

THE AMBIGUOUS PROTECTION OF SCHOOLS UNDER THE LAW OF WAR—TIME FOR PARITY WITH HOSPITALS AND RELIGIOUS BUILDINGS

GREGORY RAYMOND BART*

INTRODUCTION

A disturbing trend during recent armed conflicts is that states tend to treat school buildings less respectfully than they treat hospitals and religious buildings. One important cause of this trend is the different privileged status afforded to each building type under the law of war. The law of war equally forbids targeting hospitals, religious buildings, schools, and other civilian buildings unless they become justifiable military objectives. But ironically, it fails to equally protect these buildings from being used for such objectives in the first place. Under the law of war's privileges for civilian hospitals and most religious buildings, armed forces cannot use these buildings for military purposes—without exception. In contrast, the law of war's privilege for school buildings ambiguously allows military use based on necessity. This is surprising because military use converts a school from a privileged site into a justifiable target for an opposing army. Even more troubling, such use increases the likelihood that an opposing army will confuse converted and unconverted schools and wrongfully attack one that shelters children and other civilians.

State practice paradoxically both opposes and accepts military use of schools during war. The ongoing conflict in Iraq provides many examples. In 2003, the United States condemned Iraqi military commanders for employing school buildings and grounds as sites for

* Commander, Judge Advocate General's Corps, U.S. Navy; Chief, Operational Law and Policy, United States Special Operations Command, 2007–present; Office of the Judge Advocate General of the Navy, 2003–2007; Staff Judge Advocate for Commander, Special Operations Command Central, 2000–2003; A.B., University of Chicago, 1987; J.D., Boston University School of Law, 1991; LL.M., with Distinction, Chetwood Prize recipient, Georgetown University Law Center, 2006. The views expressed herein are solely the author's and may not necessarily represent the views of the Department of the Navy, the Department of Defense, or the United States Government. The author thanks Professor David A. Koplow of Georgetown University Law Center and Captain Joseph Baggett, JAGC, USN (Ret.) for their comments on earlier drafts of this article. He also expresses special gratitude to his bride Rosalinda Bart and to his parents, who have both passionately taught in schools for over thirty-five years. © 2009, Gregory Raymond Bart.

artillery, materiel storage, and headquarters.¹ Human Rights Watch noted that the Iraqi practice directly contributed to the number of civilian casualties because those buildings became lawful targets for the coalition forces.² The United States also denounced hostile insurgent forces for using school buildings as weapons caches and bases to launch attacks.³ Meanwhile, in northern Iraq, U.S. military commanders employed school buildings for military headquarters and command posts.⁴ Of note, American forces utilized school buildings that they characterized as abandoned or as former schools while Iraqi and insurgent forces exploited ones that were still occupied by students.⁵ But these incidents beg the question of why armed forces respect hospitals and religious buildings more than schools?

This article considers whether the law of war provides school buildings with a less privileged status than it gives to hospitals and religious buildings. It proposes that three critical issues necessarily affect any legal regime that seeks to establish privileged status for a specific type of building during war: 1) defining which buildings qualify; 2) ensuring maintenance of privileged status by prohibiting their military use; and 3) ensuring their recognition by armed forces.

The article's first section reviews how the law of war and humanitarian law evolved to address these issues for hospitals and religious buildings. It traces how the law of war originally gave these buildings only a derivative privileged status that was based entirely on the presence of civilians and noncombatants. Through a series of treaties, the law of war gradually gave direct, independent protection to hospital buildings based on their inherent humanitarian nature and to most religious buildings based on their cultural and spiritual value to a people. The law shifted from focusing exclusively on the obligations of military attackers in targeting to creating equally shared obligations for attackers and defenders not to use these buildings for military purposes.

The second section shows that the law of war's privilege for schools

1. See CENTRAL INTELLIGENCE AGENCY, PUTTING NONCOMBATANTS AT RISK: SADDAM'S USE OF "HUMAN SHIELDS" 5-6 (2003).

2. HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 79, 125 (2003), available at <http://www.hrw.org/reports/2003/usa1203/usa1203.pdf>.

3. Kathleen T. Rhem, *Marine General: Fallujah Operations 'Ahead of Schedule'*, AMERICAN FORCES PRESS SERVICE, Nov. 11, 2004, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=24854>.

4. Russell Skelton, *U.S. Forces Use Schools for Cover*, SYDNEY MORNING HERALD, April 4, 2003, at 3.

5. See HUMAN RIGHTS WATCH, *supra* note 2, at 74-76 (indicating that Iraqi forces regularly used schools for weapons placement and storage, putting civilians in danger).

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has not evolved to the same extent because it fails to clearly answer the above three questions for school buildings. Current international law does not provide most with a direct, clear, and independent privileged status based on their inherent humanitarian nature or value to a people. Rather, it protects schools against military use based solely on the presence of civilians and noncombatants. It thereby focuses exclusively on the military attacker's obligations to discriminate in targeting. These indirect protections are anachronistic compared to the direct ones currently afforded to hospitals and religious buildings.

The final section proposes that the law of war should adopt for schools a modern privilege that answers the above three issues. It asserts that school buildings have an inherent value to society that merits independent protection. It further suggests a framework for a modern school privilege by borrowing the best aspects of the protections currently afforded to hospitals and religious buildings. Specifically, for schools, a modern privilege should describe which buildings qualify, prohibit their military use, and establish a distinctive emblem. In this manner, the law of war might inhibit in the future the high incidence of school building destruction that has been common in recent armed conflicts.

I. THE PRIVILEGES FOR HOSPITALS AND RELIGIOUS BUILDINGS UNDER THE LAW OF WAR

Through a series of treaties over the last century, the law of war's privileges for hospitals and religious buildings evolved from providing derivative protections based on the presence of civilians and noncombatants to providing direct protection. This process occurred on different timetables for each type of structure. However, for both, it was linked to gradual international recognition of the need to preserve these buildings because of their inherent humanitarian, cultural, or spiritual value.

Delegates at successive international conventions noted that during nineteenth and twentieth century wars hospitals and religious buildings were generally privileged against being targeted but this privilege was ineffective at preventing their damage and destruction.⁶ Therefore, the delegates progressively developed in each convention more detailed definitions of which buildings were covered by these privileges. More significantly, they observed that it was meaningless to make hospitals and religious buildings immune from attack if armed forces

6. See LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 500–01 (2d ed. 1999).

could still turn these buildings into lawful targets by using them for military purposes based on vague concepts of necessity. The goals of the state-participants in these conventions evolved from merely prohibiting the targeting of hospitals and religious buildings to crafting detailed restrictions on their military uses.⁷ States also recognized that their new goals required clear means through distinctive emblems for military forces to recognize medical and religious sites on the battlefield.

The histories of the privileges for hospitals and religious buildings are relevant to considering the current privilege afforded to schools. The issues that shaped the evolution of the hospital and religious building privileges may be applied to assess the effectiveness of current school building protections.

A. *The Independent Privileged Status of Hospital Buildings*

Under customary international law, there were no universally accepted privileges afforded to hospitals and wounded persons. Rather, combatants provided protections sporadically, depending on the nature of the conflicts and the participants.⁸ For example, during the Revolutionary Wars of the eighteenth century, a French commander proposed to an Austrian commander that:

[T]he roads leading to hospitals [should] be marked by special signs which would indicate the presence of wounded in the vicinity. Troops were to avoid these roads wherever possible or in passing along them were to abstain from disturbing noises. Hospitals were to remain the property of the belligerent even after he had evacuated the country.⁹

Significantly, the Austrian commander rejected this proposal, citing the ideological nature of the conflict.

The law of war's modern privilege for hospitals originated in the international movement to protect the wounded and sick that arose after the Battle of Solferino in 1859.¹⁰ France and Sardinia's allied armies decisively defeated Austria's forces at Solferino. Their victory

7. *See id.* at 496–97.

8. *See id.* at 490–91.

9. *Id.* at 491.

10. *Id.* at 492–93; *see also* L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 27 (2d ed. 2000).

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was a crucial historical step in the Kingdom of Sardinia's unification of modern Italy. However, reports of the battle stated that both sides fought brutally and that many wounded and dying soldiers were shot or bayoneted. Jean-Henri Dunant, a witness to the battle, vividly described its horrors in *A MEMORY OF SOLFERINO*.¹¹ This book sparked an international humanitarian movement to safeguard wounded persons and hospitals during war. This movement created the International Committee of the Red Cross and caused the world's states to adopt a series of multilateral treaties on the law of war and humanitarian law.¹²

1. Protection of Hospital Buildings from Targeting Based on the Presence of Wounded and Sick Persons

Early treaties established a privilege for hospitals but narrowly defined it in terms that depended on privileges afforded to wounded and sick persons. The first of these was the 1864 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies in the Field.¹³ Article 1 stated, "Ambulances and military hospitals shall be acknowledged to be neutral, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein."¹⁴ This created a privileged status for hospitals that existed only when wounded and sick persons were present.¹⁵ Article 2 similarly declared that hospital personnel could "participate in the benefit of neutrality," but only while sick and wounded were present.¹⁶ Curiously, the convention did not define who the sick and wounded were and left that issue presumably to common sense. However, it specified that the privilege applied only to military hospitals.¹⁷ Civilian hospitals were therefore not privileged sites under the 1864 Geneva Convention and only had sporadic protections, depending on the parties to a conflict.

Further, on the issue of maintaining status, this convention did not

11. HENRI DUNANT, *A MEMORY OF SOLFERINO* (1986).

12. PIERRE BOISSIER, *FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS* 134–39 (2d ed. 1985).

13. Amelioration of the Condition of the Wounded on the Field of Battle art. 1, August 22, 1864, 22 Stat. 940, 1 Bevans 7 [hereinafter 1864 Geneva Convention]. There were fifty-seven state parties, including the United States, the United Kingdom, France, Germany, Prussia, the Russian Federation, Switzerland, and Turkey.

14. *Id.*

15. JEAN S. PICTET, *COMMENTARY I: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD* 197 (Jean S. Pictet ed., 1952).

16. 1864 Geneva Convention, *supra* note 13, art. 2.

17. PICTET, *supra* note 15, at 196–97.

prohibit or restrict armed forces from using hospitals for military purposes. Article 1 merely declared vaguely that a hospital's neutrality ended if it was "held by a military force."¹⁸ Perhaps the 1864 Geneva Convention made its most lasting contribution to the law of war by establishing the first ever method for armed forces to recognize privileged hospital buildings. Article 7 stated:

A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuations. It must, on every occasion, be accompanied by the national flag. An arm-badge (brassard) shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority. The flag and the arm-badge shall bear a red cross on a white ground.¹⁹

Despite this significant step towards protecting hospitals, the convention nonetheless contained no prohibition against armed forces using buildings marked with this symbol for military purposes.

