition towards his front lines. If the civilian dies incidental to the attack of the truck, there is no crime; but if the driver is attacked directly, the soldier who has fired at him has committed a violation of Article 51(3) and 85(3)(a) and must be brought to trial for a war crime.[107]

From a historical perspective, the hypothetical is fascinating because the ICRC used precisely the same one in its DPH study almost 20 years later.[108] The 2009 DPH Study provided a distinction between temporary loss of protection and continuous or status-based loss,[109] something

Parks had not considered in 1990.[110] Further, the ICRC provided three elements to qualify as a direct participant in hostilities:[111] (1) threshold of harm, (2) direct causation, and (3) belligerent nexus.[112] Analyzing the hypothetical under these elements, the ICRC concluded the driver "would almost certainly have to be regarded …as direct participation in hostilities."[113] The example reveals something of the evolution of IHL. Parks' criticism is justified, and it clearly influenced the U.S. approach, but experience has adjusted our understanding of express law.

Parks argues that protection of civilians should be a shared obligation.

Proportionality

Articles 51 and 57 of Protocol I prohibit attacks which may be expected to cause incidental harm which would be excessive in relation to the concrete and direct military advantage anticipated.[114] In *Air Wars*, Parks criticizes this rule no less than 12 times, calling it ambiguous, impractical, and a reversal of responsibility for civilian casualties. [115] Historically, "collateral civilian casualties resulting from the attack of a legitimate target were not regarded as the responsibility of an attacker," but rather the defender or civilians themselves.[116] Parks argues that protection of civilians should be a shared obligation.[117] Protocol I shifts responsibility "exclusively onto an attacker,"[118] which results in weaker forces exploiting the law for tactical advantage. Parks argues shifting responsibility to the attacker results in more risk to civilians.[119]

Whether proportionality is easy to apply is another question, but today it is not controversial.[120] The DoD Manual repeats the rule multiple times in various contexts.[121] Targeting doctrine also repeats the rule,[122] and most IHL practitioners today are surprised at Parks' criticism.[123] Parks' concerns about ambiguity and technological limitations have been, if not resolved, at least substantially mitigated to allow application.[124]

On respective responsibility, experience has proven that weak enemies do respond to incentives by endangering civilians.[125] Parks would almost certainly argue that Articles 51 and 57 have created that environment, making tragic events inevitable.[126] Yet if an attacking force becomes inured to the deaths of civilians habitually used as "human shields" by the defending force, arguing that the defending force had greater responsibility seems extremely unlikely to advance the primary goal of protecting civilians. It also seems obtuse to place responsibility on civilians to protect themselves from aerial bombardment. Parks' feelings on this subject in 1990 were largely colored by his experience in Vietnam and Operation ROLLING THUNDER, where the enemy often used civilians as human shields.[127] In December, 2019, his opinion had not changed, but had been tempered, and when asked today he simply says that all parties are responsible for civilian casualties.[128]

CONCLUSION

In 1986 and 1987, Australia and the United States conducted joint war games, which concluded a military commander "adhering to the requirements of Protocol I would be defeated by an opponent not following them."[129] Parks cites this as a major reason Australia postponed ratification shortly before *Air Wars* was published.[130] Australia did ratify in 1991[131] with no reservations.[132] Moreover, the U.S. and Australia have since participated together in multiple combat operations with only minor issues of interoperability, implying Parks' prediction has not come to fruition. But to be fair, his ominous prophecy applied only to "mid-to high-intensity conflict,"[133] and as they relate to a proverbial "total war," Parks' arguments remain untested.

Parks lost his proportionality argument in the long run. Reading his work 30 years later reveals that he got some things wrong. It also shows that IHL in general, and particularly our understanding of it, tends to shift over time. Nonetheless, Parks' work deserves serious study by judge advocates today. His work provides insight, both as a challenge to modern-day thinking, and as a plethora of practical guides to important areas of IHL. As Parks might say, "the law does not exist in a vacuum," and his work allows us to peek outside our ephemeral bubble of experience.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **U.S. Naval Institute:** W. Hays Parks
- **Lawfare Blog:** Hays Parks on the Demise of the DoD Law of War Manual

ENDNOTES

[1] Sir Adam Roberts, *Land Warfare: From Hague to Nuremburg, in* The Laws of War: Constraints on Warfare in the Western World 117 (Sir Michael Howard, George J. Andreopoulos & Mark Shulman eds., 1994)

[2] Professor Carrie McDougall, Address at the Asia-Pacific Centre for Military Law (August 2018).

