International Institute of Humanitarian Law

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Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

Strengthening IHL compliance: The conduct of hostilities, the protection of essential services and humanitarian assistance in contemporary armed conflict

STUDI

Politica

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Strengthening IHL compliance: The conduct of hostilities, the protection of essential services and humanitarian assistance in contemporary armed conflict

46th Round Table on Current Issues
of International Humanitarian Law
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Cover image: AFP/BNPB.

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Preface

In recent decades, armed conflicts have undergone substantial transformations. Modern warfare is distinctly defined by an abundance of very heterogeneous actors, spanning from conventional armed forces to irregular armed factions, non-state entities, organised criminal syndicates, terrorist groups, private contractors, and even hybrid combinations thereof. All these entities, moreover, have increased over time their capability to conduct military operations across multiple domains, encompassing the land, maritime, air, space, and cyber domains. Adding to the intricacy, concurrent armed conflicts of varying natures occasionally emerge within identical geographical areas, exacerbating the complexity by blurring the relevant legal framework, its application and respect.

In other terms, the traditional battlefield has evolved with the use of force now extending across time, space and scope. From a military perspective, this complex operational environment is marked by heightened volatility and uncertainty, impacting both decision-making processes and response capabilities. The ability of commanders to make decisions in accordance with provisions of international humanitarian law and other applicable standards within such a framework is undeniably challenging.

From a humanitarian standpoint, this complexity gives rise to further challenges. The intricate framework poses significant barriers to communication, complicates cooperation, and often impedes the mutual understanding of the legal obligations and directives to be followed by humanitarian personnel. In this context, the outcomes and possible success of the humanitarian action are heavily jeopardised.

Against this background, the flagship event of the Sanremo Institute, organised in collaboration with the International Committee of the Red Cross, focused on "Strengthening IHL compliance: the conduct of hostilities, the protection of essential services and humanitarian assistance in contemporary armed conflict". The conference was held on September 14 and 15, 2023, for the second time in its history in a hybrid format to allow both physical and remote participation.

The conference examined the applicability of international humanitarian law principles and rules to multi-faceted humanitarian crises, extending its scope by delving into international human rights law and the many additional rules and complementary legal regimes. With the participation of internationally renowned experts, the Round Table also discussed exemplary methodologies, good practices and new instruments aimed at enhancing the protection of civilians. Therefore, the panels examined the

effectiveness of IHL-regulated tools such as safe passages, protected zones and demilitarised zones, as well as other innovative strategies, to prevent harm to the civilian population and facilitate the provision of humanitarian assistance. To complement its analysis, the conference finally addressed the most challenging humanitarian aspects of contemporary conflicts and their impact on ensuring humanitarian access, aid and the protection of essential services.

Building on the results of the Round Table, these proceedings aim to reaffirm the Sanremo Institute's commitment to promoting the application and observance of international humanitarian law/law of armed conflicts, human rights, and all the related bodies of law worldwide.

I wish to extend heartfelt gratitude to all those involved in organising and contributing to the success of this important edition of the Round Table. I am confident that this esteemed international gathering, along with its outcomes presented by this volume, will successfully perpetuate the "humanitarian dialogue in the Spirit of Sanremo" and bolster knowledge, respect and compliance with IHL.

Lt. General (retd) Giorgio BATTISTI
President of the International Institute of Humanitarian Law

Opening session

Welcome address

Caterina PIRERI
Deputy Mayor of Sanremo

Gentilissimi partecipanti, autorità,

a nome di tutta l'amministrazione comunale e del Sindaco Alberto Biancheri, sono particolarmente onorata di dare il benvenuto ai partecipanti della 46ª edizione della Tavola Rotonda sui problemi attuali del diritto internazionale umanitario, organizzata congiuntamente dall'Istituto di Sanremo e dal Comitato Internazionale della Croce Rossa di Ginevra.

Estendo quindi i miei saluti a coloro che non hanno potuto partecipare in presenza ma che stanno seguendo l'evento da remoto, augurandomi di potervi accogliere a Sanremo il prossimo anno.

Vorrei spendere innanzitutto qualche secondo per esprimere il profondo orgoglio che provo nel rappresentare la città in cui questo prestigioso Istituto opera oramai da più di cinquant'anni.

Grazie al suo prestigio internazionale, l'Istituto rappresenta infatti per diversi motivi una risorsa preziosa per la città di Sanremo e per tutto il Ponente ligure. Fin dal 1970, il costante lavoro svolto dall'Istituto per promuovere il rispetto del diritto internazionale umanitario e dei diritti umani a livello globale ha certamente contribuito ad arricchire l'immagine della nostra città e della nostra regione nel mondo.

In questo contesto, la Tavola Rotonda gioca da sempre un ruolo particolarmente rilevante. Organizzata ogni anno nel mese di settembre, la Tavola Rotonda si è trasformata nel corso del tempo in un evento riconosciuto a livello globale, capace di riunire centinaia di esperti, professionisti e importanti attori del settore umanitario.

Quest'anno la Tavola Rotonda farà luce su un tema di fondamentale importanza: la necessità di proteggere l'assistenza umanitaria e la salvaguardia dei servizi essenziali in caso di crisi umanitarie. Nel complesso scenario contemporaneo, con violenti conflitti armati sia all'interno che tra diversi Paesi, imponenti movimenti di persone e disastri naturali causa di un numero ingente di vittime, proteggere gli aiuti umanitari e garantire l'assistenza ai civili è di estrema importanza. A questo proposito, vorrei peraltro esprimere la mia più sentita solidarietà e vicinanza ai popoli marocchino e libico, in questo difficile e drammatico momento della loro storia.

Grazie al lavoro dell'Istituto ho avuto modo di apprendere come il rispetto del diritto internazionale umanitario può salvare le vite di coloro

che non partecipano alle ostilità e, al contrario, si sottraggono alla violenza apertamente, rifiutandola.

Nonostante queste persone meritino indubbiamente assistenza e soccorso, tutti noi quotidianamente leggiamo e riceviamo notizie che riportano di gravi violazioni delle norme internazionali perpetrate da attori istituzionali e non, a livello locale, nazionale e transnazionale.

Sono certa che la Tavola Rotonda di Sanremo costituirà anche quest'anno un'opportunità di confronto costruttivo e scambio di pareri ed esperienze tra tutti i partecipanti coinvolti, grazie al contributo degli autorevoli esperti provenienti da tutto il mondo e riuniti qui a Sanremo, oltre che online, dall'Istituto.

A nome di tutti i cittadini di Sanremo e del Sindaco, permettetemi di esprimere dunque i miei migliori auguri per una fruttuosa conferenza, con la più sincera speranza che, durante questo breve soggiorno, possiate trovare il tempo di scoprire, o riscoprire, le bellezze della nostra amata città.

Spero di rivedervi presto a Sanremo, vi ringrazio per l'attenzione.

Opening remarks

Edoardo GREPPI
President*, IIHL

Excellencies, Ladies and Gentlemen, let me welcome you, both here in Sanremo and virtually, to the 46th Round Table of the International Institute of Humanitarian Law presented, as ever, in co-operation with the ICRC. The subject of this year's Round Table is "Strengthening IHL compliance: the conduct of hostilities, the protection of essential services and humanitarian assistance in contemporary armed conflict".

This is the second Round Table held in this dual format after the success of last year's event, and it is good to see so many familiar faces here at Villa Ormond and familiar names online. The dual format does require additional preparation and at this point I would like to thank both the Institute's staff and the team from the ICRC in Geneva who have been working since March to make this event happen.

As I mentioned in my opening remarks last year the character of conflict in the 21st century is that it is entwined with the civilian population and the effects upon them far greater than ever before. We have seen in the many conflicts around the world in recent times that the impact on civilians is ever increasing. The key way to mitigate this is to strengthen the compliance with IHL amongst those participating in armed conflict whether they be state armed forces, non-state armed groups or individuals directly participating in hostilities. It is important to be realistic and accept that there will always be conflict and the laws which govern the conduct of that conflict and the way that force is used by the participants are more important now than ever. How do we strengthen compliance when the battlefield has a greater multiplicity of actors than ever before? When Henry Dunant saw the battlefield at Solferino (and at San Martino a similar battle had taken place) it was a bloody and brutal environment but a much more simplistic one. On one side the French and Sardinian-Piedmont armies and on the other the Austrian army. It was a binary conflict. Compare this with the conflicts we see occurring around the world in 2023. Even in International Armed Conflicts there are non-state groups involved while Non-International Armed Conflicts are dominated by such actors. In this context, bearing in mind that on occasions there are

* Professor Edoardo Greppi was succeeded as President of the International Institute of Humanitarian Law by Lt. General (retd) Giorgio Battisti at the conclusion of the 46th Round Table on Current Issues of International Humanitarian Law.

multiple concurrent conflicts in the same geographical space, IHL compliance faces more challenges than ever before but these are challenges we must strive to meet.

The first panel this afternoon will consider the nature of the most urgent challenges in contemporary conflict and frame the discussion we will have over the next couple of days. We will then move to consider the practicalities of meeting these challenges in the conduct of an operation and how to limit the danger, and indeed harm, to the civilian population and those services essential for their wellbeing before considering how military actors seek to do this in their planning and the tools they use. Finally, today we will examine preventing the misuse of the civilian population and their protection from being used to further the aims of a conflict actor.

Tomorrow, the first panel will look at the challenges of delivering humanitarian assistance in the complex modern battlefield and the immensely important issue of the protection of essential services to ensure the wellbeing of the civilian population. This will look at the difficult area of co-ordination between the multiple actors in conflict zones, something which has become increasingly complicated by the expansion of actors within contemporary conflicts. The final panel will discuss the tools which can be utilised to facilitate protection and delivery of essential service. It will consider humanitarian access, protected zones and humanitarian corridors. Particularly in this regard, we are proud to promote the relevance of the Sanremo *Guiding Principles on the Right to Humanitarian Assistance*, adopted in 1993 – exactly 30 years ago – by the Council of the Institute as a follow up on the works of the 17th Round Table. The Sanremo Guiding Principles constitute one of the few existing documents that explicitly envisage the possibility to activate measures such as "humanitarian corridors" to make humanitarian assistance available in situations of restricted access to victims. The panel will thus consider their utility and effectiveness.

I have no doubt we will have two days of considered and in-depth analysis of the issues of contemporary conflict. As we sit here in the beautiful location of Villa Ormond we must remember as we discuss IHL, that the law we are considering is being implemented as we speak by young women and men in conflicts around the world. We must not lose sight of that. The law needs to be applied and to do so it needs to be understood by those young women and men in the most unbelievably stressful circumstances. Equally we must not forget the awful circumstances in which civilians in conflict find themselves. The Round Table has always been an event which focusses on how the law can best be implemented – indeed that is the Institute's mission – and I sincerely hope that this Round Table will further that essential work.

I will conclude my introductory remarks now so that we can move to Professor Bothe's keynote speech. Thank you once again for attending this 46th Sanremo Round Table whether you be here in Sanremo or online. Much effort has gone into the preparations, and I believe we will have fruitful few days of discussion here at Villa Ormond and virtually.

Mirjana SPOLJARIC
President, International Committee of the Red Cross (ICRC)

Excellencies, dear Colleagues,

When belligerents do not comply with international humanitarian law, it creates grievous suffering for civilians and immense challenges for humanitarian actors. There is no doubt about this.

Whether in Ethiopia, Yemen, Ukraine or Sudan, armed conflicts continue to exact a heavy toll on civilians.

During hostilities, men, women and children are killed and wounded. They suffer the dire consequences of damaged infrastructures – such as electricity and water and sanitation systems; and of not having access to essential services such as healthcare, food and education.

Everywhere the ICRC operates, we have seen time and time again that suffering is always exacerbated when:

- fighting moves to urban areas,
- when heavy explosive weapons are used,
- when cities become besieged,
- when impartial humanitarian organizations are denied access to the civilian population
- and when conflicts become protracted.

Over the next two days, you will delve into debates surrounding critical legal issues concerning the conduct of hostilities, protection of essential services and delivery of humanitarian assistance.

I wish to offer three considerations.

- First, warring parties must take measures to prevent much of the devastation in the first place. This is possible through strict compliance with the fundamental principles of distinction, proportionality, and precaution set out in international humanitarian law. These basic rules are critical for ensuring essential service continuity during armed conflict and for mitigating the direct and indirect effects caused by the means and methods of warfare employed during hostilities.
- Second, warring parties are the ones that bear the primary responsibility to protect and provide for the basic needs of the civilian population under their control. While humanitarian actors play an important role, it is a subsidiary one which does not absolve belligerent parties from their duties in this regard.

- Third, in the face of widespread damage to critical infrastructure and prolonged disruptions to essential services, the scale and complexity of humanitarian needs are daunting.

The principled humanitarian action of the ICRC and the entire Red Cross and Red Crescent Movement serves to protect war-affected communities.

We engage with belligerents at every level, driven by the voices of the people most affected.

We prevent critical infrastructure from collapsing and strengthen people's resilience.

Yet, these challenges inevitably extend beyond the technical, practical, and financial capacities that can be mustered by a collective humanitarian response.

Dear Colleagues,

I am grateful to the Sanremo Institute of International Humanitarian Law for our long collaboration and convening this important Round Table.

I am also pleased to see we are joined by so many esteemed experts from governments and their respective armed forces, international organizations, humanitarian community, and academia.

To make international humanitarian law a political priority again for all parties to the Geneva Conventions is a strenuous task.

It requires our collective effort.

Thank you.

Message

Antonio TAJANI
Minister of Foreign Affairs and International Cooperation, Italy

Ringrazio il Presidente Edoardo Greppi dell'Istituto Internazionale di Diritto Umanitario ed il Comitato internazionale della Croce Rossa per questa lodevole iniziativa e saluto tutti i partecipanti all'incontro di oggi.

Nel solco del tradizionale impegno e della riconosciuta attenzione per le tematiche umanitarie dell'Italia, il Governo sta svolgendo un ruolo di primo piano nella protezione delle persone più vulnerabili, per rendere il nostro Paese sempre più protagonista a livello internazionale anche in questo ambito.

Ancora di più nella congiuntura attuale, con la brutale aggressione della Russia all'Ucraina e il ritorno della guerra alle porte dell'Europa, si afferma l'importanza e l'attualità del Diritto umanitario, chiamato ad adeguarsi a sfide sempre più insidiose, esacerbate dall'impiego di tecnologie nuove e devastanti.

Il Governo italiano è attivamente impegnato in tutti i principali fori multilaterali per la tutela dei più fragili, con le missioni di pace in varie aree di crisi: nei Balcani, in Africa, nel Mediterraneo allargato e in Medio Oriente, fino al continente asiatico. Un impegno a 360 gradi ben illustrato nel Rapporto volontario sull'attuazione del diritto internazionale umanitario in Italia, frutto del lavoro di una Commissione interministeriale *ad hoc* e della Croce Rossa Italiana, che sarà presto pubblicato e consultabile sul sito internet del Ministero degli Esteri.

Il Rapporto colloca l'Italia tra gli Stati virtuosi che hanno deciso di sottoporre a disamina il proprio operato in questo campo, dando visibilità agli sforzi profusi, alle buone prassi sviluppate e all'impegno concreto adottato a tutela delle fasce più vulnerabili della popolazione civile, vittime di conflitti armati in tutto il mondo.

Il documento restituisce un'immagine profilata dell'Italia ispirata ai valori fondanti di una società basata sui principi cattolici della solidarietà e tutela dei più fragili.

Nel confermare l'attenzione e il sostegno del Governo italiano e del Ministero degli Esteri a iniziative di divulgazione del diritto internazionale umanitario, come quella odierna, auguro a tutti voi un buon lavoro.

Opening remarks

Lorenzano DI RENZO
Rear Admiral, Commander, Naval Academy, Italian Navy

Thank you, Professor. Civil and military authorities, distinguished guests, ladies and gentlemen, good morning. As Professor Greppi just mentioned, in addressing this esteemed audience, today I have the privilege to convey the greetings and the sense of gratitude of the Chief of the Italian Armed Forces Admiral Cavo Dragone, to the International Institute of Humanitarian Law and, of course, to its President, Professor Edoardo Greppi, whom I met for the first time today – it was very nice meeting you, Sir.

Again, on behalf of the Italian Armed Forces, I also wish all participants a fruitful Round Table along with a pleasant stay in the beautiful city of Sanremo – speaking of which, I am very happy to extend my greetings to the Deputy Mayor of this beautiful city, Mrs Caterina Pireri and also to the Director of the International Committee of the Red Cross, Dr Meltzer, whom I have just seen for the first time.

I know that I am stating the obvious when I say that stability and peace on our borders are essential elements to ensure our own security and growth. In this framework, respect for humanitarian law, an essential condition for stability and peace, is a moral obligation and has always been the guiding star of the Armed Forces.

In a context increasingly characterized by activities in the new domains of cyber and space, actions in the cognitive domain, and by a confrontation that is often hybrid in nature and, therefore, below the legal level of armed conflicts, it is essential to seek solutions that can provide common responses to the changing international context.

For this reason, this meeting, also thanks to the contribution of the eminent experts in the field of international humanitarian law, providing a multidisciplinary perspective, is instrumental in bringing our entire community up to speed on the state of current affairs. It also confirms the systematic approach of the Italian Armed Forces in its commitment in line with traditional international alliances. We intend to continue to play a leading role in the management of international crisis, in the protection of civilian population but also in the protection of critical infrastructures that provide essential services to society.

Your very presence here confirms the importance of international humanitarian law and the inescapable need to understand the essence of its principle in today's conflicts, where the military component has regained

a new central role, as the current crisis in Ukraine unfortunately has confirmed.

A shared vision of the future requires us to work together, to think and to look beyond the obvious and to remain committed to promoting peace and international stability, two values in which we strongly believe both as soldiers and as citizens. I am confident that this meeting will stimulate a lot of discussion, a lot of analysis and will provide a great amount of food for thought for the upcoming years. Therefore, I wish you all a successful meeting and a very interesting time. Buon lavoro a tutti!

Keynote speech

Michael BOTHE
Professor Emeritus of Public Law, J.W. Goethe University, Frankfurt/Main; Member, IIHL

Mr President, dear Friends and Colleagues. Many thanks for the kind words of introduction, and for the invitation to give this speech, which is a great honour for me. It is a kind of culmination of 50 years of personal interaction with the Institute, which has always been inspiring for me – and I am grateful for it.

1972-2023

The first time I came to this Round Table was in 1972, and since, I have participated more or less regularly. In light of this experience, it may be appropriate to share with you a few thoughts comparing 1972 and 2023. 1972 was an exciting moment. We were preparing a development of IHL in the particular geopolitical setting which had developed since World War II and the adoption of the Fourth Geneva Conventions. The geopolitical conflicts were characterized by the North-South and East-West splits, the Cold War and decolonization, into which particular conflicts were more or less integrated, for example the Middle East. There were discourses about alleged violations of the law which had happened in recent conflicts and about the insufficiency of the law to address them.

And there was, I must emphasize, a widely held belief that new law was necessary and useful as a remedy to regrettable failures in the protection of the victims of armed conflict. The result of the 1974-1977 Diplomatic Conference, the two APs, was the result of this belief. I think the actors involved in these negotiations did a good job and let me be your witness that the Sanremo Institute played a considerable role in smoothing the negotiations.

But what has the impact of these achievements been? Where do we stand a little less than 50 years later?

Let me try to answer these questions having a quick look on the subjects to be discussed in these two days.

Conduct of hostilities

It is one of the merits of the two Protocols to have confirmed the principle of distinction. Different types of conflict have always presented a challenge to the principle. Remember the invention of the *guerilla* in the Spanish fight against Napoleon after 1808. The phenomenon of asymmetrical conflicts continues to be with us. Today, there are non-state actors of different types. There is less state control of organized violence.

Let us consider IHL and technical innovation. Today's major challenge is digitalization, or cyber war. Technology keeps developing at a breath-taking speed, and international law has to cope with that. I cannot discuss comprehensively the questions of cyberwar which have been debated here in Sanremo and elsewhere.

Just allow me a word on Artificial Intelligence. It is on the agenda of regulators around the globe and in many areas of the law. IHL is no exception. As in other fields, AI is both a risk and a chance for achieving useful purposes. In IHL, there is the risk that decisions to attack produced by AI do not comply with the rule of distinction and allow attacks violating the principle without human decision-makers having the possibility to intervene conscientiously and carefully. But are all decision-makers in question conscientious and careful? On the other hand, AI has the advantage of digesting much more information than humans. It has thus a greater possibility to assess the character of a given target and to evaluate the scope of collateral damage by applying the principle of proportionality.

A related issue concerning the principle of distinction is proportionality and necessary precautions: what degree of collateral damage is unacceptable and what measures of precaution must be taken in order to avoid transgressing this line? There are two issues, both regarding so-called knock-on effects:

- The vulnerability of civilian populations under modern conditions of life;
- The relevance of long-term effects.

The first one seems obvious unless you add a global content to it. What about the extraterritorial effect of attacks? The traditional law of neutrality states that collateral damage caused on the territory of a neutral State is unlawful. Does this apply to any extraterritorial effect of devastation of agricultural land? Is the destruction of crops that are not needed for the sustenance of the population of a party to the conflict, but are needed by the population of third States, unlawful for that very reason?

A word of explanation also of the long-term effects, or proportionality interpreted in light of the rights of future generations. Intergenerational equity,

respect for the rights of future generations, is a constitutional principle of current international law. It applies to any human activity. warfare is no exception. The military might reply that the foremost interests it has to defend is to win a war. Granted, but even a legitimate goal does not necessarily justify all means to achieve it. The really complicated problem in this connection is environmental limitations of the conduct of hostilities. There is uncertainty about what kind of restraints on military action is really necessary for the sake of intergenerational equity. There is thus a need to develop more concrete rules for environmental protection in the conduct of hostilities, such as rules on protected spaces – an approach suggested by IUCN many years ago and repeated by the ICRC President in 2010 when he made proposals for IHL development.

Essential services

The protection of essential services is part of the problems just described. The first question is whether and to what extent facilities providing essential services constitute military objectives because they are dual use objects. The military use of making an object a military objective must be carefully assessed by the attacker taking into account the concrete situation. Not every bridge is a military objective. On the other hand, the State which would be attacked must avoid military use of objects which are civilian in nature wherever this can be avoided. This applies in particular to educational institutions. Schools should be safe places!

The second problem is proportionality. Considering the vulnerability of modern society, its dependence on multiple services (energy, health, communications), proportionality assessment must be made taking into account various aspects of this vulnerability, for example, children's right to safe schools.

Humanitarian assistance

Humanitarian assistance is an old principle of the Red Cross and thus of IHL, that goes back to Henri Dunant's action in Solferino. The Additional Protocols make it clear that there is a duty to provide, facilitate and accept humanitarian assistance. Relief actions "shall be undertaken". The duty applies in both international and non-international armed conflict.

A thorny practical problem is raised by the fact that this duty is subject to the agreement of a relevant party to the conflict. The negotiating history of the Protocols makes it clear, and this is generally accepted, that this agreement

may not be refused for arbitrary reasons. What does this mean? There must be concrete military circumstances justifying refusal. A general wish to win a war is not a valid reason in this sense.

But whose agreement is necessary? In the case of international conflict, it is undisputed that it is the party physically controlling an area where an assistance mission (relief in the terms of the Protocols) has to pass through or is implemented. In the case of non-international armed conflict, there is a regrettable, but widely argued interpretation that it is the State on the territory of which a non-international armed conflict occurs, regardless of the question of whether the sitting government controls the relevant area. This is a misinterpretation of Art. 18 AP II. I know people in the room who do not share this view of mine, but they have not convinced me. The result of this misinterpretation can be seen in Syria. It makes humanitarian assistance dependent on the will of the Assad regime, giving it a chance to blackmail humanitarian organizations. Security Council action to nevertheless permit relief operations through a territory not controlled by the Assad regime has become subject to Russian veto, the last one in July of this year would close the only remaining transborder crossing. It is high time that the international community abandons this misinterpretation and accords to the term "party concerned" in AP II (whose agreement is necessary) the same meaning it has in Art. 70 AP I, namely the party physically controlling relevant territory. Everybody in this audience is aware of it: thousands of victims cry for it!

Compliance

Finally, a word about compliance. The Geneva Conference 1974/77 created better substantive law. It also made modest progress concerning procedures to ensure compliance. But a tragic record of non-compliance remains, it may even have deteriorated. Why is this so? What are the compliance obstacles, what are the compliance pulls? There is an irritating observation: compared with 1977, a wealth of procedures and processes has been added to the toolkit of ensuring compliance, but with limited success! There have been developments in international criminal law, including the establishment of competent international courts, and universal jurisdiction. There is recourse to human rights procedures to foster compliance with IHL – the IHFFC was established under AP I, numerous inquiry procedures were established by the Human Rights Council, or by other organs of the UN, by NGOs. There is a confusing array of fact-finding activities. Ascertaining relevant facts is important for ensuring compliance with the law in general and with IHL in particular. Yet a little order should be put into this chaos:

there are different goals of fact-finding, involving different legal bases and different procedures: naming and shaming, confidential action to protect victims, informal and formal compliance procedures (criminal justice, compensation of damages awarded by courts or arbitral tribunals).

Currently, there are different fact-finding activities relating to the war in Ukraine. This may be salutary and necessary. The legal problem to be taken into account is to make sure that the result of these fact-findings can be introduced into court procedures in a way which conforms to the requirements of procedural fairness. The IHFFC is consent based and geared towards confidential means of ensuring compliance. This should have been a recipe for success, but alas, it has not worked that way. The inquiry commissions launched by the Human Rights Council are a constant but divers practice. Their record of impact, or lack thereof, deserves close attention. As a provisional summary I would say, it is ambivalent.

The multitude of compliance procedures should not detract from the fact that there has been a remarkable resistance against these procedures. The Russian withdrawal of the recognition of the IHFFC is a sign of this. Such resistance became obvious by the frustrating failure of the Swiss-ICRC Initiative to introduce a better compliance procedure into the treaty system of the GC. The opposition against the project came from States which are now launching a BRICS counterweight against the traditional West and the international system it has to a large extent shaped. This is a challenge to IHL compliance, and it will remain with us for a while, I am afraid.

So, where are the compliance pulls? Deterrence which is often invoked is problematic. Martti Koskenniemi coined a wonderful term calling international law "the gentle civilizer of nations" (emphasis on "gentle"). Compliance is based on a public spiritual climate where respect for the law leads to the reputation decision-makers want to obtain and retain.

Conclusion

This climate, to conclude, is a subtle and delicate result of international discourses. Whether IHL can fulfil its functions to protect victims of armed conflict, thus, depends on conditions in the international system which it cannot itself guarantee. IHL and compliance with it is a cultural phenomenon. We in this room are part of these discourses. To influence them is our responsibility. It is a noble task of the Institute which has assembled us. The conference may provide a contribution.

Thank you for this opportunity to share my reflections with this remarkable audience.

I. Scene setter – Panel discussion on the most urgent challenges posed to the application of IHL provisions to protect essential services and humanitarian assistance in contemporary conflicts

Chair: Gabriella VENTURINI
Professor Emerita, University of Milan; Council Member, IIHL

Setting the scene: key contemporary challenges to humanitarian assistance

Emanuela-Chiara GILLARD
Senior Research Fellow, Oxford Institute for Ethics, Law and Armed Conflict; Associate Fellow, International Law Programme, Chatham House

Introduction

It is a great privilege to be back and a great personal pleasure.

To help set the scene and guide our discussions in the coming days, I am going to group some of the most pressing challenges to essential services and humanitarian action into three broad categories. First, challenges posed by the conduct of hostilities; second, challenges to humanitarian relief operations; and third, challenges posed by sanctions.

We are going to be discussing many, perhaps not all of these challenges in the coming days. It is helpful to separate them into broad categories for a number of reasons.

First, because the rules of international humanitarian law (IHL) relevant to the three broad categories of issues are different.

Second, because so are the stakeholders. By this I mean with whom those who seek to promote compliance with the law or to conduct humanitarian relief operations must engage. The actors with which we must engage are different. For problems posed by the conduct of hostilities, it is armed forces that play the primary role, and it is with them that those who want to uphold IHL, or conduct humanitarian action, must engage with, members of the armed forces but also organised armed groups.

With regard to impediments to humanitarian action that are not due to the conduct of hostilities, such as delays in issuing visas, or problems with imports on relief items, it is other parts of governments that are responsible, possibly within Ministries of Foreign Affairs or Trade or Commerce Departments. We are also beginning to see that some organised armed groups have established units responsible for coordinating with humanitarian organisations. For example, in Sudan, the Rapid Support Forces opposing the government, have established an Agency for Relief and Humanitarian Operations. Similarly, in northwest Syria, the SSG has the Office of Humanitarian Action Coordination, and in Yemen the Houthis have established a similar body.

This is an interesting and important new development: more sophisticated organised armed groups are also beginning to have a dialogue on coordination of humanitarian action.

It is very different actors altogether that are involved in the adoption and implementation of sanctions – my third broad cluster of issues. There are different departments in Ministries of Foreign Affairs that deal with humanitarian action, as well as the Treasury and Commerce Departments.

When trying to promote compliance with the law, it is important to also look at this dimension: who are the stakeholders? Who is it that we need to engage with? The reality is that some parts of government are simply not as familiar with IHL, and humanitarian action, as those that we ordinarily engage with in situations of armed conflict: usually uniformed interlocutors. This is something that we need to be aware of when presenting the law, and when building the necessary trust to overcome these challenges.

What are essential services and what does IHL say about them?

Setting that aside, as a preliminary point, I have been asked to say a few words on what constitute 'essential services' from a technical and legal perspective.

I can think of few people more competent than my fellow panellist, Prof. Mark Zeitoun, Director General of the Geneva Water Hub to give technical examples. I will leave that aspect to him, and just say a few words about the law.

When we are talking about 'essential services', what are we referring to? In the coming days, we will be discussing services necessary for the survival of the civilian population in situations of armed conflict: water and electricity. I think we can safely broaden it a little beyond these services. Borrowing an expression from the law of occupation, I think we should be looking at services essential to *la vie publique*. This allows us to add telecommunications, including connectivity for internet, banking services, but also transport facilities, roads, railroads, ports, and airports. I think these are the types of essential services we will be looking at in the coming days.

Now, from the perspective of IHL, the starting point of the analysis is not the services themselves, but rather the infrastructure that is necessary to generate and distribute these services. IHL says very little about services other than the provision of medical care and education in some situations. But it does say a lot about tangible objects, such as infrastructure.

Quite simply, we just need to apply the ordinary rules of IHL: unless the infrastructure is an exclusively military network or facility, the starting

point is that it is a civilian object, and as such must not be the object of direct attack, or indiscriminate attacks. Expected damage to it in the course of an attack against a military objective must be taken account in proportionality assessments, and all feasible precautions must be taken to minimise damage to it.

As always, the position changes if, by virtue of the nature, location, purpose or use of a particular object, it makes an effective contribution to military action, and its total or partial destruction in the circumstances prevailing at the time offers a definite military advantage, then it just becomes a military objective.

At risk of stating the obvious, the position under IHL is binary. An object is either a civilian object or a military objective. For the purpose of the rules of IHL, there is no such thing as a dual use object. The moment a civilian object is used for military purposes, it becomes a military objective. Attacks against it are not prohibited, but incidental harm that such attacks are expected to cause – death or injury of civilians, damage to civilian objects – must be considered in proportionality assessments.

How does IHL take into account the services provided by the infrastructure such as electricity or clean water, and in particular, the consequences of the absence of these services on civilians? Is it under proportionality assessments? Or is it under other rules of IHL, like the obligation to take constant care in the conduct of military operations to spare the civilian population and civilian objects?

I do not think I have said anything uncontroversial or particularly sophisticated so far. But I do think it is helpful to have a shared understanding. The devil is in the detail as a matter of law and I am sure that we are going to enter into many of these devilish details in the coming days.

So now, let me turn to my three broad categories of challenges posed to infrastructure and humanitarian action in contemporary conflicts.

For each of my three categories, knowing we will have detailed discussions on these issues in the coming days, I am going to briefly identify the type of challenge, any unsettled legal questions, if they exist, and also importantly, see where we are at in terms of what more could be done in terms of practical tools for promoting compliance with a relevant law: it could be guidance materials, like the Sanremo Guiding Principles on Humanitarian Action that Professor Greppi referred to. It could be other materials, policies and practices.

An overarching reflection is that in 2023, we are unlikely to get any new law to address these issues. In fact, it is not law that is necessary, but rather types of far more practical tools that guide how the law can be applied in practice, and help understand the adverse impact of military operations on civilians in a granular manner, and suggest specific ways for minimising this.

Challenges posed by the conduct of hostilities

The first set of challenges are those posed by the actual conduct of hostilities. These challenges are the ones that are most immediately evident. They are the range of ways that actual fighting can damage or impair infrastructure or impede humanitarian action.

As far as infrastructure that provides essential services, such as water or electricity, is concerned, these could be attacks directed against the infrastructure, or indiscriminate attacks, or there could be situations where the infrastructure is damaged during an attack against a military objective in the vicinity. This raises straightforward questions of proportionality.

To what extent must knock on effects be considered in proportionality assessments? This is not a new question. The more difficult legal question is what I hinted at before: when the infrastructure becomes a military objective, for example, because it is also used by the armed forces. In this situation, what is the proper framework of analysis for the loss of services that the infrastructure provides? And this is a different question to when the infrastructure is a civilian objective and damage to it is collateral damage. Many of these questions have already received considerable attention, and we will be discussing them in the coming days.

One dimension that has received less attention is the obligation in Article 57(1) of Additional Protocol I to take constant care in the conduct of military operations to spare the civilian population, civilians and civilian objects.

This provision allows a broad range of adverse harm to be taken into account. Far more than the very specific types of harm that are considered for proportionality assessments: death or injury to civilians, and damage to civilian objects.

Much more remains to be done to give effect to this provision. Armed forces must equip themselves with processes to gain a greater awareness of the nature and extent of the adverse harm military operations can pose to civilians, including in terms of access to essential services. These factors are rarely systematically included in military doctrine and policies to a sufficient degree of granularity. Once they have been identified all feasible precautions should be taken to avoid them. Again, the devil is in the detail. Obviously, what is feasible depends on the particular context where military operations are being undertaken and will vary from situation to situation.

Nonetheless, it is essential to have a framework of analysis that requires belligerents to consider the potential harmful effects of their operations. There is some encouraging good practice from the US in this regard. In August 2022, the US adopted the Civilian Harm Mitigation and Response Action Plan, which establishes an institutional architecture and supporting processes

to more effectively avoid or minimize civilian harm. Central to this is the commitment to achieving a more robust understanding of what's referred to as the 'civilian environment', looking at the civilian population, resources, infrastructures and essential services on which civilian life depends. This is an extremely helpful framework of analysis and I know we are going to be hearing more about it in the coming days.

So far, I have focused on the impact of facilities on infrastructure. Clearly, hostilities can also hinder humanitarian operations: movements may be curtailed, and humanitarian facilities and convoys may be hit or damaged.

I do not think there is any lack of clarity about the law. Personnel and assets of humanitarian organisations are civilian in nature and must not be attacked but respected and protected.

What is needed is good practice to facilitate giving effect to these protections. A variety of arrangements are possible to assist belligerents to comply with their obligations under IHL. One example are humanitarian notification arrangements whereby humanitarian actors provide information on the location of static assets, such as warehouses, offices, residences, and also movements, to assist belligerents in discharging their obligations to identify such civilian objects and not to target them. It is fundamental to understand that such notification arrangements do not change obligations under IHL but are just a way to facilitate giving effect to them. I am just mentioning them. I know we are going to be hearing specifically about humanitarian notification arrangements in the coming days.

Many other humanitarian arrangements exist, including for example, evacuations to facilitate the safe movement of civilians from areas of active fighting. The details of evacuations are not addressed by the law. But again, it is really important that belligerents have policies and practices in place to enable them to happen in a manner that is safe. And they need to exist before hostilities commence.

Challenges to humanitarian relief operations

This takes me to my second cluster of issues: those that relate directly and exclusively to humanitarian action and are caused by impediments other than the conduct of hostilities.

Until recently, the rules of IHL regulating humanitarian relief operations had received far less attention than those regulating the conduct of hostilities. This is unwarranted because in modern wars, more civilian deaths and suffering occur as a result of humanitarian crises, prompted or exacerbated

by the conflicts than from actual hostilities. It was the conflict in Syria that drew attention to these bodies of rules, and it was long overdue.

Syria shone a light on aspects regulating relief operations: the first step. Organisations that wish to conduct operations need to have the green light to actually be present and operate in a particular context. Syria shone a light on this aspect because Damascus had very few humanitarian actors present in 2011. When the conflict broke out new actors that wanted to respond needed to get the green light to be there, and Damascus was unwilling to provide this green light. This situation led to lengthy discussions of whether the consent of the State was required as a matter of law for operations in areas under the control of organised armed groups that could be reached directly from neighbouring States.

This led to the unprecedented involvement of the Security Council, which imposed relief operations in Damascus, sidestepping the rules of IHL. Since July of this year, this authorisation was not renewed, and we are back to the ordinary world of the ordinary rules of IHL. I actually think this is a good development: delicate negotiations are involved and putting them in the limelight, and into the hands of the Security Council, an eminently political body, was not helpful.

In practice, however, most problems usually arise at the second stage of the rules of IHL, when the green light to operate in a particular country has been given. At this stage, all parties – States and organised armed groups – must allow and facilitate rapid and unimpeded passage of relief supplies. Most frequently it is at this stage that problems arise. The law says very little in practice and what are referred to as 'bureaucratic impediments' are, in fact, among the most severe constraints, possibly more than actual on-going hostilities.

These impediments take a variety of forms: restrictions on entry of persons and goods into the country; cumbersome procedures to obtain visas or import supplies; limitations of movements, amounts and types of relief items, or permissible modes of transport. These restrictions are often imposed in an inconsistent or unpredictable manner and at multiple levels – at capital level, regionally and locally.

It is these kinds of problems that pose the most significant impediments to the capacity to respond. It would be helpful to elaborate a compilation of good practices in the same way that has been done for international disaster law. Ultimately, key managing to conduct humanitarian operations, however, is still a matter of humanitarian negotiations, as it should be, quite frankly, because it is a matter of trust.

So far, I have talked about humanitarian relief operations. 'Humanitarian access', which is not an expression used in IHL, but that the Security

Council uses and that is used in policy discussions, is generally understood as having two dimensions. First, the capacity of humanitarian actors to reach populations in need, which is what IHL addresses and what we tend to focus on. The second dimension is the capacity of civilians to reach goods and services, be they provided by the State or in the form of commercial goods, or in the form of humanitarian action.

This second dimension has received far less attention as a matter of law. If you look at IHL, it says very little on the capacity of civilians to access services. There is something on medical service, but that is it. One key aspect are restrictions on the freedom of movement of civilians, but it is human rights law rather than IHL that regulates this. Very little has been written about freedom of movement of civilians in situations of armed conflict. This is unwarranted, as freedom of movement is essential to civilians' capacity to reach basic goods and services.

One last point to consider are commercial goods and services. They are not regulated by IHL to any degree. IHL focuses on the provision of humanitarian services. But obviously, if civilians can rely on commercial goods and services, their need for humanitarian assistance is much less. In practice the availability of commercial goods is also negatively impacted by conflict and measures such as sanctions, that lead to a shortfall that humanitarian action simply cannot make up for.

This said, IHL says very little on commercial goods and services. Article 23 of the Fourth Geneva Convention requires passage of some limited commercial goods, medical items, food stuffs, clothing and tonics for children under fifteen and expectant mothers. But that is it.

I think it would be important to look more at commercial services. There are recent examples from Tigray when banking services were simply switched off. It was not a cyber-attack. The government was in a position to tell banks to stop working, and this had really severe impact on the civilians in Tigray. What is the correct framework of analysis? I do not think IHL necessarily has the answers.

Sanctions

This year's Round Table is about contemporary challenges to humanitarian action. In identifying such contemporary challenges, I could not not mention sanctions. Even though I might be the only person to mention them in these two days.

Sanctions can have a severe impact on the capacity of humanitarian actors to operate as foreseen by IHL and in accordance with humanitarian

principles. Sanctions can also be relevant to infrastructure that provides essential services, as the response to the Syria earthquake has shown.

This is no longer a new topic: for ten years, sanctions have been identified as one of the key challenges to humanitarian response. Why? The prohibitions in financial sanctions on making funds or assets available to designated persons or entities can affect assistance or funds provided in the course of humanitarian action. Until very recently, sanctions only very rarely included safeguards that allowed payments to be made or assets to be provided to designated persons or entities, when this is necessary, in order to conduct humanitarian action.

In this regard, I can conclude on a cautiously optimistic note. In December 2022 the Security Council adopted a resolution that introduced an exception to all its financial sanctions, that essentially allows making funds or assets available to designated persons, groups, if this is necessary for humanitarian assistance, or activities to meet basic human needs.

We are in an encouraging place when it comes to UN financial sanctions, and a number of other actors that impose sanctions – the European Union and States are increasingly replicating these safeguards in their own autonomous measures.

However, it is not the end of the story. There are other types of restrictions in sanctions that can impact humanitarian action. For example, the response to the Syria earthquake earlier this year has shown that some of the greatest hurdles are now posed by import restrictions, and in particular restrictions that can affect the capacity to bring in equipment that is necessary to repair infrastructure.