The 1899 Hague Convention with Respect to the Laws and Customs of War on Land adopted all of the 1864 Geneva Convention protections for the sick and wounded and attempted to expand the privilege for hospitals.²⁰ Article 27 of its regulations stated, "In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes."²¹ But it is doubtful whether Article 27 gave hospitals a protected status against targeting that was independent of the presence of sick and wounded persons. The words, "hospitals, and places where the sick and wounded are collected," might be construed as redundant, implying that hospitals' protected status is derivative of their presence. Alternatively, they might be considered as part of a list—two types of buildings that qualify separately and independently for protection. It is reasonable to assume

18. 1864 Geneva Convention, *supra* note 13, at art. 1.

19. *Id.* at art. 7. A picture of the 1864 Geneva Convention's distinctive emblem is attached to this article at appendix 1, figure 11-1(a), reproduced from DEP'T OF THE NAVY ET AL., NAVAL WARFARE PUB. 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 11-6 (1997) [hereinafter COMMANDER'S HANDBOOK].

20. Convention with Respect to the Laws and Customs of War on Land art. 21, July 29, 1899, 32 Stat. 1803, 1 Bevans 247. [hereinafter Hague Convention of 1899 or Hague II]. There were forty-nine state parties, including the United States, the United Kingdom, France, Germany, the Russian Federation, Switzerland, and Turkey.

21. *Id.* at art. 27.

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that the absence of the word “other” before the words “places where the sick and wounded are collected” was intended to indicate that such places were merely another type of building—besides hospital buildings—that military forces should take care to avoid in their attacks. This interpretation means that Article 27 of Hague II would have established for these buildings a privilege that was independent of the presence of wounded and sick. If so, the armed forces of that period did not widely accept this interpretation.²² At that time, military medical personnel did not rely on an independent protected status for hospital buildings and transports. In fact, they commonly feared that empty ambulances did not qualify for protected status because of the absence of wounded persons. And strangely, many ambulance drivers purposely entered battlefields with wounded persons already present in their ambulance in order to ensure the vehicle’s protected status.²³

Nevertheless, Hague II did contain the first restrictions on the military use of hospital buildings. Article 23 of its regulations declared that improper use of the Red Cross as a means to injure the enemy amounted to unlawful treachery.²⁴ But Article 27’s terms stopped short of expressly prohibiting armed forces from using hospital buildings for military purposes. It did not prevent armed forces from converting military hospitals from their humanitarian purpose as long as the forces did not make improper use of the Red Cross. Such conversion simply caused hospitals to lose their privilege against being targeted. Arguably, this was not a significant deterrent against military use, given that Hague II’s privilege ultimately depended on the coincidental presence of wounded and sick persons.

Further, Hague II did not specifically address the military use of civilian hospitals. Rather, Article 56 merely established some limited protections for civilian charitable buildings in occupied territories, and this applied only generally to civilian hospitals. It declared that all charitable buildings should be treated as private property, even if publicly owned, and that seizure, destruction, or intentional damage to them was prohibited and subject to legal proceedings.²⁵ But its lan-

22. PICTET, *supra* note 15, at 197.

23. *Id.*

24. Hague II, *supra* note 20, at art. 23. Treachery takes many forms, but it is generally considered present when a combatant feigns noncombatant status in order to achieve an advantage during an attack. See DEP’T OF THE ARMY, FIELD MANUAL FM 27–10: THE LAW OF LAND WARFARE, para. 50 (1956) [hereinafter FM 27–10].

25. Hague II, *supra* note 20, at art. 56. Article 34 of the U.S. Army’s Lieber Code of 1863 contained very similar language and therefore did not provide hospitals with any greater

guage did not specifically prohibit armies from temporarily requisitioning or using civilian hospitals.²⁶ Also, it did not address the fact that such use might cause an opposing army to destroy the temporarily converted hospital as a legitimate military target. Finally, this provision focused on legal proceedings to compensate private owners for damage to their buildings in occupied territories. Its terms did not declare as a goal preserving the inherent humanitarian nature of hospital buildings.

2. Independent Protection of Hospital Buildings from Targeting

The 1906 Conference for the Revision of the Geneva Convention of 1864 drafted and concluded a new convention to resolve some of these issues—but only for military hospitals.²⁷ The resulting 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies expressly granted a direct and independent privileged status to military hospital buildings during war.²⁸ Concerning the medical (sanitary) service, Article 6 broadly stated, “Mobile sanitary formations (i.e., those which are intended to accompany armies in the field) and the fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.”²⁹ Thus, the presence of sick and wounded was no longer a prerequisite to a hospital building’s privileged status.³⁰ The 1906 convention explained that the Red Cross emblem could be placed even on supplies connected to medical care.³¹ It included specific guidance as to how a hospital could maintain its privileged status:

A sanitary formation or establishment shall not be deprived of the protection accorded by Article 6 by the fact:

privileged status than that provided in the 1864 or 1899 conventions. D. SCHINDLER AND J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 8 (1988).

26. See FM 27–10, *supra* note 24, at para. 406, 407, 412.

27. PICTET, *supra* note 15, at 197.

28. Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field arts. 6–7, July 6, 1906, 35 Stat. 1885, 1 Bevans 516 [hereinafter 1906 Geneva Convention]. There were fifty-two state parties, including the United States, the United Kingdom, France, Germany, the Russian Federation, Switzerland, Italy, and Turkey.

29. See *id.* at art. 6.

30. PICTET, *supra* note 15, at 197.

31. 1906 Geneva Convention, *supra* note 28, at art. 19.

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1. That the personnel of a formation or establishment is armed and uses its arms in self defense or in defense of its sick and wounded.

2. That in the absence of armed hospital attendants, the formation is guarded by an armed detachment or by sentinels acting under competent orders.

3. That arms or cartridges, taken from the wounded and not yet turned over to the proper authorities, are found in the formation or establishment.³²

But like earlier conventions, the 1906 Geneva Convention did not prohibit forces from using hospital buildings for non-medical purposes, as long as they removed the distinctive protective emblem of the Red Cross. Article 6's language that hospitals must be "protected and respected" referred primarily to restrictions against targeting hospitals, not the military use of a hospital building.³³ This convention even accepted the practice that armed forces could convert an opponent's military hospitals to non-medical use as long as there was an "important military necessity" and care was provided for any displaced sick and wounded.³⁴ Thus, under this convention, a military hospital building maintained its privilege against being targeted only as long as the building was not used as a means to injure the enemy.³⁵

The last important law of war treaty that entered into force before World War I was the 1907 Hague Convention Respecting the Laws and Customs of War on Land (known as Hague IV).³⁶ It replaced Hague II. However, Hague IV did not expand the law of war's privilege for hospital buildings. It included Hague II's prohibition against the treacherous use of the Red Cross emblem. It also contained Hague II's requirements that armed forces take necessary steps to spare hospitals and other civilian buildings during attacks and that, in occupied territories, they refrain from seizing charitable and private buildings.³⁷

Of note, the 1907 Hague Convention also produced the Hague

32. *Id.* at art. 8.

33. See PICTET, *supra* note 15, at 196.

34. 1906 Geneva Convention, *supra* note 28, at art. 15.

35. *Id.* at arts. 7–8.

36. Convention Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention or Hague IV]. There are thirty-five state parties, including the United States, the United Kingdom, France, Germany, the Russian Federation, Japan, Switzerland, and Austria–Hungary.

37. *Id.* at arts. 23, 27, 56.

Convention Concerning Bombardment by Naval Forces in Time of War (known as Hague IX). It added to the law of war a distinctive emblem for the battlefield identification of all civilian buildings.³⁸ Its purpose was to assist naval commanders in not targeting these buildings. Article 5 required civilians to mark protected buildings with “[V]isible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.”³⁹ But the distinctive emblems could only be placed on buildings that were not being used for military purposes. Hence, Hague IX did not prohibit the military use of civilian hospitals and also only covered bombardment by naval forces.

During World War I, Hague IV’s and Hague IX’s terms were largely ineffective in preventing armed forces from using civilian buildings for military purposes and their subsequent destruction as targets.⁴⁰ Both the Allied and Central Powers made numerous counter-charges of violations of Hague IV.⁴¹ For example, Allied forces alleged that the German Luftwaffe purposely carried out the majority of their bombing attacks at night in order to feign or create an inability to see protective emblems and to discriminate hospitals from lawful military targets. The Germans bombed at least two military hospitals—one American and one Canadian—under this excuse despite having conducted daytime aerial reconnaissance only a few hours before the night attack.⁴²

3. Protection of Hospital Buildings from Military Use

After World War I, the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field replaced the 1906 Geneva Convention and slightly improved the privilege for military hospital buildings by raising the level of necessity under which military forces might convert an opponent’s military

38. Convention Concerning Bombardment by Naval Forces in Time of War, art. 5, October 18, 1907, 36 Stat. 2351, 1 Bevans 681 [hereinafter Hague IX]. There are thirty-five state parties, including the United States, the United Kingdom, France, Germany, Japan, the Russian Federation, and Switzerland. Of note, Italy is not a state party.

39. *Id.* A picture of Hague IX’s distinctive emblem is attached to this article at appendix 1, figure 11-1(k), reproduced from COMMANDER’S HANDBOOK, *supra* note 19, at 11–8.

40. Matthew D. Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE H.R. & DEV. L.J. 153, 158 (2005).

41. GREEN, *supra* note 6, at 500–01.

42. *Id.*

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hospitals to non-medical uses.⁴³ Under this convention, such use had to be for “urgent military necessity.”⁴⁴ Significantly though, it did not affect the level of military necessity required for armed forces to use civilian hospitals for non-medical purposes. The privileges given to civilian hospital buildings under the law of war remained substantially the same throughout World War I and World War II.

The most significant steps in the development of the privileged status of hospital buildings occurred after World War II. The Geneva Conventions of 1949 fundamentally expand and clarify the protections afforded to hospitals regarding which buildings are covered, the maintenance of their protected status, and battlefield recognition.⁴⁵ The 1949 Conventions replace the 1929 Convention but carry forward the concept of providing direct protection for hospital buildings that is not dependent on the presence of noncombatant sick or wounded persons. Geneva Convention I (GC I) focuses on the condition of the sick and wounded. Article 19 defines which hospital buildings are privileged and broadly declares, “Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the parties to the conflict.”⁴⁶ The convention’s drafters purposely inserted the phrase “at all times” to clarify that the privileged status of hospital establishments existed inherently and was not transient or dependent on the presence of noncombatants.⁴⁷ Geneva Convention II (GC II) extends similar protections to hospital ships.⁴⁸ Moreover, Geneva Convention IV (GC IV), Article 18 declares similar protections for all civilian hospitals in all

43. Convention for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303 [hereinafter the 1929 Geneva Convention]. There are sixty state parties, including the United States, the United Kingdom, France, Germany, Italy, Japan, the Russian Federation, and Switzerland.