[3] Statute of the International Court of Justice, United Nations Charter Annex art. 38, 26 June 1945.

[4] *W. Hays Parks*, U. Va. Ctr. for Nat'l Sec. L., https://cnsl.virginia.edu/w-hays-parks (last visited 3 January 2020) [since being cited, this link appears to no longer be available]. Very recent expert commentary illustrates Parks' powerful influence over IHL. Earlier this year controversy erupted over journalistic descriptions of the killing of Major General Qassem Soleimani as an assassination. *See* Shane Reeves & Winston Williams, *Was the Soleimani Killing an Assassination?*, Lawfare, 17 January 2020, https://www.lawfareblog.com/was-soleimani-killing-assassination. The authoritative voice on the subject was a 1989 memorandum written by Parks, which provided a clear definition and helpful explanation of the prohibition of assassination in international law. *See id.*

[5] Telephone Interview with W. Hays Parks (18 December 2019). Parks was commissioned in the Marine Corps immediately after law school. After significant training, he volunteered to serve in Vietnam, and was immediately sent on a 14-month deployment where he served as a prosecutor and infantry commander. *Id.* Parks was present and responsible for base defense during the Tet offensive and experienced significant combat events. *Id.*

[6] W. Hays Parks, *The Law of War Adviser*, 31 Judge Advocate General J. 1 (1980).

[7] *W. Hays Parks*, *supra* note 4.

[8] W. Hays Parks, National Security Law in Practice: The Department of Defense Law of War Manual, Address to the American Bar Association (8 November 2010). The manual was ultimately published four-and-a-half years after his address. U.S. Dep't of Def., Department of Defense Law of War Manual (June 2015, updated December 2016) [hereinafter DoD Law of War Manual]. In describing his 16-year effort, Parks said he attempted to balance the competing ideas expressed in the adages of "the best is the enemy of the good" while "speed is great, but accuracy is better." *Id.*

[9] *See* W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 Int'l Rev. Red Cross 548 (1990).

[10] *Id.*

[11] Parks, *supra* note 8.

[12] *See, e.g.*, W. Hays Parks, *Air Wars and the Law of War*, 1 A.F. L. Rev. 1 (1990).

[13] W. Hays Parks, *Lessons from the 1986 Libya Airstrike*, 36 N.E. L. Rev. 4 (2002). Among other legal principles articulated by Parks in 1986 was the idea that "the obligation to reduce collateral civilian casualties…is the responsibility of all parties…. Civilians who choose to remain near a target do so at an assumed risk." *Id.* at 761.

[14] W. Hays Parks, *War Crimes in the Gulf War*, 66 St. John's L. Rev. 73 (1992); W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 Dick. J. Int'l L. 3 (1992). Parks also provides valuable insight in describing his experience in dealing with nearly 70,000 prisoners of war. *See id.*

[40] Some proposed a weapon analysis program called CUSHIE for "causes unnecessary suffering or has indiscriminate effects." *Id*. at 519. When this attempt failed the ICRC initiated its effects-based SIrUS Project for "superfluous injury or unnecessary suffering." *Id*. at 527. The ICRC adopted an effects-based analysis that looked not at the intended normal effect, but solely at the potential wounding effect of various weapons. *Id*.

[41] Parks, *supra* note 22, at 18.

[42] It is worth noting here that although "unnecessary suffering" and "superfluous injury" are often used synonymously, including in the ICJ Advisory Opinion, Parks argues that "superfluous injury" is the more appropriate term to use, as it more closely resembles the French term, which was the original language of the 1907 Hague Convention. *Id* at 18.

[43] Legality of the Threat or Use of Nuclear Weapons, *supra* note 38.