This takes me right back to the point I was making at the beginning about which actors we must engage with. In the discourse on sanctions, humanitarian actors progressively established a constructive dialogue with Ministries of Foreign Affairs, and with Ministries of the Treasury, that are the actors adopting and implementing financial sanctions.

We need to develop the same engagement with the Ministries of Commerce or Trade that are responsible for the sanctions on imports of assets – identifying the very specific problems that restrictions can pose to humanitarian action and practical approaches to address them, in a manner that does not undermine the policy objectives of the sanctions.

The current challenges of cyber conflicts and the need to fully understand this new phenomenon

Ludovica GLORIOSO
Major, Italian Army; Legal Advisor, NATO Security Force Assistance Centre of Excellence

Thank you, Professor Gabriella Venturini, for your introduction, I am pleased and honoured to be part of this prestigious panel and audience. The event represents for legal advisors and international experts a unique and annual key initiative in this field.

My thanks go to President Prof. Greppi and Vice-President General Battisti for this kind invitation.

I am currently working at the NATO SFA COE, and before I was deployed at the Cyber Defence Centre of Excellence in Tallinn. I am delighted to share my experience as practitioner in international environments and organisations. Before starting with the briefing, the disclaimer is that this briefing does not represent the opinions or policies of NATO and it is designed to provide an independent position.

Both the International Institute of Humanitarian Law and NATO SFA COE, although covering different topics, have published research papers highlighting the importance of enhancing civil-military cooperation by including local actors and civilian organisations in the process, so as to deeply understand the dynamics of the crisis areas.

Addressing the event: 1st section on the new challenges of digitalization and cyber environment

As mentioned in the Allied Joint Doctrine for Cyberspace Operations (AJP – 3.20):

> *The conduct of Alliance operations and missions is governed by international law and the domestic law of the participating nations.*
> *Within this framework, NATO sets out the parameters within which its military forces can operate, as set out in Allied Joint Doctrine (AJP-01).*
> *Legal considerations play a key role in the decision-making process and during an operation. This is particularly important at the operational level where campaigns are designed and directed. International law provides prescriptions and limitations for forces and individuals.*

Today my focus is related to the current challenges of the cyber conflicts and the need to understand in depth this new phenomenon. The first section describes the general issues of the new technologies while the second highlights the vulnerabilities for the civilian services and the specific challenge of Critical Infrastructure (CI):

A widely discussed topic is the use of new and emerging technologies, how they are shaping the foundation of security and defence.

In the new digital environment, as emphasised by the current literature, the traditional military approach cannot be effective because we are witnessing a true revolution which involves military and civilian infrastructures. Technology is shaping a new typology of conflicts and if we compare with kinetic warfare, we see fundamental differences: their domain ranges from the virtual to the physical; the nature of their actors and targets involves artificial entities alongside human beings and military objectives; their level of violence may span from non-violent to potentially violent acts. The current debate guided by strategists, policy makers, ethicists, legal advisors is how these new capabilities should be developed in a responsible manner and in accordance with IHL.

These differences are redefining our understanding of key concepts such as harm, target, combatants, weapons and attack.

This also has implications on our understanding of the state and non-state actors involved in the conflicts, and ethical issues as well, related to:

1. Risks;
2. Rights;
3. Responsibilities.

Cyber threats are pervasive, and they can target or can be launched through civilian infrastructures (pc, website, etc.) with the related difficulties in attributing attacks, thus allowing perpetrators to deny any responsibility.

Cyber in the context of the civilian services

We know that cyber operations could be used as a tool for destroying software and data. The operators may interfere with the information flow over the satellite link to deliver the specified operational effect.

The targeted satellite link could also be used by civilian emergency services to coordinate search and rescue operations in disaster-affected areas. This interference with the satellite link has a side-effect of causing disruptions to the communication channels used by emergency services resulting in civilian casualties.

Digitalisation has increased the vulnerabilities that can be exploited through cyberattacks. This is increased by global fragmentation, geostrategic interests and lack of consensus on controlling the harmful use of Artificial Intelligence (AI) and cybersecurity technologies, amplifying the challenges to peace and security.

AI technologies have the potential to shape cyber conflicts with the data manipulation that is becoming one of the most powerful tools in the cyberwarfare arsenal, able to conduct cyber incidents, and corrupt the integrity of essential civilian data sets in different fields (social security, biometrics, and tax). The risk is multifaceted and extends across knowledge- and information-based sectors.[1]

The question is how international law applies to the different cybersecurity scenarios in case of cyber attack. The main stakeholders, represented by States, policy makers, ethicists and international experts face new legal and policy challenges. International efforts to produce legal interpretation and delineate rules of engagement in cyberspace should intensify their focus on preventing adversarial data manipulation.

We are assisting at the capacity of AI cyber operations to automate such intelligence threats that will have an impact on sensitive scenarios in civilian contexts, outside traditional military settings.

Experts have already reported increased cyberattacks as indicated by the International Committee of the Red Cross [ICRC] (2019)[2] aimed at targeting the safety and control systems that operate critical infrastructure such as electrical, water and sanitation facilities. In the near future, cyberattacks augmented by AI could be designed to manipulate the functioning of the automated data-based protocols that help run power plants and drinking water utilities, modifying the components in the water supplies with an impact on human health. The advent of automation in the current system also provides an increasing potential to expand a cyber attack's impact through interconnected sectors concerning food and vaccine production, medicine and logistics and public services.

As emphasised by the UN General Assembly in 2021,[3] the evolving

[1] Pauwels E, "Civilian Data in Cyberconflict: Legal and Geostrategic Considerations" (Centre for International Governance Innovation) www.cigionline.org/articles/civilian-data-in-cyberconflict-legal-and-geostrategic-considerations/.

[2] "Cyberattack on International Committee of the Red Cross" (Redcross.org) www.redcross.org/aboutus/newsandevents/news/2022/cyberattackoninternational-committee-of-the-red-cross.html.

[3] Aparac J, "Working Group on Use of Mercenaries: The Increasing Number of Private Military and Security Companies Operating in the Humanitarian Space Exacerbates the Risk of Violations of Human Rights and International Humanitarian Law" (Ohchr.org, September

threat of the privatization of cybersecurity attacks through a new generation of private companies such as 'cyber mercenaries' is increasing, creating difficulties in identifying the private from the national sector.

A specific challenge of critical infrastructure (CI)

States play an important role to identify which infrastructures can be considered as Critical Infrastructures (CI), and, from "critical information infrastructure" and "critical national infrastructure" to "national, transnational and supranational critical infrastructure" – there is little consistency in the terminology adopted by States.[4]

The lack of agreement about what constitutes CI for the purposes of norms can be problematic. Some States have also been hesitant to designate specific sectors as CI due to concerns that this would condone malicious cyber activities against sectors that are not specified. The 2021 UN Group of Governmental Experts Report[5] expressly acknowledges these concerns, noting that, even where a sector is not designated as CI, it does not amount to condoning malicious activities against those sectors. Furthermore, even where States specify certain sectors as CI, they are not precluded from designating other sectors as such in the future. There have also been calls to extend norms to mention specific sectors, even if those sectors are already widely considered to be CI. In February 2020, the International Committee of the Red Cross[6] proposed extending the application of norms to address the "particular vulnerability of health care facilities" in response to cyber operations against hospitals and vaccine research Centres during the pandemic.

While agreement about what sectors constitute CI for the purposes of the norm is useful in providing clarity, this introduces unnecessary additional complexity to how international law applies in this context. The contested

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21, 2021) www.ohchr.org/en/news/2021/10/workinggroupusemercenariesincreasing-number-private-military-and-security.

[4] Haataja S, "Cyber Operations against Critical Infrastructure under Norms of Responsible State Behaviour and International Law" [2023] International journal of law and information technology dx.doi.org/10.1093/ijlit/eaad006.

[5] CyberPeace Institute, "The UN GGE Final Report: A Milestone in Cyber Diplomacy, but Where Is the Accountability?" (CyberPeace Institute, June 9, 2021) cyberpeaceinstitute.org/news/the-un-gge-final-report-a-milestone-in-cyber-diplomacy-but-where-is-the-accountability/.

[6] Ado AB, Saleh YI and Usman MG, "Contribution of the International Committee of the Red Cross (ICRC) to the Development and Implementation of International Humanitarian Law" (2015) 2 International Journal of Multidisciplinary Research and Development.

nature of CI and focus on whether a sector is CI for the purposes of the norm has the potential of narrowing the application of international law only to those sectors that States have agreed to constitute CI. The need for a cyber operation to affect CI also creates an additional requirement that is not evident in existing international law. This is because, irrespective of whether a sector is designated as CI or not, existing international law obligations apply to cyber operations causing effects in the territory of other States.[7,8]

Therefore, the question on what constitutes CI under the lens of the norm, has the potential of adding complexity to determining whether a cyber operation violates international law.

Prevention

Prevention could be done through a control on the ways in which sensitive civilian data sets are stored and it is essential to have a method for testing such data systems, identifying potential threats and vulnerabilities. Mitigation systems and operational foresight have been adopted for an effective protection against information security risks.

Conclusion

My conclusion is that suggesting new tools and approaches is a core first step to prevent damages to the civilian population and can contribute with contemporary challenges by delivering the highest quality of support.

It is important to acquire lessons learned, best practices and to develop new models, adopting a more comprehensive approach always supported by strategic planning, able to adapt to the evolving contexts, and evaluation activity to ensure the achievement of objectives.

Thank you.

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[7] Haataja S, "Cyber Operations against Critical Infrastructure under Norms of Responsible State Behaviour and International Law" [2023] International journal of law and information technology dx.doi.org/10.1093/ijlit/eaad006.

[8] For example, a cyber operation against election infrastructure rising to the level of a violation of sovereignty or intervention will constitute a violation of international law regardless of whether the victim State considers the infrastructure to be CI or not. Similarly, cyber operations against healthcare facilities causing sufficient effects will constitute violations of international law even if those sectors are not specifically mentioned in the norm.

Reverberating effects of attacks on water services in protracted conflicts

Mark ZEITOUN
Director General, Geneva Water Hub

Thank you very much, Madam Chair.

As a water engineer turned social scientist cum policy worker, I come with my head bowed before this esteemed crowd of international law and military specialists maybe like a lamb to a slaughter perhaps, or like a Canadian rugby player to an Italian football field.

I was asked to reflect from this perspective on the most pressing issues in terms of dangers to civilians from non-implementation or noncompliance with IHL. To do that, I will cover the basics of water and urban systems and then look at the impact that armed conflict has on them, and the degree of protection offered by IHL. I will conclude that the impact can reverberate well beyond the zone of attack, and long after the dust settles. I also find that while IHL struggles with the complex reality of protracted urban conflicts, it is still a pretty good guide in this uncharted territory and the issue is really with the *implementation* of IHL. This is because the impact that I am going to describe is reasonably foreseeable, and that foreseeability increases with time.

The assertions are based on work and analysis that I have undertaken with the ICRC, and on lawyers' interpretations, which consider that reasonably foreseeable reverberating effects of attacks be considered as a legal obligation when assessing incidental harm for the purposes of proportionality and precautions in attack, which has obligations on targeters, of course.

First, there are a few things to know about urban water systems, mainly that they are more than just infrastructure. So, we are not just talking about critical infrastructure. To get safe water to your tap, you need hardware – so you need some infrastructure pipes, pumps, etc., and you also need the equipment to build it. But you need consumables too, like chlorine to treat the water or fuel for the maintenance vehicles. Most of all, you need *people*; those who can repair the system when it gets damaged or maintain it during long protracted conflicts.

The effects of attacks on people or consumables or hardware can, quite obviously and evidently, be direct as can be seen from the pictures of fallen water towers, or blown up pipes of pumping stations. The protection offered by IHL here is pretty good, at least in theory. There is specific protection

for civilian objects, objects that are indispensable to the survival of the population, etc. It gets more complicated when considering urban services as they are not just people, consumables and hardware: they are also all interconnected. Water systems are tied to food systems and to hospitals. Hospitals rely on energy supplies, of course, one part of the system gets knocked out, and then all the systems get affected one way or the other. That is what we call the interconnectivity of urban services. Interconnectivity is quite complicated, and the object and person-specific protection offered by IHL does not explicitly acknowledge such interconnectivity.

Another dimension that I think we should consider, based on my experience, is the indirect impact of armed conflict: it is not just when a pumping station is blown up and can't work anymore, but it is when it falls into disrepair because it has not been maintained, or when dams are not maintained properly. If a pumping station is not maintained properly, because there is a brain drain, because people have left the country – remember, people are the most important component of any system – then the pressure drops in the pipes. And so, what do people do? Well, people who want to provide water for their kid install small pumps at the top and at the bottom of their apartment building, and they suck the water up to the rooftop tanks. But when you suck up the water, you are creating negative pressure, and so you suck in whatever is around the pipes as well. That could be bacteria, or it could be toxic chemicals, especially if there is wastewater or sewage beside the drinking water lines. You are basically sucking up sewage and any disease that might be in those microorganisms and feeding it to your family. That's what we call indirect impact.

And then there's also this notion of *reverberating effects*. An explosive attack can have direct effects, and indirect effects, and these reverberate along so that if you measure it by the person sat at the end of the system, the person who drinks the contaminated water is far beyond the blast zone. If you think about the impact on the hospitals – surgeons who can no longer sterilize their equipment, as in Gaza – then someone gets more affected by the infection of his / her wound, than by the actual wound itself. And the effects of disease endure long after the blast has occurred, sometimes months, or, indeed, years later. As Plato is said to have said: *only the dead have seen the end of war*. The wounded continue to see it and to feel it. It is these reverberating effects that are the most sinister.

Think about reverberations, like what happens when you pull a bow across violin strings, or when BB King strikes a note on his guitar, those that cut right through your body and go into your soul. Just as when you throw a rock into a still lake, there are ripples that touch everything in their path. Without ambition, without intent, but most surely, and sometimes with maximum

effect. It is the same with attacks on civilian infrastructure, especially water systems; well, it is a lot less beautiful an image, because if you have seen people who have died or are dying from cholera, then it's a pretty horrific image, and one we all want to avoid.

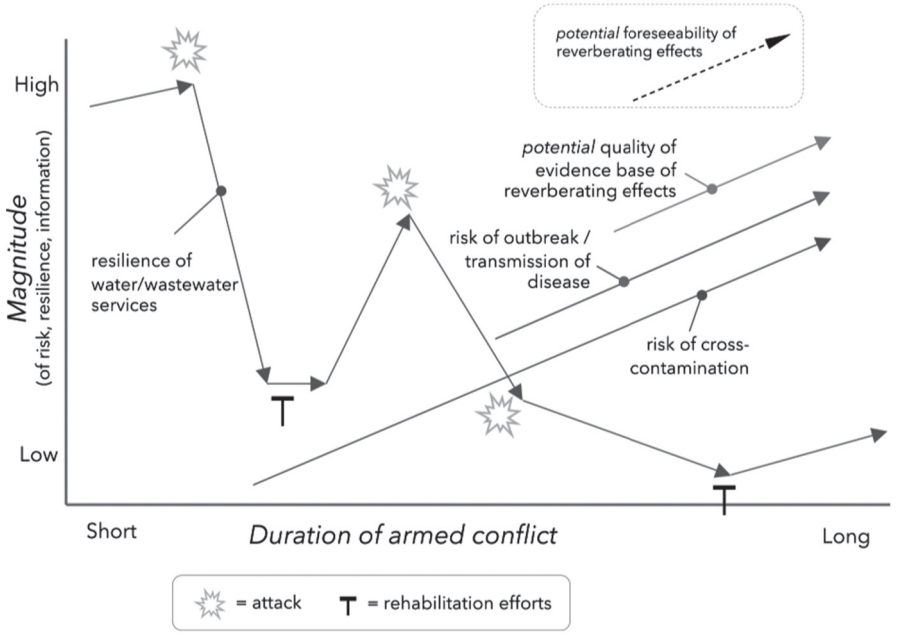

Figure based on data from Yemen, Basrah and Gaza showing the relationship between degradation of quality of a water service and increasing risk of disease, impact of reverberating effects and foreseeability of the reverberating effects (and, so, implications for targeters). Based on Talhami M, Zeitoun M, "The impact of attacks on urban services II: Reverberating effects of damage to water and wastewater systems on infectious disease", International Review of the Red Cross, 2021; 102(915): 1293-1325. DOI: 10.1017/S1816383121000667.

What are the implications for better protection of civilians? Well, there is one more dimension that I would like to add to our analysis: the effect of time. Because as the conflict protracts, as it goes on, then the resilience of any water system decreases, because it has been hit several times – just as a jab to a boxer in the 11th round is much more damaging than a jab in the first round. The more any component of a water system gets damaged, the more any attack can affect it, and the greater the chance there is actually of contamination or cross contamination of sewage and water. Because the wastewater system gets damaged over time, the water systems are damaged,

and people have coping mechanisms of sucking up the water through the water systems, it is more likely that there will be a spread of disease.

What is interesting here is that also with time, we can collect more data. The longer we are in the conflict, the better data we have or the more time we have to collect data. So, it is not just that the risk of disease increases in this example, but that the evidence base should also increase. This means that the foreseeability of these impacts increases with time. Because we have a better evidence base, and because it is so well known, the epidemiology is there. So, when we ask the question, how much of this impact is foreseeable when this or that attack happens in this or that country? The short answer is: 'quite a lot of it'. And evermore, with the passage of time.

I shall conclude with my main takeaways, again:

- that attacks on urban services can reverberate well beyond the zone of attack long after the dust settles;
- that impact is reasonably foreseeable;
- that foreseeability increases with time.

What are the obligations for targeters in terms of IPOE, weapons selection, target selection? I think this is the perfect room to discuss that in and I look forward to your questions. Thank you very much.

II. Compliance with IHL in the conduct of military operations

Chair: Richard ALLEN
Brigadier General, Assistant Head Operational Law, UK Army

Protecting critical infrastructure enabling essential services during armed conflict

Abby ZEITH
Legal Adviser, Arms and Conduct of Hostilities Unit, ICRC

The views expressed in this presentation are those of the author alone and do not necessarily reflect the views of the ICRC. The author would like to thank Laurent Gisel for his feedback on earlier drafts.

Thank you to the chair for the kind introduction and good morning to all. It is a real privilege to be amongst such distinguished conference participants at this year's Round Table discussing incredibly important issues concerning the protection of essential services and humanitarian assistance in contemporary military operations.

As we heard in the first session, essential services – such as electricity, healthcare, food production and distribution, water, and sanitation – are impacted in multiple ways during armed conflict.[1] A common cause is damage to critical infrastructure enabling service provision during hostilities. That damage is often intentional when targeted either lawfully or unlawfully. It might also be incidental especially when heavy explosive weapons are directed against targets in the vicinity of such infrastructure.[2]

Often belligerents will deprive civilian populations of essential services via methods other than attacks as part of their strategy. The suffering is exacerbated when fighting moves to urban areas, when heavy explosive weapons are used, when civilians are trapped and cities besieged, when impartial humanitarian organizations are denied access to the civilian population, and when fighting becomes protracted.

The ICRC alongside our Movement partners bear first hand witness to the human cost of essential service disruption in armed conflicts in every region across the globe. The consequences are immediate, long-term, wide-spread, and cumulative. They range from mass displacement, food insecurity and energy insecurity, outbreak and spread of infectious disease, reduced livelihoods,

[1] ICRC, "Urban Services During Protracted Armed Conflict: A Call For a Better Approach to Assisting Affected People" (2015) www.icrc.org/sites/default/files/topic/file_plus_list/4249_urban_services_during_protracted_armed_conflict.pdf.

[2] ICRC, "Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas" (2022) www.icrc.org/en/document/civilians-protected-against-explosive-weapons.

environmental damage, and death.[3] The scale and complexity of humanitarian needs almost always extends beyond the technical, practical, and financial capacities that can be mustered by a collective humanitarian response.[4]

As Professor Zeitoun said earlier this morning, essential services depend both on the infrastructure itself and the people and consumables.[5] IHL provides crucial safeguards in this respect. These rules not only protect infrastructure, but also the civilian personnel who operate, maintain and repair that infrastructure, and service provider stocks and equipment. Similarly, rules on starvation and on relief operations in combination seek to ensure that civilians do not starve and are not deprived of supplies essential to their survival.[6]

In this presentation, I will mention some key IHL considerations relevant to the protection of infrastructure enabling essential services. Specifically, though, I will focus on infrastructure used by both militaries and civilians simultaneously. Although, commonly referred to as "dual use" objects, this is a functional term that does not exist in IHL. From a legal perspective an object is either a military objective or a civilian object; there is no intermediate category.

"Critical infrastructure" is in principle a civilian object

There are various definitions of critical infrastructure used by States and International Organizations.[7] Although not defined under IHL, most of what States consider to be critical infrastructure are in principle civilian objects.

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[3] ICRC, "War in Cities: Preventing and Addressing the Humanitarian Consequences for Civilians" (2023) shop.icrc.org/war-in-cities-preventing-and-addressing-the-humanitarian-consequences-for-civilians-extract-executive-summary-and-recommendations-print-fr.html.

[4] World Bank, ICRC and UNICEF, "Joining Forces to Combat Protracted Crises: Humanitarian and Development Support for Water and Sanitation Providers in the Middle East and North Africa" (2021) www.icrc.org/en/document/joining-forces-secure-water-and-sanitation-protracted-crises; ICRC, "Towards More Effective Humanitarian Operations in Urban Areas of Protracted Armed Conflicts: Lessons Learned from Applying Operational Resilience and Institutional Learning in Gaza" (2022) shop.icrc.org/towards-more-effective-humanitarian-operations-in-urban-areas-of-protracted-armed-conflicts-pdf-en.html.

[5] ICRC, "Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People" (2015) www.icrc.org/en/document/urban-services-protracted-conflict-report.

[6] ICRC, "Starvation, Hunger and Famine in Armed Conflict: An Overview of Relevant Provisions of International Humanitarian Law" (2022) shop.icrc.org/starvation-hunger-and-famine-in-armed-conflict-pdf-en.html.

[7] For example, United Nations and Interpol, "The Protection of Critical Infrastructure Against Terrorist Attacks: Compendium of Good Practices" (2022) www.un.org/

They are protected against direct attack, reprisals, and incidental harm.[8] They benefit from a presumption of civilian status in case of doubt.[9] Attacks against these objects launched for the primary purpose of spreading terror among the civilian population are also prohibited.[10]

When does critical infrastructure qualify as a military objective?

Of course, the challenge is that a significant amount of critical infrastructure is shared by militaries and civilians also during armed conflict. This includes energy infrastructure; telecommunication networks; the production of petroleum, oil and lubricants; logistical "lines of communication" (e.g., roads, bridges, transportation systems and airports and airfields, ports, tunnels); space systems; food production and distribution capacities; and water and sanitation infrastructure.

The mere fact that a specific piece of civilian infrastructure is used by one party to an armed conflict will not be enough for it to qualify as a military objective within the meaning of IHL. It must fulfil the two prongs of the definition. One should not assume that just because it fulfils the first prong of the definition, it automatically fulfils the second prong.[11]

For the first prong, "effective contribution to military action", there must be a close connection – or "proximate nexus" – between the use of that piece of infrastructure and the fighting itself.[12] This nexus will typically relate to tactical or operational level activities such as a power station providing

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counterterrorism/sites/www.un.org.counterterrorism/files/2225521_compendium_of_good_practice_web.pdf.

[8] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 48.; Henckaerts J-M and Doswald-Beck L, Customary International Humanitarian Law (Volume I: Rules, ICRC and Cambridge University Press 2005) rule 147.

[9] Additional Protocol I art 52.; Henckaerts J-M and Doswald-Beck L, Customary International Humanitarian Law (Volume I: Rules, ICRC and Cambridge University Press 2005) rule 8.

[10] Additional Protocol I art 51(2); Additional Protocol II art 13(2).; Henckaerts J-M and Doswald-Beck L, Customary International Humanitarian Law (Volume I: Rules, ICRC and Cambridge University Press 2005) rule 2.

[11] Concretely, this means that: (1) by its nature, location, purpose (intended future use) or use, a piece of infrastructure must make an effective contribution to *military action*; and (2) its total or partial destruction, capture or neutralization, *in the circumstances ruling at the time*, must offer a definite military advantage.

[12] Gisel L, "The Relevance of Revenue-Generating Objects in Relation to the Notion of Military Objective", Proceedings of the Bruges Colloquium: The Additional Protocols at

electricity to military headquarters or command, control, and communication systems. In some circumstances, there will be a nexus to strategic-level activities aimed at achieving direct military effects. For example, targeting specific energy infrastructure to deny an adversary's air-defence capabilities or impacting upon war materiel production.[13]

As for the second prong, there must also be a "concrete and perceptible" advantage benefitting the armed forces seeking to attack that infrastructure in the circumstances ruling at the time; not sometime in the hypothetical future.[14] In other words, IHL prohibits target classification that are sweeping or anticipatory. For example, the entire transportation or communications network of a country or area under enemy control. This would contradict the requirement to continually validate the nature of a proposed target and any subsequent attack would most likely be indiscriminate.[15]

Of particular concern is the tendency by some parties to armed conflict to adopt broad interpretations of the military objective definition. They do this to justify operations against critical civilian infrastructure not for the purpose of degrading an adversary's military capabilities, but rather for political or economic reasons. To be clear, IHL forbids attacks against objects if the sole purpose is to degrade an adversary's economic capacity.[16] That is even if those objects are indirectly sustaining war-fighting capability.[17] Unless the operation is against a target that is a military objective in the first place, IHL also prohibits attacks specifically designed to force the adversary to the negotiating table, to influence the will of the population, or to intimidate political leaders.[18]

40: Achievements and Challenges (2017) www.coleurope.eu/sites/default/files/uploads/page/collegium_48_webversie.pdf.

[13] Zeith A and Giorgou E, "When the Lights Go out: The Protection of Energy Infrastructure in Armed Conflict – Humanitarian Law & Policy Blog" (Humanitarian Law & Policy Blog, April 20, 2023) blogs.icrc.org/law-and-policy/2023/04/20/protection-energy-infrastructure-armed-conflict/.

[14] Solf WA, 'Art. 52 API' in Bothe M, Partsch KJ and Solf WA (eds.), "New Rules for Victims of Armed Conflicts" (2nd edn, Martinus Nijhoff Publishers 2013) 367, para 2.4.6.

[15] International Law Association Study Group, "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare" (2017) www.ila-hq.org/en_GB/documents/ila-final-report-25-june-2017.

[16] Gisel L, "The Relevance of Revenue-Generating Objects in Relation to the Notion of Military Objective", Proceedings of the Bruges Colloquium: The Additional Protocols at 40: Achievements and Challenges (2017) www.coleurope.eu/sites/default/files/uploads/page/collegium_48_webversie.pdf.

[17] Dinstein Y, "The Conduct of Hostilities under the Law of International Armed Conflict" (4th edn, Cambridge University Press 2022), pp. 126-127.

[18] Fleck D (ed.), "The Handbook of International Humanitarian Law" (4th edn, Oxford University Press 2021), p. 179.

Can all "dual-use" infrastructure that qualifies as a military objective within the meaning of IHL be attacked? Not necessarily

Once a piece of critical infrastructure is used in such a way that it fulfils the legal definition of military objective, that entire object – but only that object, not the entire infrastructure – becomes a lawful target. But does that mean IHL permits attacks against dual-use objects in all circumstances? Not always.

IHL affords heightened protection to certain types of critical infrastructure notably hospitals and other medical facilities and transports,[19] objects indispensable to the survival of the civilian population,[20] and works and installations containing dangerous forces namely dams, dykes and nuclear power plants,[21] to cultural property,[22] and to the natural environment.[23] Every specific protection regime is different, but it often entails protection against operations other than attacks.

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[19] "Protecting Health Care: Guidance for the Armed Forces" (ICRC, Geneva, November 2020) shop.icrc.org/protectinghealthcareguidanceforthearmedforcespdfen.html.

[20] ICRC, "Starvation, Hunger and Famine in Armed Conflict: An Overview of Relevant Provisions of International Humanitarian Law" (2022) shop.icrc.org/starvation-hunger-and-famine-in-armed-conflict-pdf-en.html; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 54; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) art 14; Henckaerts J-M and Doswald-Beck L, Customary International Humanitarian Law.

[21] Zeith A and Giorgou E, "Dangerous Forces: The Protection of Nuclear Power Plants in Armed Conflict – Humanitarian Law & Policy Blog" (Humanitarian Law & Policy Blog, October 18, 2022) blogs.icrc.org/law-and-policy/2022/10/18/protection-nuclear-power-plants-armed-conflict/.

[22] ICRC, "1954 Convention on the Protection of Cultural Property – Factsheet" (ICRC, May 2021) www.icrc.org/en/document/1954conventionprotectionculturalpropertyeventarmedconflictanditsprotocols0?utm_term=&utm_campaign=gu_DSA_GSN_EN_traffic_Alle+Seiten_AOK_2023&utm_source=adwords&utm_medium=ppc&hsa_acc=2458906539&hsa_cam=20202495119&hsa_grp=152583294634&hsa_ad=660057586232&hsa_src=g&hsa_tgt=dsa19959388920&hsa_kw=&hsa_mt=&hsa_net=adwords&hsa_ver=3&gclid=Cj0KCQjw3tCyBhDBARIsAEY0XNkU0bUGqX59F2mkE_wJNXullEFP8SHY2KHGJaiowlQAuBMHHliz1JUaAm_ZEALw_wcB.

[23] ICRC, "Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary" (ICRC, December 2020).; Murphy V and Obregon Gieseken H, "Fighting without a Planet B: How IHL Protects the Natural Environment in Armed Conflict – Humanitarian Law & Policy Blog" (Humanitarian Law & Policy Blog, May 25, 2021) blogs.icrc.org/law-and-policy/2021/05/25/fighting-without-planet-b/.

In any case, even when critical civilian infrastructure does not benefit from heightened protection under IHL, all other customary and treaty IHL rules protecting the civilian population from the effects of hostilities, as well as the natural environment, continue to apply. This includes prohibitions on indiscriminate and disproportionate attacks, and the rules on precautions in attack and against the effects of attacks.

What constitutes incidental harm for proportionality and precautions when targeting "dual-use" infrastructure that has become a military objective within the meaning of IHL?

One important question relates to the type of incidental civilian harm that must be considered when targeting "dual-use" infrastructure that has become a military objective but does not benefit from specific protection under IHL. The prevailing view, and one that is supported by the ICRC, is that proportionality and precautions remain relevant when targeting such "dual-use" objects. Concretely that means:

- Firstly, an attacking party must consider the incidental harm caused to civilians and other civilian objects in the vicinity of the targeted "dual-use" infrastructure – which is uncontroversial.
- Secondly, an attacking party must also consider the consequences of impairing the civilian use or functionality of the very dual-use object to be attacked. This includes reasonably foreseeable[24] indirect or reverberating civilian harm caused by such impairment.[25]

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[24] What is foreseeable at the moment of attack is to be assessed from the perspective of the 'reasonable commander', namely a person trained and experienced in the military art, making use in good faith of information from all sources reasonably available to them in the circumstances. Parties to a conflict must do everything feasible to assess whether an attack will comply with the rule of proportionality. In the ICRC's view, this entails an obligation to do everything feasible to obtain information that will allow for a meaningful assessment of the foreseeable incidental effects, on civilians and civilian objects, of an attack. See ICRC, "Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas" (2022) www.icrc.org/en/document/civilians-protected-against-explosive-weapons pp. 96-101.

[25] ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions" (ICRC, November 2019) www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts, p. 19. For an account of this debate with regard to proportionality, which would apply *mutatis mutandis* with regard to precautions, see ICRC, "International Expert Meeting Report: The Principle of Proportionality" (ICRC, September 3, 2018) www.icrc.org/en/document/international-expert-meeting-

Moreover, illness or disease triggered by, for example, inadequate or insufficient water and sanitation and food due to essential service disruption resulting from critical infrastructure targeting constitutes relevant civilian harm for proportionality and precautions.[26] So too does environmental damage caused by, for example, the release of harmful substances such as chemical and radioactive contaminants due to direct attacks against oil and fuel infrastructure.[27]

Poverty, unemployment, and economic hardship are usually not considered to constitute relevant incidental civilian harm *per se*. Neither is displacement as such. However, displacement due to lack of essential services is relevant for proportionality and precautions in attack insofar as it may lead to disease or deaths of those displaced. What is more, displacement caused by incidental damage to a civilian object will affect the "weight" to be given to the damage to a piece of critical infrastructure when assessing incidental harm.[28]

When considering incidental harm in protracted conflicts, belligerents must bear in mind that the quality of a service will have become degraded often because of the inability to ensure proper maintenance of infrastructure, lack of consumables or unavailability of maintenance staff. Moreover, war wounded are also likely to be putting medical infrastructure under stress even if that infrastructure is not damaged in the first place.

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report-principle-proportionality, pp. 37-40; International Law Association Study Group, "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare" (2017) www.ila-hq.org/en_GB/documents/ila-final-report-25-june-2017, pp. 11-12.

[26] ICRC, "Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas" (2022) www.icrc.org/en/document/civilians-protected-against-explosive-weapons, p. 100; Zeith A and Giorgou E, "When the Lights Go out: The Protection of Energy Infrastructure in Armed Conflict – Humanitarian Law & Policy Blog" (Humanitarian Law & Policy Blog, April 20, 2023) blogs.icrc.org/law-and-policy/2023/04/20/protection-energy-infrastructure-armed-conflict/.

[27] ICRC, "Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary" (ICRC, Geneva, December 2020).

[28] ICRC, "Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas" (2022) www.icrc.org/en/document/civilians-protected-against-explosive-weapons, pp. 101-102; Zeith A and Giorgou E, "When the Lights Go out: The Protection of Energy Infrastructure in Armed Conflict – Humanitarian Law & Policy Blog" (Humanitarian Law & Policy Blog, April 20, 2023) blogs.icrc.org/lawandpolicy/2023/04/20/protection-energy-infrastructure-armed-conflict/.

Why is it problematic to target "dual-use" infrastructure even if it qualifies as a military objective within the meaning of IHL?

Even though "dual-use" critical infrastructure has often been targeted in armed conflicts, they have always been an especially problematic "target set". There are many reasons for this; I will offer at least two.

First, given the interconnectedness and interdependence of essential services, it is very difficult to limit the effects of an attack to those portions of a service being used by the armed forces.[29] For example, attacks against space systems used by militaries (e.g., satellites, ground stations and their datalinks) that also provide critical space-based services to civilians such as communications, navigation and remote sensing may lead to disruptions in energy, water and sanitation, transportation, food production and distribution, healthcare, finance, disaster prevention and mitigation, emergency services and humanitarian relief. Such interruptions could be local, regional, or global, and of short or longer duration.[30]

As for energy systems, they are organized differently in every country. Unfortunately, in many cities where the ICRC operates, energy infrastructure and services have been built on a monolithic system design.[31] They lack diversified sources of energy production. Too often, a failure in an upstream component (e.g., power plants, high-voltage infrastructure) leads to a failure of all downstream components (e.g., distribution networks). Inevitably, this leads to the failure of all other services reliant on it for energy supply. This monolithic architecture renders the operational continuity of services vulnerable to single points of failure. The vulnerability can be noticed in the infrastructure itself, as well as in the supply chains necessary to ensure operation. During times of crisis, this vulnerability remains a large risk to carry, with few options available to restore services to scale and in a timely manner.

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[29] Jachec-Neale A, "The Concept of Military Objectives in International Law and Targeting Practice" (Routledge 2014).

[30] Zhou W, "War, Law and Outer Space: Pathways to Reduce the Human Cost of Military Space Operations" (Humanitarian Law & Policy Blog, August 15, 2023) blogs.icrc.org/law-and-policy/2023/08/15/war-law-outer-space-reduce-human-cost-of-military-space-operations/; Eves S and Doucet G, "Reducing the Civilian Cost of Military Counterspace Operations" (Humanitarian Law & Policy Blog, August 17, 2023) blogs.icrc.org/lawandpolicy/2023/08/17/reducingciviliancostofmilitarycounterspace-operations/, accessed May 27, 2024.

[31] World Bank, ICRC and UNICEF, "Joining Forces to Combat Protracted Crises: Humanitarian and Development Support for Water and Sanitation Providers in the Middle East and North Africa" (2021) www.icrc.org/en/document/joining-forces-secure-water-and-sanitation-protracted-crises.

Second, we submit there can be a tendency for warring parties to overestimate the "concrete and direct" military advantage anticipated from attacking certain pieces of so-called "dual-use" critical infrastructure.

- Militaries may lack adequate intelligence as to the extent to which it is making an "effective contribution" to the enemy's military action.
- There may be speculation as to the military benefits of targeting such infrastructure.
- Sometimes militaries do not correctly anticipate how the enemy might react in response to mitigating the impact of such attacks.

For example, military historians, practitioners and others have studied closely several interdiction operations aimed at electric power in previous conflicts (e.g., Second World War, Korea, Vietnam, and Iraq). Some take the view that although targeting energy infrastructure might in certain circumstances provide short-term military advantage, the long-term strategic and operational military advantages often remain questionable.[32] In any event, those advantages are often outweighed by the reverberating effects of such attacks on the civilian population. This is especially the case when militaries tend to be priority users during armed conflict. They are, therefore, more likely to be allocated residual electricity capacity in the national grid, and they are more likely to have emergency power systems for redundancy.[33]

Mitigating civilian harm from targeting of critical infrastructure

Contemporary military practice and doctrine makes clear that "dual-use" infrastructure critical for essential service provision is likely to remain a "target set" priority and especially for those reflecting on large-scale military operations.[34] This is not withstanding the significant risk of civilian harm. The next panel is on risk mitigation when planning for contemporary military operations and I am sure the other esteemed panellists will have much more

[32] Griffith TE and Major JR, "Strategic Attack of National Electrical Systems" (Defense.gov) media.defense.gov/2017/Dec/29/2001861964/1/1/0/T_GRIFFITH_STRATEGIC_ATTACK.PDF.

[33] Waxman MC, "International Law and the Politics of Urban Air Operations" (RAND 1999).

[34] NATO, "AJP-3.9 Allied Joint Doctrine for Joint Targeting" (Edition B, Version 1, NATO Standardization Office, November 2021). Annex B – Examples of NATO Target Sets (e.g. airports and airfields; transportation/lines of communication; naval ports; petroleum industry; electric power).

to say. That said, I would like to finish my remarks by speaking briefly about training and planning.[35]

Those involved in joint and combined multi-domain targeting operations – whether it be as part of deep operations or in support of close operations – need to be technically proficient and structurally enabled to address complex IHL and legal interoperability challenges especially as they relate to deliberate targeting of "dual-use" critical infrastructure enabling essential services. For example:

- When it comes to lawful target selection and proportionality assessments,[36] headquarters staff must not make sweeping or anticipatory target classifications. They must not plan attacks against infrastructure for reasons other than degrading an adversary's military capabilities. As for proportionality, it is important the command knows the limits imposed by the requirement that anticipated that "military advantage" be "concrete and direct".[37]
- As for target verification[38] and incidental harm assessments,[39] warring parties must not make unsubstantiated assumptions or generalizations about critical infrastructure within their area of operations,[40] whether it be projected military effects of targeting it or the anticipated impact

[35] The following considerations on deliberate targeting of "dual-use" infrastructure based on a recent blog post by Seneviratne L, Zeith A and Onishi K, "Reducing the Human Cost of Large-Scale Military Operations" (Lieber Institute West Point, July 3, 2023) lieber.westpoint.edu/reducing-human-cost-large-scale-military-operations/.

[36] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 51(5)(b) and Article 57; Henckaerts J-M and Doswald-Beck L, "Customary International Humanitarian Law" (Volume I: Rules, ICRC and Cambridge University Press 2005) rule 14.

[37] ICRC, "The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law, Expert Meeting Report", (ICRC, Geneva, August 2018), pp. 11-25.

[38] Additional Protocol I art 57(2)(a)(i).; Henckaerts J-M and Doswald-Beck L, "Customary International Humanitarian Law" (Volume I: Rules, ICRC and Cambridge University Press 2005) rule 16.

[39] ICRC, "The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law, Expert Meeting Report", (ICRC, Geneva, August 2018), pp. 32-46.

[40] Zamani M, "Ian Henderson, the Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I" (2011) Journal of conflict and security law dx.doi.org/10.1093/jcsl/krr009, pp. 139-141; Zeith A and Giorgou E, "When the Lights Go out: The Protection of Energy Infrastructure in Armed Conflict – Humanitarian Law & Policy Blog" (Humanitarian Law & Policy Blog, April 20, 2023) blogs.icrc.org/law-and-policy/2023/04/20/protection-energy-infrastructure-armed-conflict/.

on essential service delivery. Even when operating in a high tempo and information deprived environment, understanding how essential systems are interconnected and identifying the most vulnerable infrastructure needs to be a priority information requirement at all levels for all operations. While this type of information may be difficult to acquire, it certainly does not negate the legal requirement to take all feasible measures to obtain it. Of course, this may be challenging for commanders at the tactical edge caught up in close battle but we know that many potential targets are pre-identified in advance during intelligence preparation of the operational environment and as part of the military decision-making process.