44. *Id.* at art. 15.

45. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. There are 194 state parties, including the United States, the United Kingdom, all developed countries, Iraq, and Afghanistan.

46. GC I, *supra* note 45, at art. 19.

47. See PICTET, *supra* note 15, at 195 (stating that the presence of the wounded was not necessary for a hospital to qualify as a medical unit).

48. GC II, *supra* note 45, at arts. 22, 28, 35.

areas—both occupied territory and home territory.⁴⁹ Thus, after the 1949 Geneva Conventions, the law of war more clearly defined privileged hospital buildings as all hospitals, meaning medical establishments, regardless of their military or civilian personnel or their permanent or temporary nature.⁵⁰

The 1949 Geneva Conventions add specific guidance on how hospital buildings keep their protected status and what, if any, non-medical uses are appropriate. Jean Pictet, the noted writer of the official commentary to the conventions, opined that 1949 drafters gave Article 19's phrase that hospitals must be "respected and protected" a wider meaning in the 1949 Geneva Conventions than in the 1929 Geneva Convention.⁵¹ The words previously referred only to the obligation of attacking armed forces to avoid targeting hospitals. Under the 1949 Conventions, the phrase acquires the additional meaning that all military forces—attackers and defenders—must not impede or interfere with the medical duties or mission of hospitals.⁵² Military forces are therefore no longer prohibited only from targeting hospitals or from using them treacherously to injure the enemy. After 1949, the law of war also prohibits armies from using military or civilian hospital buildings for any purpose that affects medical functions. Certainly, the conversion of a hospital to military purposes such as a headquarters or munitions warehouse would affect its functions and is generally prohibited. The 1949 Geneva Conventions also require state parties to locate military facilities as far as possible from medical establishments so that an opposing army's attacks on military objectives do not endanger hospitals.⁵³

Nevertheless, GC I preserves the 1929 Geneva Convention's exception that allows military forces to convert an opponent's military hospitals in occupied territory to non-medical uses. This is permissible in the case of urgent military necessity, as long as the sick and wounded

49. GC IV, *supra* note 45, at art. 18.

50. OSCAR M. UHLER ET AL., COMMENTARY IV: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 145 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958). The authors comment that Article 18's definition of hospitals includes all establishments where medical attention is given, regardless of whether they are hospitals, clinics, sanatoria, health centers, ophthalmic, psychiatric or child clinics. They even include makeshift medical sites temporarily placed in non-medical buildings such as schools. But they do not indicate whether a whole building would qualify for the privilege if only part of it is used for medical purposes.

51. PICTET, *supra* note 15, at 196–97.

52. *Id.* at 196.

53. GC I, *supra* note 45, at art. 19; GC IV, *supra* note 45, at art. 18 (recommending that, where possible, civilian hospitals be located far away from military objectives).

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still receive care.⁵⁴ Significantly, GC IV, Article 57 contains a similar military necessity exception concerning temporary military requisition or use of civilian hospitals in occupied territory.⁵⁵ However, Article 57 specifically prohibits occupying armies from doing so as long as such hospitals are necessary for the needs of the civilian population. The drafters intended this provision to help preserve the humanitarian nature and purpose of all civilian hospital buildings.⁵⁶

Additionally, the 1949 Geneva Conventions significantly tighten the conditions under which hospital buildings can lose their protected status and become lawful targets when armed forces convert them to military purposes. Article 21 of GC I states:

The protection to which fixed establishments and mobile medical units of the Medical Services are entitled shall not cease unless they are used to commit, outside of their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.⁵⁷

GC IV contains a similar requirement for civilian hospitals.⁵⁸ Thus, attacking military forces must notify the opposing side that a hospital building's privileged status is in jeopardy due to its real or suspected military use before they may target the building.

Finally, the 1949 Conventions amplify the means and methods for military forces to identify hospitals in the battlefield. These practical measures are designed to minimize the chances for civilian and noncombatant casualties and collateral damage. The 1949 Conventions add the emblems of the Red Crescent and Red Lion and Sun to the previously

54. GC I, *supra* note 45, at arts. 33–34.

55. GC IV, *supra* note 45, at art. 57.

56. UHLER ET AL., *supra* note 50, at 316–18. The authors comment that the drafters rejected a complete prohibition against military requisition of civilian hospitals. But they did so for humanitarian reasons, not deference to military necessity. They felt that such a restriction would not be respected by armies seeking to care for their wounded. Plus, the restriction would deny them medical treatment and therefore not be consistent with the humanitarian goals of the conventions.

57. GC I, *supra* note 45, at art. 21.

58. GC IV, *supra* note 45, at art. 19.

approved distinctive emblem of the Red Cross.⁵⁹ They also provide a method for warring state parties to notify each other of the existence and location of safety zones that contain hospital buildings.⁶⁰ GC IV even contains a draft agreement for state parties to designate such zones and which includes a distinctive emblem to mark and identify the zones.⁶¹ Finally, the 1949 Geneva Conventions require state parties to adopt legislation or other means to ensure that all distinctive emblems are not misused.⁶² The 1949 conventions thus remove much uncertainty for military forces about the marking and identification of hospitals as sites that are privileged against targeting and military use.⁶³

The 1977 Protocol I to the 1949 Geneva Conventions further clarifies and expands the protections of hospital buildings on the issues of a definition for hospitals, maintenance of their privileged status, and their identification.⁶⁴ Although the United States is not a party to Protocol I, it supports and follows as a matter of policy and customary international law the protocol's provisions concerning the protection of hospitals.⁶⁵ Protocol I defines hospitals as establishments "organized

59. GC I, *supra* note 45, at arts. 38–44; GC II, *supra* note 45, at arts. 41–43; GC IV, *supra* note 45, at art. 18. A picture of the Red Crescent emblem is attached to this article at appendix I, figure 11-1 (b), reproduced from *COMMANDER'S HANDBOOK*, *supra* note 19, at 11–22.

60. GC I, *supra* note 45, at art. 23; GC IV, *supra* note 45, at arts. 14–15.

61. GC IV, *supra* note 45, at Annex I, art. 6. A picture of the safety zone distinctive emblem is attached to this article at appendix I, figure 11-1 (d), reproduced from *COMMANDER'S HANDBOOK*, *supra* note 19, at 11–6.

62. GC I, *supra* note 45, at arts. 53–54.

63. Of interest, the Geneva Conventions leave great discretion to states concerning the marking of civilian hospitals during peacetime versus wartime. The authors comment:

The marking of civilian hospitals is intended essentially for time of war; it is then that it takes on its real importance. However, the rule may be made more flexible in application, in order to ensure that practical considerations are taken into account so that the marking will be completely effective. There is in fact no reason why a State, which is obliged to consider every possibility, should not be able to mark its civilian hospitals in peace time.

UHLER ET AL., *supra* note 50, at 151.

64. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 8, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. There are 164 state parties, including the United Kingdom, France, Germany, Italy, Japan, the Russian Federation, China, North and South Korea, and Switzerland. The United States has signed but not ratified Protocol I. Of note, Iraq, Afghanistan, and Iran are not state parties.

65. Martin P. Dupuis, John Q. Heywood & Michele Y.F. Sarko, *The Sixth Annual American Red Cross—Washington College of Law Conference on International Humanitarian Law: A Workshop on*

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for medical purposes” and exclusively assigned to such purposes.⁶⁶ Accordingly, it precludes any temporary military use of hospital buildings.⁶⁷ It specifically declares that hospitals cannot be used in any manner to shield military objectives from attacks.⁶⁸ Further, it specifically limits military use of civilian hospitals in occupied territories, mandating that such facilities must retain their medical purpose.⁶⁹ For example, military forces are prohibited from turning a civilian hospital building in occupied territory into military headquarters. They may use the building only as a military hospital. Protocol I contains an annex with pictures of the distinctive emblems and adds light and radio signals as means to communicate the identity of hospitals to military forces.⁷⁰

Thus, the privileged status of hospitals truly evolved in law of war treaties from the 1864 Geneva Convention to the 1977 Protocol I. These treaties changed the definition of protected hospitals from ones that contained noncombatant sick and wounded persons to all military and civilian medical buildings regardless of their occupancy. It clarified that hospitals are not buildings with fungible uses that can be converted to military purposes. Rather, the modern hospital privilege recognizes hospitals as structures with an inherently humanitarian purpose that must be preserved. Accordingly, it articulates detailed restrictions on all military forces’ use of hospitals and provides practical means for forces in the field to identify and recognize these privileged

Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT’L L. & POL’Y 415, 423 (1987).

66. Protocol I, *supra* note 64, at art. 8(e); CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 128 (Yves Sandoz et al. eds., 1987) (adding that medical units must be exclusively assigned to medical purposes).

67. PILLOUD ET AL., *supra* note 66, at 128, 167. Of interest, the authors imply that the definition of hospital excludes buildings that partly serve a non-medical purpose.

68. Protocol I, *supra* note 64, at art. 12, ¶ 4; PILLOUD ET AL., *supra* note 66, at 167.

69. Protocol I, *supra* note 64, at art. 14; PILLOUD ET AL., *supra* note 66, at 185, 186.

70. Protocol I, *supra* note 64, at Annex I. Of note, see the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, S. TREATY DOC. NO. 109-10, 45 I.L.M. 558, which added for medical establishments a fourth distinctive emblem—a red frame in the shape of a square on edge on a white ground—also called the Red Crystal. A picture of the Protocol III’s distinctive emblem can be found at appendix 1, figure (1). Protocol III did not further expand the protections afforded to hospitals. There are currently nineteen state parties, including Bulgaria, Croatia, El Salvador, Georgia, Hungary, Philippines, Switzerland, and the United States, and sixty-five state signatories, including Australia, Canada, France, Germany, Israel, Italy, Poland, the Russian Federation, Turkey, and the United Kingdom.

buildings. The modern hospital privilege does not simply limit attacking forces from targeting such buildings. It places a shared burden on both attacking and defending military forces.