[44] This assertion is supported by the author's experience in reading hundreds and writing dozens of legal reviews of new weapons for the Australian Defence Force between 2017-19.

[45] Parks, *supra* note 22 at 18.

[46] *Id*.

[47] DoD Law of War Manual, *supra* note 8, para. 6.6.1.

[48] United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) Protocol on Non-Detectable Fragments (Protocol I), 10 October 1980, 1342 U.N.T.S. 137.

[49] CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 10 October 1980, 2048 U.N.T.S. 93.

[50] CCW Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 10 October 1980, 1342 U.N.T.S. 171.

[51] CCW Protocol on Blinding Laser Weapons, (Protocol IV) 13 October 1995, 1380 U.N.T.S. 370. Parks's involvement in Protocol IV is a fascinating history in itself. He was a lead negotiator for the U.S. at the UN Conferences and in 1995, regrettably found his name on national headlines after he wrote an inflammatory memo that leaked to the media. See Bradley Graham, *Accusatory Memo has the Pentagon in Full Retreat*, Wash. Post, 1 October 1995, https://www.washingtonpost.com/archive/politics/1995/10/01/accusatory-memo-has-the-pentagon-in-full-retreat/2ae058c2-3cd9-4567-86e3-a098710ca13d/. Parks has also written that Protocol III was futile in that it prohibited a non-existent weapon. *See* Parks, *supra* note 16. However, the restriction in Protocol III has limited use of lasers on the battlefield today.

[52] CCW Protocol on Explosive Remnants of War (Protocol V), 28 November 2003, 2399 U.N.T.S. 100. Several failed attempts were made to prohibit other weapons, such as cluster munitions, blast weapons, small-caliber projectiles, directed-energy weapons and others. *See* Parks, *supra* note 16, at 523.

[53] W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 Int'l Rev. Red Cross 548 (1990). This may be partly owing to the fact that he was a principal author. *See id*.

[54] Parks, *supra* note 16, at 518. The others are CCW Protocol II, prohibiting landmines and booby-traps. *Id*., and CCW Protocol V, *supra* note 52.

[55] *See, e.g.*, ICRC CIL Study, *supra* note 24, at Rule 85.

[56] *See* CCW Protocol III, *supra* note 50.

[57] Parks, *supra* note 16, at 535.

[58] *Id*.

[59] Since 2013, the CCW States Parties have been discussing lethal autonomous weapon systems (LAWS). United Nations, *Background on Lethal Autonomous Weapons Systems in the CCW* (2017), https://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument. These discussions led to a series of Informal Meetings of Experts in Geneva to discuss a possible ban. *Id*. In 2016 at the Fifth CCW Review Conference, a Group of Government Experts (GGE) was created to discuss challenges and issues related to LAWS, including a possible ban. The UN GGE on LAWS has met four times. United Nations, *2019 Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS)* (2019), https://www.unog.ch/80256EE600585943/(httpPages)/5535B644C2AE8F28C1258433002BBF14?OpenDocument. The UN GGE meetings include a range of opinions, from the Human Rights Watch Campaign to Stop Killer Robots to the resistant attitudes of Russia. Thus far no broad agreement has been reached.

[60] For many years the ICRC and some States, including Germany, have sought to limit or prohibit the use of explosive weapons in urban settings. Judith Kiconco, Address to the ICRC's Open Session of the Peace and Security Council on the Protection of Civilians Against Use of Explosive Weapons in Populated Areas (17 July 2019), https://www.icrc.org/en/document/ewipa-icrc-statement-use-explosive-weapons-populated-areas. Multi-lateral discussions have taken place, for example, as a side-event to the UN General Assembly's First Committee. Ruben Nicolin, *Strengthening the Protection of Civilians from the Use of Explosive Weapons in Populated Areas* (29 October 29 2018), https://www.un.org/disarmament/update/strengthening-the-protection-of-civilians-from-the-use-of-explosive-weapons-in-populated-areas/. However, broad consensus on the subject remains elusive.