- In terms of precautions in the choice of means and methods,[41] as well as in the choice of targets,[42] how might such considerations influence requests for, allocation of, and subsequent employment of joint and combined multi-domain capabilities? Although, there may be no general obligation to always use or acquire the most precise or modern capability, if a precaution is feasible, it must be taken. What is more, if the only way to conduct an operation without violating the prohibition of indiscriminate or disproportionate attacks is to use a specific capability, there are two options: use it or do not carry out the attack at all.[43]

Preparedness for lawful multi-domain targeting – especially at echelons above brigade – calls for realistic and demanding training. That training must go further than the standard brief on principles and rules of IHL. Rather, these rules and principles must be operationalized, also through well-calibrated and exercised targeting authorities, delegations, and standard operating procedures. These are all essential for striking the careful balance needed for responsible "mission command" and command responsibility.

Providing such training for large scale military operations can be difficult because, for many militaries, it seems impossible to train entire divisions, let alone corps, physically in the field, at a distance and over time, and

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[41] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 57(2)(a)(ii).; Henckaerts J-M and Doswald-Beck L, Customary International Humanitarian Law (Volume I: Rules, ICRC and Cambridge University Press 2005) rule 17.

[42] Additional Protocol I art 57(3); Henckaerts J-M and Doswald-Beck L, "Customary International Humanitarian Law" (Volume I: Rules, ICRC and Cambridge University Press 2005) rule 21.

[43] International Law Association Study Group, "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare" (2017) www.ila-hq.org/en_GB/documents/ila-final-report-25-june-2017, p. 45.

alongside coalitions and partners. Nor can one ever truly replicate the impact of essential service disruption upon the civilian population despite realism being an essential component of quality training.

Of course, professional military education, command post exercises, wargames, and synthetic/virtual training environments are useful for thinking through legal and humanitarian challenges. Such activities are most effective when designed in such a way that ensures that realistic civilian harm considerations are deeply embedded throughout and, where possible, humanitarian actors are involved where appropriate. Ensuring that lessons learned from previous operations are widely disseminated, also in relation to both immediate and long-term civilian harm, is also essential.

Conclusion

Thank you again for the opportunity to be with you here in the idyllic city of Sanremo. I look forward to the discussions today and tomorrow.

International humanitarian law considerations on the conduct of military operations and electrical energy infrastructure

Chris JENKS
Special IHL Advisor to the Judge Advocate General of the Army, US Department of Defense; Council Member, IIHL

Within the discussion on the conduct of military operations and their direct and indirect impact on essential services and humanitarian assistance, my focus is on how international humanitarian law (IHL) treats or considers energy infrastructure, more specifically, electrical energy infrastructure.

There is an ongoing effort to raise awareness of the interconnected nature of energy infrastructure and objects indispensable to the survival of the civilian population,[1] including, but not limited to, food and water. I believe the primary motivation behind this effort is aligned with the central purpose of IHL, to "limit the effects of armed conflict".[2]

I believe a secondary motivation is to update our interpretation of IHL based on technological changes and advances.[3]

I agree with and support both these rationales.

But I partially question their application and the resulting conclusion, which I understand to be that electrical energy infrastructure is – or should be

[1] One argument is that certain electrical energy infrastructure may be considered indispensable to the survival of the civilian population because of its interconnected nature to objects already enumerated as indispensable under Article 54 of Additional Protocol I. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 54 [hereinafter AP I]. But the prohibition on attacking indispensable objects only applies to objects also used in direct support of military action where the attack "may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement". As discussed *infra*, the use of "may be expected" in proportionality analysis is challenging to parse out or specify. It is no less challenging in the context of indispensable objects. The point being framing electrical energy as an indispensable object does not solve the targeting question, it mostly shifts the analysis from one rule to another, with both using "may be expected".

[2] ICRC, "What Is International Humanitarian Law?" (Icrc.org, 2004) www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf, accessed December 7, 2023.

[3] See, e.g., ICRC, "New Technologies in Warfare", International Humanitarian Law and The Challenges of Contemporary Armed Conflicts Recommitting to Protection in Armed Conflict on the 70th Anniversary of The Geneva Conventions (ICRC 2019).

– less likely to qualify as a military objective now[4] than in the past and that even when it does qualify, ensuring the proportionality of an attack against such infrastructure is "likely to be difficult".[5]

I acknowledge that the proportionality analysis can be challenging.[6] Our collective thinking on if and how to include not just direct but reasonably foreseeable indirect harms has evolved over time, appropriately so. But including speculative, indirect, harm, harm that is possible, not likely, seems inconsistent with the language of the proportionality rule that the harm be "expected".[7]

Electrical energy currently plays a very different role, both in society writ large and in the conduct of military operations, to the time of the first Additional Protocol (AP I), which provides much of the IHL relevant to this discussion. Consider for a moment just some of the advances since AP I was concluded in 1977: the internet, the prevalence first of computers and then smart phones, and their ever-increasing capabilities.[8]

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[4] The United Nations Under-Secretary General spoke to the UN Security Council in 2022 regarding attacks by the Russian Federation against energy infrastructure in Ukraine: "*I will say it once again: attacks targeting civilians and civilian infrastructure are prohibited under international humanitarian law. So are attacks against military objectives that may be expected to cause harm to civilians that would be excessive in relation to the concrete and direct military advantage anticipated. The United Nations strongly condemns these attacks and demands that the Russian Federation immediately cease these actions*". "DiCarlo: Relentless, Widespread Attacks against Civilians and Critical Infrastructure Continuing across Ukraine" (Dppa.un.org, November 23, 2022) dppa.un.org/en/dicarlo-relentless-widespread-attacks-against-civilians-and-critical-infrastructure-continuing. The import of the Under-Secretary General's remarks is that either the energy infrastructure in Ukraine was purely civilian or, to the extent that the infrastructure was a military objective that attacking it was expected to cause civilian harm excessive to the anticipated military advantage. The Under-Secretary General did not provide any information or support for either of those conclusory outcomes.

[5] Zeith, A and Giorgou E, "When the Lights Go out: The Protection of Energy Infrastructure in Armed Conflict – Humanitarian Law & Policy Blog" (Humanitarian Law & Policy Blog, April 20, 2023) blogs.icrc.org/law-and-policy/2023/04/20/protection-energy-infrastructure-armed-conflict (claiming that "[*c*]*onsidering the severe and often long-lasting impact of the disruption of essential services due to attacks against pieces of energy infrastructure, ensuring the proportionality of such attacks is likely to be difficult)*".

[6] As discussed in note 2 *supra*, the analysis under the indispensable object rule seems similarly challenging.

[7] As the rule states, "*those who plan or decide upon an attack shall: refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated*". Additional Protocol I, *supra* note 2, at Art. 57(2)(a)(iii) (emphasis added).

[8] As one commentator noted in 2019, "the iPhone in your pocket has over 100,000 times the processing power of the computer that landed man on the moon 50 years ago". Kendall G, "Your Mobile Phone vs. Apollo 11's Guidance Computer" (Realclearscience.com, July 2,

I submit that electrical energy infrastructure is, at a minimum, just as likely to qualify as a military objective today as it has historically. This does not mean that electrical energy infrastructure *always* qualifies as a military objective. It does mean that we should not consider the role electricity plays in society in isolation, we should also include evolving and increasing armed forces electricity demands.

I wonder if at least some of the recent claims of what the indirect harm calculus is required to consider are self-created and self-inflicted, akin to having tied IHL into a Gordian knot and then pointing out the difficulties the knot represents for IHL's application.

My overarching concern is the risk of distorting IHL as the result of exclusively focusing on the interconnected nature of energy infrastructure and civil society. Focusing on the potential harm to civilians is only part of the analysis. The interconnected nature of that same energy infrastructure and the armed forces and the potential military advantage from its disruption must also be included.

Additionally, the overall discussion might be better served by acknowledging the refusal or inability of States to separate or distinguish energy infrastructure serving civilian versus military uses. Not only is the distinction issue not improving, it appears to be worsening. For example, we should also include the ramifications of recent trends whereby States use various aspects of energy infrastructure to facilitate website platforms and mobile phone applications which allow civilians to provide tactical intelligence information during armed conflict.[9]

To explain both my concerns and conclusions, this article discusses when

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2019) www.realclearscience.com/articles/2019/07/02/your_mobile_phone_vs_apollo_11s_guidance_computer_111026.html.

[9] Following Russia's full-scale invasion of Ukraine, Ukraine modified an app called 'Diia' or 'Action.' Prior to the war, Diia worked like a digital driver's license and included links to public services from coronavirus-vaccination certificates to construction permits. See Harwell D, "Instead of Consumer Software, Ukraine's Tech Workers Build Apps of War" Washington post (Washington, D.C.: 1974) (March 24, 2022) www.washingtonpost.com/technology/2022/03/24/ukraine war apps russian invasion/. Following the invasion, Ukraine modified Diia to include a number of applications specific to the armed conflict, including one labelled "E-Enemy" which provides verified users the ability to inform the Ukrainian military of Russian troop and equipment sightings using a cell phone or computer. See Bergengruen V, "How Ukraine Is Crowdsourcing Digital Evidence of War Crimes" [2022] Time time.com/6166781/ukraine-crowdsourcing-war-crimes/. As of May 2023, Diia was labelled "poised to be shared with countries around the world". "USAID, Ukraine's Ministry of Digital Transformation, to Host Diia in DC Event on US-Ukraine Partnership for E-Government Innovation" (U.S. Agency for International Development, May 22, 2023) www.usaid.gov/newsinformation/pressreleases/may222023usaidukrainesministrydigitaltransformationhostdiiadceventusukrainepartnershipegovernmentinnovation.

electrical energy infrastructure qualifies as a military objective, followed by challenges in applying distinction and in determining both military advantage and incidental harm as part of proportionality.

Military objective

As a general proposition, military objectives may, subject to other considerations, be made the object of attack, while civilian objects may not. As applied to electrical energy infrastructure, the subsequent analysis is made confusing and even erroneous by the continued use of the misnomer "dual-use" objects.

"Dual Use"

In this regard, IHL is a binary construct. To quote Christopher Greenwood,

> [i]f an object is a military objective, it may be attacked (subject to the requirements of the principle of proportionality), while if it is a civilian object, it may not be attacked. There is no intermediate category of 'dual-use' objects: either something is a military objective or it is not.[10]

Definition of military objective

The definition of military objective derives from AP I.[11] Yet well before AP I, infrastructure producing energy for military consumption and use was already considered a permissible target of attack.

In 1956, as part of the considerable lead up to AP I, the ICRC submitted its Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War. These rules included a "List of Categories of Military Objectives" which included "installations providing energy mainly for national defence, e.g. coal, other fuels or atomic energy and plants producing gas or electricity mainly for military consumption".[12]

The use of the word "mainly", twice, is a significant qualifier. But the

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[10] Greenwood C, "Customary International Law and the First Geneva Protocol of 1977" in Peter Rowe (ed.), The Gulf War 1990-1991 In International and English Law (1993).

[11] Additional Protocol I, *supra* note 2, at art. 52(2).

[12] See Sandoz Y *et al.*, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (International Committee of the Red Cross 1986),

ICRC's list recognizes the obvious nexus between energy infrastructure and military operations.

Flash forward to AP I, which requires that:

> [*a*]*ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*.[13]

So long as electrical energy infrastructure is effectively facilitating current or future military equipment, facilities and/or operations, and attacking that infrastructure will directly benefit the attacking force, the military objective requirement is met. This includes electrical energy infrastructure which supports civilian electricity use in addition to the military.

Demonstrating a shift from the ICRC's use of "mainly", electrical energy infrastructure which provides more, even considerably more, energy for civilian than military purposes can still qualify as a military objective. Stated another way, and quoting Marco Sassòli, "[w]hen an object is used for both military and civilian purposes, it may be held that *even a secondary military use turns it into a military objective*".[14]

After defining military objective, Article 52 of AP I provides examples of objects normally dedicated to civilian purposes. That list includes "a place of worship, a house or other dwelling or a school".[15] That list does not include energy infrastructure.

2002 n.3 [hereinafter Commentary on the Additional Protocols]. The list was "drawn up by the ICRC with the help of military experts and presented as a model, subject to modification". Id.

[13] Regarding the terms which make up the definition of military objective, "effective contribution" refers to an actual contribution, not a degree or level. Similarly, "definite military advantage" refers to just that, a definite, not a potential or indeterminate advantage, which is military in nature.

[14] Sassòli M, "Legitimate Targets of Attacks under International Humanitarian Law", Hpcrresearch.org (Cambridge 2003) www.hpcrresearch.org/sites/default/files/publications/Session1.pdf, 7 Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law (emphasis added).

[15] Additional Protocol I, *supra* note 2, at art. 52(3). According to the ICRC Commentary, Art. 52(3): "*was adopted only after long and difficult discussions. Many delegations would have wished for a more precise definition, possibly containing a list of examples of civilian objects and military objectives. The Conference preferred a general definition. The three examples of civilian objects given in paragraph 3 was as far as it was willing to go*". Commentary on the Additional Protocols, *supra* note 13, at 2035.

Targeting electrical energy infrastructure requires introducing distinction before a more detailed analysis of proportionality.

Distinction

The definition of military objective is operationalized through the principle of distinction, which requires that parties to an armed conflict must distinguish between the civilian population and belligerents and between civilian objects and military objectives.

One challenge with energy infrastructure is that the same infrastructure is often used for civilian and military purposes. This commingling of purposes complicates both the proportionality analysis and any overall assessment of whether a given attack on energy infrastructure comported with IHL.

Precautions & proportionality

Included among a number of AP I precautions with respect to attack, proportionality requires that those who plan or decide upon an attack shall:

> *(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated*.[16]

Proportionality requires an assessment, one which is objective but qualified, that of the "reasonable military commander".

Reasonable military commander

As the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia explained:

> *It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants. Further, it is unlikely that military commanders with different*

[16] Additional Protocol I, *supra* note 2, at art. 57(2)(a)(iii).

doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the "reasonable military commander". Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.[17]

In terms of who makes the proportionality decision, this is not to say that a non-military person could not make the proportionality decision. What it is saying is that the standard against which that decision is to be evaluated is that of a person with all the experience, training, and understanding of military operations that is vested in a "reasonable military commander.[18]

But what is the reasonable military commander assessing? Incidental harm first of all.

Incidental harm

Here is where we see the potential for confusion from dual-use language. Consider an attack which destroys a component of an electrical energy infrastructure which was involved in producing, storing or transmitting electricity for both civilian and military purposes. Thinking of that component as dual use may suggest that there need be an assessment of incidental harm. As applied to the component, that is incorrect. There was no incidental harm. There was direct, intended, harm.

And again, it does not matter for military objective qualification that the component was more involved in civilian electricity production, storage or transmission than military.

While not considering the component itself, a proportionality analysis would consider *expected* incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.

The use of the word "expected" is significant. The *travaux préparatoires*

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[17] Office of the Prosecutor, 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" (Icty.org, 2000) www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal, 30.

[18] Henderson I and Reece K, "Proportionality under International Humanitarian Law: The 'Reasonable Military Commander' Standard and Reverberating Effects, 51 VAND" (2021) 835 L. REV [hereinafter Henderson & Reece].

for AP I indicates there was discussion of using "which risks causing" incidental harm.[19] This language would have required consideration of all possible incidental harms.

But that language was not adopted.

The adopted language, "which may be expected to cause" reflects that incidental harm must be likely, not merely possible, in order for that harm to be included in the proportionality assessment.

One can imagine that damaging or destroying an electrical energy infrastructure may cause any number of 2nd, 3rd, 4th order effects. Incorporating an example used by Henderson and Reece, consider an attack on electrical infrastructure.[20] While the infrastructure was linked to a number of military purposes, it was also linked to a water treatment plant. The commander, considering the attack, has information that suggests that the water treatment plant could be without power for up to a month and that during that time 90% of the civilians' water needs could be met through bottled water from the defending State. But 10% of the civilians' water needs are unlikely to be met, at least by the defending State. As a result, it is possible that 10% of the city's civilian population could die of thirst in the coming weeks.

Must the attacking commander include that 10% in the proportionality analysis?

> *Perhaps the civilians will relocate. Perhaps humanitarian aid will be provided. Perhaps the armed conflict will come to an end. Perhaps it is the rainy season and rainwater can be harvested. So while civilians dying of thirst in the coming weeks is possible, it is not necessarily inevitable. But more so, it is not even confidently predictable*.[21]

The question presented becomes should the reasonable military commander be expected to account for indirect effects which are neither inevitable nor confidently predictable and which might be avoided through possible remedial action?

The answer to that question is then compared to the anticipated military advantage.

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[19] See *Commentary on the Additional Protocols*, *supra* note 13, at 2209.

[20] See generally Henderson & Reece, *supra* note 19.

[21] Id. at 853.

Concrete and direct military advantage anticipated

As we potentially reconsider what constitutes indirect harm to civilians and civilian objects based on electricity's interconnected nature, should not we engage in a similar inquiry related to concrete and direct military advantage?

Consider the following hypothetical situation and whether the military objective test has been met and whether direct military advantage would or should be anticipated.

State A is considering kinetically targeting one or more components of State B's electrical energy infrastructure. State A's rationale for this potential attack is that State B has produced an internet website and a digital phone application (app) which, using the internet, allows State B civilians to input or report, in real time, the presence of State A's armed forces and military equipment to the State B armed forces. The pre-war website and app, built off previous pre-war versions, were used purely for civil administrative purposes including maintaining digital identification. The previous version had over 10 million users, all of whom now have access to the website and app. Additionally, State B advertises both the website and the app on radio, television, and online. State A has information which suggests that State B civilians' use of the website and particularly the app[22] has led to State A's armed forces being subjected to a number of attacks by State B's armed forces in several different provinces or regions of State B.

In terms of military objective, both use and purpose (future use), would seem to be implicated but for what? There are different components to the operation of the modified app, many of which require electricity. Which (if any) combination of electrical production, storage, transmission might qualify as a military objective?

Would concrete and direct military advantage be anticipated from State A damaging, degrading, or destroying one (or potentially) more components of the electrical energy infrastructure facilitating the modified app?

If the answer is yes, then the permissibility of targeting electrical energy infrastructure would appear to be increasing, not decreasing.

If that increase is unacceptable, then the international community should consider what actions would facilitate IHL better protecting electrical

[22] For example, State A armed force vehicles had been positioned in covered and concealed positions inside State B for an extended period of time without being attacked. A member of the State A armed forces reported seeing two individuals in civilian clothes using cell phones near the vehicle positions. Within an hour, State B used uncrewed aerial systems to attack the previously undiscovered State A military vehicles.

infrastructure. Those actions do not include what has happened since AP I – States worsening the lack of distinction between energy for civilian vs military purposes. It also does not include ignoring that similarly to civil society, energy has an increased importance to the armed forces and the conduct of military operations and so an increased military advantage to making that energy infrastructure the object of attack is likely.

Conclusion

To illustrate that last point, consider whether the military uses the same, more, or less energy now than at the time of AP I in 1977 or the 1949 Geneva Conventions.

According to a June 2021 report by the U.S. National Academies of Sciences, Engineering, "[s]ince World War II, the US Army is using approximately 20 times more energy per soldier".[23]

Although dated, there are additional statistics which no doubt have changed but which are still illustrative. For example, in 2019, the U.S. Department of Defense (DoD) was reported to be the United States' largest energy consumer.[24] According to a 2007 study, DoD's electricity use would supply enough electricity to power more than 2.3 million average American homes.[25] In terms of electricity consumption, if it were a country, DoD would rank 58th in the world, using slightly less than Denmark.[26]

More broadly, look at any military operations center filled with monitors and screens and computers. Outside the headquarters there are soldiers, sailors, airmen and marines all with various devices and tools requiring power. Then consider the role – and energy demands of – cyber activities and computing just within the military.

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[23] National Academies of Sciences, Engineering, and Medicine News Release, "U.S. Army Should Continue to Use Hydrocarbon Fuel as Primary Source of Energy on the Battlefield, Says New Report" (Nationalacademies.org, June 9, 2021) www.nationalacademies.org/news/2021/06/usarmyshouldcontinuetousehydrocarbonfuelasprimary-source-of-energy-on-the-battlefield-says-new-report.

[24] Crawford NC, "Pentagon Fuel Use, Climate Change, and the Costs of War" [2019] Watson Institute for International and Public Affairs Costs of War, 4 watson.brown.edu/costsofwar/files/cow/imce/papers/Pentagon%20Fuel%20Use%2C%20Climate%20Change%20and%20the%20Costs%20of%20War%20Revised%20November%202019%20Crawford.pdf, 4.

[25] Lengyel GJ, "Department of Defense Energy Strategy Teaching an Old Dog New Tricks" [2007] 21st Century Defense Initiative Foreign Policy Studies, The Brookings Institution web.archive.org/web/20140529175335/http://www.brookings.edu/~/media/research/files/papers/2007/8/defense%20lengyel/lengyel20070815.pdf, 11.

[26] Id.

This is not to suggest that any and all targeting of electrical energy infrastructure is permissible. But as we look at strengthening IHL compliance and the protection of essential services and humanitarian assistance, we should be mindful of the risk of distorting IHL if we exclusively focus on the nexus between energy infrastructure and civil society and ignore what and how the military is using that same infrastructure and the worsening distinction challenge.

Targeting of infrastructure in Ukraine and Libya

Erika WEINTHAL
Professor of Environmental Policy and Public Policy, Nicholas School of the Environment, Duke University

I want to thank the International Institute of Humanitarian Law for inviting me to present here today. It is an honour to be with such a distinguished group.

I want to begin by noting that I am neither a military person nor a lawyer, nor have I worked for a humanitarian organization. Thus, at times I may use language that is more customary for environmental social scientists when I discuss international humanitarian law or related concepts because I am a political scientist who works on environmental security and peacebuilding. It is through the lens of the environment, conflict and peacebuilding that I seek to understand the ways in which the environment, natural resources, and associated infrastructure can spark conflict, but also can prolong war, be a tool of war making, as well as a target in war, and then conversely, how the environment, natural resources can serve as a means of diplomacy and peacebuilding.

To provide some context for my comments today, I have been working with colleagues over the last several years to document the way in which state and non-state actors have targeted infrastructure and natural resources in armed conflict.[1] As such, I will focus my comments today primarily on the wars in the Middle East and North Africa (MENA) and in Ukraine. While it is correct to note that different groups have always targeted infrastructure and natural resources over the course of history, I argue that the magnitude and scope of targeting has intensified in recent years. And because infrastructure is highly centralized and often monolithic in many countries in the MENA and Ukraine, the populations that depend upon this infrastructure for basic services are increasingly vulnerable during war when it is destroyed.

It is also important to underscore today that we have much better documentation about the impacts of war on infrastructure owing to the work of many researchers: for example, the Pacific Institute has compiled a water

[1] For example, see: Sowers JL, Weinthal E and Zawahri N, "Targeting Environmental Infrastructures, International Law, and Civilians in the New Middle Eastern Wars" (2017) 48 Security dialogue 410 www.jstor.org/stable/26294229; Weinthal E and Sowers J, "Targeting Infrastructure and Livelihoods in the West Bank and Gaza" (2019) 95 International affairs 319, dx.doi.org/10.1093/ia/iiz015.

conflict chronology, which includes historical incidents of where water has been used as a military target and tool.[2] The chronology includes notable historical examples such as the accusation that the Spartans had poisoned the source of Athens's water during the Peloponnesian Wars. Other examples include British and German troops bombing dams to halt troop movement during World War II.[3]

Since World War II, the international community, however, has worked to find ways to prevent belligerents from attacking civilian objects, such as water installations, power plants, agricultural land through strengthening the Geneva Conventions – notably Additional Protocols I and II.

Yet, despite these advancements, we still find civilian objects being targeted: specific cases include damage to the Afghanistan's irrigation systems, known as the Karez, during the Soviet Afghan war; Iraq's attack on Kuwait's desalination plants during the first Gulf War; Russia's destruction of the water system in the Donbas region in Ukraine since 2014; and during the Syrian civil war, ISIS capturing the Tabqa dam, threatening to cut off electricity delivery to Damascus.[4]

I want to start with some illustrations of my research on infrastructure targeting. I have been working with my colleague, Professor Jeannie Sowers at the University of New Hampshire, to build a unique data base on the targeting of civilian infrastructure in the wars in the MENA;[5] this database draws upon other publicly available databases, but also information from humanitarian organizations, human rights groups, UN organizations, and newspapers. We have sought to capture incidents of targeting of water, energy, transportation, health, and agricultural infrastructure in conflicts in Yemen, Syria, Libya, and Palestine. Again, as you will see, because we take a broad perspective, we include transportation in our database along with data on education facilities.

The following slide gives you an example of what this targeting of infrastructure looks like in Yemen over time; in the beginning of the war, most of the attacks were on the energy sector. But since 2015, there has been

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[2] Pacific Institute, "Water Conflict Chronology Timeline List" (Worldwater.org) www.worldwater.org/conflict/list/.

[3] Also see, Vyshnevskyi V *et al.*, "The Destruction of the Kakhovka Dam and Its Consequences" (2023) 48 Water international 631 dx.doi.org/10.1080/02508060.2023.2247679.

[4] For example, Daoudy M, "Water Weaponization in the Syrian Conflict: Strategies of Domination and Cooperation" (2020) 96 International affairs 1347 dx.doi.org/10.1093/ia/iiaa131.

[5] Duke University, Nicholas School of the Environment, "Targeting of Infrastructure in the Middle East" sites.nicholas.duke.edu/time/.

an intensification of targeting of the agricultural and water sectors. I also want to point out that agricultural land has been increasingly targeted in the conflict.[6]

What we try to do in our work is to map out spatially the prevalence of attacks on infrastructure in conflicts such as Yemen. One of my main points is that different actors seek to target infrastructure in different ways depending on the conflict. It is important to note that it is not just the bombing or shelling of infrastructure, or the use of explosive weapons that harms infrastructure, but we are increasingly finding the sabotage and blockades of infrastructure along with the impacts from disrepair or the misuse of infrastructure. Restrictions on access to spare parts should be seen as a form of destroying infrastructure, especially during conflict. Michael Talhami and Mark Zeitoun have done incredible work on the reverberating effects of infrastructure destruction, looking at the indirect impacts of destroying energy infrastructure for water systems, sewage systems.[7]

And I will note, in our database, we also try to attribute who is targeting the infrastructure. But it is often difficult to do so because we are talking about many small non-state actors in these conflicts.

Again, I want to emphasize that different groups frequently seek to capture infrastructure such as dams, and then weaponizing this infrastructure to put pressure on other parties or to control populations. So, while much of the conversation on this panel concerns the conduct of military operations and the challenges of applying the principles of distinction and proportionality, ultimately civilians bear the brunt of attacks on infrastructure, even if considered to be incidental harm. More so, the impacts on civilians from targeting infrastructure may not be fully visible immediately; rather, the effects are long-term. What should be evident is that when populations lack clean water, proper sanitation, access to health care, electricity or even education, the impacts will linger. These effects are compounding as conflicts are increasingly protracted.

I am going to talk about two cases today -- Ukraine and Libya. Before I do so, I first want to highlight some commonalities across the broader set of conflicts, just to give some grounding to the discussion. While some of these issues have already been discussed among other panellists, many of the

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[6] Sowers J and Weinthal E, "Humanitarian Challenges and the Targeting of Civilian Infrastructure in the Yemen War" (2021) 97 International affairs 157 dx.doi.org/10.1093/ia/iiaa166.

[7] Talhami M and Zeitoun M, "The Impact of Explosive Weapons on Urban Services: Direct and Reverberating Effects across Space and Time" (2016) 901 international-review.icrc.org/articles/impact-explosive-weapons-urban-services-direct-and-reverberating-effects-across-space-and.

current wars in the MENA as well as Ukraine have a set of similar features. First and foremost, these are largely urban conflicts. The targets are often urban infrastructure, but sometimes the infrastructure upon which cities depend may not be in the city center. Because we are talking about urban conflicts, civilians are often on the frontlines. This has been the case in cities such as Grozny, Gaza City, Aleppo, Raqqa and Kharkiv, among others.

Second, urban environments depend on heavily centralized and coupled infrastructure, some of which can undoubtedly support military operations. But more so and tied to what we have also heard about earlier today, this infrastructure is connected to global supply chains. This infrastructure includes ports and export facilities, and increasingly ports, for example, have also come under fire, or parties have sought to blockade ports, as has been the case in Yemen and Libya. And when ports are destroyed, there are also long-term economic and human welfare implications, both domestically and globally. Russia's blockade of Ukrainian ports along the Black Sea has had widespread impacts on global food security. The blockades of Libyan ports have curtailed oil exports, and blockades in Yemen have affected the humanitarian delivery of food assistance.

In the social sciences, we use the term "nexus", probably a bit too much, but it has some applicability for understanding the challenges for determining distinction and proportionality. It is no longer possible to silo civilian objects: one cannot just talk about water or energy, infrastructure separately because of the way infrastructure is increasingly coupled. For example, the transfer of water via large water conveyance schemes requires substantial energy. The treatment of water requires energy and conversely, the production of energy requires water. This has been especially salient for nuclear power plants, as in Ukraine, or for desalination plants in Libya and in Gaza.

The last commonality that I want to mention is that these are not conflicts just between conventional armies but rather they involve multiple non-state actors. We are increasingly talking about multiple armed groups, where alliances are shifting, as has been the case in Yemen, Syria, and Libya. In Libya, for example, it is often difficult to determine responsibility for attacks on infrastructure because of the large number of actors.[8] We are, moreover, also witnessing external global powers involved in many of these conflicts.

Now, I am going to turn to Ukraine and discuss the ways in which infrastructure has been targeted over the last year or year and a half. Like other conflicts in Chechnya, Syria, Yemen, Iraq, we are witnessing the

[8] Weinthal E and Sowers J, "Targeting Libya's Rentier Economy: The Politics of Energy, Water, and Infrastructural Decay" (2023) 1 Environment and Security 187 dx.doi.org/10.1177/27538796231217548, 3-4.

widespread use of airpower and explosive weapons. However, Ukraine also has a different dimension that has to do with its nuclear power plants. Here, I am also going to date myself: I came of age during the Cold War, and as a scholar I was shaped by the Cold War and the accident at Chernobyl in 1986. For those of us who studied the Soviet environment, Chernobyl cast a very heavy cloud over us. As such, it was unimaginable that in the aftermath of Chernobyl that nuclear power plants would come under fire. But since 2022, we have been witnessing nuclear power plants repeatedly being attacked. Prior to 2022, there are only a few instances of nuclear installations coming under fire and most of these plants were non-operational nuclear power plants such as when Iran bombed Iraq's reactor in 1980.

Rather, it has long been taken for granted by the international community that nuclear power plants are to be safeguarded and off-limits during war. And indeed, one of the most notable accomplishments of nuclear non-proliferation took place nearly 30 years ago, when Ukraine gave up its nuclear weapons in return for security guarantees. As a result, Ukraine's nuclear power plants were to be for civilian use only. They were never intended for military purposes. And as we heard, international humanitarian law prohibits attacks on objects that contain dangerous forces, essentially because they have severe consequences for human life. Since the beginning of the war, Russian troops have occupied nuclear power plants in Ukraine, beginning with the non-operational Chernobyl nuclear power plant, then the operational Zaporizhzhia nuclear power plant. While Chernobyl might have been non-operational, it still, however, contained dangerous forces, because of the presence of spent nuclear fuel rods that required water for cooling. Thus, even nuclear power plants that had no dual-use purposes in Ukraine have been "weaponized".

Over 2022, I have been working with a colleague, Carl Bruch, to capture the intensity of the shelling in the vicinity of nuclear power plants. Drawing upon data from the International Atomic Energy Agency, we have found that there have been 34 shelling incidents at nuclear power plants in Ukraine.[9] I would suggest that this is an underestimate because it does not capture low-flying missiles, for example, near the Zaporizhzhia nuclear power plant. At one point in December 2022, almost all the nuclear power plants had come under fire.

I also want to say a few words about the Nova Kakhovka dam, because international humanitarian law makes it clear (Article 56, AP 1) that fighting should not take place "at or in the vicinity of" a work or installation that could

[9] Weinthal E and Bruch C, "Protecting Nuclear Power Plants during War: Implications from Ukraine" (2023) 53 Environmental Law Reporter.

release dangerous forces. The breach of the Nova Kakhovka dam highlights the ambiguous nature of the term "in the vicinity of" because the essential source of the water that is needed for the cooling of the reactors and the spent fuel rods were not entirely in the physical vicinity of the nuclear power plant.

Thus, when one looks at infrastructure in armed conflict, it is increasingly apparent that one needs to take a broader nexus approach, especially as the Nova Kakhovka dam played an important role in providing water for the cooling pond for the Zaporizhzhia nuclear power plant – despite being more than 150 KM away from the nuclear power plant.

The breach of the Nova Kakhovka dam on 6 June, furthermore, shows the dangers of attacks on infrastructure that contains "dangerous forces" especially for civilians in urban centers. I don't have time to go into all the details, but I want to note that the impacts have been profound for civilians: towns have been flooded and people whose livelihoods depend on fishing have been devastated. Because these are heavily industrialized urban environments, the flooding of industrial sites released chemical waste and various fuels, affecting wetlands in the lower Dnipro. Flooding has also caused land mines to be dislodged. While a disaster at the Zaporizhzhia nuclear power plant has been averted, there remains a need to find a permanent solution for a reservoir to support the cooling ponds.

With my remaining time, I want to say a few words too about Libya. In Libya, there are multiple armed groups, militias, and factions, all of which have been involved in targeting infrastructure in a range of different ways. There are also numerous outside actors involved, including the Wagner forces.

Libya is a country defined by its highly centralized water and energy infrastructure. And what is notable here is that this infrastructure has continued to play a unique role in uniting the country even as it has politically fragmented. Specifically, I am referring to the oil and gas infrastructure and then the Great Man-made River in which fossil (non-renewable) groundwater is pumped from the Nubian Sandstone aquifer through a network of pumps and pipes across the country to urban centers along the coast.

In my collaborative work with Jeannie Sowers, we map out the different ways in which different types of infrastructure have been targeted, especially during the more intense periods of fighting. While we have found that there are numerous attacks (including shelling, explosives, shootings) on transportation and medical infrastructure, the warring parties in Libya have largely not sought to destroy the energy or water infrastructure.[10] Rather, we

[10] Weinthal E and Sowers J, "Targeting Libya's Rentier Economy: The Politics of Energy, Water, and Infrastructural Decay" (2023) 1 Environment and Security 187 dx.doi.org/10.1177/27538796231217548, 3-4.

have found that the parties to the conflict have largely sought to control or disrupt the oil and gas infrastructure, often seeking to control or blockade the export terminals. And despite instances of sabotage to the water infrastructure, we have also found that the parties to the conflict did not seek to destroy the Great Man-Made River infrastructure, as it was vital for providing water to the entire country.

To conclude, I just want to underscore that when a highly urban population depends on centralized coupled infrastructure, populations are particularly vulnerable if the infrastructure is damaged. The recent devasting floods in Derna, moreover, underscore the ways in which war undercuts the capacity of States to respond to disasters because it is often difficult to repair and invest in infrastructure during war [even if not destroyed]. Thus, the compounding effects of war on infrastructure are that populations are increasingly vulnerable to such climate-related disasters. Simply, war has made countries less climate resilient.

Thank you for your attention.

Starvation, hunger and famine in armed conflicts: the case of siege warfare

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Introduction

Starvation, famine and hunger are three different but interrelated concepts. Hunger is defined as "the situation in which the body does not have enough food".[1] Famine, instead, is "a situation in which there is not enough food for a great number of people, causing illness and death".[2] Both hunger and famine can cause starvation, meaning "the state of having no food for a long period, often causing death".[3] Which is the relationship between these three concepts and armed conflicts? Conflicts and general food insecurity are linked by a causal relation.[4] Conflicts are the primary cause of food insecurity, leading often to starvation.[5] As it has been seen in the conflicts in Yemen, Syria, Eritrea, South Sudan, Nigeria, Mali and Ukraine (to name a few), conflict-inducted hunger is often used as a means to control the civilian population, causing general destitution and death among civilians. This is especially true when conflicts are conducted in urban areas, as it is the case nowadays. This leads not only to a major involvement of the civilian population, which receives almost no protection from the conduct of hostilities, but it also often leads to isolation and deprivation of essential services and goods, endangering the survival of civilians.

The aim of this essay is to briefly investigate the links between hunger and starvation on one side, and an old but renewed method of warfare, typical of urban warfare, namely the siege. In order to do that, this work will provide an overview of siege, its characteristic and employment. Then, it will focus on the legal obligations under international humanitarian law (IHL) relating

[1] Cambridge Dictionary, Hunger dictionary.cambridge.org/dictionary/english/hunger.

[2] Cambridge Dictionary, Famine dictionary.cambridge.org/it/dizionario/inglese/famine.

[3] Cambridge Dictionary, Starvation dictionary.cambridge.org/it/dizionario/inglese/starvation.

[4] This causal relation has been outlined also in the UNSC Resolution 2417 (2018), para.s 1 and 6.

[5] Lander B and Richards RV, "Addressing Hunger and Starvation in Situations of Armed Conflict — Laying the Foundations for Peace" (2019) 17 Journal of international criminal justice 675 dx.doi.org/10.1093/jicj/mqz055.

to the use of sieges, focusing in particular on those IHL provisions dealing with the protection of the civilian population, humanitarian intervention and starvation. Finally, it will conclude highlighting the existing causal link between IHL, starvation and siege warfare.

Siege as a method of warfare

Sieges are neither defined nor prohibited under IHL. They are a recognised method of warfare, meaning they fall under the category of the ways in which weapons are used and of military tactics. Generally speaking, a siege involves the encirclement of an urban area with the primary intention of isolating the enemy.[6] In order to do that, the besieging party imposes restrictions of essential goods, aiming, by so doing, at the forced surrender of the besieged forces.[7] Sieges have been employed since ancient times; however, in recent armed conflicts this method of warfare has regained much of its appeal, especially given the major military advantages related to its employment. Sieges, indeed, avoid the involvement in street-to-street fighting, and, thus, are less costly in terms of human and economic resources. In addition, they are often the preferred option when it is impossible to have access to urban areas or when they are well defended, impeding, at the same time, the movement of the enemy forces. Given the increasing number of Non-International Armed Conflicts (NIAC) and the consequent increase of urban warfare, it is not surprising that sieges have become the common feature among recent and contemporary conflicts. Evidence of the use of this method of warfare can be found, for example, in Syria, Iraq and Yemen, but also in the more recent International Armed Conflict (IAC) between the Russian Federation and Ukraine,[8] testifying its widespread employment.

The conformity of sieges to IHL is a broadly discussed issue. A detailed analysis of this discussion is beyond the scope of this work. Suffice it to say that, at the moment, sieges are not prohibited under IHL, as there is no customary or treaty norm prohibiting them. However, there is common understanding that this method of warfare has to be conducted in respect of

[6] Nijs M, "Humanizing Siege Warfare: Applying the Principle of Proportionality to Sieges" (2020) 102 International review of the Red Cross 683, dx.doi.org/10.1017/s1816383121000680, p. 686.

[7] OHCHR, "International Humanitarian Law and Human Rights Law relevant to Siege Warfare" (2017) United Nations Office of the High Commissioner for Human Rights, p. 2.

[8] OHCHR, "Situation of human rights in Ukraine in the context of the armed attack by the Russian Federation: 24 February – 15 May 2022" (2022) United Nations Office of the High Commissioner for Human Rights, pp. 10-11.

the applicable IHL principles. This, more in detail, means that sieges have to be conducted in such a way that the principles of distinction, proportionality, precaution and military necessity are respected, in addition to the applicable norms relating to methods of warfare. Then, why are they so discussed? Mainly because of the adverse impact that this method of warfare has on the civilian population. Civilians are, more often than not, confined in the urban areas under siege, suffering for all the restrictions and attacks coming from the besieging party. It is in this framework that the starvation of civilians becomes the crucial concern during siege warfare. As noted, encirclement tactics have the main aim of forcing the enemy party to surrender by cutting the provision of essential goods. Civilians under sieges are destined to the same fate. The restriction on the passage of essential goods and services; the impossibility to leave the sieged area; the general destitution; and the impediments to humanitarian aid are well known features of contemporary sieges. To those, it has to be added the recurrent use of explosive weapons with wide impact area, which can be harmful not only for the direct risks posed to civilians, but also for the reverberating effects on infrastructures and services essential for their survival.[9] Especially in prolonged sieges, civilians often face starvation because of the heavy restrictions imposed by the parties to the conflict, so that the link between starvation and siege have become one major issue of concern in these conflicts.[10] IHL poses some limitations to the conduct of hostilities aiming at the safeguarding civilians from starvation. These are applicable also in the conduct of sieges. In the following section, an overview of these norms will be provided.

IHL restrictions to sieges: prohibition of starvation and access of humanitarian aid

There are different IHL norms that restrict siege warfare. Those, as already noted, are not specifically addressed to siege warfare, but are applicable also in their cases. Among them, the most relevant ones, for the aim of this work, are those related to the prohibition of starvation; the protection of services and infrastructures necessary for the survival of the civilian population; and the passage of humanitarian aid.