B. *The Independent Privileged Status of Religious Buildings*

The law of war's privilege for religious buildings evolved analogously to the privilege afforded to hospital buildings. Even so, the law of war has not yet clarified for religious buildings the issues of definition, maintenance of status, and identification to the same extent as it has for hospitals.⁷¹

1. Protection of Religious Buildings from Targeting Based on the Presence of Civilians and Noncombatants

At the close of the nineteenth century, the privilege afforded to religious buildings depended entirely on the presence of civilians and noncombatants, such as priests, rabbis, chaplains, or sick and wounded persons. It therefore focused narrowly on the obligations of attacking military forces in their targeting. But throughout the twentieth century, the drafters of successive treaties grappled with the details of a wider religious building privilege in terms of defining which structures qualify, prohibiting their military use, and identifying them on the battlefield. They gradually embraced shared duties for attacking and defending military forces to prevent or inhibit the military conversion of religious buildings into legally justifiable targets.

The 1899 Hague II Convention and the 1907 Hague IV Convention provided a limited and dependent privileged status to religious buildings. They required that care should be taken to spare religious buildings from targeting, provided that they are not being used for military purposes.⁷² But just like hospitals at that time, armed forces treated this privilege in practice as providing protection from targeting only as long as noncombatants were present. More significantly, this privilege did not prohibit armed forces from using religious buildings for military purposes and thereby depriving them of their protected status. Armed forces readily overcame the privilege by claiming military necessity.

Further, the 1864, 1906, and 1929 Geneva Conventions did not provide direct, independent protections for religious buildings. Their

71. See GREEN, *supra* note 10, at 154–55.

72. See Hague II, *supra* note 20, at arts. 21, 56; Hague IV, *supra* note 36, at arts. 23, 27, 56.

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terms focused on the privileges afforded to hospitals and sick and wounded persons, but not to religious property.⁷³ Accordingly, the privileges in these conventions extended to religious buildings only to the extent that churches, synagogues, mosques, and the like provided shelter to the sick and wounded; such protections were clearly derivative of the presence of civilians and noncombatants and not based on the inherent humanitarian nature and purpose of religious buildings. These conventions did not prohibit military forces from using religious buildings, depriving these structures of their privileged status. Thus, the conventions failed to ensure the protection of many religious buildings during World War I. For example, German military forces bombed Rheims Cathedral in France, claiming ostensibly that French forces had used the building for military purposes.⁷⁴

As a result, in 1935 delegates from the United States and twenty other countries crafted an agreement called the Roerich Pact.⁷⁵ They intended the Pact to improve protections for religious buildings and all cultural property. Significantly, the Pact included a distinctive emblem for marking such buildings so that armed forces could identify them.⁷⁶ However, its text largely mirrored Hague IV's prohibitions against seizure of charitable property, extending such protections to religious and cultural property. Moreover, Hague IV's protections were ineffective during World War I. The Roerich Pact also required state parties to a conflict to "respect and protect" cultural property; however, like similar language in the 1929 Geneva Convention, the Pact's terms referred to prohibitions against targeting rather than against military use of cultural property. As stated, it was not until the 1949 Geneva Conventions that these terms acquired a broader meaning to prohibit military use. Moreover, the state parties to the Roerich Pact were mostly from the Americas. Thus, it had a very limited impact on the privilege afforded to religious buildings during World War II.⁷⁷

73. See GREEN, *supra* note 10, at 153–54.

74. Joshua E. Kastenburg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 286 (1997).

75. Treaty Between the United States of America and other American Republics on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 [hereinafter Roerich Pact]. There are ten state parties, including the United States, Mexico, Cuba, Colombia, and Brazil. Of note, all state parties are western hemisphere countries.

76. A picture of the Roerich Pact's distinctive emblem is attached to this article at appendix I, figure 11-1 (h), reproduced from COMMANDER'S HANDBOOK, *supra* note 19, at 11-8.

77. See Matthew D. Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 Yale H.R. & Dev. L.J. 153, 159–60 (2005) (noting that the

The 1907 Hague IV Convention determined the privileged status for religious buildings during World War II. This convention unfortunately gives little guidance on what constitutes a protected religious building, how such protections are maintained, or even the means for armies to identify them. Accordingly, its terms often went unheeded.⁷⁸ There were occasions where German soldiers used churches and synagogue buildings for military purposes, resulting in these buildings losing their privileged status and being targeted by the Allies' armed forces. British forces also allegedly used churches as resting areas for troops during their retreat in 1940 at Dunkirk, France.⁷⁹ However, purely as a matter of policy, the Allies' armed forces generally avoided using religious and cultural buildings.⁸⁰ Perhaps the most celebrated incident concerning Hague IV's ineffective protection of religious buildings was the Allies' bombing of the Benedictine Monastery at Monte Cassino, Italy. Many scholars have debated whether the Allies' attack violated Hague IV.⁸¹ General Eisenhower opined that the monastery had lost its protected status due to the presence of German artillery and that the bombing was based on military necessity.⁸² But the debate begged the question of the need for clearer prohibitions under the law of war against the military use of religious buildings.⁸³

Unfortunately, the 1949 Geneva Conventions do not provide religious buildings with a privileged status that is independent of the presence of civilians and noncombatants.⁸⁴ They focus almost entirely on the condition of sick and wounded persons, prisoners of war, and civilians rather than on any privilege against the military use of religious property. As such, they emphasize attacking military forces' responsibilities concerning targeting and do not adequately address defending forces' shared responsibilities concerning military use of religious buildings. In short, they provide no more protection for churches, synagogues, mosques, and the like than existed under the 1907 Hague IV Convention.⁸⁵

Axis and Allied Powers largely ignored the privileges afforded to cultural property by the Hague Convention of 1907 and the Roerich Pact during World War II).

78. *Id.*

79. GREEN, *supra* note 10, at 46.

80. Kastenburg, *supra* note 74, at 288–89 n. 49–50.

81. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 838–39 n. 27 (1986).

82. *Id.* at 839 n. 28.

83. See Kastenburg, *supra* note 74, at 289.

84. GREEN, *supra* note 10, at 153–54.

85. *Id.* at 154–55.

2. Independent Protection of Religious Buildings from Targeting

Fortunately, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict addresses, for buildings of important cultural significance, many of the legal and practical aspects of definition, maintenance of privileged status, and identification on the battlefield.⁸⁶ It creates the term “cultural property,” defining it as buildings that are of “great importance to the cultural history of every people,” and specifically includes religious establishments.⁸⁷ This definition includes religious buildings with artistic or historic significance, but not all religious buildings. The convention applies to buildings such as the Vatican or the Dome of the Rock, but not to ordinary places of worship.⁸⁸ Concerning maintenance of privileged status, Article 4 directs state parties to respect cultural property by refraining from using it in any manner that might cause it damage during armed conflict.⁸⁹ Finally, concerning battlefield identification, the 1954 Convention creates an internationally-recognized distinctive emblem to mark the identity and privileged status of cultural sites such as religious buildings.⁹⁰ It is in the shape of a royal-blue and white shield—with a royal-blue square turned on edge and forming the bottom point of the shield, a royal-blue triangle inverted above, pointing at, and touching the square, and the space on either side being taken up by a white triangle.⁹¹ Further, like the Red Cross and other emblems for hospitals, the 1954 Convention includes specific prohibitions against treacherous use of the cultural property emblem.⁹² Thus, the 1954 Hague Convention elevates the privileged status of some historic religious buildings from mere dependence on the presence of civilians and noncombatants to independent protection against targeting and military use based on their inherent cultural value to society. It therefore represents

86. *Id.* at 153.

87. Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 1, May 14, 1954, 249 U.N.T.S. 214 (entered into force August 7, 1956) [hereinafter 1954 Hague Convention]. There are 114 state parties, including France, Germany, Iran, Iraq, the Holy See, the Russian Federation, and Switzerland. The United States and the United Kingdom have signed but not ratified. The U.S. Senate provided advice and consent to ratification, subject to understandings, on September 25, 2008. Of note, Afghanistan is not a state party or signatory.

88. GREEN, *supra* note 10, at 155.

89. 1954 Hague Convention, *supra* note 87, at art. 4.

90. *Id.* at arts. 16–17.

91. *Id.* at art. 16; A picture of the 1954 Hague Convention’s distinctive emblem is attached to this article at appendix 1, figure 11-1 (g), reproduced from COMMANDER’S HANDBOOK, *supra* note 19, at 11–7.

92. 1954 Hague Convention, *supra* note 87, at art. 17.

a shift in the law of war by recognizing, in part, that attacking and defending military forces have shared obligations in their treatment of some religious buildings.

3. Protection of Religious Buildings from Military Use

The 1977 Protocol I greatly clarifies this status and expands the prohibition against military use to include most religious buildings, independent of their historic or cultural value.⁹³ While the 1954 Hague Convention focuses on property that is “of great importance to the cultural heritage,” Article 53 of Protocol I enlarges the scope of protection to include objects which “constitute the cultural or spiritual heritage.”⁹⁴ The Commentary on Protocol I notes that the term “cultural” generally applies to buildings of historic importance, but the term “spiritual” specifically applies to places of worship.⁹⁵ The language of Protocol I provides this privileged status to religious buildings independent of their historical significance or the presence of civilians and noncombatants. Although it does not extend to all places of worship, it certainly includes all buildings that express the religious nature of a people.⁹⁶ As described in the Commentary on Protocol I:

The Conference rejected the idea which was put forward by some delegations of including any and all places of worship, as such buildings are extremely numerous and often have only a local renown of sanctity which does not extend to the whole nation. Thus, the places referred to are those which have a quality of sanctity independently of their cultural value and express the conscience of the people.⁹⁷

Thus, Protocol I expands the definition of what religious structures qualify for the privilege.

Nevertheless, there are still some ambiguities in determining which buildings are covered by the privilege. Not every prayer room or *ad hoc* church meets the threshold. But all religious buildings that represent the “people” do. Although the Commentary to Protocol I referred to the “nation,” it also noted that the drafters of Protocol I purposely used

93. PILLOUD ET AL., *supra* note 66, at 646–47.

94. Protocol I, *supra* note 64, at art. 53.

95. PILLOUD ET AL., *supra* note 66, at 646.

96. *See id.* at 647.

97. *Id.*

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the more inclusive term “people” instead of “country” in Article 53 to describe the relative significance of the spirituality of a privileged building.⁹⁸ “People” is not defined and does not signify a specific region, ethnic group, or religious denomination. However, the authors of the Commentary to Protocol I certainly felt that a religious building must have more than merely local renown. It might be fairly argued that Article 53 protects most permanent religious buildings that might tend to attract worshipers of more than a purely local nature.