[61] The Global Coalition to Protect Education from Attack, an NGO, has, since 2015, sought to obtain State signatures on a non-binding Declaration that claims to prevent the use or targeting of schools in armed conflict. Global Coalition to Protect Education from Attack, *Safe Schools Declaration and Guidelines* (2019), http://www.protectingeducation.org/safeschoolsdeclaration. To date 89 States have signed. *Id.*

[62] As of 2019, 48 states had signed The Treaty on the Prohibition of Nuclear Weapons, though it has not yet entered into force, as 50 signatures are required. Treaty on the Prohibition of Nuclear Weapons, 7 July 2017. The treaty is the result of the ICRC's "humanitarian initiative" to prohibit completely the possession or use of nuclear weapons for all States. Of the 48 States that have signed, none are nuclear power States.

[63] Since 2008, and amended in 2014, China and Russia have sponsored a draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (PPWT). The U.S. and others have consistently resisted these efforts for several reasons, including suspicion over the motives, and perhaps hypocrisy of the drafters. Ambassador Robert Wood, Address to the United Nations General Assembly (20 October 2017), *available at* https://usun.usmission.gov/explanation-of-vote-in-the-first-committee-on-resolution-l-54-further-practical-measures-for-the-prevention-of-an-arms-race-in-outer-space/

[64] Parks has often argued that for a law of war treaty to succeed it should follow the following rules: (1) Treaties that stringently regulate the use of weapons are less effective than arms control agreements, but effective weapons are unlikely to be banned. W. Hays Parks, *Making Law of War Treaties: Lessons from Submarine Warfare Regulation* 75 Int'l L. Stud. 339, 365 (2000). (2) Beware those who claim humanitarian motives. *Id.* Treaties with emotional appeal are likely to offer short-term political gain, but have less chance of long-term respect. *Id.* (3) The law of war cannot be used to cancel another nation's strengths or mitigate against a nation's weakness. *Id.* at 366. Finally, difficult issues seldom become easier to solve with the passage of time. *Id.* at 367.

[65] W. Hays Parks, *The Law of War Adviser*, 31 Judge Advocate General J. 1, 6 (1980).

[66] *Id.* at 19.

[67] *See* W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 Dick. J. Int'l L. 3, 399 (1992). Parks warns that "attention to law of war implementation and training is directly proportionate to the individual staff judge advocate's or commander's interest in the law of war." Parks, *supra* note 65, at 23-24.

[68] W. Hays Parks, *Teaching the Law of War: A Reprise*, 3 IDF L. Rev. 2007-2008.

[69] *Id.* at 11-13. Related to this point, John Bellinger very recently emphasized the need to ensure IHL is not viewed as "politically correct or Lilliputian infringements on U.S. sovereignty." John Bellinger, *Attacking Iran's Cultural Sites Would Violate the Hague Cultural Property Convention*, Lawfare, 5 January 2020, https://www.lawfareblog.com/attacking-irans-cultural-sites-would-violate-hague-cultural-property-convention.

[70] *Id.* As a young Captain, the present author delivered dozens, perhaps more than 100, IHL briefings to tactical forces in Afghanistan. Some of these briefings included discussion of IHL's correlation with morality and honor, with mixed results. Generally, the author found a reverse correlation between combat experience and the level of interest in such discussions. Parks, with his own combat experience, would not be surprised.

[71] Daniel Muñoz-Rojas & Jean-Jacques Frésard, ICRC Ref No. 0853, The Roots of Behaviour in War: Understanding and Preventing IHL Violations (2004).

[72] *Id.*

[73] *Id.*

[74] Fiona Terry & Brian McQuinn, ICRC Ref No. 4352, The Roots of Restraint in War (2018).

[75] *Id.* at 32.

[76] *Id.* at 32, 34; *see also* Dr. Helen Durham, Address to Asia Pacific Centre for Military Law (October 2018).

[77] Parks, *supra* note 68, at Annex.

[78] *Id.* at 11.

[79] *Id.* at 14-15.

[80] W. Hays Parks, *Part IX of the ICRC 'Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 NYU J. Int'l L. & Pol. 769 (2010).