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[9] Nijs M, "Humanizing Siege Warfare: Applying the Principle of Proportionality to Sieges" (2020) 102 International review of the Red Cross 683 dx.doi.org/10.1017/s1816383121000680, cit., p. 685.

[10] Gaggioli G, "Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?" (EJIL: Talk!, January 30, 2019) www.ejiltalk.org/jointblogseriesoninternationallawandarmedconflictaresieges-prohibited-under-contemporary-ihl/.

Firstly, it has to be underlined that, under IHL, the starving of the enemy forces is a legitimate method of warfare, provided that it is not indiscriminate and that the principle of proportionality is respected.[11] The same cannot be said in relation to the starvation of the civilian population, prohibited both in IACs and NIACs. More in detail, Article 54 (1) of Additional Protocol I (API)[12] states that the starvation of civilians as a method of warfare is prohibited. A similar statement can be found in Article 14 of Additional Protocol II (APII).[13] Therefore, to be prohibited, starvation has to be conducted as a method of warfare, meaning there has to be the precise intention of a party to the conflict to starve the civilian population. All the cases of incidental starvation, therefore, seem to be excluded from this provision. Some scholars argue that the requirements under Articles 54 (API) and 14 (APII) are enough to impede sieges laid over both civilians and combatants, in respect also of the principle of distinction.[14] However, the prevailing interpretation is more permissive towards sieges: starvation has to be used as a method of warfare in order to be prohibited.[15] According to this view, sieges laid to reach a military objective, and not with the intention to starve civilians, are perfectly lawful.[16]

A different discourse has to be made concerning the protection of the objects necessary for the survival of the civilian population. Article 54(2) prohibits the attacking, destroying, removing or rendering useless objects needed for the survival of the civilian population, including (but not limited to) foodstuff, livestock, crops, drinking water installations, etc.

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[11] Nijs M, "Humanizing Siege Warfare: Applying the Principle of Proportionality to Sieges" (2020) 102 International review of the Red Cross 683 dx.doi.org/10.1017/s1816383121000680, p. 687.

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

[14] Dannenbaum T, "Siege Starvation: A War Crime of Societal Torture" (2022) 22 Chicago Journal of International Law, p. 372.

[15] Akande D and Guillard E-C, "Conflict Inducted Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law" (2019) 17 Journal of International Criminal Justice, pp. 761-762.

[16] Gaggioli G, "Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?" (EJIL: Talk!, January 30, 2019) www.ejiltalk.org/jointblogseriesoninternationallawandarmedconflictaresieges-prohibited-under-contemporary-ihl/ op.cit.; Nijs M, "Humanizing Siege Warfare: Applying the Principle of Proportionality to Sieges" (2020) 102 International review of the Red Cross 683 dx.doi.org/10.1017/s1816383121000680, p. 688.

Article 54(3), on the other hand, allows attacks towards those objects only if they are used exclusively by the armed forces. However, Article 54(3)(b) poses an additional element: even if the attack is directed towards objects that satisfy the requirement under Article 54(3), attacks towards these objects are prohibited if expected to cause the starvation of civilians or their displacement. According to a reading of these dispositions, the second part of Article 54 would prohibit starvation also when not intentional or if not used as a method of warfare.[17] However, as we will see, this is not a universally shared view.

What has been said so far is related to IACs; Article 14 (APII) is more limited in scope. Therefore, it is doubtful whether the provisions under Article 54 (2) and (3) amount to customary IHL and can so be applied to NIACs.[18]

In addition to the prohibition of starvation, IHL imposes other obligations which, if respected, prevent hunger and starvation among civilians. The rules governing humanitarian aid and evacuation are, indeed, of crucial importance in cases of siege.[19] These rules, however, are of controversial nature. Generally speaking, parties to the conflict, under whose control the civilian population is, have the main responsibility in meeting the essential needs of the population. If this is not possible, impartial and neutral States or organizations may deliver humanitarian aid, provided that there is the consent of the parties to the conflict. There are two major issues in relation to these provisions: *whose* consent is needed; and to *which extent* can a party withhold consent. A detailed discussion of these elements is not possible.[20] It is evident, however, how food insecurity and starvation can be caused when consent is not given, or when it has impeded or hindered the passage and consignment of humanitarian relief.

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[17] For further insight: Akande D and Guillard E-C, "Conflict Inducted Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law" (2019) 17 Journal of International Criminal Justice 761, cit., pp. 762-765.

[18] ICRC, "Rule 54. Attacks against Objects Indispensable to the Survival of the Civilian Population", ICRC Customary International Humanitarian Law Database ihl-databases.icrc.org/en/customary-ihl/v1/rule54.

[19] Rules on humanitarian aid are almost the same in IAC and NIAC: Article 70 (API), Article 18 (APII).

[20] See for example: Nijs M, "Humanizing Siege Warfare: Applying the Principle of Proportionality to Sieges" (2020) 102 International review of the Red Cross 683 dx.doi.org/10.1017/s1816383121000680, pp. 689-692; Akande D and Guillard E-C, "Conflict Inducted Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law" (2019) 17 Journal of International Criminal Justice 761, cit., pp. 769-772.

Conclusions: siege and food insecurity

The link between food insecurity and sieges cannot be ignored anymore. One major problem is that hunger, famine and starvation have always been considered as inevitable traits of armed conflicts, something that cannot be avoided.[21] This is particularly evident in the cases of sieges and other encirclement operations. States, and some authors as well, indeed, have often seen the prohibition of starvation and of the block of essential supplies as somehow derogable in siege warfare.[22] This because, in order to be successful, sieges require a complete encirclement, involving, necessarily, the indiscriminate starvation of civilians. This is considered unavoidable, even when the intention of the besieging party is the sole starvation of the adverse party. More than once, sadly, it has been argued that the prohibition of starvation did not take enough into consideration the imperative military necessity of sieges.[23]

One question to be asked is if the existing IHL provisions are enough to tackle starvation in armed conflicts, especially when sieges are employed. A clear and univocal ban to starvation is lacking under IHL.[24] The prohibition of starvation, as currently stated, poses a very high threshold to its practical identification as an IHL violation. Often, parties to a conflict consider starvation only as a collateral damage of their actions, covering behind their lack of intentionality.[25] For this reason, some authors argue that IHL is inadequate to effectively contrast the use of starvation in armed conflicts.[26]

As it is well known IHL has the aim of providing a balance between the

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[21] Stevoli M, "Famine as a Collateral Damage of War" (2020) 11 Journal of international humanitarian legal studies 163 dx.doi.org/10.1163/18781527-01101001, p. 163.

[22] Zappalà S, "Conflict Related Hunger, 'Starvation Crimes' and UN Security Council Resolution 2417 (2018)" (2019) 17 Journal of international criminal justice 881 dx.doi.org/10.1093/jicj/mqz047p. 894; Dannenbaum T, "Siege Starvation: A War Crime of Societal Torture" (2022) 22 Chicago Journal of International Law, cit., p. 404.

[23] For a more detailed analysis of these arguments, see: Dannenbaum T, "Siege Starvation: A War Crime of Societal Torture" (2022) 22 Chicago Journal of International Law, cit., pp. 383-388.

[24] Zappalà S, "Conflict Related Hunger, 'Starvation Crimes' and UN Security Council Resolution 2417 (2018)" (2019) 17 Journal of international criminal justice 881 dx.doi.org/10.1093/jicj/mqz047, p. 899.

[25] Stevoli M, "Famine as a Collateral Damage of War" (2020) 11 Journal of international humanitarian legal studies 163 dx.doi.org/10.1163/18781527-01101001, cit., p. 169.

[26] Zappalà S, "Conflict Related Hunger, 'Starvation Crimes' and UN Security Council Resolution 2417 (2018)" (2019) 17 Journal of international criminal justice 881 dx.doi.org/10.1093/jicj/mqz047, p. 902.

principles of humanity and military necessity. From this brief analysis, it emerges that, more often than not, the requirements of military necessity prevail over the protection of the civilian population from hunger and destitution during sieges. Are we really so willing to allow such a derogation from the principle of distinction? Only time will tell.

III. IHL and operational military planning and risk-assessment in modern warfare

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Smart operations: rethinking operational art to effectively protect civilians

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> 'Iron fist' for the terrorists, and a 'velvet glove' for the people.[1]
>
> General JJ Singh,
> Chief of the Army of India (2005-2007)

Introduction

Clausewitz correctly remarked that war is a true chameleon whose nature changes depending on its environment.[2] With the growing urbanisation of warfare and the prominence of asymmetric combat operations, civilians are increasingly getting victimised in the battlespace.[3] The nature of warfare has changed since the instruments of the Law of Armed Conflict (LOAC) were adopted, starting with The Hague Law emanating from the two Peace Conferences held in 1889 and 1907. International humanitarian law (IHL) is a branch of LOAC constituting what is termed as Geneva Law, comprising the Geneva Conventions that were adopted mainly in 1949 after the Second World War. The two Additional Protocols to the 1949 Geneva Conventions were adopted in 1977 and the third one in 2005. While LOAC has been developed to adapt to the evolving nature of warfare, however, its "cardinal principles remain constant, regardless of the changing context, and are essential to its very existence".[4] The evolution of warfare continually

[1] Singh JJ, *A Soldier's General: An Autobiography* (New Delhi: HarperCollins: 2012), 97. Podder S and Roy K, "Use of Force to Protect Civilians in United Nations Peacekeeping: Military Culture, Organisational Learning and Troop Reticence" (2024) 26 Civil wars 74 dx.doi.org/10.1080/13698249.2022.2119506.

[2] Echevarria AJ II, "Clausewitz and Contemporary War" (Oxford University Press, Oxford, September 27, 2007) dx.doi.org/10.1093/acprof:oso/9780199231911.001.0001.

[3] ICRC, "Decision-making Process in Military Combat Operations", (Geneva: October 2013), para. 18.

[4] International Institute of Humanitarian Law, "Guiding Principles on the Right to Humanitarian Assistance", (Sanremo: Italy, 1993), internationalreview.icrc.org/sites/default/files/s002086040082206a.pdf, 519-520. See also United Nations Office for the Coordination

challenges IHL and threats to civilians have diversified and multiplied in hostilities.

As this discussion focuses on the protection of civilians in armed conflicts, the more focused expression IHL will be used instead of the broader term LOAC. International armed conflicts (IAC) and non-international armed conflicts (NIAC) are governed by different rules of IHL. However, just like the civil war between rival armed groups in Sudan has shown, the Russian invasion of Ukraine, or the fighting between the State of Israel and the Hamas non-state armed group, have proven that civilian harm poses the same threat in IAC as they do in NIAC. Nonetheless, NIAC involving non-state armed groups pose the most challenge due to their prevalent noncompliance with IHL. More so, contemporary NIAC are fought by myriad non-state actors including state-sponsored private military corporations which raise complex challenges for classification purposes.[5] Hence this paper discusses armed conflicts generally without drawing the distinction.

Since it is beyond question that Africa is the battleground for over 70 per cent of the world's ongoing hostilities around the world, the discussion places more emphasis on the protection of civilians in Africa.[6] Arguably, over 60 per cent of the United Nations (UN) Security Council's peace and security agenda involves conflicts in Africa.[7] Africa and Africans have suffered, and continue to suffer, from the appalling consequences of these hostilities including massacres of innocent civilians and the economy in general, rendering the continent to be the poorest globally. Different stakeholders, including the UN and the African Union (AU) deploy tremendous resources and efforts to find effective solutions on how to better protect civilians or mitigate their harm in conflicts on the continent.

IHL requires that both combatants and non-combatants understand their humanitarian obligations during hostilities. To be sure, the obligation on non-combatants is the prohibition to take active participation in hostilities lest they waive their immunity from attacks. All parties to a conflict are

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of Humanitarian Affairs (OCHA), "Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict", (OCHA, 2016).

[5] Redaelli C, "A Common Enemy: Aggregating Intensity in Non-International Armed Conflicts – Humanitarian Law & Policy Blog" (Humanitarian Law & Policy Blog, April 22, 2021) blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/.

[6] Council on Foreign Relations, "Global Conflict Tracker" www.cfr.org/global-conflict-tracker/. See also International Institute for Strategic Studies (IISS), "Armed Conflict Survey 2022" (London, 2022), www.iiss.org/publications/armed-conflicts-survey/2022/armed-conflict-survey-2022/.

[7] UNSC, "Statement of the President of the Security Council" (31 August 2022) UN Doc S/PRST/2022/6.

obliged to incorporate IHL into their legislation, military manuals, and training to enhance protection of non-combatants. Troops must reinforce the distinction between civilians who are immune from direct attack under IHL, and combatants, including those directly participating in hostilities.[8] However, States and non-state armed groups (NSAGs) remain essentially unanswerable to civilians for the harm they cause in what Miliband called the "age of impunity", an era characterised by the total disregard for the rule of law, particularly IHL, which allows the suffering of civilians to continue unabated.[9]

In addition to the urbanisation of indiscriminate warfare, other challenges of contemporary conflict include new forms of belligerence such as cyberwarfare, the use of new technologies of warfare including unmanned aerial vehicles, the exploitation of civilian population for mass intelligence gathering including deprivation of their livelihoods in protracted conflicts to influence operations, the prevalence of non-state armed groups and the prevalence of mercenaries, terrorism and concomitant brutal counterterrorism measures, the destruction of the natural environment and the question of how to enhance respect for IHL.[10] With the emergence of new means and methods, contemporary warfare is multidomain, multidimensional with a multiplicity of actors including States, non-state actors, and international organisations.[11] In this precarious environment, the principles underlying IHL are more relevant than ever.

International human rights law (IHRL) is now within the fabric of modern military operations.[12] Understanding IHRL is critical for military commanders in engaging in contemporary operations.[13] The most dramatic trend for LOAC

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[8] ICRC, "Decision-Making Process in Military Combat Operations" (2013) www.icrc.org/en/doc/assets/files/publications/icrc-002-4120.pdf, para. 18.

[9] IRC, "Statement by David Miliband, President and CEO of the International Rescue Committee, on Unfolding Humanitarian Catastrophe in Idlib" (The IRC, February 14, 2020) www.rescue.org/pressrelease/statementdavidmilibandpresidentandceointernational-rescue-committee-unfolding accessed May 28, 2024.

[10] ICRC, "Report on IHL and the Challenges of Contemporary Armed Conflicts", (Geneva, 2019) www.icrc.org/en/document/icrcreportihlandchallengescontemporary-armed-conflicts.

[11] *Ibid*., p. 75.

[12] Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1367; See also Al-Skeini and Others (Respondents) v Secretary of State for Defence (Appellant); Al-Skeini and Others (Appellants) v Secretary of State for Defence (Respondent) (Consolidated Appeals) [2007] UKHL 26, 13 June 2007.

[13] Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1380.

in the past decade is the increasing salience of international human rights law in the juridical-military calculus, in what Meron termed the phenomenon the "humanization of humanitarian law".[14] Although progress has been made on the normative and policy fronts towards protecting civilians, the reality on the ground continues to be ominous. Peace and security are at the heart of the UN Charter, and conflict prevention and resolution are key ideals for all States.[15] However, the provisions promoting peaceful settlement of disputes are not pronounced in the Charter and have not been complemented by *jus ad pacem*, as a *lex specialis* to promote the use of negotiation to prevent and resolve armed conflicts.[16]

This paper addresses the question of why protection remains a challenge from a military point of view, considering the increased advocacy and the wide dissemination of IHL by the International Committee of the Red Cross (ICRC) and other actors. The paper also outlines how to mitigate harm to civilians and how to prevent harm from happening in the first place. Following this introduction, the discussion explores why civilians constitute the bulk of the victims in contemporary hostilities and exposes the gaps in integrating IHL in the military, which trickles down to operational art, military decision-making process (MDMP), targeting, and, eventually, the rules of engagement (ROE).[17] The paper also exposes the gap in defining and integrating "risk" as an element of operational art. It postulates a revision to include risk analysis, mitigation, and methodology to guide identifying, assessing, and mitigating civilian harm.

The discussion is anchored by the prospect theory in military decision-making process which posits that the decision maker's reference point determines the domain in which one makes the decision.[18] The central argument is that compliance with IHL should not be the end but the means

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[14] Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1381; Meron T, "The Humanization of Humanitarian Law" (2000) 94 The American journal of international law 239 dx.doi.org/10.2307/2555292.

[15] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, ch. VI, arts. 1, 3, 33.

[16] Freeman M and Casij Peña M, "Negotiating with Organized Crime Groups: Questions of Law, Policy and Imagination" (2023) 105 International review of the Red Cross 638 dx.doi.org/10.1017/s1816383122000649.

[17] Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 379.

[18] Shortland N, Alison L and Barrett-Pink C, "Military (in)Decision-Making Process: A Psychological Framework to Examine Decision Inertia in Military Operations" (2018) 19 Theoretical issues in ergonomics 752 dx.doi.org/10.1080/1463922x.2018.1497726.

to protect civilians in hostilities with the goal of ending the conflicts to achieve peaceful and inclusive societies and to significantly reduce all forms of violence everywhere in line with the UN Sustainable Development Goal (SDG) 16 and the purposes of the UN Charter.[19] Civilian harm mitigation should be the moral, ethical, and legal standard to assess military operations' credibility and overall effectiveness.[20] The paper seeks to contribute to the search for ways and means to protect civilians better when peace fails. In doing so, the paper introduces the concept of smart operations which incorporates an element *jus ad pacem* since conflict prevention to secure peace is a sure way to protect civilians. As compliance with IHL increases the prospects for conflict resolution, smart operations have a potential impact of enhancing the protection of civilians and ending conflicts.

Doctrinal gaps contributing to victimisation of civilians in hostilities

Numerous deaths, extensive incidental injury of civilians, and excessive collateral damage to civilian objects characterise contemporary armed conflicts. Hostilities pitting non-state armed groups operating within populated areas against government forces using far superior military means are a recurring pattern, exposing civilians and civilian objects to the harmful effects of hostilities. Civilians constitute the majority of victims in contemporary hostilities, constituting about 90 of war casualties.[21] At least 11, 075 civilians died in the 12 conflicts in 2021 alone. The United Nations (UN) reported a 53 per cent increase in civilians killed across 12 armed conflicts in 2022.[22] About 94 per cent of the victims of explosive weapons in populated

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[19] United Nations, "17 Goals", Sustainable Development, Department of Economic and Social Affairs, sdgs.un.org/goals. See also United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031, TS 993, 3 Bevans 1153, art 1.

[20] Hunt CT, "'To Serve and Protect': The Changing Roles of Police in the Protection of Civilians in UN Peace Operations" (2024) 26 Civil wars 98 dx.doi.org/10.1080/13698249.2022.2119507; Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1367. Gilder A, "The UN and the Protection of Civilians: Sustaining the Momentum" (2023) 28 Journal of conflict and security law 317 dx.doi.org/10.1093/jcsl/krac037.

[21] Marc A, "Conflict and Violence in the 21st Century: Current Trends as Observed in Empirical Research and Status" (World Bank) www.un.org/pga/70/wp_content/uploads/sites/2/.

[22] United Nations, "Highlights of Security Council Practice 2023" (Www.un.org, May 23, 2023) www.un.org/securitycouncil/content/highlights-2023.

areas were civilians in those 17 conflict affected areas in 2022.[23] The number of active conflicts globally remain at a historically high level and the number of civilian casualties is likely to increase with the massacre in October 2023 in Gaza and escalating violence in Africa.[24] Government forces and non-state armed groups have been implicated in abuses against civilians in at least 15 armed conflicts on the continent such as Burkina Faso, Cameroon, the Democratic Republic of the Congo, Ethiopia, Mali, Mozambique, and South Sudan.[25] The intermingling of armed groups with civilians has become a preferable strategy in present-day warfare, where other actors have used the tactic as a justification to circumvent the requirement to take precautions to minimise civilian harm. The ubiquity of civilians in today's hostilities requires troops to take a cautious and pragmatic approach in warfare to avoid civilian deaths, mitigate incidental injury and diminish collateral damage.

Military forces have three main levels of command namely, strategic, which translates the political aim into military objectives; operational, which translates broad strategic level objectives and guidance into concrete tasks for tactical forces; and tactical, which directs the specific use of military forces in operations to implement the operational-level plan.[26] As such, legality of political direction, cognitive skills of commanders, clarity of strategic objectives and operational orders are critical to tactical implementation of the mission on the ground. For this reason, to enhance respect for humanitarian norms governing the conduct of hostilities, States are required to integrate IHL obligations into military training, doctrine, and all levels of military planning and decision-making.[27]

Literature on the protection of civilians has concentrated on peacekeeping operations.[28] However, the protection of civilians in armed conflict is a

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[23] United Nations, "Protecting Civilians in Times of Crisis" (UN News Global, 2023) news.org/en/story/2023/05/11/11367#.

[24] Uppsala University, "The Number of Deaths in Armed Conflicts Doubled between 2021 and 2022" (Phys.org, June 7, 2023) phys.org/news/2023-06-deaths-armed-conflict.html.

[25] Segun M and Hassan T, "Africa: Conflicts, Violence Threaten Rights" (Human Rights Watch, January 12, 2023) www.hrw.org/news/2023/01/12/africa-conflicts-violence-threaten-rights.

[26] Ekelhof M and Persi Paoli G, "The Human Element in Decisions about the Use of Force" (Geneva: United Nations Institute for Disarmament Research 2020) unidir.org/files/2020-03/UNIDIR_Iceberg_SinglePages_web.pdf.

[27] ICRC, "ICRC Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts, 72.

[28] See for example, "The Kigali Principles on the Protection of Civilians" (Global Centre for the Responsibility to Protect, May 29, 2015) www.globalr2p.org/resources/the-kigali-principles-on-the-protection-of-civilians/.

cornerstone of the Fourth Geneva Convention (GCIV). The protection of civilians is also a major concern in international criminal law as exemplified by the establishment of the International Criminal Court (ICC). From an IHL integration perspective, the concept of operational art is focused on the enemy with little or no consideration for protecting civilians in warfighting. All the same, Article 82 of Additional Protocol I (API) to the 1949 Geneva Conventions requires the involvement of legal advisors in planning military operations.[29] While this may serve as a backdoor in bringing in perspective on how civilians can be protected, it does not necessarily mean that legal advisors' inputs may prevail and influence how other staff involved in planning operate.

Nevertheless, targeting is an exercise that requires a multitude of perspectives beyond legal, ethical, and political. A humanitarian perspective is not limited to humanities experts, nor are military experts the only ones to incorporate military goals in their thinking. Viewing difficult situations from multiple perspectives provides a more holistic picture.[30] The ICRC has observed that humanitarian considerations are trumped by political, security or economic interests in contemporary armed conflicts.[31] Hence the necessity for multidimensional perspectives in conducting contemporary operations where the need to protect civilians is more critical and imperative.

Omission to include IHL in strategic level professional military education

Rather than large-scale military clashes backed by sovereign States, contemporary warfare is characterised by long-term counterinsurgency and stability operations requiring a genuine understanding of both IHL and IHRL, including other relevant connected bodies of law.[32] However, IHL and IHRL are hardly delivered as courses in professional military education (PME) curricula at strategic and operational levels. This does not negate the

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[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I).

[30] Shortland N, Alison L and Barrett-Pink C, "Military (in)Decision-Making Process: A Psychological Framework to Examine Decision Inertia in Military Operations" (2018) 19 Theoretical issues in ergonomics 752 dx.doi.org/10.1080/1463922x.2018.1497726.

[31] ICRC, "ICRC Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrcreportihlandchallengescontemporaryarmedconflicts.

[32] Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1367.

reality that, the ability of commanders and their staff to analyse missions and mitigate risks against civilians, depends on the depth of their cognitive schemas and knowledge of IHL and the military institutional culture in integrating the principles of IHL to inform their strategic approach to operations. Military culture alludes to the core beliefs, norms, attitudes, and values that troops share. It guides their perception and decisions about strategy, operations, and tactics.[33] The ICRC has reported that high levels of IHL training result in greater adoption of norms of restraint by combatants.[34] The lack of training may help explain why non-state armed groups may be more prone to violating IHL.

Achieving better protection for civilians in armed conflict depends on the respect, implementation, and enforcement of IHL. Decisions on targeting involve complex operational, strategic, tactical, legal, ethical, social and political assessments, and the need for flexibility to respond to changing circumstances on the ground. As targeting is a dynamic process, the cognitive skills and judgement of the commander are critical. While Article 83 of Additional Protocol I obligates States to disseminate IHL to the military and civilians alike, a survey of renowned higher learning institutions for professional military education shows that IHL and international human rights law are not part of the curriculum in war colleges and national defence colleges worldwide. For example, the curricula at the United States (US) Army War College (USAWC), the US National Defence University, and the National Defence Colleges in Bangladesh, India, Kenya, and Nigeria, do not cater for IHL.[35]

Only a few command and staff colleges, such as the one in Malawi, teach these critical humanitarian courses that are vital to protecting civilians and their rights during hostilities. Thus, a lack of knowledge or understanding of IHL at the strategic level affects its integration into military culture and decision-making. For argument's sake, the popularity and frequency of the use of the term IHL in academia and civil society circles, as opposed to the term LOAC by the military, underscore the point that this body of law is mastered more in academic institutions than the military where the latter is the *lingua franca*.

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[33] Podder S and Roy K, "Use of Force to Protect Civilians in United Nations Peacekeeping: Military Culture, Organisational Learning and Troop Reticence" (2024) 26 Civil wars 74 dx.doi.org/10.1080/13698249.2022.2119506.

[34] ICRC, "ICRC Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrcreportihlandchallengescontemporaryarmedconflicts, 74.

[35] For example, see United States Army War College, "Academic Program Guide" (Armywarcollege.edu, 2023) www.armywarcollege.edu/documents/Academic%20Program%20Guide.pdf.

Oversight of IHL as an element of operational art

The term operational art alludes to "the pursuit of strategic objectives, in whole or in part, through the arrangement of tactical actions in time, space, and purpose".[36] Operational art applies to all types and aspects of operations. Granted, risk is included as one of the elements of operational art. However, the framework does not address the requirement for risk assessment and the need for commanders to mitigate risk, particularly civilian harm.[37] The explanation of risk as an element of operational art needs to include a risk assessment and mitigation framework, which ought to address questions of protecting and mitigating civilian harm. Contemporary warfighting cannot depend on chance but on a methodological risk assessment and mitigation framework following accurate intelligence. A framework for risk analysis and mitigation as an element of operational art is necessary for commanders to consider IHL obligations to mitigate civilian harm during operations.

Greater specificity in the description of the risk and the requirement to mitigate such risk is critical for commanders to consider all applicable factors, including IHL, to make informed decisions. Given the imperative to protect civilians in contemporary conflicts, operational art should include risk analysis and mitigation and incorporate a risk analysis methodology to enhance accuracy and specificity in describing and managing risk, especially regarding IHL obligations to improve decision-making in mitigating civilian harm by commanders.[38]

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[36] Army Doctrine Reference Publication (ADRP) 3-0, *Operations* (Army Headquarters, Washington DC, 11 November 2026).

[37] The Chairman of the Joint Chiefs of Staff Manual (CJCSM) on Joint Risk Analysis (CJCSM 3105.01) requires Commanders to provide an explicit and tangible articulation of risk to better align ends, ways and means to maximize the probability of success in meeting strategic objectives; Chairman of the Joint Chiefs of Staff (CJCS) Manual, Joint Risk Analysis Methodology, CJCSM 3105.01A (Department of Defense, Washington DC, 12 October 2021).

[38] The CJCSM 3105.01 provides a Joint Risk Analysis Methodology (JRAM) to assist Commanders in conducting a risk assessment for operations. The JRAM uses a framework with three major components and four steps or activities to address risk comprehensively. The three major components are 1) risk appraisal, 2) risk management, and 3) risk communication. The four steps include: 1) problem framing, 2) risk assessment, 3) risk judgment; and 4) risk communication. The JRAM is an analytical tool for Commanders to reduce risks against adversaries to ensure success in operations. Risk analysis and mitigation and military judgment help determine risk levels, mitigation strategies, and acceptable risk levels to problem sets and strategic objectives. CJCS Manual, "Joint Risk Analysis Methodology".

The discrepancy in the definition of risk

Risk is defined differently in risk management and as an element of operational art. In the context of risk management, control and actions are taken to eliminate a hazard or reduce its risk.[39] As an element of operational art, risk is viewed as a challenge for commanders to create and maintain conditions necessary to seize, retain, and exploit the initiative.[40] The willingness to incur risk or risk appetite is perceived as key to exposing enemy's weaknesses that an enemy considers beyond reach. However, large-scale force-on-force conflicts are becoming much less frequent. The discrepancy in understanding risk affects the assessment of risk by military commanders in armed conflicts in that they may focus more on the adversary than protection of civilians.

Today, military commanders face operational situations in which some action must be taken, and two or more actions are available, but all potential actions may have negative ethical consequences.[41] Modern militaries are increasingly executing operations that include asymmetric warfare, counterinsurgency, and nation-building, which often involve complex ethical issues such as an adversary's use of non-combatants as cover. In contemporary hostilities, the protective scope of IHL remains the utmost concern in discourse.

The law of targeting lies at the heart of IHL. The principle of distinction is the keystone in the law governing targeting.[42] This semantic discrepancy in defining risk contributes to the oversight to consider IHL in MDMP. To ensure integration of and compliance with IHL, operational art should encompass a risk mitigation matrix to enable commanders to conduct an IHL assessment in a given situation to achieve better outcomes to mitigate civilian harm.[43]

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[39] US Department of the Army, Army Techniques Publication (ATP) 5-19, Risk Management (Government Printing Office, Washington DC, 2014).

[40] ADRP 3-0, "Operations".

[41] Reed GS *et al.*, "A Principles-Based Model of Ethical Considerations in Military Decision Making" (2016) 13 The Journal of Defense Modeling and Simulation Applications Methodology Technology 195 dx.doi.org/10.1177/1548512915581213, 195.

[42] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I) art 48; Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 379.

[43] Kay L, "It's Time to Update the Military Decision-Making Process" (From the Green Notebook, October 13, 2020) fromthegreennotebook.com/2020/10/12/its-time-to-update-the-military-decision-making-process/.

Adversarial-centric military decision-making process

When understanding how commanders make decisions in combat, most military doctrines centre on the MDMP, which is a linear process of identifying, evaluating, and choosing the best course of action (CoA).[44] The MDMP remains an effective process for developing plans, courses of action, and solutions to problems. However, processes must adjust to the environment in which they are utilised to avoid losing relevance to solving contemporary problems. The MDMP framework has not been updated to reflect the contemporary operating environments, the cultural upbringing and competencies of military personnel, and the nature of multidomain operations it must now guide.[45] The MDMP needs to articulate the synthesis required for mission analysis and elaborate on the risks obtained in operation and ways to mitigate them, particularly mitigating civilian harm.

Smart operations, defined

The nature of contemporary counterinsurgency and stability operations has broadened the scope of military operations in that commanders must engage in various activities beyond traditional combat-related roles. Concomitant with this expanded range of military responsibility is an expanded scope of legal responsibilities for commanders that requires them to know, understand, and comply with different branches of law.[46] Questions of the responsibility to protect (R2P), IHRL, international refugee law (IRL), and other humanitarian laws are now within the fabric of modern military operations.[47]

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[44] Shortland N, Alison L and Barrett-Pink C, "Military (in)Decision-Making Process: A Psychological Framework to Examine Decision Inertia in Military Operations" (2018) 19 Theoretical issues in ergonomics 752 dx.doi.org/10.1080/1463922x.2018.1497726.

[45] Kay L, "It's Time to Update the Military Decision-Making Process" (From the Green Notebook, October 13, 2020) fromthegreennotebook.com/2020/10/12/its-time-to-update-the-military-decision-making-process/.

[46] Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1370.

[47] Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1375. See also Al-Skeini and Others (Respondents) v Secretary of State for Defence (Appellant); Al-Skeini and Others (Appellants) v Secretary of State for Defence (Respondent) (Consolidated Appeals) [2007] UKHL 26, 13 June 2007 www.refworld.org/jurisprudence/caselaw/gbrhl/2007/en/40313.

An understanding of both IHL and IHRL is critical for military commanders engaging in contemporary operations.[48]

Today's hostilities with amorphous battlefields characterised by their complexity and scope, require meticulous planning to mitigate civilian harm. Technically, modern day operations demand seamless coordination between and among different actors as well as judicious use of cutting-edge technologies to maximise efficiency while minimizing risks to civilians, essential services, and humanitarian assistance. Legally, troops must comply with IHL, IHRL, IRL, among others, which must be central when planning and executing military operations. Compliance with the law is not only a matter of legal, moral, or ethical obligations but is also a matter of legitimacy and operational success. Failing to adequately account for legal constraints in planning can potentially lead to undesirable consequences. Apart from individual accountability, troops can lose credibility thereby increasing risks and their safety, face geopolitical backlash, undermine international support, alienation of civilian population, complicating reconstruction and return to peace.

The prospect theory in the MDMP posits that the decision maker's reference point determines the domain in which one makes the decision. For example, if the domain is one of losses, the decision maker will tend to be risk-seeking.[49] If the domain is about gains, then the decision maker will risk averse. On this footing, this paper proposes "smart" operations as a frame of reference to propel a decision-maker to a domain of adherence with IHL to mitigate civilian harm. As a concept, smart operations entail using kinetic and non-kinetic elements in adherence to legal constraints in combat with the view to protect civilians without compromising military advantage in armed conflicts. The concept of smart operations seeks to facilitate contextually sensitive legal and ethical decision-making by military personnel.[50] To better protect civilians from harm, smart operations should be grounded in law, particularly IHL, international human rights law, and international refugee law.[51] Therefore, apart from compliance with the obligation to teach and learn

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[48] Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1380.

[49] Shortland N, Alison L and Barrett-Pink C, "Military (in)Decision-Making Process: A Psychological Framework to Examine Decision Inertia in Military Operations" (2018) 19 Theoretical issues in ergonomics 752 dx.doi.org/10.1080/1463922x.2018.1497726.

[50] Reed GS *et al.*, "A Principles-Based Model of Ethical Considerations in Military Decision Making" (2016) 13 The Journal of Defense Modeling and Simulation Applications Methodology Technology 195 dx.doi.org/10.1177/1548512915581213.

[51] Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para 8, 3.

IHL, armed forces should also be familiar with international human rights law, and international refugee law including the law relating to internally displaced persons and such other humanitarian legal regimes.

Besides using kinetic force, smart operations may include soft approaches and cultural intelligence as enablers for troops to accomplish their mission more effectively in compliance with IHL. Just like multidimensional operations involving diplomats, military forces, civilian police and humanitarian agencies, smart operations should equally involve multidimensional and multiagency perspectives. When a conflict is civil in character, the operations must create a "conceptual space for diplomacy, economic incentives, political pressure and other measures to create a desired political outcome of stability, and if possible".[52] Striking the right balance between political desirability, legal compatibility, and military feasibility to protect civilians is the acme of smart operations.[53]

Conceptual framework for smart operations

The protection of civilians in contemporary military operations takes place alongside broader protection efforts, including the promotion and protection of human rights and humanitarian protection, which seek to prevent, mitigate, and stop violations of human rights and fundamental freedoms, ensure that these rights are respected and protected by duty bearers and ensure access to essential services and humanitarian assistance.[54]

When comparing alternative courses of action, modern military decision-makers must often consider both the military effectiveness and the ethical consequences of the available alternatives.[55] Missions today must protect

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[52] Podder S and Roy K, "Use of Force to Protect Civilians in United Nations Peacekeeping: Military Culture, Organisational Learning and Troop Reticence" (2024) 26 Civil wars 74 dx.doi.org/10.1080/13698249.2022.2119506.

[53] Jackson M, 'The Realities of Multidimensional Command: An Informa Commentary' in Geoffrey Till and Gary Sheffield (eds.), The Challenge of High Command: The British Experience (Palgrave Macmillan, 2003) 139-145. Podder S and Roy K, "Use of Force to Protect Civilians in United Nations Peacekeeping: Military Culture, Organisational Learning and Troop Reticence" (2024) 26 Civil wars 74 dx.doi.org/10.1080/13698249.2022.2119506 , 11.

[54] Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 10.

[55] Reed GS *et al.*, "A Principles-Based Model of Ethical Considerations in Military Decision Making" (2016) 13 The Journal of Defense Modeling and Simulation Applications Methodology Technology 195 dx.doi.org/10.1177/1548512915581213.

civilians through force if necessary and address an expansive range of root causes, from which threats to civilians emanate.[56] Compliance with the law does not only demonstrate military professionalism but also enhances the prospects of peace as it creates an environment where parties can efficiently resolve the conflict.

For example, the UN Security Council's resolutions on protecting civilians in armed conflict have stressed the need to address root causes of armed conflict to enhance the protection of civilians in the long-term. The most effective and sustainable way of protecting civilians is to ensure stability, peace, and security through inclusive political processes and sustainable solutions to conflict and to support States to fulfil their responsibility to protect civilians and respect, protect, and fulfil the human rights of individuals on their territory.[57] Below is a description of the conceptual framework of what should characterise smart operations.

Comprehensive and integrated approach to military operations

Smart operations to mitigate civilian harm require a comprehensive and integrated approach.[58] In this sense, a comprehensive approach to protect civilians and mitigate civilian harm should consider and address various factors that influence and threaten civilians' safety and security in both the short- and long-term, including political, security, and socio-economic factors, as well as gender dynamics. Such an approach recognises that protecting civilians requires the full range of capacities and capabilities available to the mission and other actors. An integrated approach to protecting civilians involves multistakeholder and multidimensional strategic coordination, including civilian, police, and military. A comprehensive and integrated analysis, planning, and execution are critical to ensure that a mission can effectively mitigate civilian harm.[59]

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[56] Gilder A, "The UN and the Protection of Civilians: Sustaining the Momentum" (2023) 28 Journal of conflict and security law 317 dx.doi.org/10.1093/jcsl/krac037, 336. Donais T and Tanguay E, "Protection of Civilians and Peacekeeping's Accountability Deficit" (2021) 28 International peacekeeping (London, England) 553 dx.doi.org/10.1080/13533312.2021.1880900.

[57] See Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 9.

[58] UNGA, 'Report of the Special Committee on Peacekeeping Operations' (2021) UN Doc A/75/19, para 129.

[59] See Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping"

With the prevalence of civilians with different needs in contemporary conflicts, the military cannot be the only actor. With the proliferation of NSAGs who have the propensity to attack aid workers, humanitarian space is shrinking but it is also getting overcrowded with actors with different interests in conflicts. A comprehensive and integrated approach requires meticulous coordination and interoperability of the military with other humanitarian actors, including law enforcement, to extend or restore state authority in areas where civilians have become reliant on or subjected to unaccountable governance by NSAGs.[60] The police and the judiciary, for example, are essential in creating protective environments through their efforts to build the capacity of institutions, and tackle impunity.[61] The collaboration between the various actors should be carried out in accordance with the principles of humanitarian action without political bias, particularly independence, humanity, neutrality and impartiality of humanitarian actors to avoid adverse effects.[62]

Comprehensive preparation for the battlespace to mitigate civilian harm

The first question in MDMP should be the specific legal framework within which the hostilities are to be conducted. Comprehensive Preparation for the Battlespace (CPB) requires accurate information on general locations of legally protected persons, objects, installations, and areas, all factors that help shape the decision-making process.[63] Accurate information at appropriate levels is critical to inform this early decision-making phase and subsequent course of action.[64] Likewise, intelligence is a vital factor in shaping the commander's planning process and, later, developing courses of military action. The commander must be apprised of his legal framework as part of the initial framing of the problem. Commanders must clearly

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(Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 3, 3.

[60] Hunt CT, "'To Serve and Protect': The Changing Roles of Police in the Protection of Civilians in UN Peace Operations" (2024) 26 Civil wars 98 dx.doi.org/10.1080/13698249.2022.2119507, p. 13.

[61] *Ibid*., p. 12.

[62] IIHL, "Guiding Principles on the Right to Humanitarian Assistance", (1993) international-review.icrc.org/sites/default/files/S0020860400082206a.pdf, Principle 8.

[63] Also known as Intelligence Preparation of the Battlefield (IPB).

[64] ICRC, "Decision-Making Process in Military Combat Operations" (2013) www.icrc.org/en/doc/assets/files/publications/icrc-002-4120.pdf, para 6.

understand the implications of the legal status of their operations. The legal framework will shape all military activity, from the strategic, operations, to the tactical level.[65]

Risk analysis and mitigation of civilian harm framework

Efforts to mitigate harm to civilians are expected to inform operational planning and the conduct of operations and shall be taken before, during, and after the implementation of operations. Before an operation, a full risk assessment must be conducted, and contingency plans for protecting civilians and mitigating civilian harm must be developed in systematic consultation with the relevant civilian components. This exercise will identify and analyse direct and indirect negative consequences, including civilian displacement, impact on livelihoods, health, and education, possible reprisals against the civilian population, and resulting explosive remnants of war. Mitigation measures to address these consequences should be identified and included in operational plans, contingency plans, and other orders. This exercise should be informed by a gender analysis to address, integrate, and account for the differentiated impacts of operations on different population groups. Operations should be followed by an after-action review that analyses the impact of the operations, including community perceptions, and identifies lessons learned for future operations.[66]

Protection of civilians and mitigation of harm strategies

To express willingness to comply with IHL, commanders should develop a strategy to protect civilians and mitigate harm, complete with a matrix of courses of action to ensure success. The strategy should set out the required strategic objectives; assess threats, risks, and capacity; prioritise among threats; and define the mission approach, activities, roles, and responsibilities for the protection of civilians and coordination mechanisms internally and with other actors. The mission's protection of civilians and mitigation of civilian harm strategy must be informed by age and gender-sensitive analysis.