Most importantly, the privilege in Article 53 specifically prohibits military use of these religious buildings. This is more than the protection against targeting that Article 52, Protocol I gives to all civilian buildings and that previous conventions generally provided. As described by the Commentary to Protocol I:

Article 53 lays down a *special* protection which prohibits the objects concerned from being made into military objectives and prohibits their destruction. This protection is additional to the immunity attached to civilian objects; all places of worship, regardless of their importance, enjoy the protection afforded by Article 52.⁹⁹

Hence, while Article 52 merely states that general civilian objects “shall not be the object of attack or of reprisals,” Article 53 specifically prohibits states from using places of worship that constitute the spiritual heritage of peoples “in support of the military effort.”¹⁰⁰

Unfortunately, Protocol I does not add to the practical means for armies to identify protected religious sites. For cultural religious sites, it perhaps refers to the 1954 Hague Conventions’ distinctive blue and white emblem. But Protocol I does not designate a separate emblem for those religious buildings that Article 53 protects but that the 1954 Hague Convention does not. In any event, the issue of identification has always been less problematic for religious buildings than for other civilian buildings as a matter of common sense. Most religious buildings have exterior markings—a cross, star, or crescent—that indicate their spiritual purpose.¹⁰¹ It might seem surprising that Protocol I does

98. *Id.* at 646.

99. *Id.* at 647.

100. Protocol I, *supra* note 64, at art. 53.

101. For example, Israel uses the Red Star of David to mark religious sites. A picture of this emblem is attached to this article at appendix 1, figure 11-1(c) from COMMANDER’S HANDBOOK, *supra* note 19, at 11–6.

not include a prohibition against treacherous use of religious symbols. But such a restriction might be considered implicit in Article 53's general prohibition against using protected religious buildings for military purposes.

Thus, the privileged status of religious buildings has evolved analogously to the privileged status of hospital buildings under the law of war but not to the same extent. Over the course of the nineteenth and twentieth centuries, successive treaties articulated in increasingly greater detail the independent basis for the religious building privilege in terms of defining which buildings qualify, prohibiting their military use, and creating practical means to identify and recognize them. The law of war shifted from only limiting military attackers' choice of targets to prohibiting all military forces—attackers and defenders—from converting religious buildings to military purposes. Unfortunately, the privileged status of school buildings has not yet undergone the same evolution that occurred in the cases of hospitals and religious buildings.

II. THE LESSER, INADEQUATE CURRENT PRIVILEGE FOR SCHOOL BUILDINGS

The privileged status of schools has not changed significantly since the 1899 and 1907 Hague Conventions. Those conventions vaguely declared that military forces must take “necessary steps” to spare most civilian buildings during sieges and bombardments and that seizure of such buildings was forbidden.¹⁰² But in practice, military forces viewed those protections as merely derivative of the presence of civilians and noncombatants and only as limitations on an attacker's choice of targets. The 1899 and 1907 Conventions' terms were therefore as ineffective at providing adequate protections for school buildings as they were in providing such protection for hospitals and religious buildings during the World Wars. For example, during World War I the German Army shelled the University of Louvain under the alleged premise that French forces were using the university for military purposes.¹⁰³ Although subsequent conventions attempted to give better protection to hospitals and religious buildings by solving issues of definition, maintenance of status, and battlefield identification, these issues unfortunately remain largely unaddressed for school buildings.

Neither the 1899 Convention nor the 1907 Convention define the specific qualities that make a building an educational institution for

102. Hague IV, *supra* note 36, at arts. 27, 56.

103. Thurlow, *supra* note 40, at 158.

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purposes of being privileged against targeting or military use. For example, Article 27 of the Hague IV Regulations simply states that military forces must try to spare buildings “dedicated to religious, art, science, or charitable purposes” during attacks.¹⁰⁴ It does not explicitly state that these categories cover school buildings. Article 56 provides an equally vague prohibition concerning seizure of civilian buildings.¹⁰⁵ It applies to institutions dedicated to education. But what is an institution dedicated to education? How long must a building be used for education for it to be considered dedicated? Do children and other civilian or noncombatant students need to be present for the privilege to exist? Could nonuse cause a school to lose its protected status? Or do educational buildings merit protection inherently?

Further, the later Geneva Conventions of 1864, 1929, and 1949 offer few answers to these questions. They focus on the protection of sick, wounded, and civilians generally. They clarified the definition of hospitals for purposes of privileged status and provided enhanced indirect protections for religious and school buildings to the extent that those buildings might happen to be used for sheltering wounded and sick persons. All buildings used for such purposes are entitled to be marked with medical distinctive emblems, such as the Red Cross or Red Crescent. But these conventions do not define what constitutes a school building. Moreover, as with religious buildings, these conventions exclusively concern an attacking force’s choice of targets and do not create an independent privileged status that might prohibit attacking and defending armed forces from using school buildings for military purposes. Ultimately, they provide no more protection for school buildings than exist generally for all civilian buildings under the 1907 Hague Convention.

Nevertheless, some school buildings receive additional protection based on their cultural value pursuant to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. This convention addresses for school buildings “of important cultural significance” many of the legal and practical aspects of definition, maintenance of privileged status, and identification on the battlefield.¹⁰⁶ But it does not specifically include school buildings in its definition of cultural property and thus would not apply to most schools. Certainly, some historic universities and school buildings

104. Hague IV, *supra* note 36, at art. 27.

105. *Id.* at art. 56.

106. GREEN, *supra* note 10, at 153.

might qualify if they are of “great importance to the cultural heritage of every people.”¹⁰⁷ However, this definition is extremely vague and open to interpretation and therefore abuse by opposing armed forces at war. It might apply to the ancient buildings of Oxford and Cambridge Universities, but not to ordinary grammar schools or high schools. And even old universities have many new buildings. What is sufficiently ancient to receive the benefit of the privilege? American universities are relatively new compared to the established educational institutions of Europe; conceivably, then, no American universities are eligible. The 1954 Hague Convention therefore lacks clarity in defining the school buildings to which it might provide a privileged status during armed conflict.

Concerning maintenance of this status, Article 4 directs state parties to respect cultural property by refraining from using it in any manner that might cause it damage during armed conflict.¹⁰⁸ With respect to battlefield identification, states have discretion to mark protected historic school buildings with the 1954 Hague Convention’s distinctive blue and white emblem in the same manner as historic religious buildings.¹⁰⁹ Thus, the 1954 convention elevates the privileged status of some historic schools from providing dependent protection, based on the presence of civilians and noncombatants, to providing independent protection against targeting and military use, based on these buildings’ inherent cultural value to society. As with religious buildings, it represents the beginning of a shift in the law of war towards recognition of shared responsibilities by attacking and defending armed forces in their treatment of school buildings.

But this is where the evolution of a privileged status for schools stops. Article 53 of Protocol I extends the protections of the 1954 Hague Convention to religious buildings that represent the cultural or spiritual values of a people, if not to such buildings generally. It expressly prohibits armed forces from using these religious buildings “to support the military effort.”¹¹⁰ But Article 53 does not apply to school build-

107. 1954 Hague Convention, *supra* note 87, at art. 1.

108. *Id.* at art. 4.

109. The 1954 Hague Convention creates two categories of protected cultural sites—ordinary and special. They both carry the same protections. The difference between them is that state parties have discretion to mark ordinary cultural sites. Special cultural sites are designated by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and listed on an international registry. *See id.* at art. 8.

110. Protocol I, *supra* note 64, at art. 53.

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ings.¹¹¹ Rather, Protocol I provides school buildings only with the general protections against being targeted that are given to all civilian buildings in Article 52.¹¹²

Moreover, Articles 52 and 53 allow for military use of school buildings by expressing without limitation that schools may be converted into military objectives. Article 52 defines a military objective, in part, in terms of an object's contribution to military action.¹¹³ It states that religious and school buildings are normally dedicated to civilian purposes but creates a presumption in case of doubt whether a "place of worship . . . or a school, is being used to make an effective contribution to military action."¹¹⁴ This language therefore recognizes that armed forces may conceivably use any unoccupied civilian buildings for military purposes, especially those near combat areas.¹¹⁵ As stated, Article 53 limits the application of this language in the case of religious buildings by expressly prohibiting their military use. But Protocol I contains no limitation of its application in the case of school buildings. Accordingly, Article 52 acknowledges that unlike religious buildings, no independent prohibitions exist against military use of school buildings—i.e., converting them into military objectives.¹¹⁶

Protocol I limits military use of schools only to the extent that civilians and noncombatants are present. Article 51 prohibits state parties from placing military objects in locations where civilians are present.¹¹⁷ Such acts are considered as the use of human shields to inhibit an opposing army from targeting those military objects.¹¹⁸ Accordingly, if civilian students are still using a school building, an army may not lawfully use the building for military purposes. Protocol I's privileged status for schools is therefore entirely derivative of the presence of civilians and not based on these buildings' inherent humanitarian value.

The current law of war contains no clear general prohibition against armed forces using school buildings for military purposes, as long as civilians and noncombatants are not present.¹¹⁹ Such military use

111. See Protocol I, *supra* note 64, at art. 53 (failing to specifically mention schools).

112. See PILLOUD ET AL., *supra* note 66, at 647.

113. Protocol I, *supra* note 64, at art. 52.

114. *Id.*

115. See PILLOUD ET AL., *supra* note 66, at 637.

116. *Id.* at 636–37.

117. Protocol I, *supra* note 64, at art. 51.

118. *Id.*

119. Of note, the Military Commissions Act of 2006, 10 U.S.C. §§ 948a–950 (2006), did not create such a general prohibition under the law of war. It is a domestic statute, not part of the

could potentially include converting unoccupied school buildings into headquarters, fortified positions, artillery sites, observation posts, barracks, or supply depots. School buildings are therefore not privileged or protected sites to the same degree as hospitals and religious buildings. Human Rights Watch tacitly acknowledged this distinction in its recent report on the conduct of the war in Iraq and civilian casualties. The report excludes school buildings from its criticism of the illegal Iraqi practice of placing military objectives in places that are specially protected under international law. It states, “In addition to protecting civilians, international humanitarian law gives special protection to certain facilities, including hospitals, places of worship, and cultural property. Iraqi armed forces used these protected places to advance their military goals.”¹²⁰ Human Rights Watch explained in detail that Iraq’s military use of hospitals and mosques violated international humanitarian law by failing to honor the special privileged status of these sites. Yet the report’s section on protected sites did not mention the Iraqis’ improper military use of schools. The report discussed that issue later in the section concerning protection of the civilian population and implied derivative protection of school buildings.