[81] W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, Address to the American Society of International Law (2005).

[82] Parks, *supra* note 80, at 784. Professor Michael Schmitt was similarly situated, and he likewise published harsh criticism of the ICRC's DPH Study. *See* Michael Schmitt, *Perspectives on the ICRC Interpretive Guidance: Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. Int'l L. & Pol. 697 (2010). Yet, because the study ostensibly provides a specific test to resolve an ambiguous rule, it is nevertheless used often by allies.

[83] *See* DoD Law of War Manual, *supra* note 8, para. 5.8.4.

[84] *Id.*

[85] W. Hays Parks, *Update on the DoD Law of War Manual*, Address to the American Bar Association 22nd Annual Review of the Field of National Security Law 2 (2012).

[86] *Id*. at 3.

[87] "Total War" is a phrase Parks uses often in his article *Air Wars and the Law of War*, 32 A.F. L. Rev. 1, 51 (1990). He does not define the term, but uses it to describe a major conflict where the survival of the state is at stake.

[88] *See generally id*.

[89] *See id*. at 2-3.

[90] *See e.g., id*. at n.1, wherein Parks attempts to summarize the total number of civilian deaths during World War II as a result of aerial bombardment. *See also, id*. at 39, wherein Parks references a 1936 German military manual to show Germany's historical position on targeting war-sustaining objects.

[91] *See e.g., id*. at 74-75. Parks provides here an analogy from Winston Churchill, wherein Churchill mockingly speculates on what an arms control treaty would look like in the animal kingdom. Parks also uses sports analogies to describe the difficulty of IHL compliance. *See id*. at 51. Parks also finds clever quotes to deliver his arguments. He quotes Vice Admiral Sir John A. Fisher in saying: "If I'm in command when war breaks out I shall issue my orders: The essence of war is violence. Moderation in war is imbecility. Hit first, hit hard, and hit anywhere." *Id*. at 13.

[92] As one of many examples, Parks quotes the Lieber Code in saying: "the more vigorously wars are pursued the better it is for humanity." *Id*. at 8; quoting U.S. Dep't of War, General Order No. 100, Instructions for the Government of the Armies of the United States in the Field by Order of the Secretary of War, para. 29 (1863). The present author has learned that few things will turn a room of IHL academics against you more quickly than articulating the Lieber Code principle that "sharp wars are brief."

[93] *Id*. at 59.

[94] Tracey Begley, ICRC, *Is It Time to Ratify Additional Protocol I?* (2015), http://intercrossblog.icrc.org/blog/d9r104eqyjzqgma49vlapmk6a9l67i. It is worth noting that following the signing of Protocol I, the U.S. was widely expected to ratify. Indeed, the U.S. Air Force published a law of war pamphlet in 1976 incorporating Protocol I. *See* U.S. Dep't of Air Force, Pam. 110-31, *International Law - The Conduct of Armed Conflict and Air Operations* (1976).

[95] *W. Hays Parks*, *supra* note 4.

[96] *Id*.

[97] Parks, *supra* note 12, at 90-91; Appendix to John W. Vessey Jr., Chairman of the Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, 3 May 1985. Parks insists he had little to do with Protocol I's rejection. Telephone Interview with W. Hays Parks, *supra* note 5. He says the primary force at the Pentagon was Douglas Feith, a policy political appointee. *Id*. However, Parks participated in the review. *Id*.

[98] *See* Parks, *supra* note 12, at 90-91

[99] *Id*. at 81.

[100] *Id*. at 218.

[101] *Id*. at n.644. In this case, the proposed rule died in committee, but similar efforts were frequent. In Parks's view, these efforts were often supported by altruistic, but misguided NGOs. *See id*.

[102] *Id*. at 75. Here Parks references a conversation with Waldemar A. Solf, *id*. at n.255. Solf was a member of the U.S. delegation to the Diplomatic Conference and subsequently co-authored a now well-known book on the conferences. Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, New Rules for Victims of Armed Conflicts xv (2d ed. 2013). Parks also criticized the delegates for lack of experience, stating that because none had "dropped a bomb in anger" they lacked sufficient understanding to create a law of war treaty. Parks, *supra* note 12, at 78. He quotes the English author, John Glasworthy: "idealism increases in direct proportion to one's distance from the problem." *Id*. at 219.