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[65] ICRC, "Decision-Making Process in Military Combat Operations" (2013) www.icrc.org/en/doc/assets/files/publications/icrc-002-4120.pdf, para 7.

[66] See Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 55.

As appropriate, its core elements must be integrated into mission planning documents, including the mission concept, strategy/plan, component/section level planning documents, conflict analysis, results-based budget, and comprehensive performance assessment system (CPAS).[67]

Integration of IHL into the MDMP and operational orders

IHL should be integrated into the operational and tactical decision-making process and operational orders during armed conflict to create the necessary conditions for the law to be respected in operations. While analysing a superior's orders, the task commander needs to assess whether one may lawfully execute the given mission within the applicable legal framework.[68] Therefore, commanders should be knowledgeable in, and conscious of, their obligations under IHL and the potential humanitarian impact of their actions. The commander's planning guidance to his staff should include the necessary direction to ensure that subordinates incorporate legal and humanitarian factors into their analysis.[69] Constraints shape planning and may be expressed in the form of rules of engagement or fire support coordination measures.[70]

Command responsibility or hierarchical accountability

Command responsibility or hierarchical accountability is a tenet of IHL. Accordingly, commanders will be held criminally responsible if they knew, or should have known, that subordinates would commit war crimes but did nothing to prevent it or if they fail to act against (punish or report) subordinates who have already committed a war crime. Other superiors, such as staff officers, who do not have operational command responsibility, are still criminally liable if they become aware of current or pending crimes their subordinates commit and do not prevent or report them to their

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[67] See Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 75.

[68] That is to say when extracting and deducing the immediate superior commander's intent, the tasks (specified and implied) necessary to fulfil the mission, the applicable constraints, and the potential changes in the situation.

[69] ICRC, "Decision-Making Process in Military Combat Operations" (2013) www.icrc.org/en/doc/assets/files/publications/icrc-002-4120.pdf, para. 7.

[70] *Ibid*., para. 10.

superiors.[71] Further, commanders have the responsibility to ensure adequate training of their troops in IHL, IHRL, and other relevant humanitarian norms. Therefore, commanders should verify their subordinates' knowledge regarding their rights and obligations under IHL and ensure that they are adequately trained.[72]

Smart courses of action: protecting civilians in contemporary hostilities

After mission analysis, the commander directs the completion of an estimate.[73] Commanders continue to review the mission throughout the estimate process and subsequent execution. The courses of action development is based on the direction given by the commander after mission analysis. Therefore, the Commander's Planning Guidance is an opportunity for the commander to direct the staff to design courses of action that minimise the humanitarian impact of operations and emphasise the areas where compliance with IHL is critical.[74] A commander chooses a course of action based on several considerations, including military effectiveness, logistical feasibility, and ethical violation. In this case, smart operations should focus on the legal, ethical, and humanitarian concerns that influence and constrain contemporary military operations. Below are proposed guidelines to support military decision-making by evaluating ethical implications of potential IHL in contemporary armed conflicts.[75]

Delineating battlefield: the case of urbanisation of warfare

Contemporary armed conflicts do not have defined battlefronts. Today, the battlefields are in urban areas and such highly populated environments, span across borders, and blur the lines between combatants and civilians. The 1949 Geneva Conventions require that all parties to armed conflicts and those who support them should respect IHL, particularly those rules on

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[71] *Ibid*., para.s 1-2.

[72] *Ibid*., para. 20.

[73] Also known as Commander's Planning Guidance and the Plan for Staff Work.

[74] ICRC, "Decision-Making Process in Military Combat Operations" (2013) www.icrc.org/en/doc/assets/files/publications/icrc-002-4120.pdf, para.s 11-12.

[75] Reed GS *et al.*, "A Principles-Based Model of Ethical Considerations in Military Decision Making" (2016) 13 The Journal of Defense Modeling and Simulation Applications Methodology Technology 195 dx.doi.org/10.1177/1548512915581213, 196.

the conduct of hostilities that protect civilians and civilian objects.[76] Aside from attackers, defenders also have a duty, to the maximum extent feasible, to remove the civilian population, individual civilians, and civilian objects under their control from the vicinity of military objectives; avoid locating military objectives within or near densely populated areas; and take other necessary precautions to protect the civilian population, individual civilians, and civilian objects under their control against the dangers resulting from combat operations.[77]

Military commanders should make protecting civilians against the effects of hostilities a strategic priority in planning and conducting all military and security operations in populated areas. On their part, States should join the new Political Declaration on Explosive Weapons in Populated Areas. In adopting Resolution 2573, the UN Security Council demanded that parties to armed conflicts should prevent, reduce, and mitigate the damage that armed conflict causes in urban centres.[78]

Protection of civilian objects and prevention of collateral damage

As seen in the war in Ukraine, civilian objects have constantly and consistently been deliberately targeted in modern conflicts.[79] However, According to Article 8 of the Rome Statute, it is a war crime to intentionally direct attacks against civilian objects. Article 52(1) of AP I prohibits attacking civilian objects that are not considered military objectives. Military objectives are those which "by their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage".[80] If there is a question as to whether an

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[76] See generally the 1949 Geneva Conventions.

[77] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I) art 58. Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 404.

[78] ICRC, "ICRC Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts.

[79] The harm to civilians is technically labeled "incidental injury", while that to civilian objects is "collateral damage". Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 405.

[80] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

object that is "customarily dedicated to civilian purposes is being used for military purposes, and thus subject to targeting, a presumption that the object retains its protected civilian status attaches until facts on the ground indicate otherwise".[81] Two cumulative criteria must be satisfied before targeting an object: it must make an "effective contribution" to the adversary's military action, and attacking the object must offer a "definite military advantage".[82] If an object does not meet this criteria, it should not be targeted.

Commanders should make informed decisions on collateral damage and incidental injury before attacking. Schmitt and Widmar state that proportionality does not require a strict calculus of comparison nor a balancing test arriving at an equilibrium but rather that the possible collateral damage should preclude an attack when it is likely to be "excessive" – that is, "when there is a significant imbalance between the military advantage anticipated, on the one hand, and the expected collateral damage to civilians and civilian objects, on the other".[83] Therefore, given the increased risk of unintended harm against civilians and collateral damage against civilian objects, any foreseeable collateral damage or incidental injury to an attacker when planning, approving, or executing an attack must be thoroughly considered during the proportionality calculation to protect civilians.[84]

Smart targeting: preventing indiscriminate attacks

The concept of military necessity is often abused, especially when used as an excuse for using force rather than a reason to limit it.[85] Even when a lawful military objective is the intended target, using indiscriminate weapons or those that cause superfluous injury or unnecessary suffering is prohibited.[86] With the interdependency or interconnectedness of essential services, the complexity of today's battlefield requires proficiency in the law

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Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I) art 52(2).

[81] AP I art 52(3).

[82] Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 392.

[83] *Ibid*., p. 405.

[84] *Ibid*., pp. 405-406.

[85] Mardini R, "Briefing to UN Security Council Open Debate on Protection of Civilians" (International Committee of the Red Cross, May 25, 2022) www.icrc.org/en/document/deliberateattacksoncivilianscausinguntoldsuffering, accessed May 29, 2024.

[86] In LOAC parlance, targeting implies "attack", an act of "violence against the adversary, whether in offence or defence". Article 35(2), Article 49(1), and Article 51(4) of API. See also Article 22, 1907 Hague Convention IV.

of targeting and marksmanship. Although there is no explicit provision on the principle of distinction between civilian objects and military objectives and the prohibition of directing attacks against civilian objects in NIAC, the general protection in Article 13 of Additional Protocol II is broadly interpreted to cover that provision.[87] The prohibition on direct attacks against civilian objects has been included in Article 3(7) of the Amended Protocol II to the Convention on Certain Conventional Weapons, and Article 2(1) of Protocol III to the Convention on Certain Conventional Weapons, which have been made applicable to NIAC.[88] With regards to IAC, Additional Protocol I encapsulates the crux of the law of targeting.[89] The five constituent elements of targeting are target, weapon, execution of the attack, collateral damage and incidental injury, and location. Rules of Engagement represent the practical application of IHL to military operations.[90] The existence of an armed conflict is the condition precedent triggering the application of IHL.[91] The legality of an engagement depends on full compliance with the rules set out for each category.[92]

Target is generally approached in two ways: dynamic which allows forces time to process information and plan more rigorously before engaging a target; and deliberate, in contrast, which is compressed in time to prosecute targets that are identified spontaneously to go through deliberate targeting process.[93] If a target qualifies as a military objective and a weapon used is

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[87] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II). Bothe M, Partsch k-J and Solf W-A (eds.), New Rules for Victims of Armed Conflicts (Martinus Nijhoff, The Hague 1982) 677.

[88] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II) (amended 3 May 1996) geneva-s3.unoda.org/static-unodasite/pages/templates/theconventiononcertainconventionalweapons/amended&2bprotocol/; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) genevas3.unoda.org/staticunodasite/pages/templates/theconvention-on-certain-conventional-weapons/2bprotocol/bill.

[89] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API).

[90] ICRC, "Decision-Making Process in Military Combat Operations" (2013) www.icrc.org/en/doc/assets/files/publications/icrc-002-4120.pdf.

[91] Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy, 379-409.

[92] *Ibid*.

[93] Ekelhof M and Persi Paoli G, "The Human Element in Decisions about the Use of Force" (Geneva: United Nations Institute for Disarmament Research 2020) unidir.org/files/2020-03/UNIDIR_Iceberg_SinglePages_web.pdf.

lawful, Article 57 of API, which is applicable to IAC, requires that those planning or approving attacks must take constant care to spare the civilian population, civilians, and objects.[94] Regarding specific precautions in attack requirements, attackers are obligated to verify that the targets are neither civilians nor civilian objects or subject to special protection.[95] Troops need to be aware that Article 57 of API requires continuous assessment of the situation and, if need be, suspension and cancellation of attack to comply with IHL and rules of engagement.[96] Attacks should be limited strictly to military objectives. Parties to both IAC and NIAC must respect the distinction between civilian objects and military objectives and not direct attacks against civilian objects.[97]

Attackers are also required to take feasible precautions in the choice of means (weapons) and methods (tactics) of attack in order to minimise "incidental loss of civilian life, injury to civilians and damage to civilian objects".[98] Attackers must also use tactics that will minimise collateral damage.[99] Beyond weapons and tactics options, attackers must consider the full range of targets that, if attacked, would yield the same or similar military advantage. When options are available, the attacker must select the objective that "may be expected to cause the least danger to civilian lives and civilian objects".[100]

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[94] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) art 57(1).

[95] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) art 57(2)(a)(i); Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 401.

[96] Ekelhof M and Persi Paoli G, "The Human Element in Decisions about the Use of Force" (Geneva: United Nations Institute for Disarmament Research 2020) unidir.org/files/2020-03/UNIDIR_Iceberg_SinglePages_web.pdf.

[97] See the ICRC, "Plan of Action for the Years 2000-2003", 27th International Conference of the Red Cross and Red Crescent (ICRC 1999) 185-186, 188-193.

[98] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) art 57(2)(a)(ii).

[99] What the military calls tactics are referred to as "methods" of attack in LOAC parlance) Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy.

[100] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) art 57(3); Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 403.

Data-Driven, evidence-based analysis, planning, and decision-making

New technologies can help troops anticipate, prevent, and respond to threats to civilians and engage local populations better. Mitigating civilian harm should be at the centre of decisions related to the deployment and tasking of assets and the acquisition, analysis, and sharing of derived information. New enabling technologies can support efforts and help build collective mission capacity for data-driven, evidence-based analysis, planning, and decision-making.[101]

Constructive engagement and dialogue

The primary responsibility for respecting IHL and ensuring respect falls on States and parties to armed conflict. In asymmetric warfare, parties to the conflict should demonstrate political will and good faith in protecting those affected by armed conflicts.[102] Regardless of the enemy's nature, combatants must comply with IHL in their operations. For example, the Indian Army's counterintelligence (COIN) doctrine states that insurgents are citizens and have legitimate grievances. For Indian troops, insurgencies are viewed as political problems, and that there are no purely military solutions to counter armed rebellions. Hence, the Indian Counterintelligence doctrine makes policing less violent than some Western militaries' coercive compellent force.[103]

Taking the example of American troops that sought to coerce cooperation using indiscriminate force in Mogadishu in 1992 as a regrettable lesson, smart courses of action that use discriminatory force to mitigate civilian harm may also help garner legitimacy in the mission area.[104] Despite the alleged breach of rules of IHL, during operations in Afghanistan, American troops were increasingly working with, rather than against, civilians to win their hearts and minds, which is critical in contemporary conflicts. Therefore, constructive engagement and dialogue with locals is beneficial as they are

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[101] Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 33.

[102] See Common Article 3 to the Geneva Conventions. See also The Prosecutor v Duško Tadić, Case No. IT-94-1-A (Judgement on Appeal) 15 July 1999.

[103] Podder S and Roy K, "Use of Force to Protect Civilians in United Nations Peacekeeping: Military Culture, Organisational Learning and Troop Reticence" (2024) 26 Civil wars 74 dx.doi.org/10.1080/13698249.2022.2119506, p. 8.

[104] *Ibid*., p. 6.

also crucial intelligence sources since they know the terrain and can provide actionable and timely intelligence.[105] Further, IHL recognizes the inherent need of negotiations and dialogues to end hostilities, which can afford better protection for civilians.[106]

Sparing non-combatants from the effects of hostilities

Civilians and their objects must be spared as much as possible from the effects of armed conflicts. According to Article 8 of the Rome Statute, intentionally directing attacks against individual civilians not taking direct part in hostilities constitutes a war crime. With regard to IAC, the distinction between combatants and civilians in Article 48 of Additional Protocol I is the *sine qua non* of protection for individuals. Article 51(2) AP I operationalises the principle of distinction that the civilian population and individuals shall not be an object of attack, and prohibits acts or threats of violence aimed at terrorising the civilian population. Civilians are individuals who are not members of the armed forces and are immune from direct attack in hostilities.[107]

To better protect civilians, everyone should be considered a civilian unless they are members of the armed forces or an organised armed group with continuous combat function and civilians directly participating in hostilities for such time as they do so. In case of doubt, whether a person is a civilian, that person should be considered a civilian.[108] Special protection should be accorded to vulnerable groups, particularly women, children, and

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[105] For example, Community Liaison Assistants (CLAs) can support uniformed and civilian personnel in their interactions with communities, local authorities, and other local actors in peace support operations. They assist with information gathering, threat or needs assessments, conflict mediation, early warning, local-level protection planning, coordination of and follow-up on field visits and patrols/operations and strengthening the resilience of local communities. See Podder S and Roy K, "Use of Force to Protect Civilians in United Nations Peacekeeping: Military Culture, Organisational Learning and Troop Reticence" (2024) 26 Civil wars 74 dx.doi.org/10.1080/13698249.2022.2119506 9. Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 29.

[106] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II) art 6(5).

[107] See Article 4A(1), (2), (3), and (6) of the Third Geneva Convention and Article 43 of API. Jean-Marie Heinckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law (1984), Rule 5. Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy, pp. 381-382.

[108] Combatants may be attacked solely based on their status except for *hors de combat*.

people with disabilities who are affected by conflict differently.[109] Parties to the conflict must adopt specific protections for vulnerable persons, such as children and persons with disabilities. Further, parties must adhere to the 2022 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas ("Dublin Declaration"), which seeks to better protect civilians against the use of explosive weapons in populated areas.[110]

The challenge of human shields is commonplace as a tactic in today's conflicts.[111] Despite tactical challenges to determine whether a human shield is participating voluntarily or involuntarily, involuntary human shields do not lose their protected civilian status, so attackers must carefully consider any expected harm to them.[112] Therefore, in disseminating IHL, civilians should be informed that voluntary human shields forfeit their immunity from attack during the time they provide physical obstacles to combat operations of a party to the conflict. Their voluntary cover of combatants erodes the protection they are accorded in proportionality assessment or taking precautions.[113]

Article 35 API test: humanising new technologies of warfare

The advent of fully autonomous weapon systems (AWS) has raised questions about the distinction between indiscriminate weapons and the indiscriminate use of weapons. There is no question that autonomous

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Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 385.

[109] United Nations, "Highlights of Security Council Practice 2023" (Un.org, May 23, 2023) www.un.org/securitycouncil/content/highlights-2023.

[110] ICRC, "Milestone Declaration Brings Hope That the Immense Suffering of Civilians Is No Longer Accepted as an Inevitable By-Product of Warfare" (International Committee of the Red Cross, November 18, 2022) www.icrc.org/en/document/milestone-political-declaration-brings-hope accessed May 29, 2024.

[111] There are two types of human shields: voluntary and involuntary. See "Philippines: Mistreatment, Hostage-Taking in Zamboanga" (Human Rights Watch, September 19, 2013) www.hrw.org/news/2013/09/19/philippinesmistreatmenthostagetakingzamboanga.

[112] Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 389.

[113] ICRC, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" (International Committee of the Red Cross, June 11, 2020) www.icrc.org/en/publication/0990interpretiveguidancenotiondirectparticipation-hostilities-under-international 56. See also Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy. Schmitt MN, "Human Shields in International Humanitarian Law" (2009) 47 Columbia Journal of Transnational Law 292.

weapon systems include very accurate weapons. The issue, instead, is whether autonomous weapon systems can distinguish lawful from unlawful targets on the battlefield, including the ability to interpret ambiguous human behaviour. The real question is whether using autonomous weapon systems in a particular environment and combat context will meet the requirements of LOAC.[114] The answer is in Article 35 of API, which prohibits indiscriminate weapons or those that cause unnecessary suffering or superfluous injury.[115] Hence, developers of AWS should be aware of the legal constraint embodied in Article 35 of API.

Preventing weapons from falling into the wrong hands

Another challenge is the inadequate regulation of the availability and the misuse of conventional weapons. Some malign actors are acquiring weapons which are eventually targeted at civilians without regard to human rights and IHL. Under the Geneva Conventions and customary international law, States have an obligation to ensure respect for IHL. This obligation includes a responsibility to ensure that the arms and ammunition they transfer do not end up in the possession of persons likely to use them to violate IHL. The Arms Trade Treaty (ATT) is meant to address such concerns. Clause 12 of the Kigali Principles on the Protection of Civilians enjoins States parties to be vigilant in monitoring and reporting any human rights abuses or signs of impending violence in the areas in which their personnel serve. By way of extension, States that endorsed the Kigali Principles should be vigilant in monitoring the flow of arms and ammunition on the continent to prevent them from getting into the hands of perpetrators of human rights and IHL violations.

Ensure safe access for humanitarian assistance and provision of essential services

Humanitarian workers have faced many overlapping challenges in their efforts to reach populations most in need, including death, injuries, looting, and kidnapping. In most situations, governments and NSAGs impede

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[114] Schmitt MN and Widmar E, "'On Target': Precision and Balance in the Contemporary Law of Targeting" [2014] Journal of National Security and Policy 398.

[115] ICRC, "Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts.

access to conflict-affected communities, limiting the ability of humanitarian actors to assist civilians in need. It is a war crime under Article 8 of the Rome Statute to intentionally direct attacks against personnel, installations, materiel, units, or vehicles involved in a humanitarian assistance mission, if they are entitled to the protection given to civilians and civilian objects under international humanitarian law. According to Article 9 of the Rome Statute, it is a crime against humanity to intentionally inflict conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

The Sanremo Guiding Principles posit that every human being has a right to humanitarian assistance.[116] The primary responsibility to protect and provide assistance to the victims is on the authorities who have effective control of the territory where the victims are.[117] To realise this right, it is critical to ensure the access of victims to aid and the access of humanitarian actors to the victims.[118] Such humanitarian assistance must be carried out subject to the consent of the State in whose territory the operations will be carried out, and the consent must not be arbitrarily withheld. The same is the case in non-international armed conflict, where a humanitarian assistance is intended for civilians in territory under the effective control of non-state armed groups.[119] Humanitarian assistance consists of any materiel indispensable to the survival of victims, such as foodstuffs, water, medication, medical supplies and equipment, minimum shelter, clothing; of services, such as medical services, tracing services, religious and spiritual assistance, as well as civil defence.[120] Article 8 of the Rome Statute makes it a war crime to intentionally use starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.

All parties to a conflict, be it IAC or NIAC, have the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need.[121] Belligerents should ensure unimpeded humanitarian access and

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[116] IIHL, "Guiding Principles on the Right to Humanitarian Assistance" (1993) internationalreview.icrc.org/sites/default/files/S0020860400082206a.pdf, Principle 1.

[117] *Ibid*., Principle 4.

[118] *Ibid*., Principle 6.

[119] OCHA, "Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict" (2016) paras D and E, pp. 6-7.

[120] IIHL, "Guiding Principles on the Right to Humanitarian Assistance" (1993) internationalreview.icrc.org/sites/default/files/S0020860400082206a.pdf, Principle 9.

[121] With regards to International Armed Conflicts (IAC), see Article 9 of Geneva

protection of all aid workers and supplies and ensure that their sanctions and counterterrorism measures do not negatively impact the delivery of assistance. Article 4 of the Tallinn Manual 2.0 also requires the protection of critical infrastructure for state functions.[122] Parties to armed conflict should implement United Nations (UN) Security Council Resolution 2573, which recognises the importance of protecting critical infrastructure, personnel, and goods during hostilities.[123] Apart from respecting protective, demilitarized, neutralised zones under the Geneva Convention I (GCI), Article 14 GC IV, innovations such as humanitarian corridors, humanitarian notification to belligerents, and the signing of deeds of commitment by NSAGs have helped to ensure population at risk access to humanitarian aid.[124]

Incentivise compliance with IHL: dealing with non-state armed groups

The proliferation of NSAGs lacking organised structure presents a challenge to compliance with IHL in contemporary armed conflicts.[125] Since extent entities can influence the behaviour of armed forces and armed groups, the onus to ensure compliance with IHL rests on those who have influence over the groups to inculcate a culture of respect for the laws and customs of war.[126] Some NSAGs also control territory and have established

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Conventions I, II, and III; and Article 10 of Geneva Convention IV and Article 70 Additional Protocl I. With regards to Non-International Armed Conflicts (NIAC), see Common Article 3 to the Geneva Conventions and Article 18 (2) Additional Protocol II. See also Rules 31, 32, 56, and 55 of Customary International Humanitarian Law.

[122] Michael N and Schimitt L (eds.), Tallin Manual 2.0 on the International Law Applicable to Cyber Warfare (Cambridge University Press 2017). Check T, "The Tallinn Manual 2.0 on Nation-State Cyber Operations Affecting Critical Infrastructure" (2023) American University National Security Law Brief, Vol. 13, No. 1, 1619. digitalcommons.wcl.american.edu/nslb/vol13/iss1/1.

[123] Conflict and insecurity have been the most significant drivers of acute insecurity for around 117 million people in 19 countries and territories in 2022. Crops were destroyed, livestock stolen, land spoiled, roads blocked, and farmers driven from their fields. United Nations, "Highlights of Security Council Practice 2023" (Www.un.org, May 23, 2023) www.un.org/securitycouncil/content/highlights-2023.

[124] See Article 23 of Geneva Convention (GC) I, Article 14 of GC IV, Article 16, GC, Article 59 Additional Protocol I (AP I), Article 64 API.

[125] ICRC, "Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts, 74.

[126] ICRC, "Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts 75.

"rebelocracies", which is a form of social order in long-term civil wars.[127] In most cases, people living in territory controlled by NSAGs are at the mercy of their rebellious captors. The use of the term "terrorist act" in the context of armed conflict is not only confusing but also disincentivises NSAGs to abide by the laws and customs of armed conflict, including IHRL.[128] Therefore, when engaging with NSAG, the relevant stakeholders should incentivise the protection of civilians and mitigate civilian harm, encourage the illegal armed groups to prevent or stop attacks on civilians, seek a group's meaningful commitments to desist from attacks on civilians and improve their understanding and respect for IHL and IHRL, as well as to diffuse tensions, identify grievances and build confidence between parties to the conflict.[129]

Taming the proliferation of mercenaries to ensure accountability

Outsourcing of military functions has become prevalent in recent years. In the "age of entropy", some private military corporations (PMCs) have more power than States.[130] Some private military corporations have been engaged to augment the State's capacity to project, force, train foreign forces, and provide security or regime protection. In some cases, countries have outsourced private military corporations to evade accountability for committing or complicity in abuses. Article 47 of API states that mercenaries do not enjoy immunity in hostilities. The UN and the AU have outlawed the use of mercenaries in hostilities. Therefore, States should enforce the prohibition of mercenaries in contemporary conflicts, as they have a propensity to prolong conflicts and exacerbate the suffering of civilians.

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[127] Arjona A, Cambridge Studies in Comparative Politics: Rebelocracy: Social Order in the Colombian Civil War (Cambridge University Press 2016).

[128] Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 45.

[129] Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf para. 45. ICRC, "Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrcreportihlandchallengescontemporaryarmed-conflicts.

[130] Mcfate S, The New Rules of War: Victory in the Age of Durable Disorder (Collins 2019).

Jus ad pacem: towards smart operations for conflict resolution

The purpose of war has been the annihilation of the enemy. However, since adopting the humanitarian norms embodied in the Geneva Conventions, the purpose of warfighting morphed into defeating or weakening the adversary, not annihilation. While it is not the duty of troops to resolve conflicts, ending conflicts is in the best interest of the belligerents and the civilians. The UN Sustainable Development Goal (SDG) 16 calls on States to achieve peaceful and inclusive societies and to significantly reduce all forms of violence everywhere.[131] An important step to achieve this goal is to protect civilians from hostilities and end ongoing conflicts. Therefore, compliance with IHL should not be the end but the means to protect civilians in hostilities with the goal of ending the conflicts to secure peace. Peace is a common good and it is the very essence of establishing the UN in 1945. However, non-compliance with the law for political, security and economic interest weakens accountability for violations, increases the severity of the humanitarian consequences of the conflict and seriously undermines global peace and security.[132]

The fact that most of the victims of contemporary armed conflicts are civilians calls for a multidimensional approach to armed conflicts to end conflicts as civilians bear the brunt of hostilities. While *jus ad bellum* cannot guarantee preventing an armed conflict, *jus in bello* has not been fully complied with by parties to the conflict to protect civilians. As it is impossible to entirely prevent armed conflict, when enforcing the laws and customs of war, effort must be put into resolving it.

By and large, armed conflicts result from the failure of bargaining. Warfighting presents a collective action problem of destroying to persuade the warring parties to stop the destruction, as it will be the same actors responsible for reconstruction in the post-war era. External actors, including IHL advocates, can also use the bargaining theory to explain the deleterious costs of conflict and incentivise the benefits of a cease-fire.[133] In negotiating with NSAGs generally, Freeman and Peña have provided useful insights that:

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[131] United Nations, "17 Goals", Sustainable Development, Department of Economic and Social Affairs, sdgs.un.org/goals.

[132] ICRC, "Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts, p. 75.

[133] Jackson MO and Morelli M, "The Reasons for Wars – An Updated Survey", *Handbook on the Political Economy of War*, Chris Coyne (ed.), (Elgar, 2011).

Naturally, adequate conditions for negotiation depend on the existence of a credible threat, without which there is neither the capacity to deter violence nor bargaining power in any negotiation. Yet, sticks (deterrents) are insufficient on their own; carrots (incentives) are also needed. Those incentives must be tailored to the target group's origins, identity, codes, structure, goals and strategies – just as needs to be done when negotiating with conventional guerrillas. These variables, in turn, are closely related to what the groups might expect to attain in the negotiation itself, which might include recognition of their identity; legalization of their right to association; safe passage through rival turf; temporary ceasefire; social inclusion measures; better prison conditions; or legal leniency measures, such as amnesty or a halt to extradition.[134]

For purposes of bargaining, external actors should bargain with belligerents through coercive diplomacy (assurance, inducement, and persuasion).[135] For example, a carrot (incentive) can be that any possible sanctions against any warring parties may be lifted if they agree to share power or resources. An example of a stick (threat of consequences) would be more punitive and severe sanctions imposed against them.[136] Another sweetener can be an offer of the broadest possible asylum envisaged in Article 6(5) of Additional Protocol II at the end of NIAC, with the exception of persons suspected or accused of, or sentenced for, war crimes, genocide, or crimes against humanity.[137] Needless to say that blanket amnesty for war crimes cannot be granted even in situations of transitional justice. Where parties avoid cooperation, they end up in a worse situation, and there will be an optimum mutual benefit where the parties cooperate. Hence, a need to accept the decentralised power-sharing arrangement by belligerents, where possible.

Kalyvas has gone beyond Collier's categorisation of war beyond greed and grievance.[138] Kalyvas notes that a convergence of local and supralocal

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[134] Freeman M and Casij Peña M, "Negotiating with Organized Crime Groups: Questions of Law, Policy and Imagination" (2023) 105 International review of the Red Cross 638 dx.doi.org/10.1017/s1816383122000649 644-5. See also Freeman M and Felbab-Brown V, "Negotiating with Violent Criminal Groups: Lessons and Guidelines from Global Practice" (IFIT, Barcelona, March 2021) ifittransitions.org/wpcontent/uploads/2021/03/001-Negotiating-with-Violent-Criminal-Groups-v4.pdf (all internet references were accessed in August 2022), p. 11.

[135] Boesche R, "The First Great Political Realists: Kautilya and His Arthashastra" (Lexington Books 2003), p. 78.

[136] Thomas C. Schelling, *Arms, and Influence* (New *et al*.: Yale University Press, 2008, reprint of the original 1966 version).

[137] See also "Customary International Humanitarian Law", Volume II, Chapter 44, Section D, Rule 159.

[138] Kalyvas SN, "The Ontology of 'Political Violence': Action and Identity in Civil Wars"

imperatives endows civil wars with their complex character, straddling the divide between the political and the private, the collective and the individual.[139] This points to the importance of identifying "local cleavages" (local dynamics) to address the question of reconciliation and peacebuilding in civil wars. As Staniland rightly notes, politics does not end when the first bullet is fired.[140] Therefore, understanding these local dynamics may help policymakers devise effective strategies and interventions towards conflict prevention.

While the ICRC is the guardian of IHL, the UN Human Rights Council oversees global respect for, and enforcement of IHRL, and the UN High Commissioner for Refugees focuses on international refugee law, there is no dedicated body to encourage incentives and benefits to promote the use of negotiation to prevent and resolve armed conflicts.[141] The omission of a *lex specialis* and an institution to promote conflict prevention and resolution may have contributed to internecine wars thereby exacerbating the abuses against civilians. The best option to protect civilians is to end hostilities. The fact that until recently, the UN focused on *jus ad bellum* while the ICRC has been concerned with *jus in bello*, stalled the development of *jus ad pacem*, which is the link between the two bodies of law. This is where regional actors such as the AU would come in to focus on ending wars or resolving conflicts.

Smart operations should create room for peace negotiations by ensuring compliance with IHL while aiming at the cessation of hostilities with conflict resolution as the main goal. Knowledge of, and compliance with, IHL is not the ends but the means towards cessation of hostilities. The obligation to disseminate IHL under Article 83 of API applicable to IAC and Common Article 3 of the Geneva Conventions and Article 19 of AP applicable to NIAC is meant for the military and civilians alike. The dissemination of IHL should include a clarion call for active citizenship to ensure oversight and diagonal accountability of belligerents.[142] The civil society should develop

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(2003) 1 Perspectives on politics 475 dx.doi.org/10.1017/s1537592703000355. See Collier P and Anke H, "Greed and Grievance in Civil War" (May 2000) ssrn.com/abstract=630727.

[139] Kalyvas SN, "The Ontology of 'Political Violence': Action and Identity in Civil Wars" (2003) 1 Perspectives on politics.

[140] Staniland P, "States, Insurgents, and Wartime Political Orders" (2012) 10 Perspectives on politics 243 www.jstor.org/stable/41479550.

[141] Freeman M and Casij Peña M, "Negotiating with Organized Crime Groups: Questions of Law, Policy and Imagination" (2023) 105 International review of the Red Cross 638 dx.doi.org/10.1017/s1816383122000649, p. 645.

[142] ICRC, "Report on IHL and the Challenges of Contemporary Armed Conflicts" (International Committee of the Red Cross, November 22, 2019) www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts, p. 76.

capacity for oversight of the belligerents and conflict resolution as a sure way to protect civilians. While human rights defenders have been staunch advocates of IHRL, the ICRC has not been complemented much by civil society.

If there is a need for diagonal accountability to oversee compliance with the law, then there should be community-based approaches to develop IHL advocates who would ensure that States integrate IHL and adhere to its dictates. Community leaders, human rights defenders, journalists, lawyers, and other civil society representatives can make good IHL advocates to protect civilians during armed conflicts.[143] Therefore, disseminating IHL should be accompanied by awareness of dispute resolution and conflict prevention techniques. The common denominator and confluence of all these three streams of law is to protect humankind. If the purpose of the UN Charter is to save succeeding generations from the scourges of war, then ending warfare is the most viable option to protect civilians.

Conclusion

Warfare has evolved but operational art and MDMP have not. In contemporary armed conflicts, civilians are the primary victims of IHL violations committed by state and non-state actors. Protecting civilians from the harmful effects of hostilities has never been easy; hence, the goal should be to prevent war altogether.[144] While ensuring repression is fundamental, more effort should be focused on avoiding violations in the first place. The nature of contemporary counterinsurgency and stability operations has broadened the scope of military operations, so commanders must now engage in activities outside of those customarily considered combat-related.[145] While IHL is the international law that regulates armed conflicts, there is no established *jus ad pacem* to encourage, support, and sustain peace

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[143] Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf para. 58. Lührmann A, Marquardt KL and Mechkova V, "Constraining Governments: New Indices of Vertical, Horizontal, and Diagonal Accountability" (2020) 114 The American political science review 811 dx.doi.org/10.1017/s0003055420000222.

[144] Mahanty D, "Five Ways to Protect Civilians in Contemporary Armed Conflict" (SIPRI, August 29, 2023) www.sipri.org/commentary/blog/2023/five-ways-protect-civilians-contemporary-armed-conflict.

[145] Stigall D, Blakesley C and Jenks C, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict" (2009) 30 University of Pennsylvania Journal of International Economic Law 1367.

negotiations.[146] The expanded role of the military requires broadening their perspectives and understanding and application of *jus ad bellum, jus in bello,* and *jus ad pacem* to protect civilians better and save humanity.

As proposed in this paper, the concept of smart operations provides a basis for effectively integrating IHL at a strategic level to mitigate civilian harm. The execution of smart operations also requires commanders and their troops to be adequately conversant with international human rights law and international refugee law since these legal regimes are prominently relevant to contemporary armed conflicts. Though strict compliance with IHL and observance of international human rights, refugee law, and other humanitarian rules, the belligerents enhance the opportunity of negotiations and thereby increase the prospects of ending the hostilities and return to peace which is the ideal situation for protecting civilians.

Therefore, to advance the protection of civilians and mitigate civilian harm, military operations should ensure systematic integration of human rights and other specific protection-related concerns, including those related to gender and children, into peace processes and peace agreements. All relevant actors such as the UN, regional organisations, States, and non-state actors must engage the belligerent interlocutors in their responsibility to protect civilians and protect, promote, and respect IHL where relevant and international human rights law, and hold alleged perpetrators of violations accountable.[147] Given their local knowledge, community-based approaches are also critical in protecting civilians and mitigating civilian harm. Since it is unrealistic to prevent conflicts completely, compliance with IHL demonstrates professionalism, protects non-combatants, and enhances the prospects of peace as it creates an environment where parties can efficiently resolve the conflict and achieve peace as envisaged in Goal 16 of the UN Sustainable Development Goals.

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[146] Freeman M and Casij Peña M, "Negotiating with Organized Crime Groups: Questions of Law, Policy and Imagination" (2023) 105 International review of the Red Cross 638 dx.doi.org/10.1017/s1816383122000649 645.

[147] Lacroix J-P, "The Protection of Civilians in United Nations Peacekeeping" (Peacekeeping.un.org, May 1, 2023) peacekeeping.un.org/sites/default/files/2023_protection_of_civilians_policy.pdf, para. 40.

Consideration of essential services in the planning and conduct of military operations[1]

David KAELIN
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Thank you very much.

I will first start by profoundly thanking the organizer of this Round Table for inviting yet another non-legal person in the room and you will see that most of what I "*preach*" [*fig*.] in my little introduction is about dialogue, and exchange, and talking to each other. I am an engineer. I do not speak the legal language so bear with me and bear with my words. The solutions and recommendation I may talk about in this opening might seem overly simplistic, yet they are anchored in my 20 years, mostly on the ground in conflict zones, fixing broken stuff, and so, as simple as they may sound, they come from a place of reality.

I will bring to you in this opening a couple of quick points.

1. First, an engineer's perspective on what is modern warfare since it is in our title;
2. a quick reminder on the current level of humanitarian needs and how they link to armed conflicts and to the conduct of hostilities;
3. a call for dialogue, the first one between specialists, lawyers and military experts;

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[1] Reference list: ICRC, "Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People" (International Committee of the Red Cross, Geneva, 2015), www.icrc.org/en/document/urban-services-protracted-conflict-report; ICRC, "Reducing Civilian Harm in Urban Warfare: A Commander's Handbook" (International Committee of the Red Cross, Geneva, 2022), www.icrc.org/en/document/reducing-civilian-harm-urban-warfare-commanders-handbook; ICRC, "Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas" (International Committee of the Red Cross, Geneva, 2022), www.icrc.org/en/explosive-weapons-populated-areas; ICRC, "War in Cities: Preventing and Addressing the Humanitarian Consequences for Civilians" (International Committee of the Red Cross, Geneva, 2023), www.icrc.org/en/publication/4701warcitiespreventingandaddressinghumanitarianconsequencescivilians?utm_term=&utm_campaign=gu_DSA_GSN_EN_traffic_Alle+Seiten_AOK_2023&utm_source=adwords&utm_medium=ppc&hsa_acc=2458906539&hsa_cam=20202495119&hsa_grp=152583294634&hsa_ad=660057586232&hsa_src=g&hsa_tgt=dsa+19959388920&hsa_kw=&hsa_mt=&hsa_net=adwords&hsa_ver=3&gclid=Cj0KCQiAn2tBhDVARIsAGmStVnZ6YhkD2fOqUyrK1yYzsBjmFZDeqb0ivopJM7jS0QcUnRAqSFygaAkjUEALw_wcB.

4. a couple of quick examples on the discussions we have, especially with militaries about indeed what could be improved in the planning of military operations or in the conduct to reduce civilian harm;
5. I will finish with a simple call for support to a neutral impartial humanitarian action.

So modern warfare for us, ICRC engineers, and I am simplifying, it has been mostly long wars in recent decades, protracted crises, endless wars or endless cycles of violence some of long duration. This resulted in the ICRC remaining present on the ground for decades: the average duration of our presence in large operations is around 40 years now – we are not going anywhere anymore: this is modern warfare through our eyes. For the eye of the engineer, it has been also synonymous of urban: increasingly, war happens in cities or affects cities, and increasingly in places that [previously] used to be [predominantly] rural or jungle territory. All this came with large scale and extreme complexity of humanitarian needs that force us as humanitarians, just as they force the military, to adapt the way we respond.

In 2023, we are reaching a long series of sad records in terms of number of people in need of humanitarian aid: 340 million in need of humanitarian assistance, we have passed the mark of 100 million forcibly displaced people. When all the figures are going high, this is not exclusively linked to conflicts, but conflicts and the conduct of hostilities play a large role in those figures. I will not talk too much about the effects on essential services – my "*line of business*" [*fig.*] – several speakers have mentioned it much better than I have, but I will echo this by one quick confirmation. In my field of expertise which has been the delivery of essential services, so drinking water, sanitation, shelter, power supply, increasingly, there is no safe places. What I mean by that; everywhere you find an operation of the ICRC you will find our teams of engineers: essential services are affected systematically, everywhere. The effects we are most familiar with are the direct effects, the direct impact and destruction of infrastructure. But then there is a whole range of indirect effects. They come with many names reverberating, cascading, first, second, third order, knock on, out… you name it. We engineers fix it, and we live with it in the field. So, I am not the terminology expert here – pick the term you prefer. But if you want a feeling of what on the ground means, we are here and ready to engage. What I just said is the reason for my first call for a dialogue between specialists that are in silos everywhere. So, the first simple call we usually do in such forums is – "please, legal specialists and military experts – engage as much as you can with other fields of expertise", and that "this should be part of the mission, the mission analysis and several phases of planning". Because, as much as it helps me to understand your fields [of

expertise], it helps me to understand the law and in particular, the application of the law in the field, it helps me to design better programs, it is our claim that understanding our reality, understanding how essential services work, how stuff works, how essential services are delivered, has to be part of your process [as well]. It helps better planning of military operations. And, we also claim, it helps the development of the law or policies to anchor them more in reality.