III. DEVELOPING A MODERN PRIVILEGED STATUS FOR SCHOOL BUILDINGS

Given this distinction, the law of war should be updated to provide school buildings with a privileged status that is similar if not superior to the privileges afforded to hospitals and religious buildings. These three groups of civilian buildings share similar rationales for asserting special protections. All have a unique nexus to civilians and noncombatants and possess independent, inherent, and unique humanitarian values to society. There is a logical link between the military use of school buildings, their conversion into justifiable targets, and the high incidence of these buildings’ destruction in recent wars. After all, one army’s use of a school building, even if the students have left, logically increases the likelihood that an opposing army might target a function-

international law of war, and applies only to a limited group of combatants. The Act establishes a domestic system of military commissions for the United States to prosecute offenses that are committed by alien unlawful combatants—persons that are not members of any state’s armed forces. Certainly, its enumerated offenses include “Using Protected Property as a Shield,” which essentially prohibits alien unlawful combatants from using protected property for military purposes. But it defines such property as that afforded specific protection by the law of war. As stated, the law of war currently provides school buildings with no specific, independent protection against military use. *See id.* § 950v.

120. HUMAN RIGHTS WATCH, *supra* note 2, at 72.

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ing school under the mistaken belief that it is also being used for military purposes. In 2003, during Operation Iraqi Freedom, over 84% of Iraq's higher education institutions were damaged or destroyed despite efforts by Coalition Forces to avoid collateral damage.¹²¹ Similar results occurred in 1999 during the Kosovo conflict. The Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY) confirmed NATO's efforts, through precision weapons and detailed target vetting, to bomb only those buildings that were justifiable lawful military objectives.¹²² Yet, the ICTY Prosecutor also noted that Human Rights Watch found generally reliable the Federal Republic of Yugoslavia's (FRY) White Book report of civilian casualties, which included allegations that the NATO bombing campaign destroyed or damaged many schools in Yugoslavia.¹²³ Further, in the wake of military operations, the United Nations Children's Fund (UNICEF) estimated that 45% of Kosovo's schools were severely damaged or destroyed and that 668 out of 1000 needed significant repairs.¹²⁴

As already discussed, the evolution of the privileges afforded to hospitals and religious buildings began with a recognition that a nexus exists between the protection of those buildings and the safety of particular groups of noncombatants and civilians during wars. The protection of hospitals from targeting and military use was acknowledged as linked to the safety of wounded and sick persons. And the protection of religious buildings from targeting and some from military use was acknowledged as linked to the safety of pilgrims and persons seeking special refuge.

There is an analogous nexus between the protection of schools from targeting and military use and the safety of children and other civilian and noncombatant students during wars. The changing nature of warfare in the twentieth and twenty-first centuries has dramatically

121. UN Office for the Coordination of Humanitarian Affairs, *Iraq: Activists Call for Protection of Academics*, IRIN NEWS, Jan. 15, 2006, available at <http://www.irinnews.org/Report.aspx?ReportID=26049>; see HUMAN RIGHTS WATCH, *supra* note 2, at 17, 92, 95 (coalition ground and air forces included schools on no-strike lists and took other precautions to avoid damaging schools).

122. International Criminal Tribunal for the Former Yugoslavia (ICTY), Final Report to the Prosecutor by the Committee Established To Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 7, 90, June 8, 2000, 39 I.L.M. 1257, available at <http://www.un.org/icty/pressreal/nato061300.htm>.

123. *Id.* at para. 90; HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN, n. 25 and Appendix A (2000), available at <http://www.hrw.org/legacy/reports/2000/nato/index.htm#TopOfPage>.

124. United Nations Children's Fund News Release, *Kosovo Schooling Faces Great Challenges*, Sep. 2, 1999, available at <http://www.unicef.org/newsline/99pr35.htm>.

increased the number of civilian casualties during armed conflict, and a disproportionate number of these have been children.¹²⁵ This has produced a growing international consensus that the United Nations must find a solution. The United Nations Secretary-General's Special Representative for Children and Armed Conflict is studying the effects of wars on children.¹²⁶ The Security Council also recently established a Working Group on Children and Armed Conflict to monitor and report on the condition of children who are exposed to armed conflict throughout the world and to propose solutions.¹²⁷

But these relationships and needs do not mean that the law of war should provide only derivative protection to school buildings. Rather, the best means to ensure the protection of these buildings is through an international regime that provides an independent privileged status; such a regime must also answer legal and practical questions of definition, maintenance of status, and battlefield identification and recognition. In protecting school buildings, the law of war should expand its focus from exclusively limiting military attackers' choice of targets to also prohibiting attackers and defenders from converting school buildings to military purposes. For schools, one could draw analogies to the existing regimes for hospitals and religious buildings and by including these new provisions in amended conventions or an entirely new one.

Certainly, a policy need also exists for the law of war to recognize that schools should have an independent privileged status to protect them from being turned into military objectives. Just like hospitals and religious buildings, schools occupy a unique role in civilian communities. Schools are centers of education, shelter, and activity for children; facilitators of democratic expression through voting and peaceful assembly; and sources of civic pride. As such, they are often the first public structures built in new communities or settlements and are arguably more important to a community's future growth and development than other civilian buildings such as museums, sports facilities, libraries, or even a city hall. Thus, as a matter of policy, schools merit a modern privileged status similar to that afforded to hospitals and religious buildings that prohibits their military use because of their

125. THE UNITED NATIONS CHILDREN'S FUND, GUIDE TO THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT 7 (2003), available at http://www.unicef.org/publications/files/option_protocol_conflict.pdf.

126. *Id.* at 8.

127. U.N. News Service, *Security Council Starts Work on Measures to Protect Children During War*, Nov. 21, 2005, available at <http://www.un.org/apps/news/printnewsAr.asp?nid=16642>.

inherent educational, and therefore humanitarian, value to society.

A. *Defining What Is a School Building*

A modern privileged status for school buildings should clearly define to which buildings it applies. As with hospitals and religious buildings, the privilege should extend to all civilian school buildings, independent of the presence of civilians and noncombatants. It should emphasize the building's inherent humanitarian value, not just as a sanctuary for civilians and noncombatants, but as an essential part of a community's existence. By doing so, it also necessarily means that the building should be immune from military use and not just from being targeted. As discussed, a building's general privilege against being targeted is ineffective if the building can be converted into a justifiable target through military use.

The definition should clarify whether it applies equally to temporary and permanent structures. The privileged status of hospitals extends to all hospitals—whether temporary or permanent and whether fixed or mobile. In contrast, the privileged status for religious buildings states that the building must represent the spiritual conscience of a people or community. It might be argued that this excludes temporary structures and applies only to permanent buildings that attract pilgrims from a broad area. Perhaps this difference is due to the closer nexus between protecting civilians and noncombatants and protecting a building with respect to hospitals and the sick and wounded than as between religious buildings and the pious. Given the policy basis of creating more protections for schools, the privilege for schools should probably follow the hospital privilege example and apply to all permanent and temporary structures. No distinction should be made among schools other than if they are military ones, as addressed below. This means that the privilege would apply to all levels of civilian schools from day care centers and grammar schools through universities and even to commercial schools such as culinary schools or language centers.

However, as with medical establishments and religious buildings, confusion can arise from mixed civilian uses of buildings. For example, day care centers sometimes are located in office buildings. Some houses have dual roles as parents provide home-schooling. Some adults even conduct their education at home through distance learning. Finally, some factories and offices have on-the-job training centers located within non-educational buildings.

In those cases, a modern school privilege should perhaps provide greater protection than the hospital and religious building privileges afford. As already described, a hospital building must be exclusively

dedicated to medical purposes in order for it to qualify for the hospital privilege under the law of war. For example, a nurse's office in an office building or even a school would not cause the entire building to qualify for the hospital privilege. But the nurse's office, that portion of the building, would certainly qualify. In contrast, the religious building privilege does not expressly address the issue of mixed civilian uses. So, if a secular office building contains a religious room or chapel, it is unclear whether the entire building would qualify for the religious privilege. On the other hand, it might if the room or chapel made the whole building representative of the spiritual conscience of a people.

In the case of schools, it can be strongly argued that all civilian school facilities have educational value and have a nexus to civilians and noncombatants. Further, they potentially serve the needs of all civilians and represent the capacity of all persons to grow intellectually. By contrast, the primary purposes of hospitals and religious facilities arguably serve different or even limited aspects of civilian society. Hospitals certainly treat all persons—healthy and ill—and may be used as facilities for many community needs that are unrelated to medical care. But their primary purpose is not to develop the intellectual capacity of all persons. Similarly, religious buildings certainly host all worshipers and may be used for many secular community needs. But their primary purpose is a place of worship for the pious and that may not include all persons from a civilian society or global perspective. Schools therefore have a broader inherent humanitarian purpose than hospitals and religious buildings. In the context of law of war privileges, they are more analogous to religious structures that represent the spiritual conscience of an entire people than they are to hospitals or to religious structures generally. In other words, perhaps civilian schools can imbue an entire civilian building with an educational purpose, regardless of a particular school's size, level, specific civilian purpose, or even whether it grants certificates or degrees. If so, all civilian educational facilities should qualify for a modern school privilege, even when they are only part of a civilian building.

However, a modern school privilege should distinguish between civilian and military school buildings. It should clarify that civilian schools merit the privilege while military schools do not. Unlike military and civilian hospitals and religious buildings, military and civilian schools do not share the same underlying humanitarian purposes. Military schools have no obvious nexus to civilians and noncombatants. In fact, military schools generally serve to train combatants for conducting hostilities. Further, a modern school privilege should provide a framework to address mixed circumstances, such as military

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education that occurs on or near civilian school campuses.

Accordingly, to define protected school buildings, a modern school privilege must clearly articulate the differences between military and civilian school buildings. And similar to the modern hospital and religious building privileges, such definitions should focus on the school's purpose and be independent of the presence of combatants, civilians, and noncombatants. A modern privilege for schools could define the differences between military and civilian schools using the same language that the law of war employs to distinguish military objectives from civilian objects. Protocol I, Article 52 defines military objectives as, "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."¹²⁸ Based on this distinction, a modern school privilege could logically declare that the military or civilian purpose of a school building is demonstrated by its mission or curriculum,¹²⁹ location, name, and sources of funding—and how these aspects relate to military activities. For example, it is reasonable to conclude that military schools produce combatants, teach military skills, are typically located on bases, often carry the word "military" in their name, and are funded from sources closely related to military activities.

It is interesting to consider applications of such a standard to existing schools. For example, the United States' military academies would be unprivileged military schools. Their curriculum is designed to train aspiring military officers—to make an effective contribution to military action.¹³⁰ Graduates receive military officer commissions. These schools carry military names, are located on military bases, and are funded as part of the Department of Defense. On the other hand, civilian school buildings used by Reserve Officer Training Corps (ROTC) programs are a closer call.¹³¹ ROTC curricula generally include military science

128. Protocol I, *supra* note 64, at art. 52.

129. Of note, recent congressional hearings examined the curricula of Islamic religious schools—madrassas—to address concerns that they allegedly have ties to terrorist organizations and promote Islamic militancy and extremism. See Peter Bergen and Swati Pandey, Op-Ed., *The Madrasa Myth*, N.Y. TIMES, June 14, 2005, at A23; Febe Armanios, Islamic Religious Schools, *Madrassas*: Background 1, 6 (Cong. Research Serv., CRS Report for Congress Order Code RS21654, Oct. 29, 2003).