[103] Protocol I, *supra* note 19, art. 51(3). ICRC commentary held that "it is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection." ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, para. 1944 (1987).

[104] Parks, *supra* note 12 at 118.

[105] *Id*. Specifically, Parks argues that customary international law held that once a civilian carried out combat activities, he was then a legitimate target and could not revert to civilian status. *Id*.

[106] *See* Parks, *supra* note 12, at 118-20.

[107] *Id*. at 134.

[108] *Id*. At 56.

[109] Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 44, 45 (2009).

[110] To be fair, the ICRC has argued that we have only a slightly better understanding of the law today than we did in 1990, and the ICRC's analysis is an attempt add more meat to the bones of Article 51. *See* id.

[111] *Id*. at 46.

[112] *Id*.

[113] *Id*. It is worth noting that while Parks was wrong in this case, one need only change one element to the hypothetical to make him correct. If the driver were instead taking ammunition from a factory to a port, instead of the front line, he would remain a civilian while his cargo would be a military objective. *See id*.

[114] Protocol I, *supra* note 19, arts. 51, 57.

[115] *See, e.g* Parks, *supra* note 12, at 181.

[116] *Id*. at 21. This was true for both ground and aerial attacks. *See id*.

[117] *Id*. at 29.

[118] *Id*. at 112.

[119] *Id*. at 163.

[120] *See* R. Scott Adams, *Power and Proportionality: The Role of Empathy and Ethics on Valuing Excessive Harm*, 80 A.F. L. Rev. 149, 160 (2019); *see* ICRC CIL Study, *supra* note 24, at Rule 14.

[121] Col Theodore T. Richard, Unofficial United States Guide to the First Additional Protocol to the Geneva Conventions of 12 August 1949 120-22 (2019).

[122] U.S. Joint Chiefs of Staff, Joint Publ'n 3-60, Joint Targeting A-5 (28 September 2018).

[123] Even in the immediate aftermath of Parks's *Air Wars* article, at least one Australian scholar responded that Parks's argument was patently false and that it revealed the U.S. always sees itself as the attacker. *See* Judith Gail Gardam, Non-Combatant Immunity as a Norm of International Humanitarian Law 122 (1993).

[124] Since Protocol I was drafted, international case law has established the "reasonable military commander" standard, allowing commanders operational flexibility, but nonetheless requires their decisions to be objectively reasonable. *See generally*, Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects*, 51 Vand. J. Transnat'l L. 835 (2018). The "reasonable person" standard is ubiquitous in the law, and its application here undermines Parks's argument that if proportionality were a U.S. statute it would be "constitutionally void for vagueness." Parks, *supra* note 87, at 173. Further, the U.S. has created an imperfect, but nonetheless practical method for calculating estimated civilian casualties. *See*, *e.g.*, Chairman, Joint Chiefs of Staff, Instr. 3160.01, No-Strike and the Collateral Damage Estimation Methodology (13 February 2009).

[125] *See e.g.*, Michael R. Gordon, *Pentagon Inquiry Blames ISIS for Civilian Deaths in Mosul Strike*, N.Y. Times, 25 May 2017, https://www.nytimes.com/2017/05/25/us/politics/mosul-us-airstrike-civilian-deaths-isis-pentagon.html.

[126] Parks predicted that a great danger from Protocol I was that it "provides an enemy captor with an authentic basis for his misallegations in future conflicts, no matter how discriminate air operations may in fact be." Parks, *supra* note 12, at 180.

[127] Telephone Interview with W. Hays Parks, *supra* note 5.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] Protocol I, *supra* note 19, signed 7 December 1978, [1991] ATS 29.

[132] *See id*. Australia did submit some declarations. For example, Australia submitted a declaration to Articles 51-58 inclusive, stating that military commanders must reach their decisions based on an assessment of all relevant information available at the time. *See id*. at n.7.

[133] See Parks, *supra* note 12, at 222.