So, I am coming to an end and presenting things in a nutshell, and presenting more of a "teaser" [fig.] to encourage you to invite us for a more in depth discussion on what we talk about with militaries, in particular, on the planning of military operations. Continuing with another simple claim, if you feel that I push some buttons, most of what I am talking about today is a part of civilian harm that we claim can be removed, can be reduced at very little cost to military forces without compromising mission accomplishment, without overly jeopardizing your force protection, and with an amount of resources that is absolutely reasonable. There are more complex issues, but that is our claim: a large part of civilian harm can be easily avoided.

So, what do we talk about when we engage with military experts? Well first, we like to do this in multidisciplinary teams. Again, I am echoing what Dan just said. We like to line up a lawyer, a military expert, and as much as possible an engineer, a doctor or a specialist in public health. And then, for our part, our suggestions are very simple most of the time. And again, I am echoing many things that have been said; it always rotates around knowledge, it always rotates around understanding the operating environment. It is often about how to gain a better understanding of the operating environment, how to gain more depth in the intelligence preparation of the battlefield [IPB] or of the operating environment [IPOE], how to make better use of existing methods, whether military grade standoff recognition methods or even civilian grade options.

A big debate or a big topic that we go heavy on is the use of experts, and again, we understand it is complicated, we understand, to some extent, the nitty gritty of military operations, [but], somewhere along the line, ask an engineer or integrate someone who knows what he is looking at when looking at a big piece of infrastructure or a complex urban center. We talk about training of soldiers at all different levels, and not complex training, but simple training that would remove a good number of mistakes that we see in the field. All this, we believe, will result in improved planning, a better zoning of the operation area, a better, more accurate listing of sensitive, potentially protected or highly protected objects and all this at little cost will result in a diminution or reduction of civilian harm.

I am about to conclude. The last call I am making, as part of the discussion

is, where is the space for humanitarians? Well, first of all, again, take my word for it, there always comes a time where a humanitarian "*comes handy*" [*fig*.]. Someone said this morning, "perhaps a humanitarian will come and provide assistance". Well, that is a last resort but sadly, it happens. So, a very simple call, for support and understanding of our mission, as neutral intermediaries on the ground and, take the word of someone who has been working on systems that cut across frontlines, pass over checkpoints, think about pipelines, electrical grids, they do not care about frontlines, they go all over, there is [often] a need for neutral, impartial humanitarian action. That is my simple call. I hope this will attract some questions.

Thank you.

Repenser le DIH dans la guerre de haute intensité pour relever défis opérationnels

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Je représente aujourd'hui la directrice des affaires juridiques du ministère des armées et je suis très heureux et honoré de participer pour la première fois à cet évènement prestigieux qui réunit des illustres personnalités du monde du droit international humanitaire.

Je vais donc aujourd'hui partager très humblement avec vous quelques considérations concrètes personnelles, militaires et juridiques sur la prise en compte du DIH dans la planification militaire dans les conflits armés contemporains, notamment au travers de l'exemple que nous donne le conflit ukrainien, ainsi que sur l'évaluation et la réduction des risques posés par les opérations multi-domaines aux services essentiels et à l'aide humanitaire.

Il est très difficile de donner une définition de la "guerre moderne" évoquée dans le sujet. Tout le monde connaît la phrase de Clausewitz: "la guerre est un véritable caméléon". La nature de la guerre est de changer en fonction de son environnement. Lorsque nous nous sommes engagés dans la guerre contre *Daesh* en Irak et en Syrie, nous étions déjà persuadés d'être dans la guerre moderne. Aujourd'hui avec ce que nous observons en Ukraine, il semble que la guerre ait encore évolué: Nous assistons à la résurgence de phénomènes anciens (guerre des tranchées, levée en masse, blocus maritimes…) mêlés à de nouvelles formes de belligérance (cyber opérations, usage de mini-drones, utilisation des populations civiles pour le recueil massif de renseignement, opérations d'influence, exploitation des systèmes d'intelligence artificielle…).

Avec l'émergence de nouveaux moyens et méthodes et surtout d'un certain type d'hybridité, la guerre s'est profondément transformée. Ce qui est sûr c'est qu'elle est aujourd'hui multi-domaines et multidimensionnelle et qu'elle fait peser des risques accrus sur les populations civiles.

L'époque des batailles conventionnelles menées sur des fronts définis est révolue. À leur place, nous trouvons un nouveau champ de bataille, qui traverse les frontières, brouille les lignes entre les combattants et les civils, et déploie des technologies avancées à un rythme jamais vu auparavant. Dans cet environnement dynamique, les principes qui sous-tendent le droit international humanitaire sont plus pertinents que jamais. Tout d'abord, il est

impératif de comprendre que les opérations multi-domaines, caractérisées par leur complexité et leur étendue, nécessitent une planification minutieuse. Du point de vue technique, cela exige une coordination sans faille entre les différentes branches des forces armées, ainsi qu'une utilisation judicieuse des technologies de pointe pour maximiser l'efficacité tout en minimisant les risques pour les services essentiels et l'aide humanitaire.

Sur le plan juridique, nous devons nous conformer aux lois nationales et internationales, comprendre les obligations et contraintes juridiques de nos alliés. Nous devons également intégrer de plus en plus le droit international des droits de l'homme dans nos directives opérationnelles, afin de préciser certaines règles essentielles pour la protection des populations civiles et des combattants et assimilés en période de conflit armé. A titre d'exemple et à ce propos, notre manuel français du droit des opérations militaires, rendu public en février 2023, précise finement l'ensemble des règles de gestion des personnes capturées en conflit armé non international, règles inspirées pour la plupart de la jurisprudence de la Cour Européenne des Droits de l'Homme.

Le respect du DIH doit être une préoccupation centrale lors de la planification et de l'exécution des opérations militaires. Elle exige de nous une attention sans faille au respect du droit international. Il ne s'agit pas seulement d'une question de légalité ou d'une question morale et éthique: c'est une question de réussite opérationnelle. Le cadre juridique d'un engagement militaire est l'un des paramètres essentiels que le chef militaire doit prendre en compte dans la conception et la conduite de sa manœuvre, au même titre que la configuration du terrain, l'environnement et l'état des forces en présence. Le chef militaire français a conscience que s'il échoue à bien prendre en compte les contraintes juridiques dans la planification, il s'expose potentiellement à des revers d'une particulière gravité: il s'expose éventuellement, ainsi que les militaires sous ses ordres, à des poursuites judiciaires individuelles, il peut porter atteinte à la crédibilité de l'opération sur le plan international – les violations du DIH peuvent avoir un impact significatif sur l'image du pays et miner le soutien de la communauté internationale –, il s'aliène le soutien des populations civiles et complique le travail de reconstruction, et enfin il augmente les risques encourus par les militaires en opération en nuisant à leur sécurité.

Quant à la prise en compte des préoccupations humanitaires, cela devrait être une partie intégrante du processus de planification. Les acteurs, les agences et les organisations non gouvernementales humanitaires doivent être consultés dès le début du processus de planification. La collaboration étroite entre les acteurs militaires et humanitaires est essentielle pour s'assurer que les opérations militaires n'entravent pas l'accès à l'aide humanitaire vitale. Cette pleine collaboration doit néanmoins s'effectuer dans le respect

des principes de l'action humanitaire, en particulier, l'indépendance et l'impartialité des acteurs humanitaires, pour éviter les effets indésirables (perception d'acteurs humanitaires biaisée…). Les forces armées françaises dialoguent par exemple très régulièrement avec le CICR: cela permet d'avoir un retour sur nos pratiques opérationnelles et corriger le cas échéant nos actions mais également de dialoguer pour connaître la position des acteurs humanitaires sur le terrain afin de prendre toutes les précautions nécessaires.

Enfin, en ce qui concerne la responsabilité de l'intégration de ces éléments, il incombe aux commandants militaires de s'assurer que les considérations humanitaires sont prises en compte non seulement dans la planification mais aussi dans l'exécution des opérations. Cela nécessite une culture organisationnelle qui valorise la protection des civils et le respect du DIH, et cela dès le temps de paix.

Ainsi le respect du droit international humanitaire guide l'ensemble de la planification et de la conduite des opérations menées par les forces armées françaises ou auxquelles elles participent et, ce, quel que soit le milieu d'intervention. La protection des civils n'est pas perçue comme une contrainte par les forces armées françaises: c'est un objectif prioritaire. Cette intégration minutieuse du DIH dans des environnements complexes a été et est facilitée dans des engagements de portée limitée et de basse intensité. Nous avons des soldats professionnels, bien entraînés. Nous déployons des LEGAD à chaque niveau de commandement, pour planifier et conseiller utilement les chefs au combat sur la portée et la mise en application de nos engagements conventionnels.

Néanmoins l'exemple de la guerre en Ukraine nous rappelle que cette intégration et ce respect scrupuleux du DIH sera beaucoup plus difficile dans un engagement de haute intensité. Dans un tel conflit, il faut massivement former au DIH l'ensemble des conscrits et volontaires qui seront rapidement intégrés aux forces armées. Cela implique un nombre important de formateurs et des structures de formation réactives. Face à ce défi, il faut également réfléchir à des moyens innovants et efficaces de formation au DIH. Cette formation est d'autant plus importante que des règles opérationnelles d'engagement les plus coercitives seront très certainement déléguées au plus bas niveau tactique. Pour ce faire nous devrons impérativement faire confiance aux militaires déployés au plus près des combats dans leur capacité à respecter scrupuleusement le DIH. Enfin, la mise en œuvre du DIH nécessite évidemment d'en connaître les règles et principes mais aussi d'en comprendre l'esprit, de faire sienne la philosophie du DIH qui n'est pas nécessairement instinctive, particulièrement dans des contextes qui peuvent être émotionnellement éprouvants pour des individus qui n'y sont pas préparés.

Il conviendra également, dans un contexte de haute intensité de sortir du paradigme de la contre-insurrection et du schéma du contre-terrorisme. Nous observons par exemple dans les conflits armés internationaux en cours des comportements en matière de gestion des personnes capturées qui ne sont pas conformes aux standards attendus dans le cadre de la 3ème convention de Genève de 1949. Des images de prisonniers de guerre soumis à des mesures fortes de coercition et traités comme des criminels de droit commun nous parviennent parfois. Ces méthodes doivent cependant être proscrites quand on a affaire à des combattants légitimes dans le cadre d'un conflit armé international, qui jouissent en vertu de leur statut de combattant de toute une série de droits et de protections renforcées qui se distinguent de ceux des personnes capturées dans les CANI récents, comme le droit de se déplacer librement au sein de l'enceinte où ils sont retenus.

Donc se préparer à la guerre de masse, de haute intensité, ce n'est pas seulement une affaire de procédure de mobilisation, d'entraînement et d'équipement: c'est également une bonne prise en compte de ce que nous impose le droit international humanitaire, d'une part pour ne pas commettre des violations du DIH par omission (nous devons être prêts matériellement, humainement et procéduralement à gérer les prisonniers de guerre, mais aussi à occuper un territoire par exemple) d'autre part, ne pas compromettre notre capacité à vaincre l'ennemi par une compréhension trop restrictive (et inadaptée) du DCA.

Les procédures françaises mises en œuvre lors des opérations de ciblage visent à s'assurer que les grands principes du DCA sont respectés et surtout que les populations civiles soient épargnées le plus possible des effets des combats. Nous avons promu cette approche dans le cadre de la très récente déclaration de Dublin de novembre 2022 qui vise à mieux protéger les civils contre l'utilisation d'armes explosives dans les zones peuplées. Néanmoins, cette méthodologie de ciblage repose aujourd'hui sur du renseignement militaire robuste et étayé, sur des armements de précision et sur un cadre spatio-temporel permissif: il faut avoir du temps et agir sur un territoire relativement limité.

Dans la précipitation d'un engagement de haute intensité les forces armées doivent comprendre quelles sont les véritables obligations qui pèsent sur elles en matière de ciblage et accepter, lorsque cela est proportionné et nécessaire pour les opérations militaires, d'infliger des dommages et des pertes au sein des populations civiles afin de détruire un objectif militaire important. Il en va du succès des opérations militaires mais également de la crédibilité de la pertinence de l'application du DIH.

Pour conclure, toutes ces considérations nécessitent une remise en cause de nos pratiques et procédures afin que nous soyons prêts à relever le défi de

la prise en compte du DIH dans les engagements de haute intensité, tout en revitalisant sa pertinence à l'horizon des nouvelles formes de conflictualité. C'est un défi d'autant plus important, que comme je l'ai esquissé rapidement, certains acteurs se dotent progressivement d'armements dont personne n'a la pleine assurance d'en maîtriser totalement les effets ou leur capacité à bien intégrer le DIH.

Understanding the civilian environment: changes to U.S. military operational practices

Sahr MUHAMMEDALLY
Senior Faculty Associate on Civilian Harm Mitigation, US Defense Security Cooperation University

We see daily images of the impact of armed conflict on civilians and infrastructure when war takes place in cities and that more needs to be done to better protect civilians. In examining recent operations, we are learning about the gaps that exist in military training, policies, and the insufficient assessment on risks to civilians and essential services that are causing a devastating impact on civilians. Addressing those gaps could enable militaries as required by international humanitarian law (IHL) to reduce incidental civilian harm and take "constant care" to spare the civilian population and civilian objects during military operations. Undertaking comprehensive risk assessments of the civilian environment in the planning processes can better inform tactics, munitions choices, and processes to mitigate civilian harm. One recent example is how the U.S. military is updating its doctrine, policies, tactics, training, and civilian environment assessments to mitigate civilian harm.

In 2022, under the direction of the U.S. Secretary of Defense, a Civilian Harm Mitigation and Response Action Plan (CHMR-AP) was published to improve Department of Defense (DoD) doctrine, policies, practices to mitigate and respond to civilian harm resulting from military operations and its engagement with partner forces, including in multinational operations.

The plan incorporates and builds on previous studies of DoD policies and practices, investigations and review of civilian harm incidents. Specifically, as it pertains to essential services, the DoD is in the process of updating joint doctrine to define the "civilian environment" which can include the civilian population and the personnel, organizations, resources, infrastructure, essential services, and systems on which civilian life depends. The U.S. undertakes collateral damage estimates, which includes risks to essential services as parts of its targeting processes, but the new policy is aimed to improve current policies and practices to reduce civilian harm in both deliberate and dynamic targeting.

For example, Civilian Environment Teams will be created to improve a commander's ability to distinguish non-adversarial aspects of the operational environment and to ensure operational plans. These teams will better inform

a commander on risks to civilians and civilian objects, essential services and to advise on protection and restoration measures to the civilian environment after kinetic operations to the extent practicable.

Updates are also being made to the Joint Intelligence Preparation of the Operational Environment (JIPOE) process to include a more holistic analysis of the civilian environment, including population density, patterns of life, cultural norms, and the interconnected relationships between the civilian population, natural resources, infrastructure, and essential services.

The U.S. is also committed to establishing a common operating picture of the civilian environment in multinational operations and find ways to share information with respect to the civilian environment with allies and partners.

Based on recent conflicts, we see damage to essential services from munitions impact (direct or indirect) and through cyberattacks, where services are degraded, and civilian population suffers. It is, therefore, essential that the planning process for military operations sufficiently integrates such risks and undertakes mitigation measures with proper resources, including consulting with urban engineers and local experts, to reduce civilian harm. CHM considerations in preparedness must include both offensive and defensive operations, and during peacetime where resiliencies can be built from cyberattacks on essential services and fortifications of the critical infrastructure to withstand, to the extent possible, munitions impact.

Examining recent and current conflicts and building evidence is important to guide changes in military doctrine, policies, training, and tactics. Militaries generally do not engage with local civil society (CSO) or non-government organizations (NGOs). There is engagement with UN humanitarian agencies and ICRC on humanitarian notice and access to allow safe passage for the delivery of humanitarian assistance, but militaries can learn a lot more about the impact of operations from local CSOs who have information about the civilian environment to improve their operation planning and adjust tactics during operations to mitigate risk to civilians and civilian objects.

Of course, it is critical for militaries to respect mandates of humanitarian organizations, and not compromise their neutrality so they are not seen as affiliated with any military, so they can continue to operate safely and support the protection needs of civilians.

Finally, it is important to have such exchanges in Sanremo where practitioners can share how they are adapting to the myriad challenges in armed conflict in different domains and how IHL compliance can be strengthened and implemented with practical operational measures.

IV. Preventing the misuse of civilian populations and ensuring protection from illegal and other forms of instrumentalization

Chair: Nils MELZER

Director of International Law, Policy and Humanitarian Diplomacy, ICRC; Council Member, IIHL

Engagement with armed groups and *de facto* authorities on civilian protection

Christie J. EDWARDS
Head of Policy, Programmes and Legal, Geneva Call

Introduction

Many thanks to the Institute and the International Committee of the Red Cross (ICRC) for inviting me to join you for this discussion today. For those of you unfamiliar with Geneva Call, our mission is to improve the protection of civilians by working towards behaviour change of armed groups and *de facto* authorities (AGDAs) and improve their compliance with humanitarian norms, including IHL. To give a bit of context, the ICRC reports that on average, between 500-600 armed groups are actively operating in conflicts around the world, and that approximately 175 million people live in areas wholly or partially controlled by armed groups, so this clearly indicates a large need to engage AGDAs on issues of civilian protection in the areas where they operate.

First and foremost, Geneva Call engages AGDAs directly and indirectly on humanitarian norms and principles to increase the protection of civilians in armed conflict, particularly women, children, and marginalized groups most at risk. We also support local communities in their efforts to improve their own protection, as well as working with other community, religious, and political leaders who can positively influence AGDAs to better implement these norms and principles in their conduct of hostilities.

Engaging AGDAs

At the outset, it is important to clarify that in each case, we adapt engagement strategies to the motivations of the particular AGDA concerned. For example, if the AGDA is primarily interested in maintaining control over a certain population, we would use an engagement strategy which highlights how compliance with relevant humanitarian norms may increase their legitimacy in the eyes of this community. For ideologically driven AGDAs, where we might instead resort to normative argumentation, we ground discussions regarding the respect for IHL in relevant local, tribal, or religious norms.

Here, I think it is important to note that every community or culture has some form of tradition or normative framework around protection of vulnerable community members or even protection of land or the environment where we can find common ground. This approach results in tailor-made engagement and trainings on specific humanitarian priority issues which can respond specifically to the behaviours that affect civilians most.

Geneva Call also works to raise AGDAs' awareness of the effects of their behaviour on civilian populations. When it comes to the effects on the civilian population and essential infrastructure, we aim to demonstrate the domino effect which can be caused by certain behaviour. Here, it is particularly relevant to reflect on the gendered and intersectional nature of the harm caused by certain violations, or on the effect on people with disabilities or other marginalized groups, which often goes unnoticed.

For example, when populations are forcibly displaced, in addition to forcing people to leave their homes and belongings behind, the food security of entire communities who are no longer able to access their fields or hunting grounds is affected, which often has a gendered effect as women and girls are frequently primarily responsible for food preparation. Additionally, AGDAs may not take into account that some persons with disabilities or medical risks may not be able to re-locate and could be left in very vulnerable situations, or that displacement can increase risks of sexual and gender-based violence.

Additionally, when we work with AGDAs on the protection of education, we discuss preventing military use of schools, present best practices, and raise awareness of the risks brought along by using schools for military purposes. For example, AGDAs may lack awareness that the use of one school building could create the impression that other school buildings are also used for military purposes, thereby putting schools and education as a whole at risk. Geneva Call has had recent success by convincing AGDAs to remove military bases that were established close to schools and educational institutions.

Ideally, our awareness raising activities are just the first step in our engagement with AGDAs. Our goal is always to follow up on such activities with in-depth trainings and by encouraging AGDAs to adopt commitments to respect humanitarian norms on one of our thematic priority areas (such as landmines, famine and food insecurity, sexual violence and gender discrimination, healthcare, IDPs, child protection, etc.). These commitments can come either in the form of a Unilateral Declaration or a Deed of Commitment. The Unilateral Declarations are flexible documents where the AGDAs can put in their own tailored commitments and implementation plan, while the Deeds of Commitment use standardized language which Geneva Call has developed since 2000. The Deed of Commitment is signed

by the AGDA in a public signing ceremony in Geneva, and counter-signed by Geneva Call as a witness and the Canton of Geneva as the custodian. In particular, for legitimacy-seeking AGDAs, a Deed of Commitment signing can be particularly meaningful and an important public signal of their intent to implement their humanitarian obligations.

Unilateral Declarations and Deeds of Commitment also include clauses authorizing Geneva Call to monitor compliance by the AGDA and their consent to cooperate with this monitoring process, which includes feedback from civilian communities and other stakeholders about their adherence to their commitments. Additionally, signing a Deed of Commitment is paired with an implementation action plan that is contextualized to the specific issues to be addressed by the signatory AGDA. This monitoring process and action plan can then form the basis for our continued engagement with the AGDA and to ensure that the commitment becomes concrete and consistent practice.

As part of our long-term, sustained engagement approach, Geneva Call also provides training to AGDAs on the humanitarian rules governing the conduct of hostilities, particularly addressing practices that may exploit the presence of civilians or civilian infrastructure. This is often an iterative process of engagement, discussion, and trainings with AGDAs, where the emphasis is always on what measures the armed groups themselves can take to improve a humanitarian concern.

For instance, we regularly hold discussions regarding actions AGDAs take which impact the food security of civilians, noting that they should avoid attacks on markets, farms, food supply chains, water supplies, and animal flocks. We also discuss IHL rules for precautionary measures and avoiding targeting civilian objects, noting that they must keep on taking active precautions even if the opposing side is not taking passive precautions and vice versa. Finally, where appropriate, we also encourage AGDAs to make their internal regulations and codes of conduct which implement their obligations under IHL explicit on these points, requiring their members to respect IHL, even if their enemies do not do so. We always try to bring the conversation back to what the groups can do to contribute to the protection of civilians in armed conflict, particularly for women, children, and marginalized groups most at risk.

Supporting local communities

In addition to our engagement with AGDAs, Geneva Call supports civilians and local communities to raise their awareness of their protections under international humanitarian law so they can better advocate for their own

protections in armed conflict. For example, we train indigenous populations in Colombia on humanitarian norms and humanitarian negotiations, which supports them in their dialogue with armed groups and protects their territory from effects of armed conflict. We also work with civil society organizations in many conflicts around the world, explaining measures they can take to minimize the exposure of children to violence. We also educate community leaders on the legal and policy framework on the protection of children and education, equipping them with hard facts and lines of argumentation to engage in effective dialogue with the armed groups present in their community.

Conclusion

The risks and harm faced by civilian populations in armed conflict often result from a lack of awareness, knowledge, and/or capacity by the AGDAs. By engaging both with AGDAs and with affected communities, Geneva Call seeks to address this by raising awareness, capacities, and obtaining commitments by AGDAs to apply humanitarian norms and principles, which has proven successful in mitigating these risks.

Enhancing IHL compliance in combined arms manoeuvre operations

Geoffrey S. CORN
Chair of Criminal Law and Director of the Center for Military Law and Policy, Texas Tech University, School of Law; Member, IIHL

Thank you, Nils. And I echo the gratitude to the Institute for giving me this opportunity to speak with you and for the support for me being here. What I want to do today is take a little bit of a different vector: I have written before about efforts to offset or counter negative actions by belligerence that endanger the civilian population, for example, an article suggesting that we should distinguish human shielding from what I call the indirect civilian targeting, where you actually want the civilians to be killed and you are using your enemy to inflict that harm. When shielding you do not want your target attacked. Indirect civilian targeting I think sometimes occurs where the bad actor wants the civilians to be injured, so they can exploit that for informational gain – I recently finished an article suggesting that we need to place more emphasis on attempted perfidy, when perfidy is defined as a result crime, when in fact what really endangers the civilian population by diluting the effectiveness of distinction is more the conduct of engaging in the activity than its purpose. But what I want to do today is focus from the other end: how do we better prepare combat leaders to deal with the reality of the modern battlespace?

Now this is going to piggyback on our French colleague that was in the prior panel and on the Brigadier because our French colleague noted that the French Armed Forces are now at a phase where they are kind of shaking off the counterinsurgency model and retooling to be prepared for combined arms manoeuvre operations. We can say that in the abstract, but I think that understanding such a context and who becomes the focal point, or the decisive point of compliance, becomes critical when we, as a collective organization or group of individuals, are interested in implementing international humanitarian law, implementing the humanitarian objectives, and the risk mitigation objectives of the law.

Combined arms manoeuvre operations, and a higher mid-intensity conflict will be defined by mission command. Mission command by its very nature is decentralized command, where junior leaders are expected to exercise cautious initiative to implement a broad commander's intent. The suggestion that they will have access to robust or comprehensive legal

advice, when they are making these critical use of force decisions is simply unrealistic. The decisive element in ensuring compliance with international humanitarian law in the context of combined arms manoeuvre operations are junior combat leaders. By junior, I mean battalion commanders and below. Now, I am not suggesting that the higher-level commanders do not have an important role to play, and they will be more involved in the operational and strategic decisions that frame the use of force. But the vast majority of decisions that are going to endanger the civilian population, whether the enemy is exploiting the civilian population or not, is not going to be made by generals and brigade commanders, it is going to be made by the subordinate leaders who they entrust to employ the violence of combined arms manoeuvre. The mission of the military in conflict is to use combined arms to close in on and destroy the enemy in the most efficient way possible. That is what they are trained to do. That is the type of aggressiveness and violent initiative we demand of these junior leaders.

At the same time, we need to demand that they are thinking of ways to mitigate civilian risks in the execution of operations. And I use the word mitigate deliberately: we tend to gravitate towards this notion that the law requires you to reduce or prevent civilian harm. The problem I have with that is that it is an after the fact determination. What the law demands is a decision, a judgment to do all that is within your power, all that is feasible to mitigate civilian risk: it is not an effects-based equation, it is a conduct-based equation. When we start to talk about preventing civilian casualties, you can have the consequence of a commander or a junior leader who does everything within his or her capability to mitigate the risk to the civilian population, but he/she is simply unable to prevent civilian casualties, and then is condemned for causing those civilian casualties. At some point, commitment to that obligation starts to erode because it is the no-good deed that goes on punished problem: I did everything I could to avoid the casualties, but they could not be avoided. The law requires commanders to engage in feasible risk mitigation, not casualty prevention. That is an unrealistic expectation, but it is an important expectation. So, while armed forces are preparing for what seems to be a kind of resurrection of the Cold War, manoeuvre battlefield, the context is fundamentally different.

As Nils indicated, I started as a tactical intelligence officer in 1983. And yes, we prepared for combined arms manoeuvre operations, but the expectation of legal compliance at that time was completely different: a conference like this might have attracted 10 people. The world is going to demand a high degree of respect for law and the decisions that are made are going to be critiqued intensively, and that relates to strategic legitimacy. So junior combat leaders engaged in combined arms manoeuvre are making decisions that can have

strategic reverberations – as one Marine Corps General phrased it years ago, we can think of the strategic corporal, a corporal who makes a decision or a sergeant who makes a decision that has strategic consequences. So the war might look like the Cold War, but the context is fundamentally different. So, I believe that preparing junior leaders for this challenge has to become a high priority for the international humanitarian law community, and especially for military legal advisors. Because ultimately, I think, that is going to be your critical role: ensuring compliance with the law by making sure that the leaders, the combat leaders, not the lawyers, not the generals, but the lieutenants and the captains and the sergeants understand their fundamental duty to balance their aggressiveness with the interest of mitigating unnecessary risk. Now, I also believe this requires a reconsideration of the core principles that we emphasize, when we prepare leaders for this challenge. The Brigadier should refer to the standard distinction, proportionality precautions equation.

I simply do not believe that it is feasible to expect these junior leaders to understand these principles the way we think they can. I think we have to simplify it for them. Now, some people would say, and I was taught this before I was a JAG – and I used to teach it as a JAG at the JAG school – that we should focus on the balance between military necessity and humanity. I actually think that is a mistake for two reasons. Firstly, I think suggesting that humanity is balanced against military necessity, is misleading, and arguably ineffective. Why is it misleading? Because if we really understand military necessity, it implicitly integrates the principle of humanity. Military necessity means there is a legitimate justification for the act of violence you are about to unleash. That justification is to disable or weaken your enemy. If the violence you are about to unleash is not justified by that military necessity it is, by definition, inhumane. So, humanity is part of military necessity. It is a limited justification for violence. The other reason I think it is arguably ineffective is that the principle of humanity for a combat leader is too amorphous, it is too general. Now maybe in the context of the treatment of somebody who is ordered to combat it makes good sense. You treat them as a human being, they are no longer an object of violence, they are restored to a status, where you are going to do to them what you would want them to do to your subordinate. But in the context of the conduct of hostilities, I do not think it adds much to the equation. What I would suggest is that we think of a relationship between military necessity, which I think commanders and junior leaders get, they understand that: I have to do what is necessary to defeat my enemy, and employ my combat power for that purpose.

I think that has to be complemented by the broad notion of the constant care obligation. Now, my friend Emanuela (Gillard) mentioned constant care earlier, and I have become increasingly convinced that this is maybe the

most undervalued, broad principle in IHL. When we think of constant care, we think of the precautions rule and warnings and timing of attack – and that is all critically important. I have argued before that it is more objective than proportionality. But let us remember that that is subordinate to a broader obligation reflected in Article 57, which refers to military operations generally: in the conduct of military operations, constant care shall be taken – and in Article 57, it is for the purpose of mitigating risk to the civilian population, I would actually suggest that I think it is a broader obligation that can extend beyond risks to the civilian population.

I think, in some ways, it is kind of like a contemporary Martens clause: it answers the unanswered questions, so issues like reverberating effects, impact on the water supply, things like this, they might not fit neatly in a specific rule related to targeting, but they could fall under this broader obligation to take constant care. If you can avoid doing something without compromising military advantage, that reduces the risk or suffering to the civilian population, why would not you do that? We want to form combat leaders who ask that question of their subordinate. Why would not you do that, if you could do it? Why would not you bypass that village, if it enabled you to achieve your objective? Why would you use that weapon system where a smaller calibre system would have achieved the same result, but spared the civilian population? Therefore, I think what we need to do is form junior leaders who are constantly thinking: my job in the exercise of initiative to fulfil my commander's intent is to be aggressive, to be violent and to use decisive combat power against the enemy, but I must always, always think of how I can mitigate the risks of unnecessary suffering? Not just civilian risks.

I remember a couple of years ago that Neil remembered the whole debate about whether military medical personnel and facilities were protected by the proportionality rule? And the technical answer was no, because the proportionality rule applies to civilians, and these are non-combatant members of the armed forces or casualties. On the other hand, do we really want to form commanders who are going to attack an enemy position when they know there is a combat support hospital there, and they have no regard for the consequences of that attack? Do not we want them to take constant, care, not just to protect civilians, but also to prevent unnecessary suffering? Now, part of this reasoning is my increasing agreement with my friend Chris Jenks, that when we talk about protocol, one is targeting regime. It just does not seem to me to have been designed to address the challenge of combined arms manoeuvre. It is an air and missile warfare framework, a deliberate targeting framework. Just some examples, I was talking with one of the participants here who has the cross cannons on his uniform, which means he is an artilleryman. Things like harassing fires, reconnaissance by

fire, screening fires, templated fires for joint suppression of air defense, they do not fit within that framework, because you cannot identify a military objective, you are firing it. Or if you want another example, just watch the video of the thunder run into Baghdad. I think the first Armoured Division were involved where the gunners on the M1 tanks are just spraying 50 calibre rounds into the treeline as they are driving by: they are not aiming at anybody in particular, that is suppressing fire.

Combined arms manoeuvre, if we think that a lieutenant or a captain is going to make every use of force decision by saying what is my military objective? Have I taken all feasible precautions? Hey, Sergeant, is it proportional? It is unrealistic. I know somebody that I am very close with, who is a Reaper pilot, a drone pilot, and he told me, he said, we were taught this proportionality thing. But how the heck am I supposed to decide whether an attack is proportional? What you can decide is, is there a way to do it that reduces risk to people who should not suffer? That is your duty. That is your moral obligation. And that brings me to my last point, which is when we talk about this, the humanitarian objective should not be limited to just protecting individuals from unnecessary harm. We have to remember that those are our sons and daughters who we are sending out to do this dirty work, this hard work of waging war.

And any of you who are in uniform know this, this is an immense moral burden that you carry, that not only may you have to make decisions that result in death, injury or destruction, you may have to order young men and women to do it, who have to live with the consequences of those decisions for the rest of their lives. They need to know that they have acted in a way that is consistent not only with international legal expectations but also with their own innate sense of morality. Because if we want soldiers who do not have a sense of morality, we are in the wrong business. And the way we do that is we give them a rational framework to work through. And that framework cannot be a complex legal equation that lawyers use. No, it has to be very simple: I did what was necessary and I did it in a way that mitigated risk to the civilians or others that did not deserve to suffer. I can live with those consequences. And so I think that what we should be thinking about is retooling this focus to align with the type of war that those of you in uniform are preparing for now, and that is by emphasizing the true nature of military necessity, as complemented by the constant care obligation for all of your activities during the conduct of military operations.

Thank you.

Operational aspects in increasing the risk to civilians in defense

Yoav FRIEDMAN
Major, Legal Advisor to the IDF's Northern Command, Israeli Defense Forces (IDF)

Thank you, Nils, and thanks for inviting me. I am glad to participate in this important round table and, more specifically, in this session alongside Christie and Geoff.

The discussion of increasing the risk to civilians not as part of the attack, but rather by the defending party, raises interesting questions that are not simple.

I am especially glad that Geoff is part of this session, because when I read one of his articles on this subject: Indirect civilian targeting, I thought his argument was creative, interesting, and thought-provoking.

In the context of Corn's argument, it was suggested that under certain circumstances, when the appropriate mental foundation basis exists, the defending party could be seen as responsible for indirect attack which is illegal. Although the direct attack of the attacking party is legal.

Corn's article on the subject, inspired me to think about additional examples which increase the risk to civilians by the defending party to the conflict. And when I thought about such examples, it struck me that legal thinking is often dominated by the risk posed to civilians, while neglecting operational considerations.

In this brief presentation, I would like to point out legitimate operational considerations that should be considered as well as the humanitarian considerations in those kinds of actions.

Examples

To illustrate the problem, I would like to start by outlining a few hypothetical practices, in order to make the discussion more tangible and exotic.

I will start with a simple example, that already has a simple answer in the existing law, and I will move on to practices that might raise more complex questions that do not have a specific answer in the existing law.

1) *First scenario: location of military objectives within or near the civilian population*

As you can see, for example in this aerial photography – locating a military objective within or near the civilian population, can be expected to increase the risk of damage to civilians and civilian objects, due to the military objective within or near them.

This issue has already been discussed by States and experts in international law in the past. According to Article 58(b) to API – a party to a conflict shall, to the maximum extent feasible, avoid locating military objectives within or near civilian populated areas.

This rule is accepted and agreed upon, and in addition the legal intuition of all of us directs us to the conclusion that it is wrong to increase the risk to civilians, by placing military objectives in their vicinity, when it is feasible to avoid it.

2) *Second scenario: military use of civilian infrastructure*

Military use of civilian electrical infrastructure like this, for military bases, and other military objectives. This kind of use might increase the risk of an attack to the civilian infrastructure, due to the military use of this infrastructure.

Regarding this issue, there is no specific rule. There is only the general rule of "constant care" to spare the civilians and civilian objects, and maybe the catch-all clause, 58(c) to API, to take the maximum extent feasible and the other necessary precautions to protect the civilian objects under their control against the dangers resulting from military operations.

In my opinion, this example provides us a very intuitive answer: the military is not expected to develop huge power plants that will generate "military-electricity" for it separately.

Therefore, it makes sense to connect the military base to the civil electrical infrastructure. Even though it might increase the risk of an attack on the civilian infrastructure, militaries are allowed to use it.

3) *Third scenario: evacuating the civilians of the defending party for their protection – imagine missiles are flying and exploding all around, and the attacking army is moving forward to the populated area, there is a need to evacuate the civilians for their protection*

As you can see in this illustrated example, you can choose the evacuation route of the civilians between two alternatives that will protect and endanger them to the exact same extent, due to missiles at one route and the manoeuvre of the attacking party at the second route. But, and here is the interesting twist, one of the routes will also impede or disrupt the manoeuvre of the attacking party to the conflict.

This example is similar to the last example and has no specific rule applying to it. There is only the general rule of "constant care" to spare the civilians and civilian objects. Article 51(7) to API, is not relevant to this example, because it applies to human shielding which is not the case of this example.

It is understood and accepted that it is illegal to evacuate the civilians in a way that would intentionally endanger them, due to the constant care rule. At the same time, it seems that in some cases the military could consider operational considerations when choosing the route for evacuating.

4) *Fourth and last scenario: deceiving the enemy about the location of a strategic military asset*

The attacking party knows about the location of one's significant-strategic military asset with high profile commanders and equipment, and planning to attack it. The defending party, on the other hand, in order to save this significant military asset, is trying to feed the attacking party with the wrong address of an empty office building, that is a civilian object, instead of the real address of the military asset.

This kind of action will cause the attacking party to attack the empty civilian office building instead of the significant military asset, meaning the attacking party will miss the military significant asset.

Similar to the last two examples, there is no specific rule applying to this kind of situation. There is only the general rule of "constant care" to spare the civilians and civilian objects.

It seems that some cases like this example, might raise complex questions to think about.

Analysis and implications

Now, I would like to analyse the implications of those four examples.

In my opinion, some of the examples I presented do not raise a significant dilemma, but some of them raise complex questions when we apply the laws of war to them.

It seems that within the framework of the various practices presented, it is legitimate to consider not only humanitarian considerations, but rather operational considerations as well, while trying to protect the civilians.

This, based on the accepted interpretation of the term "feasible", as a term that refers to measures that are applicable, practical and feasible under the circumstances of the case, considering both military and humanitarian considerations.

Back to Corn's creative proposal, I think there may be cases in which the "indirect attack" theory will advance the protection of the civilian population and civilian objects. It is important, however, not to misread this proposal.

The attempt to define cases in which the "indirect attack" theory would apply should be reserved, in my opinion, to those cases where the defending side uses civilians as a real instrument, and as part of a strategy of delegitimizing the other party to a conflict that carries out legal attacks. Meaning when the party considers illegitimate operational considerations.

Summary

To sum up, during this presentation I tried to point out legitimate operational considerations that should be considered as well as the humanitarian considerations in some actions of the defending side, even in actions that might increase the risk to civilians.

We should be careful not to consider humanitarian considerations exclusively, because there may be some legitimate operational considerations that matter, as I illustrated.

In my opinion, the interpretation of "feasible" should be the guideline for this complex subject.

Thank you all again, and I am waiting to hear your thoughts about this subject.

V. Legal and operational challenges to the delivery of humanitarian assistance and protection of essential services in contemporary armed conflict

Chair: Claudio DELFABRO

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Civil-military coordination and the role of the military in supporting humanitarian assistance and the provision of essential services

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The Military as Actors of Humanitarian Cooperation

The post-Cold War and post '9/11' security environment has been characterized by an increase in intra-state conflict and inter-state conflict associated with global counter-terrorism strategies.

There has also been an increased readiness to intervene with multinational military contingents to restore or maintain the peace. The operational environment in areas of crisis encompasses an increasing range of civil actors, including Non-Governmental Organizations (NGOs) and International Organizations (IOs), that work with national staff and local partners, commercial interests, local authorities (if present) and local populations.

This large presence of civil operators presents more complex challenges for the military than in the past, as most activities have assumed a civil-military dimension, since the UN mission in Somalia (UNOSOM, 1992-1995) and in Mozambique (UNOMOZ, 1992-1995). The humanitarian component for political and coexistence reasons has to be considered by establishing and maintaining cooperation (and providing support) with non-military actors in the area of operations.

Support to the civil community can involve information, security, personnel, materiel, equipment, communications, specialist expertise or training.

Any support given must, however, contribute to achieving military mission objectives, although civil objectives may be supported where civil authorities and agencies would otherwise be unable to carry out their tasks.

Therefore, the military mission may be expanded to include the conduct of tasks normally the responsibility of civil organizations, especially in the initial stages of an international intervention.

Humanitarian issues are likely to be most pressing during the early phases of an operation and are likely to be the subject of intense media interest.

Relationship between military and humanitarian agencies

In the first operations of the 1990s, relations between the military and humanitarian organizations were characterized by mutual diffidence and misunderstandings due, in most cases, to the different nature of the objectives pursued by civil organizations compared to those of the military contingents present in the area of operations. The two actors had and have different mandates, working methods, terminologies, and diverse procedures on sensitive issues such as security.

Over time, with a better understanding of each other's organizations, collaboration has improved, starting with the operations in the Balkans, and has now reached a very good level of cooperation within the respect of each other's role.

In UN missions, humanitarian organizations tend to accept an external coordination mechanism if it is in line with their mandates and the objectives of their intervention.

If a mission is not under UN auspices, the relationship depends on personal initiatives dictated by different crisis contexts.

Civil-Military cooperation (CIMIC)

Based on initial experience, the interaction with the civil actors in operations is carried out through a dedicated military structure with the role of contributing to the achievement of civilian objectives in areas that can help rebuild the socio-economic fabric of the crisis area (justice, culture, economy, social, security, etc.).

In the western military doctrine, the civil-military relationship is called Civil-Military Cooperation (CIMIC). The aim of CIMIC is to support the mission objectives by establishing and maintaining cooperation with non-military actors within the area of operations.