130. See, e.g., 10 U.S.C. § 4331(a) (2006) (providing for the establishment of the U.S. Military Academy).

131. See 10 U.S.C. § 2102 (2006) (establishing the statutory authority and guidelines for ROTC programs).

courses that focus exclusively on training future military officers for operations. They may also include courses that all civilian students study with a non-military purpose, such as chemistry, biology, history, and literature. But the classes occur in buildings located on civilian universities, not on military bases. Accordingly, it might be fairly concluded that the ROTC military science classes occur in unprivileged military school buildings. In contrast, the locations of ROTC and other students' non-military courses are privileged civilian school buildings. Of note, it would be illogical to deprive other university buildings of the privilege merely because of proximity to a ROTC building. The law of war does not expressly deprive hospitals and religious buildings of their individual privileges merely because of proximity to other unprivileged buildings. Of course, hospitals and religious buildings would certainly be at greater risk for collateral damage if they are in close proximity to legitimate military targets, regardless of their privileged status.

Finally, applying Protocol I, Article 52, private military high schools and grammar schools should be privileged civilian schools only to the extent that they do not make an effective contribution to military action such that their destruction would provide the enemy with a definite military advantage. Thus, they would arguably qualify for the privilege if they are not located on military bases, are not directly funded by the Department of Defense, and do not have a military skills curriculum that automatically leads to a military rank, commission, or position upon graduation. It would be unreasonable or highly speculative to assert that private military high schools and grammar schools contribute to military action if they do not meet such criteria. Moreover, a modern school privilege should clarify that private so-called military grammar and high schools are not permitted to have curricula that are designed to train and graduate children to be combatants. The law of war prohibits states from allowing children to be combatants—to take a direct part in hostilities.¹³² Accordingly, most, if not all, private military grammar and high schools have civilian purposes and therefore be privileged under a modern privilege for school buildings.

B. *Identifying and Recognizing Schools on the Battlefield*

The issue of definition is closely linked to the practical one of battlefield recognition and distinctive emblems. Logically, a privileged building, which is marked with a universally recognized distinctive emblem, should function in its protected capacity or purpose. For

132. See Protocol I, *supra* note 64, at art. 77.

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hospitals, the law of war recognizes distinctive emblems that indicate whether a building is in fact a hospital. It outlaws the use of such emblems on buildings that are not hospitals. In contrast, the law of war's conventions and treaties do not create distinctive emblems specifically for religious buildings. The 1954 Hague Convention provides a distinctive emblem to mark some religious buildings. For others, the issue of identification is less controversial because the distinctive emblems of the world's major religions are commonly known and easily recognized. Nevertheless, for purposes of uniformity, the law of war should have a more than customary emblem to mark buildings that merit an independent privilege against targeting and military use.

Accordingly, for school buildings, there is a need to create a universally recognized distinctive emblem that would identify a temporary or permanent structure as a protected educational site. An internationally recognized emblem would be useful to armed forces in the field in distinguishing between current and former school buildings. The emblem from the 1954 Hague Convention might be used for historic school buildings that are a culturally important. But that emblem would not be applicable to most school buildings.

In order to facilitate a modern school privilege, a distinctive emblem must be designed. Like the Red Cross and other distinctive emblems, it should consist of bright, contrasting colors that are easily seen from a distance. It should be a familiar shape that is easily recognized by soldiers as signifying a school site. Also, it should be a simple pattern that students, teachers, and school administrators can easily draw and duplicate as needed.¹³³ Finally, the creation of a new distinctive emblem just for school buildings must be accompanied by a prohibition against its misuse. The law of war acknowledges and implements this basic principle with the distinctive emblems that mark hospitals and cultural property.

C. *Maintaining the School's Privileged Status*

A modern privilege for schools should also address the conditions through which such buildings maintain and keep their status. It should emphasize that attacking and defending forces equally share obligations to respect and protect school buildings. For both hospitals and

133. Of note, an emblem that meets these criteria is the five-sided yellow sign that some countries use to mark automobile traffic safety zones near elementary and secondary schools. See appendix 2. Such a distinctive emblem would be convenient and easily recognizable as associated with schools.

religious buildings, the law of war has traditionally provided that they would lose their privileged status if armed forces used these buildings for military purposes. Over the past century, the hospital privilege evolved from no restrictions on military use to allowing some uses of military hospitals based on necessity. Finally, it adopted a complete ban on military use of civilian hospitals for non-humanitarian purposes. For religious buildings, the law evolved from vague and often ignored restrictions on seizing these buildings to a complete ban on using them for non-humanitarian purposes. For schools, a modern privilege should follow these trends and forbid using civilian educational buildings for any direct, intended military purposes—for those that make an “effective contribution to military action,” as Protocol I, Article 52 defines military objectives.¹³⁴ This would require a continuous vetting of the purposes of course curricula and research programs that occur within an individual school building in order for it to maintain a privileged status.

It is important to note that these specially protected buildings can lose their privileged status for reasons other than military use. Civilians might convert them from a humanitarian purpose to another civilian purpose or even to no purpose at all. For example, civilians could transform a hospital or religious building into apartments or into an office. Of note, school buildings are typically less distinctive in their architecture compared to hospitals and religious buildings, making it easier to convert them to different uses. But this fact should not diminish the unique educational purpose and value of schools. Regardless of their design, communities still need them, and the policy reasons for their protection still exist. Even so, a modern school privilege should recognize that civilian conversion of schools to non-educational purposes will terminate these buildings’ special privileged status without violating humanitarian law. However, it should also ensure that military forces do not employ their influence on occupied territories to coerce civilians into making such conversions.

Civilians’ complete abandonment of a school building would also affect its special protections. Specifically, a modern privileged status should distinguish between temporary versus permanent abandonment. Certainly, temporary periods of nonuse should not affect a school’s status. Otherwise it would undermine the building’s independent protection and again make its status entirely derivative of the presence of noncombatants. As already discussed, such derivative pro-

134. Protocol I, *supra* note 64, at art. 52.

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tections are ineffective at protecting buildings.

For civilian hospitals, the law of war does not directly address whether abandonment affects a hospital's status and therefore the lawfulness of military use. Rather, it indicates that continued functionality and the presence of distinctive markings affect status. Protocol I prohibits armed forces from requisitioning military hospitals "so long as these resources are necessary for the provision of medical services for the civilian population."¹³⁵ The Commentary on Protocol I notes that the word "necessary" as used in this provision has "a wide range of meanings from 'useful' to 'indispensable.'"¹³⁶ But an army is clearly forbidden from using a civilian hospital building for military purposes as long as the structure has some potential medical functionality and the local population intends to use it. This might be a difficult standard for armed forces to apply in the field and ultimately depends on the circumstances and common sense. Certainly though, long periods of nonuse and the removal of protective emblems reasonably indicate abandonment.

As with religious buildings, the law of war does not specifically address whether abandonment affects status and the lawfulness of military use. Unlike the hospital privilege, the religious building privilege does not link protected status with functionality. The 1954 Hague Convention and Protocol I contain no derogations from the prohibition on using protected religious sites to support the military effort.¹³⁷ Thus, one might argue that unlike hospitals, a religious building can never lose its status through abandonment. A religious site remains sacred whether worshipers continue to pray there or not. In practice, there are thousands of inactive religious shrines throughout the world. Many are located in inaccessible war zones. Others have been lost and rediscovered. For example, the Kish Church in Azerbaijan has been abandoned for hundreds of years without an assigned priest or body of parishioners, yet it is still considered a sacred site,¹³⁸ These buildings are still regarded by the international community as protected religious sites.¹³⁹

Accordingly, civilian school buildings are more similar to hospitals

135. Protocol I, *supra* note 64, at art. 14.

136. PILLOUD ET AL., *supra* note 67, at 184.

137. *Id.* at 649.

138. See *The Kish Church: Digging Up History*, AZER. INT'L, Dec. 31, 2000, at 18, available at 2000 WLNR 7491434.

139. See generally Geoffrey S. Corn, "Snipers in the minaret – what is the rule?" *The Law of War and the Protection of Cultural Property, a Complex Equation*, ARMY LAWYER, July 2005, at 36 (noting that

than religious buildings with respect to abandonment and retention of privileged status. Like hospitals, a school building's protected status seems reasonably linked to its functionality and the intent of the local civilian population. School buildings should therefore retain their privileged status despite temporary nonuse or abandonment. After all, a school might not be used for several months because of summer break or because a population flees a town to avoid a battle. Neither circumstance seems a reasonable basis for an army to conclude that the local civilian population intended to no longer use the building for its educational humanitarian purpose.

On the other hand, a modern privileged status for schools—like for hospitals—should reasonably recognize that a school building might lose its special status if it has not been used for a significant period. Such nonuse might indicate that a civilian population no longer intends to use a school building for its humanitarian purpose. For example, in 2002, U.S. Special Forces established its Afghanistan headquarters in a school building that had been unused for an unknown period that was estimated to be several years from the physical condition of the building.¹⁴⁰ A modern privileged status for schools should address abandonment, as Protocol I obliquely does for hospitals. It should establish a framework for a case by case assessment of functionality and the intent of the civilian community. Longer periods of nonuse and civilian removal of protective emblems from schools should reasonably indicate abandonment.

CONCLUSION

Thus, the law of war currently provides schools with a less privileged status than it affords to hospitals and religious buildings. The current school privilege prohibits armed forces from targeting these buildings. But it fails to prevent or discourage military use, which converts school buildings into justifiable targets for opposing forces. States therefore have inconsistent policies concerning military use of school buildings during armed conflicts. There is a logical circumstantial link between military use of schools and the fact that in war-torn areas, large percentages of schools were destroyed in recent conflicts despite precision targeting methods and efforts to avoid damage to civilian

Hague IV protects religious sites such the mosque mentioned in the article unless some military necessity exists).

140. This point is based upon the author's experience as the Staff Judge Advocate for Commander, Special Operations Command Central, from August 2000 to September 2003.

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sites. Moreover, military use of schools endangers lives by increasing the likelihood that military forces will target an unconverted school filled with children. The current privilege for schools is untenable and must be remedied.