NATO defines it as:

> *A joint function comprising a set of capabilities integral to supporting the achievement of mission objectives and enabling NATO commands to participate effectively in a broad spectrum of civil-military interaction with diverse non-military actors*.

The role of CIMIC is to contribute to the achievement of civilian objectives in areas that can help rebuild the socio-economic fabric of the crisis area (justice, culture, economy, social, security, etc.).

The interaction will ensure that activities are harmonized as far as possible to avoid negative impacts on operations as well as on non-military operations and the civil environment. This will minimize interference or unintended conflict between different actors.

The application and profile of CIMIC depends on the type of operation, the civil environment, and the relationship with non-military actors.

Cooperation between the military and civilian agencies/organizations must be initiated at the highest level; a 'bottom-up' agreement often depends on the interpersonal relationships that can be established.

Civil-Military coordination in the perception of the two components

There are, however, some aspects that need to be considered each time when working with humanitarian organizations.

Humanitarian organizations have a tendency, by their nature and origin, to be operationally independent and to set their own objectives, without any prior coordination.

This requires a continuous process of negotiation, in which each tries to maintain a maximum degree of independence due to the reluctance to accept coordination with the soldiers, as their interests do not coincide.

The relationship between civilian operators and military are based on reasons of opportunity, which are established from time to time, depending on the type of mission and the nature of interventions, and is far from stable. In general, both military and civilians should have a clear understanding of their respective roles and how to perform them.

The military resents the expansion of their tasks while the civilians, in turn, resent it as an "encroachment" of competences.

Humanitarian personnel often complain about the military's inability to distinguish the different actors in the panorama of humanitarian organizations, considering them as a single group of NGOs. For instance, military personnel do not seem to make a distinction between human rights and development agencies.

The interaction of civilians with the military is affected by aspects of culture and organizational typology, which distinguish one from the other, due to the difficulties of humanitarian personnel to understand the internal mechanisms of the military organization.

Moreover, CIMIC is seen as a coordinating model in which the military has a dominant and leading role, an approach that is not well accepted by humanitarian actors.

On the other hand, the military tends to consider civilians, who are not

part of the mission but are in the operations area, as uncontrollable, though not hostile, and often incomprehensible to them.

The civilians consider the soldiers inappropriate for assessing the needs and impact of interventions on the local population, according to humanitarian criteria and their training; while the military have difficulty in understanding and respecting the 'humanitarian space' due to the numerous organizations with different mandates and organizational cultures, characterized by national, political, professional, and institutional diversity.

Civilian personnel find difficult to understand the chain of command, rank insignia, caveats, rules of engagement, mandate, language made entirely of incomprehensible terms (often for the military as well), abbreviations and acronyms; and are frustrated by repetitive approaches at different levels of military command trying to obtain the same information.

On the contrary, prejudices (also ideological) towards the military, is one of the limits to the exchange of information and mutual understanding, which may also have negative consequences on security.

Finally, the humanitarian organizations fear that local populations will not be able to distinguish between humanitarian assistance and operational activities, as these are carried out by the same uniformed personnel.

One aspect that also appears to be of little relevance concerns the widespread use by the military of abbreviations and acronyms that civilian personnel find difficult to understand.

The military frequently uses abbreviations and acronyms to make communication more efficient and clearer, both in oral and written expression, that makes this way of speaking a second language.

This practice helps convey complex information quickly and accurately, especially in high-pressure or time-sensitive situations with a minimum amount of wording and time.

Additionally, using standardized abbreviations and acronyms can help to ensure consistency and understanding among military personnel who may come from diverse backgrounds and training programmes. Often, the acronyms and abbreviations are not among those codified in the manuals, which should be known to all, but are the result of personal "inventions" that are also difficult for colleagues to understand.

The interfaces for civil-military coordination

The stages of coordination are based on the situation on the ground and on the non-military actors' mandates. In this regard, three levels of possible civil-military relations can be defined:

1. Civilian-military cooperation: which can take place in operations where there is an explicit mandate from the UN Security Council, in fields ranging from refugee assistance, and convoy escort, to systematic information exchange. In this context, cooperation can take place within CIMIC, in working groups, through liaison officers and observers;
2. Coexistence between the military and civilians: with areas of sporadic collaboration, according to geographical areas, sectors of intervention and the mandate of the organizations. It occurs, instead, in contexts where the operations conducted are PKO (PSO NATO terminology), approved by the Security Council, for the purpose of protecting the civilian population. There is no formal agreement between the components. Collaboration can occur either in CIMIC or through occasional exchanges of information or common activities;
3. Absence of coordination: which occurs in cases of armed conflict or PKO/PSO operations without a mandate from the Security Council. In these contexts, contacts between the military and civilians are exclusively informal, with information exchanged only in case of life or death and for security reasons.

The comprehensive approach

In the end, however, coordination is a shared responsibility, facilitated by liaison, mutual knowledge, and communication, which should be achieved with the so-called Comprehensive Approach, understood as better harmonization and coordination of international, local, civilian, and military actors when crises occur.

It is an essential dialogue between civil and military actors necessary to promote humanitarian principles, avoiding competition, minimizing incoherence and, when appropriate, pursuing common goals. A form of collaboration that, however, is not always positively mirrored on the ground due to mutual diffidence, notably on the part of humanitarian operators.

Civilian operators view CIMIC as a military instrument with military purposes, which aims to take advantage of the presence of civilian elements for intelligence purposes, and this certainly constitutes a delicate and controversial point regarding civilians' perception of their relationship with the military.

Closing remarks

Civilian actors and military contingents must cooperate without reciprocal prejudices, because the success of the mission will depend on the mutual understanding of the purpose, willingness, capabilities and motivations of military and non-military personnel.

Humanitarian issues are likely to be most pressing during the early phases of an operation and are likely to be the subject of intense media interest.

The military's insistence on having as complete a picture as possible of the situation of humanitarian operators is due above all to security aspects, considering that in the event of problems, it will be the military that will have to intervene to rescue these personnel.

Effective CIMIC will require close liaison with the non-military organizations, and it is important that their generic characteristics are understood. These include:

- lack of uniformity: each humanitarian organization has its own mandate and agenda;
- independence: the humanitarian organizations are independently motivated and determine their own priorities. They are reluctant to be controlled by other organizations. In most situations they rely on their neutrality and impartiality as a means of promoting their own security and are often reluctant to be associated with the military;
- longer-term responsibilities: compared to the military, many humanitarian agencies have more enduring commitments and longer-term investments in the countries in which they work. Thus, it is likely that their perspective on the operational requirements for the area in crisis may be different to that of the military.

Article 18(2) of Additional Protocol II: humanitarian relief and the consent requirement relating to areas under organized armed group control

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Good morning. I would like to express my gratitude to the organizers of this event, especially the Military Department of the International Institute of Humanitarian Law, for this opportunity to share with you my thoughts on the issue of consent regarding cross-border relief during non-international armed conflicts (NIACs).

In September 1992 the topic of the 17th Round Table was "The Evolution of the Right to Assistance".[1] Today, almost 31 years later, reality demands that the topic should be revisited.[2] The landscape of armed conflict has changed significantly. Most contemporary armed conflicts are non-international in nature.[3] In 2022 the International Committee of the Red Cross (ICRC) listed 524 armed groups of humanitarian concern, many of which are located on my home continent, Africa.[4] As of July 2022, it is estimated that, in terms of territorial control, 77 armed groups fully and exclusively control territory and 262 groups contest and fluidly control territory.[5] Persons living in territories under the control of armed groups are vulnerable and often need humanitarian relief.[6]

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[1] International Institute of Humanitarian Law, "Guiding Principles on the Right to Humanitarian Assistance" (1992) 17th Round Table on Current Problems of Humanitarian Law to 'The Evolution of the Right to Assistance' international-review.icrc.org/sites/default/files/S0020860400082206a.pdf, accessed December 4 2023.

[2] O'Brian S, "Foreword" in OCHA and University of Oxford (eds.), Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict: Conclusions, Commissioned by the United Nations Office for the Coordination of Humanitarian Affairs (2017) www.unocha.org/sites/unocha/files/Oxford%20Guidance%20on%20the%20Law%20Relating%20to%20Humanitarian%20Relief%20Operations%20in%20Situations%20of%20Armed%20Conflict.pdf, accessed December 4, 2023.

[3] Demeyere B, "Editorial" (2020) 102 International Review of the Red Cross 979.

[4] *Ibid*. See also Bradley M, "Additional Protocol II: Elevating the Minimum Threshold of Intensity?" (2020) 102 International Review of the Red Cross 1127.

[5] "Twelve Issues for 2022 What States Can Do to Improve Respect for International Humanitarian Law" (ICRC, 2022) para 4 www.icrc.org/en/publication/4610-twelve-issues2022whatstatescandoimproverespectinternationalhumanitarian, accessed December 4, 2023.

[6] ICRC "Report on IHL and the Challenges of Contemporary Armed Conflicts: Recommitting

My topic is the issue of consent. I specifically explore a controversial question: Whose consent is required during a NIAC when civilians in need of humanitarian aid can be assisted without the aid passing through territory under the effective control of the State? The scenario envisioned is that of territorial control by an armed group that lies on a border with a neighbouring State and when humanitarian aid can be delivered directly across the border which, some argue,[7] means that the consent of the territorial State is not required. I first consider whose consent is required; second, I briefly touch on the prohibition on arbitrarily withholding consent to humanitarian relief; and, lastly, I offer concluding remarks.

Whose consent is needed for the delivery of cross-border relief during a NIAC where the territory controlled exclusively by an organized armed group borders a neighbouring State? Article 70(1) of Additional Protocol I (AP I)[8] clearly declares that state consent is required to authorize humanitarian relief operations. The law of non-international armed conflict (LONIAC) is less clear on the question. Common Article 3 is silent as to whose consent is required,[9] whereas Article 18(2) of Additional Protocol II (AP II)[10] explicitly asserts that the consent of the High Contracting Party to the conflict, in other

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to Protection in Armed Conflict on the 70th anniversary of the Geneva Conventions" (International Committee of the Red Cross, November 22, 2019) 52-54 www.icrc.org/en/document/icrcreportihlandchallengescontemporaryarmedconflicts, accessed December 4, 2023; see also Rodenhäuser T, "The Legal Protection of Persons Living Under the Control of Non-State Armed Groups" (2020) 102 International Review of the Red Cross 991-1020.

[7] Bothe M, Partsch KJ and Solf WA, "New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949" (2nd edited reprint, Martinus Nijhoff Publishers 2013) 801; Gal T, "Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance" (2017) 50 Israel Law Review 25-47.

[8] Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Geneva Protocol I).

[9] Common Article 3 is common to all four Geneva Conventions and applies to all non-international armed conflicts. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I); Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II); Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV).

[10] Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Geneva Protocol II).

words, the territorial State, is required. The instructive wording of Article 18(2) reads "relief actions for the civilian population […] shall be undertaken subject to the consent of the High Contracting Party concerned".[11] My reading of this provision is that the territorial State must consent to the delivery of humanitarian aid, which aligns with the principle of sovereignty.

However, there are those who contest this view, and the alternative interpretation centres on the meaning of the term 'concerned'.[12]

It has been argued that the meaning of Article 18(2) of AP II should be consolidated with the meaning of Article 70(1) of AP I.[13] The application of 'concerned' in the context of Article 70(1) of AP I means that only the State party granting or receiving relief or facilitating its transit is concerned.[14] The consequence of transposing the understanding of 'concerned' under Article 70(1) of AP I to Article 18(2) of AP II is that the permission of the State is required only on the occasion that humanitarian relief crosses into territory under the State's effective control.[15] A cross-border situation in which direct access to the territory of an armed group is available demands only the permission of the armed group.[16]

I revisit Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[17] The ordinary meaning of the term 'concerned' is not particularly helpful.[18] The general rule of treaty interpretation includes the context and purpose of the treaty.[19] AP II was drafted to address a different category of conflict from that considered in AP I: it specifically addresses AP II-type NIACs.[20] The parties to AP II are different and the term 'High Contracting

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[11] Additional Protocol II (n 10); see also Moir L, "The Law of Internal Armed Conflict" (Cambridge University Press 2003) 119.

[12] Bothe *et al.* (n 7) 801; Gal (n 7) 25-47; Couchet-Saulnier F, "Consent to Humanitarian Access: An Obligation Triggered by Territorial Control, Not States' Rights" (2014) 96 International Review of the Red Cross 207-217.

[13] Bothe *et al.* (n 7) 801; Gal (n 7) 34.

[14] *Ibid*.

[15] *Ibid*.

[16] Gal (n 7) 35.

[17] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[18] See art 31(1) of the VCLT which determines that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The term 'concerned' is defined as 'agreement, permission or approval' in Mary O'Neill and Elspeth Summers (eds.), Collins English Dictionary (7th ed, Harper Collins Publishing 2015) 161.

[19] See art 31(1) VCLT (n 17).

[20] See art 1(1) of Additional Protocol II (n. 10). See also Martha M Bradley, 'Revisiting the Scope of Application of Additional Protocol II: Exploring the Inherent Minimum Threshold Requirements' (2020) 82 African Yearbook of International Humanitarian Law 81.

Party' replaces in AP II the term 'parties'.[21] Article 31(1)(c), which forms part of the general rule, determines that together with context "any relevant rules of international law applicable in relations between the parties" are to be taken into account.[22] In my view, the principle of sovereignty is a rule of this type[23] and, therefore, the consent of a State is always needed for cross-border relief.

I turn to Article 32 and employ its drafting history to gain clarity.[24] History reveals that Article 18(2) was contested and controversial.[25] The drafting history shows that the term 'parties' was replaced by the phrase 'High Contracting Party', but not much in the way of context is provided.[26] However, in my view the change is appropriate, and replacing 'parties' with 'High Contracting Party' demonstrates that state consent is always required. This requirement reflects the reality that sovereignty was a major concern of the States negotiating AP II.

The arguments in favour of non-state actor consent alone and absent state consent in this specific situation rely on a purposive interpretation of AP II or the technique of the effective interpretation of treaties.[27] In my view, Article 31(3)(c) is significant, and the interpretation must correspond to the relevant rules of international law, which include the sovereignty principle.[28]

Regarding consent, I recommend that Conclusion D of the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Conflicts* reflects a concise interpretation of 'consent' during NIAC.[29] Specifically, I highlight Conclusion D(ii):

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[21] Compare the chapeau of Common Article 3 (n. 9) art 1(1) of Additional Protocol II (n. 10).

[22] Art 31(3)(c) of the VCLT determines that '[t]here shall be taken into account, together with the context any relevant rules of international law applicable in the relations between the parties'.

[23] States generally accept that sovereignty is a rule of public international law and not merely a principle.

[24] Art 32 of the VCLT (n.17) includes the preparatory work of a treaty and the circumstances of its inclusion as a supplementary means of interpretation.

[25] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Vol. XII, Federal Political Department, Bern, 1978; CDDH/435/440.

[26] *Ibid*.

[27] Gal (n 7) 27.

[28] For an alternative argument, see Akande D and Gillard E-C, "Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict" (2016) 92 International Law Studies 490. Akande and Gillard argue that the principle of effectiveness demands that the consent requirement cannot be ignored.

[29] "Oxford Guidance" (n. 2). For an overview of the requirement of 'consent' that aligns with the interpretation of this author, see Akande and Gillard (n. 28) 489-492; Dinstein Y

In situations of non-international armed conflict, where humanitarian relief operation is intended for civilians in territory under the effective control of an organized armed group, and this territory can be reached without transiting through territory under the effective control of the State party to the conflict, the consent of the State is nonetheless required, but it has a narrower range of grounds for withholding consent.[30]

I should mention that there is an exception concerning state consent for relief operations during NIAC, namely, when the Security Council specifically mandates the execution of relief operations.[31]

The prohibition against arbitrarily withholding consent by States to permit humanitarian relief operations serves as a safeguard.[32] Admittedly, treaty law is silent on the legal grounds for denying consent.[33] The 1987 Commentaries to Article 18 of AP II expressly provide that consent cannot be refused barring good grounds.[34] The Commentaries consider the arbitrary refusal of consent as violating the prohibition against employing starvation as a method of combat.[35]

I conclude by offering the following observations:

1. State consent is always a requirement for cross-border relief operations during NIAC. Operationally, it would be wise to obtain the consent of organized armed groups as well as to ensure safe passage and an effective operation if aid is to be delivered to a territory held by an organized armed group or if passage through such territory is required.
2. The ICRC Commentaries are a valued subsidiary source of international humanitarian law (IHL). The ICRC in revising its 1987 Commentaries to Article 18(2) should pay specific attention to the issues of consent and the interpretation of 'concerned'.

"Non-International Armed Conflicts in International Law" (Cambridge University Press 2021) 201 para. 563.

[30] "Oxford Guidance" (n. 2) 6-7.

[31] Couchet-Saulnier (n. 12) 215.

[32] "Oxford Guidance" (n. 2) 7 para. E**.** For an in-depth study of the prohibition against arbitrarily withholding consent to humanitarian relief operations, see Akande and Gillard (n. 28) 483-511.

[33] See art. 18(2) of Additional Protocol II (n. 10).

[34] Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Commentary of 1987, Article 18 – Relief societies and relief actions, para. 4885, ihl-databases.icrc.org/en/ihltreaties/apii1977/article18/commentary/1987?activeTab=undefined, accessed 6 December 2023.

[35] *Ibid*.

3. Armed groups should be engaged with the law of humanitarian assistance. A starting point will be to encourage their signing of deeds of commitment such as Geneva Call's Deed of Commitment for the prevention of starvation and addressing conflict-related food insecurity.

Focus on humanitarian access and the link between conflict and hunger

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What is the meaning of the parties' obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief to people in need?

Question: what

The obligation of all parties to allow and facilitate rapid and unimpeded passage of humanitarian relief to people in need, under their right of control – based on the Fourth Geneva Convention and the Additional Protocols (in particular: Articles 23, 55 and 59 GCIV, Art. 70 API, Art. 18 APII)- is recognized as a rule of customary international humanitarian law. Such obligation also stems from the human rights law obligations of both States and non-state armed groups, which is particularly relevant in situations that do not amount to armed conflicts (Right to an adequate standard of living, including right to food and water: Art. 11 ICESCR; Right to health: Art. 12 ICESCR).

As a careful balance between humanity and sovereignty, this rule is hence also derived from general international law. Anchored in the UN Charter (art. 2; as also confirmed by several GA resolutions[1]), the principle of state sovereignty lays at the basis of the principle of non-interference. International law prohibits States from interfering directly or indirectly in the internal or external affairs of any other State where such interference threatens that State's sovereignty or political independence. This principle has, however, to be weighed against the principle of humanity, the very

[1] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (1970); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty, UNGA Res. 2131 (XX) (1965); Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UNGA Res. 42/22 (1987), Annex, para. 6.

essence of international humanitarian law. Referring to those "elementary considerations of humanity", the ICJ has stated that insofar as States provide relief assistance strictly respecting the principles of humanity, impartiality, and non-discrimination, offers of relief action cannot be considered as an unlawful foreign intervention in the receiving State's internal affairs.[2]

All too often, however, and we see it on a regular basis during our negotiations at the Security Council, attempts are made to shift the balance towards the principle of sovereignty, to the detriment of humanity, amidst other attempts to relativize the binding nature of international humanitarian law. For instance, we see how Member States, during negotiations pertaining to humanitarian access, are referring to GA Resolution 46/182 and its annexed UN Guiding Principles to emphasize the principle of State sovereignty, overshadowing the humanitarian principles of humanity, impartiality, independence and neutrality, and instead of focusing on the parties' obligations to allow and facilitate humanitarian access.

However, sovereignty does not only confer to States a certain right of control on humanitarian activities, it also establishes that the primary responsibility to meet the needs of the population lies with the State. Similarly, non-state armed groups bear the responsibility to ensure the basic needs of the civilian population under their control (Article 3 common to the GC; as regards IHRL, when non-state armed groups exercise government-like functions over a given territory and population, it is generally accepted that they shall respect international human rights law.[3]).

Question: why

When such needs are not met, for whatever reason, Parties to the conflict must allow and facilitate the passage of humanitarian relief, as long as it is impartial in character and conducted without any adverse distinction. Humanitarian organizations are indeed expected to respect the humanitarian principles. And the organizations that operate in line with these principles must be granted access to those in need. As just mentioned, such obligation also derives from the obligation of States to meet the basic needs of their population.

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[2] See Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgement of 27 June 1986, para. 242; on "elementary considerations of humanity", see para. 218 referring to ICJ, Corfu Channel, Merits, 1. C. J. Reports 1949, p. 22, para. 215.

[3] For a list of references, see Handbook, p. 40, footnote 108; see also reports of the High Commissioner for Human Rights for more recent examples on specific contexts, see A/HRC/39/43, para. 14 (Yemen) and A/HRC/34/38, para. 5 with references (Gaza).

This obligation is all the more significant given the plethora of access constraints faced by humanitarian organizations throughout conflict areas: namely the mere denial of the existence of humanitarian needs or of entitlement to humanitarian assistance; to safety concerns linked to ongoing military operations, as well as violence against humanitarian personnel, assets and facilities; various restrictions of movement of humanitarian goods and personnel, and interference in the implementation of humanitarian activities.

Question: how

Other States are also bound by the obligation to allow and facilitate humanitarian access. They are not only responsible to respect it, but to ensure its respect. This is particularly relevant when other States are involved in the humanitarian response or have influence on a country on whose territory there are people in need.

While the Parties' consent remains necessary, it amounts to an unlawful denial of humanitarian access, hence a violation of international humanitarian law, to withhold such consent arbitrarily. To mention the most extreme example, no valid reason would justify a refusal where a lack of relief would amount to starvation.

The Handbook published by Switzerland in 2014 on the normative framework pertaining to humanitarian access, accompanied by its Practitioners' Manual, remain precious sources as regards the law which underpins the rules of humanitarian access. These resources have been developed in light of the challenges in securing and sustaining humanitarian access and the central role that access plays in contributing to humanitarian assistance and protection. The Handbook lays out the existing international normative framework pertaining to humanitarian access in situations of armed conflicts, and hence elaborates on the relevant rules of general international law; international humanitarian law; international human rights law; and international criminal law.

The link between conflict and hunger, with particular reference to the use of starvation as a method of warfare

The link between conflict and hunger cannot be overemphasized and has never been as obvious. While denouncing an unprecedented food crisis, humanitarian organisations have also noted that 70 per cent of all those who are suffering from hunger are currently living in a conflict zone. Slightly

more than 5 years ago, at the political level, the Security Council adopted Resolution 2417 which recognized – for the first time – a direct link between armed conflict and violence, and food insecurity and famine. While setting up a reporting mechanism incumbent upon the Secretary-General, the resolution also strongly condemned some of the main IHL violations that are causing food insecurity, that is, the use of starvation as a method of warfare, the unlawful denial of humanitarian access and the deprivation of civilians of objects indispensable to their survival.

In order to protect civilians from food insecurity, it is essential to respect international humanitarian law. Violations of international humanitarian law are all too often the direct causes of food insecurity in conflict situations, and their consequences are exacerbated by numerous indirect effects preventing people's ability to meet their basic needs. And here, we are not only talking about unlawful denial of humanitarian access, but also about other violations, such as attacks against objects indispensable to the survival of the population and the use of starvation as a method of warfare, attacks impacting civilians and civilian infrastructure, as well as attacks against medical personnel. These objects include food, water, crops, livestock, agricultural assets, drinking water installations and supplies, and irrigation works (Art. 54 API, Art. 14 APII). Security Council Resolution 2417 also specifically mentions the protection of objects necessary for food production and distribution such as farms, markets, water systems, mills, food processing and storage sites, and hubs and means for food transportation. Infrastructure that is critical to enable the delivery of essential services – the very subject of this Round Table – was included three years later in Security Council Resolution 2573. This Resolution completes Resolution 2417 in the sense that it specifically focusses on objects indispensable to the survival of the population, further elaborating on parties' obligations related to their protection.

Indispensable to the survival of the population are also non-food items such as medicines, clothing, bedding and means of shelter (Art. 69 AP I and Art 18 APII). During the negotiations of the Elements of Crimes of the ICC, it was also recognized that the crime of starvation should go beyond the deprivation of water and food, to cover the deprivation or insufficient supply of items that are essential to survival, which include indispensable non-food items such as medicines and blankets.

This leads us to the last violation I wanted to mention with a direct impact on food security in conflict situations, that is, the use of starvation as a method of warfare. (Starvation is the action of subjecting people to famine, that is to a severe lack of food. It is hence not only an issue of food availability but of access to food. Famine can also occur when food is available, but when the capacity of the population to get food is compromised, be it due to a lack

of financial means or of social norms. Also starvation does not necessarily imply death.)

The use of starvation constitutes a war crime, that must be investigated, and suspected perpetrators must be prosecuted. It is the commitment of Switzerland towards this end that led to the adoption in 2019 of the amendment to the Rome Statute that broadened the scope of application of the crime of starvation to non-international armed conflicts.

Switzerland's work towards the recognition of the crime of starvation in NIACs and in coordinating responses at political, legal and operational levels to secure and sustain humanitarian access to crisis areas

Starvation of civilians as a method of warfare was originally not listed as a war crime in NIAC under the Rome Statute. It only existed in IAC under Article 8(2)(b)(xxv), which defines the crime as "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions". During the negotiations in 1998, a provision penalizing starvation in NIAC had been actually part of the draft Rome Statute. However, the "final package" of the Rome Statute did not include starvation in the list of war crimes in NIAC.

To harmonize the jurisdiction of the ICC with regards to war crimes in IAC and NIAC, Switzerland proposes an amendment to the Rome Statute to include the crime of deliberate starvation of civilians within the list of acts criminalized as war crimes in non-international armed conflicts. It was important for us to close this accountability gap and this loophole in the Rome Statute. Our diplomatic efforts were achieved in December 2019, when the Assembly of States Parties adopted the amendment to the Rome Statute unanimously.

Impacts of the Starvation Amendment:

- Politically: The adoption of this amendment is a strong signal in the fight against famine during armed conflict. The message is clear: those who starve civilians as a method of warfare must no longer be able to escape criminal sanctions.
- Legally: Victims of war crimes in non-international armed conflicts are entitled for justice, just as are victims of the same crimes occurring in international armed conflict. There are no grey areas anymore between permissible and impermissible conduct regarding starvation and the

obstruction of humanitarian aid in NIAC. For too long this created an "ethics free zone" in conflict.

- At the operational level, we hope that this amendment will have a preventive effect on conflict-induced hunger. But to make it happen, ratification is an essential step in providing for an adequate response to starvation crimes and will help to shift the prevailing narrative surrounding man-made starvation, which considers famine as a derivative and unfortunate consequence of war, rather than an intentional, unlawful act that violates the fundamental rights of civilians and basic laws of armed conflict.

Protection by presence, legal and programmatic tools to protect IDPs: the opposite cases of the UNHCR experience in Colombia and Myanmar

Roberto MIGNONE
Senior Operations Coordinator, UNHCR Myanmar

A very important legal instrument for the protection of IDPs is the publication: the UN Guiding Principles on Internal Displacement of 1998.

This is a compilation of human Rights, international humanitarian law, and refugee law (by analogy) principles.

They are not binding *per se* but are based on binding legal instruments (for example, the Convention on the Rights of the Child, signed and ratified by almost every country, is applicable also to IDP children).

I will present here two extreme opposite case studies, where I worked for the Protection of IDPs: Colombia (where I served for 10 years in different periods, from 1999 to 2021, both with UNHCR and with OHCHR), and Myanmar where I work currently (since 2021).

Those represent, in terms of a rewarding job, the best and the worst experiences of my over 30 years working with UNHCR and OHCHR.

In Colombia UNHCR and other humanitarian actors were able to provide effective protection to IDPs and to people at risk of displacement (the best protection is prevention), based on the UNGP on IDPs and other legal instruments.

In Myanmar, protection is not effective at all for a variety of reasons, which I will explain.

In Colombia, the Constitutional Court has recognized that the UNGP are part of the "Constitutional Block" (*Bloque de constitucionalidad*) as binding international treaties, so they are not only binding but also part of the Colombian Constitution, so they prevail over regular laws on IDPs.

In Myanmar, where the country has never even signed the Refugee Convention, the UNGP are not respected at all by the *de facto* authorities (militaries who took power in February 2021) and in most of the country they do not even recognize the phenomenon of internal displacement ("zero IDPs policy": there are 1.931.000 IDPs in Myanmar, out of which 1.625.000 are new IDPs after the coup).

Protection by presence is often the cornerstone of protection strategies for UNHCR and partners: it is based on the assumption that there is a "political cost" for state and non-state armed actors to commit abuses against civilian

population when the UN sees it, or will get to know it, as it accompanies certain communities at risk, and will report nationally and internationally about the abuses (even some narcotraffickers do care: for "economic cost", however).

Some abused IDP and at-risk communities in Colombia gave us the feedback so that when we started to visit them regularly, abuses by all armed actors (including the Colombian Army) were reduced by 90%.

In Myanmar, on the contrary, protection by presence does not work at all, especially because direct access is denied (particularly to international staff to most conflict zones), not only for protection but also for delivery of humanitarian assistance (even for victims of the cyclone in those zones), especially in the Northwest, where three out of four new IDPs are located.

We even had to remove the UNHCR logo from all NFIs: normally the logo is a protection tool, as it shows that those communities are accompanied by UNHCR. In Myanmar NFIs with logo cannot pass the check points and might even put at risk the IDPs, who in many cases are hiding in the jungles and are still targeted by the army. Moreover, if we request an authorization to distribute (which in most cases will not be approved), we are also supposed to reveal the precise location of the IDPs hiding.

The main projects we were able to implement in Colombia for the prevention of displacement (i.e., protection of communities at risk) as well as for the Protection of IDPs were:

- Documentation project with the Registrar's Office (more than one million vulnerable people, afro-Colombians, indigenous and *campesinos*/farmers in remote locations, received ID cards. UNHCR would accompany every documentation campaign, ensuring access for state authorities)
- QIPs (example of boarding schools for indigenous youth at risk of recruitment, as well as projects with school gardens that gave us a pretext to often visit those areas to monitor the situation of IDPs and communities at risk and to have protection by presence)
- Training of Indigenous Rights to 6.000 members of the Army in 90 workshops, in all of the departments of Colombia
- *Defensores Comunitarios* (with the Ombudsman Office)
- Alliance with Constitutional Court and IDPs brought to Bogotá to give testimony to the Court (two Ministers were condemned).

In Myanmar we have to distinguish between Rakhine State (border with Bangladesh) where our access to Rohingya IDPs, as well as Rakhine IDPs is limited but acceptable, and where UNHCR and partners are building thousands of temporary houses, distributing NFIs and implementing QIPs,

and the rest of the country, especially with new IDPs (since 2021), where access is very limited (and in the case of the Northwest, where we have two thirds of new IDPs, over 1.080.000, almost completely blocked, even for national staff).

The renewal of the two MOUs (Memoranda of Understanding), visas to enter Myanmar and renewal of visas for international staff, as well as travel authorizations to distribute NFIs (especially in the NW and the SE) are blocked.

In this context protection by presence cannot work and assistance is very limited (but we can deliver some assistance and QIPs through national partners mainly). 86% of human rights violations and infraction of IHL are attributed to the Army in Myanmar (unlike in Colombia where the vast majority of abuses were committed by non-state actors, such as guerrillas and paramilitary groups).

It seems that the Army in Myanmar do not consider the villagers (including IDPs) as the social base of their enemies (People Defence Forces and Ethnic Armed Groups) as in Colombia and in many other conflicts, but as their "direct enemy" and target (especially of indiscriminate airstrikes and burning of houses, more than 60.000 just in the NW).

In Colombia we just had one limitation: President Uribe at the time declared that there was no conflict, but only an armed confrontation with "terrorist groups", so he forbids humanitarian actors to interact with guerrillas and paramilitaries.

I talked with them several times, during the over 300 missions I carried out in the deep field, when I met them by chance. Nevertheless, an activity of training on HRs or IHL similar to what I did with the 6.000 members of the Army, regrettably was not possible, and that is a pity.

Although we could not address the root causes of the conflict (poverty, unequal distribution of land, corruption and others), we did try to influence the way the conflict was conducted.

So, these are two extreme and opposite case studies of UNHCR and partners working with IDPs, one (Colombia) where we had an almost completely open humanitarian space, and had a very positive impact, and another where the humanitarian space is extremely limited and shrinking by the day (Myanmar).

VI. Key humanitarian tools for the protection and delivery of essential services: humanitarian access, humanitarian corridors and protected zones

Chair: Marja LEHTO

Ambassador, Senior Expert of International Law, Ministry for Foreign Affairs, Finland; Council Member, IIHL

Key humanitarian tools for the protection and delivery of essential services: humanitarian access, humanitarian corridors and protected zones from a military perspective

Christian DE COCK
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Excellencies,
Ladies and Gentlemen,

It is an honour and a privilege to be here in Sanremo at the Round Table and, as many other speakers before me, I would like to express my sincere gratitude to the organisers for having invited me to speak before such a distinguished audience.

The aim of this panel is to examine tools to facilitate humanitarian access and the implementation of legal obligations regarding the protection of essential services and the delivery of humanitarian assistance.

Before elaborating more extensively on some of the issues involved here, please allow me the following preliminary observations, some of which have already been addressed by other panellists during this Round Table. Two elements need some further clarification, namely the use of the terms 'humanitarian access' and 'essential services'.

With regard to the term 'humanitarian access', it is noteworthy to recall that the applicable legal regime in armed conflict does not recognize or use this terminology. The relevant provision of GC IV (Article 23) refers to "the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party", as well as to "the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases", subject the conditions mentioned further in Article 23.

Regarding the obligations of the Occupying Power contained in GC IV, Article 59 stipulates that if the population of an occupied territory is inadequately supplied, it "shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal", also under the conditions proscribed in Article 59 of GC IV ("the right to search, to regulate their passage, and reasonably be satisfied that these consignments

are to be used for the relief of the needy population"). Finally, the relevant provisions of AP I refer to the basic needs in occupied territory (Article 69), with a 'renvoi' to Article 55 of GC IV and adding the provision of "clothing bedding, means of shelter and other supplies essential to the survival of the civilian population" (on top of food and medical supplies). The term of art used in Articles 69, 70 and 71 of AP I is 'relief actions'. *Idem ditto* with regard to NIACs in AP II, Article 18. Unfortunately, the terms 'relief action' and 'relief consignments' remain undefined in the terminology list of Article 8 of AP I and is completely absent in AP II (and CA 3 to the GC).

For the purpose of this Round Table, it is understood that when one refers to 'humanitarian access', 'humanitarian assistance', 'humanitarian relief operations', 'humanitarian relief', or other terms such as 'humanitarian action', these terms are used in order to be interchangeable with the exact wording of the relevant IHL provisions. 'Relief actions' are therefore actions (some would prefer the use of the term 'operations') intended only for the civilian population to provide them with essential foodstuffs, clothing, medical supplies, means of shelter, and other articles or supplies which are essential for the civilian population, as well as objects necessary for religious worship.

With regard to the protection of 'essential services', in particular during the conduct of hostilities, some clarity on what exactly is or should be covered seems necessary. As such, the term 'essential services' does not exist. The law of armed conflict, as it exists today in treaty law and customary law, already provides clear and precise rules in terms of general and special protection, e.g. relative to goods which are indispensable for the survival of the civilian population, the natural environment, cultural objects, medical units-transports and materiel, works and installations containing dangerous forces. From that perspective, one can ask oneself if these protection regimes are (or not) sufficient to ensure the required aim, namely the protection of 'services' which are essential/indispensable for the survival of the civilian population.

In order to investigate any potential contribution to the development of a more institutionalized framework to improve effectiveness and ensure actual protection, we need to re-visit the current legal framework relative to these questions. More often than not, there appears to be a growing tendency, in particular emanating from the humanitarian society or sector, to develop new laws. So the question is: do we really need more conventions?

In my humble opinion, the answer to this question is clearly 'NO'. The law of armed conflict, as it stands today, is sufficiently 'armed' to tackle with these issues.

As far as the protection of essential services against the effects of attacks

is concerned, the applicable rules have already been analysed in more detail in previous panels. These rules, on distinction; special protection; precautions (in attack and in defence); proportionality; means and methods of combat; are the result of intense negotiations between the High Contracting Parties and represent the delicate balance that States accepted in times of armed conflict between two conflicting principles which underpin this *lex specialis*, namely the principle of military necessity and the principle of humanity. The problem today, is the growing tendency to shift this delicate balance unilaterally towards the principle of humanity, ranging from the proliferation of new political declarations (*see* the 'safe school'-declaration or the latest political declaration on the use of EWIPA) or the attempts to replace the LOAC rules by international human rights rules, the invocation of the Martens-clause to achieve the same effect, or the introduction of a 'least harmful means'-approach of lethal force against lawful military objectives in the form of 'guiding principles'. From that perspective, I fully concur with KLEFFNER who stated that:

> […] *if the law is silent on a given issue, neither humanity nor military necessity can directly and on its own force alone, provide an answer to the underlying question. If the law is permitting a given action, such as the use of force against a combatant or a fighter, considerations of humanity do not provide further legal restraints on the use of that force, nor does the restrictive dimension of military necessity*.

It is yet another example of what can be referred to as "an innovative humanization lacking any legal basis". As rightly pointed out by one observer, such an approach "represents a dangerous confusion between law and policy, challenging the historical balance between military necessity and humanity with a potential to undermine further compliance with the law of hostilities and must, therefore, be rejected".

Having said that, I do share the final objectives of some of these initiatives, namely that medical facilities, schools and other educational facilities, and the civilian population (in general) must enjoy protection against the effects of the hostilities. But I do not believe that this aim can be achieved by constantly adding new layers of compulsory legislation upon the existing legal framework. The reason why I defend this position is based on the fact that the problem is not situated in the absence of legal rules. On the contrary, the legal rules are crystal clear (although some ambiguity may exist in relation to some of the rules, but even then, it is highly debatable if these ambiguities can be solved by new law). The real issue or dilemma is the non-compliance with the existing legal framework by some actors (both state and non-state

actors), such as Syria, Yemen, or Russia, comprised of launching direct attacks against hospitals, schools, civilian centres, using civilians as human shields in populated areas, launching indiscriminate attacks, …. Such *modi operandi* are war crimes and should indeed not go unpunished. But the international community will not solve the problem by enacting new legislation or declarations requesting States to do more than what the LOAC requires them to do. From that perspective, it is necessary to make a clear distinction between the 'able and willing' and the 'able and unwilling'. Militaries from the former already implement complex methodologies to abide by their obligations under the law, the CDEM (Collateral Damage Estimation Methodology) can serve as an illustration thereof. Unfortunately, the discussion is also influenced by the lack of sufficient knowledge by the humanitarian community on how modern militaries implement their obligations under the LOAC. Two examples can be cited to illustrate this complexity. In the targeting process (the process to identify and prioritize targets on which the commander wants to achieve an effect, the allocation of means to execute the mission and the conduct of a Battle Damage Assessment), targets are not randomly attacked. The identification of the target (as a legitimate military objective), and the process leading to the allocation of means and methods to achieve the desired result/outcome in the framework of a pre-planned targeting process, are the result of a careful and in-depth analysis of the target, including a detailed TSA (Target System Analysis) with its critical elements and vulnerabilities. Moreover, and before authorizing any strike, a formal CDE analysis will be conducted and according to the respective CDE-level, the appropriate TEA (Target Engagement Authority) will decide on the attack, after LEGAD consultation. In other words: States do take their responsibilities seriously when implementing the LOAC. The unwilling, on the other hand, while already disregarding their obligations under binding law, will not be impressed by any new legislation, and, therefore, initiatives to shift the balance towards 'more conventions' or 'more political declarations' are useless and to a certain extent even counterproductive. Firstly, because States already abiding by the law are now obliged to implement measures which go beyond their legal obligations and, secondly, because non-complying actors will misuse and continue to misuse such initiatives to shield themselves even more against lawful attacks by exploiting the additional obligations imposed and implemented by the willing. For these reasons, I strongly believe and reiterate again the view according to which the current legal framework, as enshrined in the Geneva Conventions, the Additional Protocols and other binding treaty and customary law, is sufficiently 'armed' to cope with modern challenges on the battlefield, provided (of course) that belligerent parties abide by these obligations.

Now, the same also applies in relation to the problematic of humanitarian access or relief actions. Here too, I believe that the current framework is balanced and reflects a careful and acceptable compromise between the humanitarian considerations which request the belligerent parties to ensure that the civilian population is sufficiently supplied with essential/indispensable goods for its survival and, if not, to allow the free and unimpeded passage of relief consignments by impartial humanitarian agencies or organisations, subject to the conditions laid down in LOAC (GC IV and AP I). The risk associated with the current framework is that belligerent parties arbitrarily withhold these supplies to the civilian population by abusing the treaty exceptions (such as the security requirements and the rights of control). But here too, new legislation will not solve the problem. Those abiding by their obligations already integrate relief elements in their operational plans, in the main body, as well as in the CIMIC-Annex (Civil-Military Cooperation) to the OPLAN (Operational Plan). This does not mean that everything is settled, but at least the foundations exist in order to coordinate relief actions with the military. In terms of practical implementation, there is no magic 'one size fits all'-bullet, but the law expressly refers to the conclusion of technical arrangements to be concluded on a case-by-case basis.

The real problem is how to ensure that unwilling belligerents abide by their obligations. That is not an easy endeavour. While acknowledging that accountability for war crimes is an important tool, other mechanisms must be explored to achieve the desired effect. One way of at least partially delivering relief goods and material to the population is for humanitarian agencies to accept a pragmatic approach when dealing with the warring factions, in particular, in situations of NIAC. Many actors would for example refuse to be 'escorted' by military convoys to their final destination, but if this is the price to pay to alleviate the suffering of the civilian population, it should at least be further explored. Another venue to 'encourage' belligerent parties to abide by their obligations may be the imposing of sanctions. On numerous occasions, the UN called upon belligerent parties to facilitate the work of humanitarian agencies 'for which access to victims is essential'. At first sight, it appears to me that imposing targeted sanctions might be more persuasive than potential countermeasures or even military enforcement actions in accordance with the UN Charter. The extent to which this option may prove effective, requires probably more and detailed study, which goes beyond the scope of my presentation.

Thank you for your attention and I look forward to your comments or questions.

Humanitarian corridors: a last resort subject to manipulation

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This intervention is based on: L'Homme Maelle, "Humanitarian Corridors: Negotiated Exceptions at risk for Manipulation", Journal of Humanitarian Affairs*, vol. 4, n. 1 (2022), 48-52*.

Calls for the opening of humanitarian corridors have become so common that they seem increasingly considered a relevant modality of humanitarian action despite much ambiguity around what they are expected to achieve, how much protection they offer, and how they are likely to affect the overall dynamic of conflicts. While the expected life-saving benefits of successfully negotiating safe passage of civilians out of besieged areas certainly justify the repeated attempts, a number of voices have also recalled that "corridors are the sign of an extremely deteriorated situation where civilians are targeted".[1] In fact, whether they are meant to allow the unobstructed deployment of humanitarian aid and/or the evacuation of civilians, humanitarian corridors are, by definition, temporary and limited in geographical scope. As such, they are a last resort, a timid assertion of the principle of free access to victims, in an extremely dire situation. They also have a history of being manipulated by warring parties or third parties to serve war strategies or to project an image of civility.

The concept itself lacks a consistent definition and is highly vulnerable to political interpretation

A basic definition is that corridors are a strip of territory that is supposed to allow both the deployment of humanitarian aid and the movement of civilians. The possibility of their opening refers to the principle of free passage affirmed in the Geneva Conventions but the concept itself actually does not exist in treaty law. The notion of "relief corridors" appears in 1 General

[1] "Guerre en Ukraine: 'C'est très inquiétant d'entendre parler de couloirs humanitaires', réagit Médecins sans Frontières" (Franceinfo, March 7, 2022) www.francetvinfo.fr/monde/europe/manifestations-en-ukraine/guerre-en-ukraine-c-est-tres-inquietant-d-entendre-parler-de-couloirs-humanitaires-reagit-medecins-sans-frontieres_4995639.html.

Assembly Resolution (45/100) of 1990 (14 December) and then resolutions on Syria authorised the opening of "border crossings" to allow aid delivery to opposition-held areas – but that is it. No other resolutions explicitly refer to the idea of corridors as a concrete way to deliver aid effectively.

Without a normative framework, it is hard to give a consistent definition of what these corridors are. Most of the time, a corridor provides safe passage in an area of active fighting but appeals to the opening of corridors have also been an attempt to facilitate access in the face of border closures or bureaucratic constraints. In 2014, during the Ebola epidemic, the Ivory Coast and Senegal announced the opening of "humanitarian corridors" with Guinea and Liberia, to allow aid to enter these two countries heavily affected by the epidemic. Another example is Myanmar, in 2008, after cyclone Nargis, where part of the international community called for the opening of air and sea corridors to deliver aid in the region most affected, in an attempt to reduce State control over aid. Then, in its most recent definition, the notion has been used to designate a specific mechanism of relocating refugees from Lebanon and Libya to Europe. Therefore, what corridors are supposed to achieve, is highly context-specific.

This is especially true of corridors intended to allow safe movement of civilians: because they can be used both for the repatriation of the population or for its evacuation (which is the most frequent). The evacuation can be massive or selective: in Syria, the term "humanitarian corridor" has been used widely to refer to the "sheltering" of civilians (Alep 2016, Eastern Ghouta 2018, Rubkan 2019). In Gaza, the evacuation routes for the wounded were also described as humanitarian corridors.

So, the terminology is ambiguous at best, potentially misleading at worst. Especially because of the disconnect between the apparent straightforwardness of the concept and the actual complexity of what it refers to in practice.

Negotiating corridors in practice: feasibility, dilemmas, risks

Here I should mention that a bias of my research is that I have been looking at cases gone wrong, perhaps overlooking a number of contexts where the outcome of corridors was more favourable. I am not trying to discredit humanitarian corridors as a whole, dogmatically. I am just trying to highlight the potential risks associated with them.

First of all, corridors are a huge compromise: by definition, they are temporary and limited in geographical scope. They are thus like a restricted "window". What happens outside their perimeter or after they are closed is a major concern. Because referring to an area (or moment in time) as 'special'

or ‘humanitarian’ means that you are basically portraying everything around it as ‘not humanitarian’. In the case of evacuation corridors, as we all know, civilians should always be protected, even if they choose not to evacuate. What is important here is that successfully implementing evacuation corridors does not or should not make a besieged city a legitimate military target after the corridor is closed.

Another risk associated with the implementation of humanitarian corridors is that the protection of civilians using those corridors can never be guaranteed, even when the corridor is consented to by both parties (which is the only way it will work – consented to in principle but also in practice: where is the corridor on the map, point A to point B, both important). Even military protection of humanitarian spaces has proven ineffective and sometimes counterproductive. In former Yugoslavia and in Rwanda, for example, corridors were targeted, and by all parties. Here it is worth mentioning that the forces controlling the enclave can also be the ones who are reluctant to let people flee because they might try to use civilians as human shields (Sri Lanka 2009). Therefore, humanitarian actors actively engaged in supporting the corridor might convey a false impression of safety to people planning to use them.

A third risk is that corridors are diverted for propaganda or military purposes. Indeed, humanitarian corridors have a very strong impact on the overall dynamic of conflicts because they directly affect issues of territorial control, they contradict siege strategies and they disrupt military operations. So, it should not come as a surprise that they can be misused by those who claim them. For example, they have been used to smuggle weapons and munitions, and to repatriate troops (Biafra 1968-69, Zaire-Congo 1996-97). They can also be used to divert attention from atrocities happening elsewhere. More broadly, calls for the opening of corridors are part of a wider context of instrumentalization of humanitarian rhetoric, whereby everything is ‘humanitarian’ these days and everyone is trying to keep up appearances on the international stage. ‘Humanitarian’ concern has become a way for States to project an image of civility and to put the blame of war on the other party.

Wider consequences for humanitarian access

There is a fundamental incompatibility between siege strategies and humanitarian imperatives, insofar as the aim of a siege is to trap the population and deprive it of the goods essential to its survival. We can, therefore, assume that when a corridor is authorized to allow supplies to reach civilians in need, it is more a matter of the belligerent maintaining a

semblance of respectability in the eyes of public opinion or the international community, than a matter of meeting the extent of the needs.

There is no denying that such corridors are useful and sometimes even necessary. But they are no 'silver bullet', nor are they an appropriate way to organise a humanitarian response. They can serve as a negotiation tool when dealing with a State/armed group conscious of its image internationally or at home but being overly satisfied with them would be like renouncing a claim to broader humanitarian access. As a humanitarian actor, MSF's role is to do everything we can to alleviate the suffering on both sides of the front line, to bear witness to the situation on the ground and to demand that people caught up in cycles of violence be protected, that indiscriminate attacks and bombings cease, and that health be respected and protected.

As for humanitarian corridors, we shall refrain from considering them the 'new normal' or a 'necessary compromise'. They are, above all else, a restrictive assertion of the principle of free access which entails foregoing wider access and potentially leaving other needs unaddressed.

Humanitarian notification systems: some common challenges and misconceptions

Nathalie WEIZMANN
Senior Legal Officer, UN OCHA

Humanitarian notification is probably not something that many of you have necessarily heard about, and probably not something you were necessarily expecting to hear about on this panel. It is a form of civil-military coordination that humanitarian organizations carry out. It has often been referred to as "deconfliction", which is a military term, and those military experts in the room will have a very particular understanding of that. We are trying to shift our description of this mechanism and call it "humanitarian notification" instead, so as not to conflate the two kinds of activities.

Humanitarian notification is a simple concept. It consists of giving parties to an armed conflict the GPS coordinates of humanitarian assets – offices, warehouses, sometimes residences, as well as convoys moving from point A to point B with some advance notice and with details of vehicles and personnel. This information is passed on to the parties so they can factor it into their military operations in order to fulfil the obligations we have been talking about: not directing attacks against humanitarian personnel or assets, not carrying out disproportionate attacks, and taking all feasible precautions in planning and launching attacks in the vicinity of these humanitarian assets and moving humanitarian convoys.

When I describe humanitarian notification for the first time, I often explain that it is the equivalent of a marking on a rooftop – for example, the equivalent of a red cross on a hospital rooftop. As simple as this sounds, it has generated an incredible amount of confusion, dilemmas, and challenges. I thought I would share some of those with you today.

As the name suggests, the UN Office for the Coordination of Humanitarian Affairs (OCHA) has the role of coordinating humanitarian action on behalf of the UN but also with hundreds, if not thousands, of humanitarian organizations all over the world, including in situations of armed conflict. In some situations of armed conflict, OCHA carries out humanitarian notification for the activities of UN humanitarian entities and NGOs.

One of the first challenges we face is in determining which organizations can participate in this arrangement. Even if we keep the scope narrow and say only humanitarian organizations may participate, this can sometimes be difficult to apply because many organizations carrying out humanitarian

work will also carry out work that is not strictly humanitarian, or because other types of organizations are working alongside humanitarians and want to be included. If we limit the scope to trusted humanitarian organizations that we know and partner with, then we can have a level of confidence that the assets and personnel that we are notifying are fulfilling a humanitarian function. The more we expand the scope, the less confidence we might have in their function. To give an example, in Yemen, more than 20,000 sites have been notified to the Saudi-led coalition. These extend far beyond facilities that serve a humanitarian function and have included water infrastructure and UNESCO World Heritage sites. You can see how that confidence could get diluted when a wide range of facilities is notified.

Other challenges arise when deciding which parties to notify. For instance, some parties might have more of a capability to factor in GPS coordinates than others. This does not mean they do not all have the same obligations under international humanitarian law (IHL). But we do need to have some confidence that the information we pass on will actually be factored in by the party receiving it. However, if we *do not* share coordinates with *all* the parties – and we know there can be many parties to a given conflict – this could lead to a misperception that we are not being neutral. Since the UN endeavours to remain neutral throughout its humanitarian activities, sharing coordinates with only some parties might lead to the wrong impression that we are partial to some parties over others. This can undermine the trust that humanitarians need to build with parties, and, ultimately, their security and access to civilians in need.

Another challenge lies in updating the lists of facilities we have notified. If we learn of a change in circumstances that would have us remove a facility from the list because it no longer serves a humanitarian function, we do not want to be signalling any kind of information of military value to the party being notified of the change. For instance, if we happen to learn a certain building is now being used for purposes that are not humanitarian, we will want to amend our list of notified facilities, but without passing information that could give a party an advantage. We have, therefore, found ways of ensuring regular list updates without signalling with real-time changes in circumstances.

One very common question we get is: How do we know that the notification system works? As you might imagine, any organization that takes on such an initiative is going to want to know if it works and will want to assert that it works. But it can be difficult to measure how well it works because the fact that a humanitarian facility or convoy is unharmed does not in itself prove anything. For all we know, none of the coordinates for the facility or convoy were ever factored in by the party receiving them, and there was never any risk to facility of convoy in the first place. Or, very simply, IHL

was complied with, and the facility or convoy was spared. So, it can be quite difficult to assess that notification works.

In addition to these challenges, there are some common distortions that we also have to address. Among humanitarian partners, the public and the media, there is a common and unfortunate notion that notification of a humanitarian asset or convoy movement somehow confers protection to them or guarantees that the convoy can move. But, as we know, the application of IHL is what determines this, not notification. The flipside is that some also seem to think that an asset or convoy that is not notified is somehow less protected under the law. We have seen hints of this, whether out of confusion, misunderstanding or even opportunism. For example, in an incident in which a detainee facility was struck, the party that reportedly launched the attack said that it had not received any requests from the UN or NGOs to notify the facility. You can see how this can turn into a very distorted and disturbing belief that notification was never meant to create, and of course is wrong. In another instance, a party has said that notification violates the norms of IHL by conferring protected status to certain sites. Of course, notification does not do this in any way, nor does it purport to do this.

In addition to the mistaken belief that notification confers protection, some believe that it provides *absolute* protection, in other words some kind of immunity from attack, without any of the assessments that IHL requires, e.g. of the use being made of the notified asset and whether that use renders it a military objective, or whether the expected incidental civilian harm would be proportionate. This results in pressure from the public or some NGOs to assert, when a notified asset is hit, that this is a violation of IHL and that criminal prosecution should ensue.

Another misconception we encounter quite often, and is at times self-inflicted, is that humanitarians need to wait for a party to acknowledge notification of a convoy's movement before proceeding with the movement. When you consider that it is a party's IHL obligation to allow and facilitate the passage of humanitarian relief and IHL in no way requires that humanitarians ask for permission for each and every movement, you can see how humanitarians would be restricting themselves by waiting for some kind of signal that they can move. Of course there are measures of control that a party can impose, but this does not mean that humanitarians need to be requesting permission for every single movement. If they self-impose such a requirement, then you could see how some parties would seize the opportunity to control each and every movement. Within the humanitarian community, we have to overcome this by satisfying our internal security requirements while also ensuring that we do not dilute understandings of what IHL does and does not require.

There is often a reliance on humanitarian notification as the principal channel of dialogue with parties to a conflict. Sometimes there is no other channel, and yet there must be multiple channels of communication between humanitarians and parties, as we heard in earlier sessions about civil-military coordination. If there are going to be obstacles along a humanitarian convoy's route, then notification is not the channel for discussing how to overcome them. If something bad happens on the route, then notification is not the channel for addressing the incident. I often try to simplify this concept for colleagues by describing the need for different walkie-talkie channels. The channel for notifying GPS coordinates is not the same as the channel for discussing other aspects of humanitarian operations. Nor is it a channel for debating whether a facility serves a humanitarian function or whether a facility is or is not protected under IHL at any given moment. We have faced the possibility that some parties receiving coordinates would argue that the facilities are not protected. But notification does not entail agreeing or disagreeing that an object is protected; it is simply designed to identify the location of humanitarian assets and movements so that they can be factored into military operations as part of a party's own "homework" in the first place.

Related to this, another common expectation is that we somehow verify the ongoing day-to-day use of some of these notified facilities, perhaps with an expectation that we would inform a party if there is some kind of military use of it or military activity nearby. Of course this is not something that humanitarians would be doing. This would be for the parties to the conflict to do.

I hope to have raised some awareness of these common challenges and misconceptions, hopefully so that participants can help demystify them as you encounter them. The onus of complying with IHL always remains with the parties, and humanitarian notification is simply an effort to maximize the opportunity for parties to factor in information that they should be seeking anyway, if they do not already have it. It is important to clarify this at the outset and throughout notification efforts.

Protected zones under IHL, the ICRC perspective

Tristan FERRARO
Senior Legal Adviser, ICRC

Protected zones (PZ) have been at the forefront of the discussions concerning certain contexts such as Syria, Yemen, or Ukraine, as an ultimate solution to protect those affected by armed conflicts. However, this issue is not a new one.

Even before the entry into force of the Geneva Conventions of 1949 and their Additional Protocols, some initiatives were undertaken decades ago to create areas where certain categories of persons – based on their vulnerability – would be sheltered and protected from the effects of armed conflicts (for instance in Madrid in 1936 or in Jerusalem in 1948). The rationale behind these initiatives is still pertinent and reflected in current IHL rules establishing and governing PZ.

What does IHL say about PZ? How does it deal with PZ?

Let us first address a terminology issue: why is the expression "PZ" used by the ICRC while it is not found as such in IHL treaties?

Indeed, IHL foresees different categories of zones, each of them using a different denomination. However, the ICRC regroups them under the expression "PZ" due to the overall objective they pursue i.e. to reinforce the protections afforded by IHL to certain categories of persons specially affected by armed conflicts. In addition, in the Additional Protocol I of 1977, these zones are included in Section I of Part IV of this instrument dealing with the general protection of the civilian population against the effects of hostilities (more specifically in the Chapter V of this section dealing with localities and zones under specific protection). Eventually, practice shows that the belligerents – when devising PZ – have often fudged on the different categories of PZ proposed by IHL by taking some elements stemming from each of these zones to identify the most appropriate solution for the situation at hand.

PZ were first introduced in IHL treaty law in 1949 in a few provisions of the Geneva Conventions I and IV, and then complemented by in 1977 in a couple of rules of Additional Protocol I. The advent of these instruments

and their provisions relating to PZ was considered as a major step forward in favour of an enhanced protection of the civilian population as in 1949 the set of rules protecting civilians from the effects of hostilities was much less developed than today.

The various categories of PZ under IHL

There are 5 categories of PZ under IHL rules:

- Hospital zones and localities (Article 23 of the GCI)
- Hospital and safety zones and localities (Article 14 of the GCIV)
- Neutralized zones (Article 15 of the GCIV)
- Non-defended localities (Article 59 of the API)
- Demilitarized zones (Article 60 of the API)

These 5 categories of IHL zones have specifics as they differ in terms of personal, geographical and temporal scope of application. They are also different when it comes to their modalities of establishment.

These PZ under IHL should also not be confused with other concepts developed outside IHL such as "safe havens" in northern Iraq in 91, "safe areas" in Bosnia in 92, the "safe humanitarian zone" in Rwanda in 94 or more recently the so-called "PoC sites" in South Sudan.

Zones foreseen under Article 23 of Geneva Convention I and Article 14 of the Geneva Convention IV can be regrouped (e.g.: Sri Lanka Jaffna Hospital in 1990 placed under ICRC protection)

These zones are characterized by their limited personal scope of application (as they concern mainly wounded and sick – combatants and civilians alike – as well as certain other categories of civilians based on their particular vulnerability: elderly persons, children under 15, expectant mothers and mothers of children under 7), by their location far from the battlefield and their small size. They have a broad temporal scope as they can be of a permanent character and can be set up in times of peace or AC.

The provisions governing such zones are quite short but are complemented by an Annex to Geneva Conventions I and IV proposing a Draft Model Agreement which may be considered as a blueprint for the belligerents willing to establish such zones. This annex provides an important guidance facilitating the establishment of zones by identifying

technical and procedural aspects, in particular, when it comes to supervisory mechanisms. This specific document, unfortunately, has never received the attention it deserves when zones have been considered. But this Annex has been the basis on which the ICRC proposed PZ in various context, notably in ex-Yugoslavia.

Neutralized zones under Article 15 of the Geneva Convention IV

If they follow the same rationale, these zones present different characteristics. They are broader in terms of personal scope of application as *all* civilians not directly participating in hostilities can be sheltered therein. They also differ in terms of geographical scope as they can be established in the zones of hostilities, are shorter from a temporal scope of application, require a written agreement which, however, can be signed at the level of field commander. Indeed, to reflect moving field realities and to allow a quicker conclusion of such agreements, the procedure foreseen by the Geneva Conventions to establish such zones ought to be pragmatic, practical and simple.

Neutralized zones have formed the backbone of IHL zones generally resorted to in practice, notably under the ICRC auspices (in 1971 in Dhaka, in 1975 in Saigon, Nicosia and Pnom Penh but also in 1991-1992 in Vukovar, Osijek and Dubrovnik). It is to be noted that the neutralized zones initiated and administered by the ICRC have been based on the ICRC's recognized right of initiative under Common Article 3 and Articles 9/9/9/10 of the Geneva Conventions to set up in a situation of acute emergency when such zones are almost the last resort to save victims of armed conflict.

Non-defended localities under Article 59 of Additional Protocol I

This PZ corresponds to a detailed update in Additional Protocol I of 1977 of the notion of undefended towns foreseen in Article 25 of The Hague Regulations of 1907.

The objective of this provision is – during hostilities – to exclude specific areas from the scope of nearby military operations to protect the population therein. It indicates that the area has been demilitarized and that its controlling party will not put any armed resistance therein.

The main difference comparing to other PZ lies in the formalism attached to the establishment of this PZ as it requires not an agreement but only a unilateral declaration by the party in control of the locality concerned

addressed to its enemy. The acceptance of the declaration sent by the enemy is, however, not discretionary as the addressee is obliged to accept it and to recognize the establishment of such zones if the conditions spelled out in Article 59 of Additional Protocol I of 1977 are effectively met in reality notably the removal of military personnel and equipment.

Demilitarized zones under Article 60 of Additional Protocol I (e.g.: "zone of confidence" established on the Ivory Coast in 2003)

These zones are to some extent similar to those described in Article 59 of Additional Protocol I in their spirit. However, they slightly differ when it comes to the procedural aspects of their establishment. An agreement is required as per the Geneva Conventions PZ but there is some flexibility for its conclusion: verbal agreements or exchange of reciprocal/concordant declaration are also valid for the purposes of Article 60 of Additional Protocol I. In addition, demilitarized zones are limited to areas located outside the zones of combat and can even be established in peacetime.

Overall, in abstract, the main difference existing between Geneva Conventions zones and Additional Protocol I PZ lies in their personal scope of application: Additional Protocol I PZ are initially set up in order to protect persons that *already* reside/inhabit in the area in question while GCs zones normally cover those seeking refuge in the PZ in question. However, under the Additional Protocol I's rules governing PZ, nothing would preclude the possibility that such zones would also shelter persons whose usual place of residence is located outside the PZ.

Are IHL rules governing PZ only applicable in IAC?

As mentioned earlier, IHL rules on zones are exclusively included in IHL instruments regulating international armed conflicts as a matter of treaty law. No provision relating to the reestablishment of PZ can be found in Common Article 3 to the Geneva Conventions or in Additional Protocol II governing non-international armed conflicts. However, belligerents involved in non-international armed conflicts could transpose by analogy existing international armed conflict rules dealing with PZ. Common Article 3, in particular, allows parties to the non-international armed conflict to bring into effect other rules of IHL by means of special agreements.

It is also worth mentioning that military manuals of key stakeholders such as the US, UK, Germany, Canada or France include references to PZ, all of

them having a broad scope of application covering both international and non-international armed conflicts.

Eventually, IHL customary rules (ICRC customary rules 35, 36 and 37 dealing respectively with zones for wounded and sick, demilitarized zones and undefended localities) contain strong prohibitions to attack PZ both in IAC and NIAC while not expressly referring to the establishment of such zones.

Features common to PZ under IHL rules

Despite the different categories of PZ above mentioned, in practice, the establishment and implementation of PZ evidence that belligerents and notably the ICRC – as the main humanitarian actor for establishing PZ – have merged the different categories foreseen by IHL (e.g.: Osijek PZ) while relying mainly on neutralized zone options. From the examples mentioned *supra*, as well as from the ICRC experience on the matter, common characteristics of PZ emerge:

1. Establishment of PZ is not compulsory. That is only a possibility left to the belligerents. PZ cannot, therefore, be imposed upon belligerents under IHL. Establishment of such PZ generally based on proposal/initiatives of impartial humanitarian organizations, notably the ICRC, which has been very often at the initiative of the establishment of these PZ, notably under its neutral intermediary function favouring its acceptance by parties to the armed conflict;
2. PZ must be demilitarized in order to lose their military value for the parties to the AC, in particular, the adverse party. It should not be placed in a location which, in itself, would constitute a military advantage for the belligerents if captured. Ensuring the civilian character of the zones is a must for PZ to take form;
3. PZ require a form of agreement/acceptance between the parties concerned (i.e. all the parties operating in the area where the PZ should be established). Formalism for such agreement is flexible but must evidence the explicit recognition of such zones by all the parties concerned;
4. PZ necessitate that the parties to the conflict concerned express a will to respect basic IHL rules aimed at sparing all those hors de combat from the effects of hostilities. In this regard, the organized and well-structured nature of the parties involved is a prerequisite for PZ. In addition, the pattern of armed conflicts also matters for the establishment of PZ: if an armed conflict is characterized by violations of IHL rules protecting

civilians in the conduct of hostilities, it is unlikely that PZ could ever be established in such situations;

5. PZ – for their effective establishment – require strong supervisory mechanisms. The establishment of PZ in situations of armed conflict will depend on a certain level of trust/confidence between the belligerents concerned, in particular, to give assurances to the enemy that the zones in questions are still of a civilian character and, therefore, not used for hampering its military operations aimed at overcoming the adversary. The existence of such level of trust is not a given, in particular, in contemporary belligerency. For this reason, in order to ensure the effective establishment of a PZ, it would be important to accompany it with a kind of supervisory mechanism (see for instance the 2003 zone of confidence with ECOWAS involvement and then UN peace mission + French troops). In this regard, guidance can be found in the above-mentioned Geneva Conventions Draft Model Agreement, but the parties concerned are free to set up another framework in which neutral intermediary could play a useful role.

IHL rules governing PZ also share one characteristic (one could say one flaw): they do not detail how PZ should be administered. This is a key issue as administering a PZ could be a heavy task: policing, controlling entry/exit with the view to ensuring that persons not entitled to enter and stay will not abuse PZ and not undermine its protected status, taking care of wounded and sick, meeting the basic needs of the population in the PZ.

To sum up, what is needed for a PZ is: the existence of well-organized and identified parties to the conflict, a minimum level of respect of IHL rules, a minimum level of trust between the belligerents concerned, as well as the availability of a well-accepted broker.

Based on ICRC's experience, to be successful, PZ would necessitate the following ingredients, be of a small size, have a limited number of persons protected entitled to benefit from the zone, be of short duration, proposed, organized and administered by a trusted neutral intermediary such as the ICRC.

Conclusion

When implemented, PZ can be a very effective tool to protect vulnerable people in armed conflicts. PZ under IHL are protection enablers. They permit the reinforcing of existing IHL protections afforded to certain categories of persons by combining it with protection given to an area in which vulnerable individuals find themselves. PZ IHL rules, therefore, establish a double layer

of protection. IHL rules on PZ add another layer of protection to civilians and other persons *hors de combat* by providing a framework in which existing protections under IHL can be implemented more efficiently.

The fact that no agreement can be found among the belligerents concerned in order to establish PZ does not mean that those trapped in the armed conflict will be bereft of any protection. All the other applicable IHL rules protecting the civilian population from the effects of hostilities continue to apply, in particular, the IHL rules governing the conduct of hostilities, as well as the IHL rules governing humanitarian access and humanitarian activities whose application are not conditioned by the prior establishment of PZ.

Concluding session

Closing remarks

Edoardo GREPPI
President, IIHL

Excellencies, Ladies and Gentlemen, I would like to make a few closing remarks as we come to the end of this 46th Round Table on the topic of "Strengthening IHL compliance: the conduct of hostilities, the protection of essential services and humanitarian assistance in contemporary armed conflict".

The topic of compliance with international humanitarian law has been given urgent priority due to recent world events. Public concern with failures of compliance is widespread. It seems to many observers that the problem is not whether the law is known, or how it might be applied in particular circumstances, or even whether the existing law is sufficient. No, the core problem, which this Round Table has addressed, is how to secure or compel compliance with the law at all.

We cannot allow a situation where the international community does not consider the enforcement of the *jus in bello*. Thus, the importance of this Round Table. Open discussions like this, in the spirit of Sanremo, amongst experts is beneficial for the public interest. The goal is to promote a well-informed understanding so that when international events happen, discussions and comments can occur with a sympathetic understanding. This understanding should not only focus on what cannot be done, but also on what is possible, and the potential for innovative development. When States, armed groups, and concerned parties know that their policies and actions will be comprehended and discussed intelligently, it encourages them to explain their decisions and practices.

During the Round Table we have heard valuable contributions and insights from across the spectrum of actors and academic perspectives.

The tone was very much set by the keynote speech of Professor Michael Bothe who, reflecting on his unmatched experience since his first Round Table in 1972, evoked a broad sweep of enforcement initiatives and mechanisms since the creation of the Additional Protocols in the 1970s.

I would like to highlight a few elements for reflection offered by our dear friend Michael Bothe.

It is one of the merits of the two Protocols to have confirmed the principle of distinction.

The phenomenon of asymmetrical conflicts continues to be with us. Today, there are non-state actors of different types. There is less state control of organized violence.

A key role is played by technical innovation.

Artificial Intelligence is both a risk and a chance for achieving useful purposes.

A related issue concerning the principle of distinction is proportionality and necessary precautions: what degree of collateral damage is unacceptable and what measures of precaution have to be taken in order to avoid transgressing this line? There are two issues, both regarding so-called knock-on effects:

- The vulnerability of civilian populations under modern conditions of life;
- The relevance of long-term effects.

A question is whether and to what extent facilities providing essential services constitute military objectives because they are dual-use objects.

The Additional Protocols make it clear that there is a duty to provide, facilitate and accept humanitarian assistance.

As far as humanitarian assistance is concerned the agreement may not be refused for arbitrary reasons. What does this mean? There must be concrete military circumstances justifying refusal. A general wish to win a war is not a valid reason in this sense.

In the case of international conflict, it is undisputed that it is the party physically controlling an area where an assistance mission (relief in the terms of the Protocols) needs to operate who has responsibility to allow the implementation of the unimpeded passage of humanitarian aid.

In the case of non-international armed conflict, there is a regrettable, but widely argued interpretation that it is the State on the territory of which a non-international armed conflict occurs, regardless of the question whether the sitting government controls the relevant area, who has that responsibility. This is a misinterpretation of Art. 18 AP II.

It is high time that the international community abandons this misinterpretation and accords to the term "party concerned" in AP II (whose agreement is necessary) the same meaning it has in Art. 70 AP I, namely the party physically controlling relevant territory. Thousands of victims cry for it.

On the issue of compliance, the Geneva Conference 1974/77 created better substantive law. It also made modest progress concerning procedures to ensure compliance. But a tragic record of non-compliance remains, it may even have deteriorated.

There is the development of international criminal law, including the establishment of competent international courts, and universal jurisdiction. There is recourse to human rights procedures to foster compliance with IHL, the IHFFC established under AP I, numerous inquiry procedures established

by the Human Rights Council, or by other organs of the UN, by NGOs. There is a confusing array of fact-finding activities. Ascertaining relevant facts is important for ensuring compliance with the law in general and with IHL in particular. Yet a little order should be put into this chaos.

Professor Bothe's powerful evocation of Martti Koskenniemi's words that international law is 'the Gentle Civilizer of Nations' set an excellent tone for our discussions. Both our thoughts and wishes go to Professor Bothe for his speedy recovery: we have very much missed his attendance at what would have been his 51st anniversary Round Table.

The Round Table then went on to consider:

- The protection of essential services and humanitarian assistance;
- Compliance with IHL in the conduct of military operations;
- The role of operational military planning and risk assessments;
- The protection of civilian populations;
- Challenges to the delivery of humanitarian assistance; and
- Key humanitarian tools for the protection and delivery of essential services.

It would be invidious of me to single out any particular contributor. All were excellent. And, most importantly, the widest possible range of voices were heard in debate. This, for me, is the very spirit of Sanremo: the most difficult and contentious issues being freely discussed in a friendly atmosphere of respect and mutual understanding with all aspects of the problem openly and properly considered.

In reflecting on our discussions, the key theme that impressed itself upon me is the complexity of the problem of compliance. In particular:

- The intricacy and interconnectedness of the engineering and life-support systems (most especially water supply) in the modern built environment that we too often take for granted;
- The need for the military to be able to operate effectively, and at pace, with key decisions delegated down to relatively junior officers, operating with incomplete information in a world where warfare is becoming more complex, confusing, and lethal;
- The challenges of the multiplicity of actors, be they States, international and non-government organisations; armed groups and *de facto* authorities;
- And, finally, the vital role of humanitarian relief agencies in the vital and often technically complex role of famine relief, and the enabling arrangements, such as humanitarian corridors, that can be used to distribute life-saving supplies to the victims of conflict.

This Round Table has represented and addressed both areas of the law of armed conflict and refugee law, which are the Institute's key elements, and has been as broad in scope as possible. The continuing work of the Institute in disseminating IHL has been advanced and will be informed by the outcome of these two days. In due course the proceedings will be collated and published as has always been the case.

Having the event here in Sanremo has allowed for much fruitful discussion and exchange of views, while simultaneously facilitating the virtual attendance of friends and colleagues from around the World who have not been able to be with us in person.

This event could not have been possible without a lot of work and support. I would like to thank firstly the Municipality of Sanremo for their ongoing invaluable support to the Institute, the Italian Ministry of Defence, and the Italian Ministry of Foreign Affairs and International Co-operation. In addition, the financial support from the Swiss Federal Department of Defence, Civil Protection, and Sport; the British Red Cross; the Monaco Red Cross; and *Vittoria Assicurazioni*, has enabled us to bring speakers from all over the world to give the benefit of their knowledge. The diversity of participants is a key to the event.

Most importantly I would pass my sincere thanks to the ICRC with whose precious co-operation the Round Table has always been presented. Once again, the work with the team in Geneva has been excellent and ensured a successful event. Without their help this would not have happened. Special thanks to Abby Zeith and Tristan Ferraro, and my warmest thanks to my friend, Nils Melzer, in his precious double role as ICRC Director of International Law, Policy and Humanitarian Diplomacy, and as a Member of the Institute's Council and former Vice-President.

I would like to thank all the presenters and chairs whose contributions have made this Round Table the interesting and valuable event it has been. The time taken to prepare your remarks and, in many cases, travel to Sanremo, is much appreciated.

The young men and women of the Ruffini Aicardi High School have assisted with the smooth running of the event over the last few days with their administrative support, and my thanks go to them and the school.

Finally, the team here at the Institute, especially the Secretary-General Stefania Baldini (and I would like to express my personal thanks to Stefania, as this is her last Round Table before retirement from the Institute, for everything that she has done for the Institute as Secretary-General); Deputy Secretary-General, Gianluca Beruto; and a warm thanks to Edoardo Gimigliano, Sara Rossi, Alessia Ibba, Luna Aimeri, and Valeria Fuso, who have worked tirelessly to prepare the Round Table. Colonel Mark Dakers,

Director of the Military Department until a few weeks ago, and his successor Colonel Nigel Heppenstall, have worked hard on the programme of the Round Table. The staff have all contributed to what has very much been a team effort, assisted and guided by the Council of the Institute.

I will conclude my closing remarks now and it is only left for me to wish you all a safe journey back home and we hope to see you again here at the Institute in the near future.

As you know, my presidency of the Institute expires this afternoon. It is the time of my farewell.

As a member of the Institute since 1990, I had the privilege of living 33 of the 53 years of this extraordinary institution. I was then elected a Council Member 12 years ago and served as Vice-President with President Fausto Pocar. In 2019, I was elected President.

It has been a great honour and a huge responsibility.

It has been a privilege for me to work with my distinguished colleagues and friends in the Council.

We ensured that the activities of the Institute were regularly and continuously planned and carried out.

We worked on the challenges posed by the need to reform the organisation and management of the Institute.

Because we did not want to miss out on anything, we also faced a global pandemic.

I warmly thank the Council, the Vice-Presidents, the Executive Board and the Staff. We are a team, and everyone pulled his or her weight, conscious of the responsibility of giving a relevant contribution to the Institute's mission.

I wish the best to all of you, and LONG LIVE our beloved International Institute of Humanitarian Law!

Nils MELZER
Director of International Law, Policy and Humanitarian Diplomacy, ICRC; Council Member, IIHL

Thank you, Mr. President. Thank you, Edoardo.

On behalf of the ICRC, I also would like to thank you and all of you for our excellent and long-standing cooperation on the occasion now of this 46th edition of the Sanremo Round Table on current challenges of IHL. I will be brief, but I need to underline the importance of the Institute for us as a partner for the dissemination, the training and clarification of international humanitarian law and, particularly, I would like to underline the importance of the Round Table as a forum that brings together military, government, humanitarian organizations and academic representatives to discuss the practical challenges for the understanding and implementation of humanitarian law in the spirit of Sanremo.

The Round Table is not an echo chamber of the like-minded – our panels have shown that – but it is a venue, for the frank, competent and respectful exchange of views and experience and lessons learned. So, it is a venue where we can learn from each other and prepare the ground, and our own mind sometimes, for solutions. Personally, I am proud and grateful to have been part of the work and the history of the Institute and this Round Table since 2007, which you and I know is being dwarfed by the experience of yourself and others in the room. Certainly, I am humbled by the testimony of Michael Bothe, whose experience with the Institute dates back to 1972, a time when I was not even in kindergarten, and some of you may not even have been around. It is a good reminder to all of us, I think, that whatever we may have achieved or believed to have achieved in life, we are always standing on the shoulders of giants.

I am particularly grateful to have served with you, Edoardo, for the past four years, and the Council. You have had a particularly difficult period to be President of the Institute during the COVID-19 pandemic. Your leadership was very important during that time. And if, after the black swan event of COVID-19, we now have a white swan event of a Sanremo Round Table again, it is also thanks to your leadership. We know that you will obviously remain part of this community of Sanremo and so thank you for that.

I also would like to personally thank Stefania for your service which has been very, very valuable for the Institute and also for us at the ICRC, so thank you wholeheartedly for that. Also, to all the outgoing Members of the Council: it has been an honour working with you, and also to all the chairs and speakers and the interpreters who have worked hard to make this a

successful and inspiring event. And obviously thanks also to our teams both at the Institute and at the ICRC for making this Round Table possible.

Thanks to all of you and also to all the participants present and online: without you, these discussions would not be possible and would not have the importance they have.

A small outlook to next year. It is the year of the 75th anniversary of the Geneva Conventions of 1949. It is also the year of the 160th anniversary of the First Geneva Convention of 1864. It is the year of the 34th International Conference of the Red Cross and Red Crescent. So, it is an important year also for the Institute and I am looking forward to continuing to work with you and to hopefully marking this special year with a special Round Table event next year here in Sanremo.

Thank you very much to all of you!

Acronyms

AC	Armed Conflict
AGDA	Armed Groups and *de facto* Authorities
AI	Artificial Intelligence
AJP-01	NATO Allied Joint Doctrine, Edition E Version 1
AJP-3.20	NATO Allied Joint Doctrine for Cyberspace Operations, Edition A Version 1
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
AU	African Union
BRICS	Intergovernmental organisation including Brazil, India, People's Republic of China and South Africa
CANI	Conflit Armé Non International
CDE	Collateral Damage Estimation
CDEM	Collateral Damage Estimation Methodology
CHM	Commission on Human Medicines
CHMR-AP	Civilian Harm Mitigation and Response Action Plan
CI	Critical Infrastructure
CIMIC	Civil-Military Cooperation
CoA	Course of Action
CPAS	Comprehensive Performance Assessment System
CPB	Comprehensive Preparation for the Battlespace
CSO	Civil Society Organisation
DCA	Droit des Conflits Armés
DIH	Droit International Humanitaire
DoD	Department of Defense
ECOWAS	Economic Community of West African States
EWIPA	Explosive Weapons in Populated Areas
GC	Geneva Convention
GC I	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC IV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
GPS	Global Positioning System

IAC	International Armed Conflict
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDF	Israel Defense Forces
IDP	Internally Displaced Person
IDPs	Internally Displaced People
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
IHRL	International Human Rights Law
INGO	International Non-Governmental Organisation
IPB	Intelligence Preparation of the Battlefield
IPOE	Intelligence Preparation of the Operational Environment
IRL	International Refugee Law
IUCN	International Union for Conservation of Nature
JIPOE	Joint Intelligence Preparation of the Operational Environment
LEGAD	Legal Advisor
LOAC	Law of Armed Conflict
LONIAC	Law of Non-International Armed Conflict
Lt. General	Lieutenant General
MDMP	Military Decision-Making Process
MENA	Middle East and North Africa
MOU	Memorandum of Understanding
MSF	Médecins Sans Frontières
NATO	North Atlantic Treaty Organization
NATO SFA COE	NATO Security Force Assistance Centre of Excellence
NFI	Non-Food Items
NIAC	Non-International Armed Conflict
NSAG	Non-State Armed Group
OCHA	Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPLAN	Operational Plan
PKO	Peacekeeping Operation
PME	Professional Military Education
PSO	Peace Support Operation
PZ	Protected Zones
QIP	Quick Impact Project

R2P	Responsibility to Protect
RoE	Rules of Engagement
SDG	Sustainable Development Goals
SSG	Syrian Salvation Government
TEA	Target Engagement Authority
TSA	Target System Analysis
UN	United Nations
UNCHR	United Nations High Commissioner for Refugees
UNGP	United Nations Guiding Principles
UNOMOZ	United Nations Operation in Mozambique
UNOSOM	United Nations Operation in Somalia
USAWC	US Army War College
VCLT	Vienna Convention on the Law of Treaties

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The Round Table also constituted an important forum to discuss the interplay between different stakeholders and parties, as well as the establishment of most essential long-term cooperation between military and non-military law enforcement bodies, public institutions, civil society organisations, private entities (e.g. financial and economic stakeholders), NGOs and humanitarian actors.

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