In solving this problem, it should be recognized that three critical issues necessarily affect any legal regime that seeks to protect buildings, especially from military use: 1) defining which buildings qualify, 2) maintaining privileged status, and 3) ensuring battlefield recognition. The law of war evolved over the past century to better protect hospitals and religious buildings by addressing these issues.

The current privilege for schools needs to similarly evolve. Most importantly, it should prohibit armies from using school buildings for military purposes. By addressing the above three issues, a modern school privilege will reduce the high incidence of destruction of school buildings in future wars. School buildings have an inherent educational and therefore humanitarian value that merits the same or greater protections than the law of war affords to hospitals and religious buildings.

Moreover, the development of a modern school privilege might also serve as a model to reassess the law of war's protections of other types of buildings during war. Schools are not likely the only under-protected civilian buildings that have a unique humanitarian value to civilized society. Further, it might become part of larger trend. The law of war's privileges for hospitals and religious buildings evolved from first placing burdens exclusively on military attackers to placing them equally on attackers and defenders. It changed from exclusively limiting military attackers' choice of targets to later equally limiting both attackers' and defenders' military use of such buildings. The development of a modern school privilege might serve as a catalyst to refocus the law of war on the equal and interrelated burdens that attackers and defenders share to alleviate the sufferings of war on civilian populations and their buildings.

APPENDIX 1

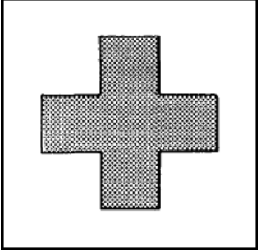
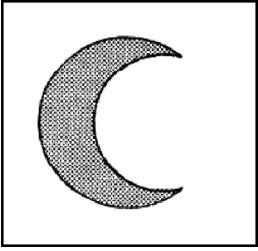
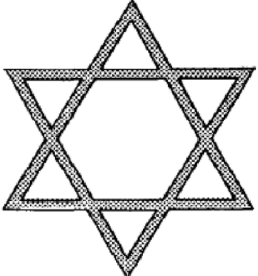

<p>a.</p> 	<p>The Red Cross</p> <p>Symbol of medical and religious activities.</p>
<p>b.</p> 	<p>The Red Crescent</p> <p>Symbol of medical and religious activities.</p>
<p>c.</p> 	<p>The Red Star of David</p> <p>Israeli emblem for medical and religious activities. Israel reserved the right to use the Red Star of David when it ratified the 1949 Conventions.</p>
<p>d.</p> 	<p>Marking for Hospital and Safety Zones for Civilians and Sick and Wounded (Three Red Stripes)</p> <p>(Noncombatants)</p>

FIGURE 11-1. Protective Signs and Symbols

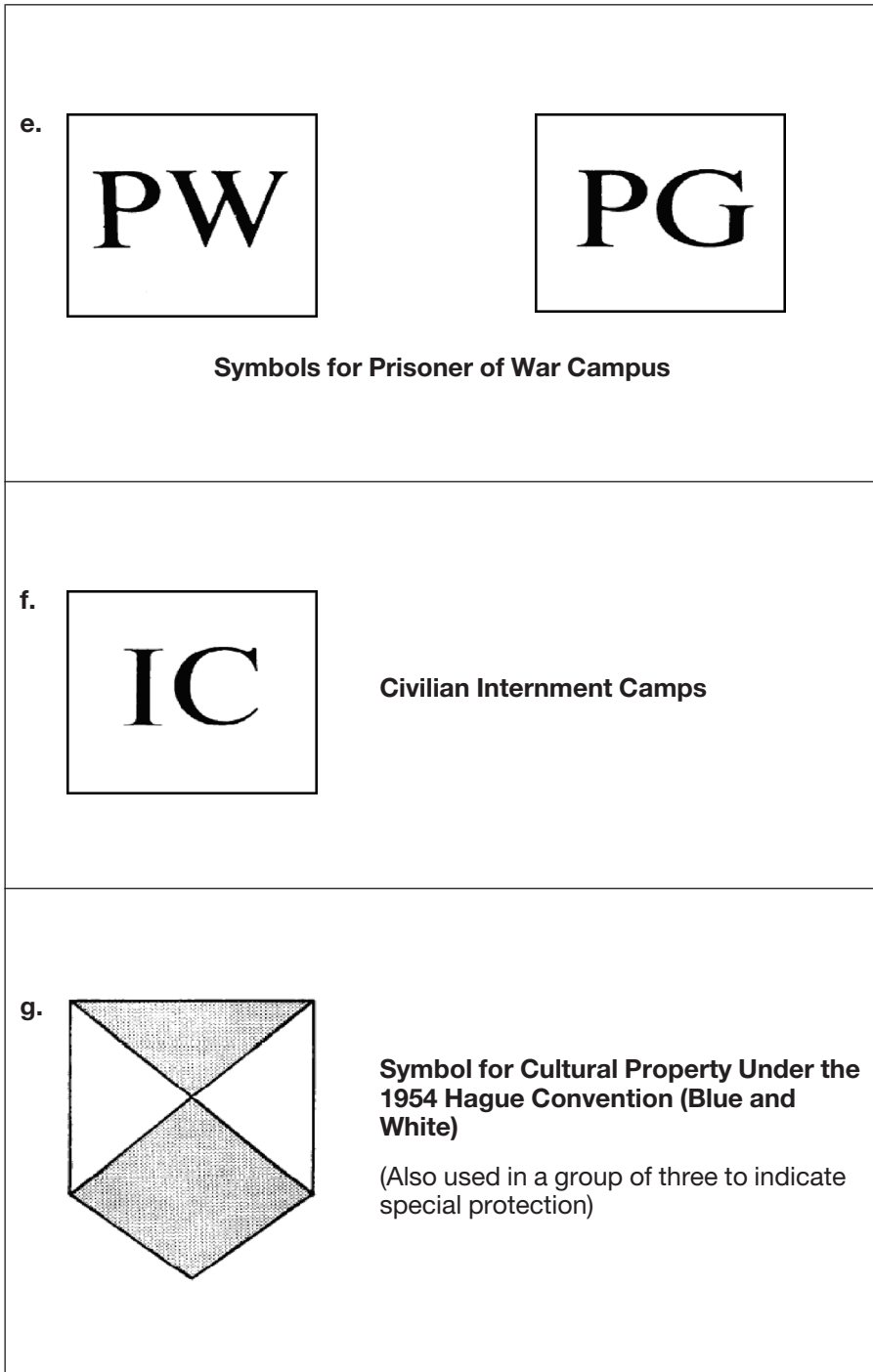


FIGURE 11-1. Protective Signs and Symbols

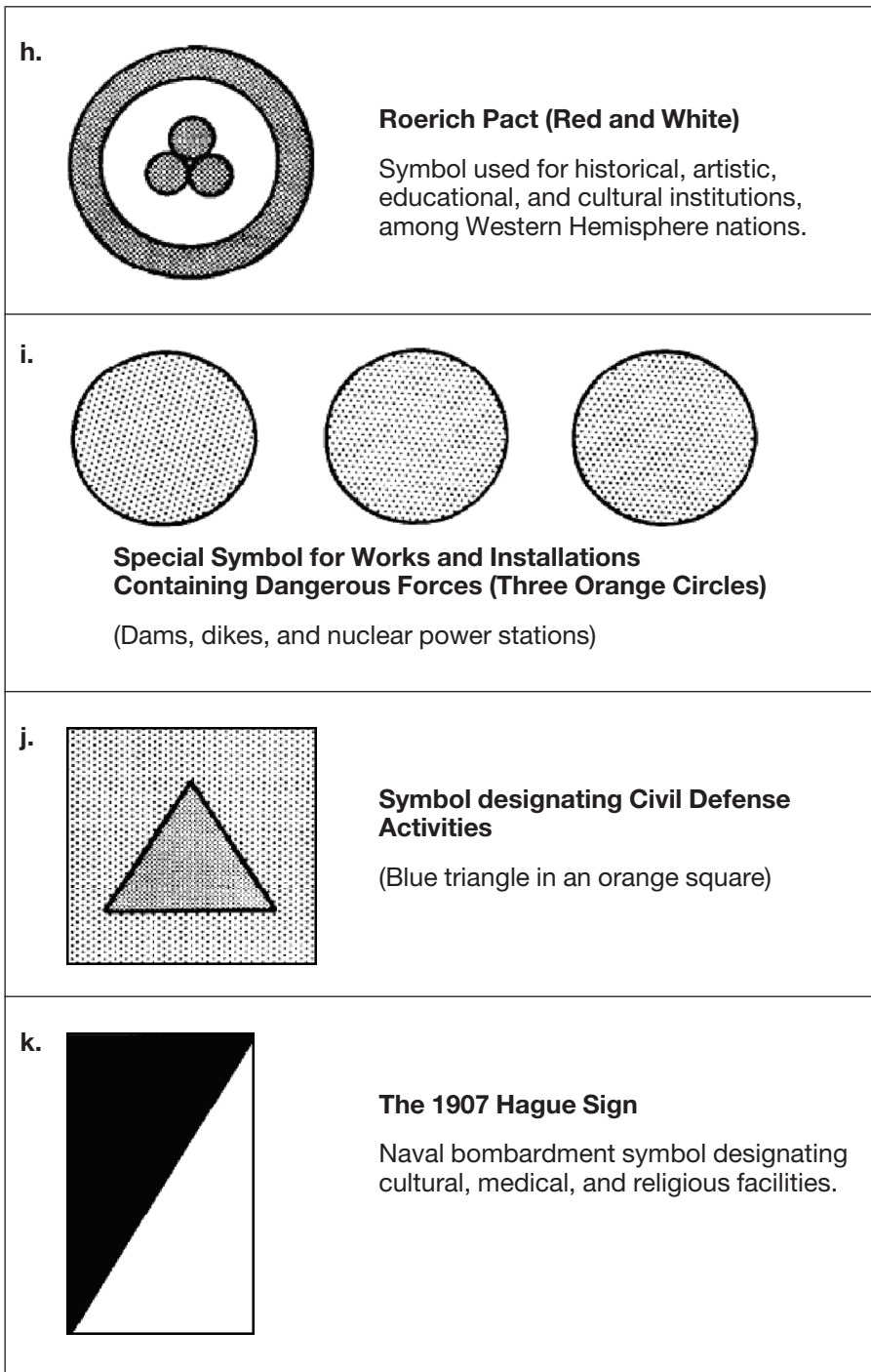


FIGURE 11-1. Protective Signs and Symbols

I.



Third Protocol Emblem – the Red Crystal (Red frame against a white background)

Symbol of medical and religious activities.

**APPENDIX 2
PROPOSED DISTINCTIVE EMBLEM FOR SCHOOLS**

