

Volume 101 Number 912

INTERNATIONAL REVIEW

of the Red Cross

Humanitarian debate: Law, policy, action

Protracted conflict



ICRC

Aim and scope

Established in 1869, the *International Review of the Red Cross* is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

Members of the Committee

President: Peter Maurer
Vice-President: Gilles Carbonnier

Mauro Arrigoni	Jürg Kesselring
Hugo Bänziger	Thierry Lombard
Edouard Bugnion	Laura Sadis
Jacques Chapuis	Doris Schopper
Melchior de Muralt	Béatrice Speiser
Christoph Franz	Bruno Staffelbach
Katja Gentinetta	Heidi Tagliavini
Maya Hertig Randall	Barbara Wildhaber
Alexis Keller	

Editorial Team

Editor-in-Chief: Ellen Policinski
Thematic Editor: Jovana Kuzmanovic
Editorial Assistant: Kvitoslava Krotiuk,
Saman Rejali and Sai Sathyanarayanan
Venkatesh
Book review editor: Jamie A. Williamson
Special thanks: Filipa Schmitz Guinote
and Michael Talhami

International Review of the Red Cross
19, Avenue de la Paix, CH 1202 Geneva
CH - 1202 Geneva
t +41 22 734 60 01
e-mail: review@icrc.org

Editorial Board

Annette Becker
*Université de Paris-Ouest Nanterre La
Défense, France*

Françoise Bouchet-Saulnier
Médecins sans Frontières, France

Emiliano Buis
University of Buenos Aires, Argentina

Hilary Charlesworth
Melbourne Law School, Australia

Sarah Cleveland
Columbia Law School, US

Adama Dieng
*UN Secretary-General's Special Adviser for
the Prevention of Genocide, Senegal*

Emanuela-Chiara Gillard
*Institute for Ethics, Law and Armed
Conflict (ELAC), University of Oxford, UK*

Fyodor Lukyanov
*Russia in Global Affairs Journal; Council
on Foreign and Defense Policy, Russia*

Tasneem Meenai
Jamia Millia Islamia, India

Sorcha O'Callaghan
Humanitarian Policy Group, ODI, UK

Emre Öktem
Galatasaray University, Turkey

Marco Sassòli,
University of Geneva, Switzerland

Michael N. Schmitt
University of Reading, UK

Sun Shiyao
*Chinese Academy of Social Sciences
(CASS), China*

Andrew Thompson
University of Oxford, UK

Cover Photo: A group of children play football against a backdrop of destroyed houses in north west Yemen. April 2017.
Credit: Karrar al-Moayyad/ICRC.

Volume 101 Number 912

INTERNATIONAL
REVIEW
of the Red Cross

Humanitarian debate: Law, policy, action

Protracted conflict

CONTENTS

Protracted conflict

- 965 **Editorial: Protracted Conflicts: The enduring legacy of endless war**
Ellen Policinski and Jovana Kuzmanovic
- 977 **Interview with Lieutenant-Colonel Joven D. Capitulo PA**
Military Assistant to the Office of the Undersecretary for Defense Policy,
Department of National Defense, Republic of the Philippines

Voices and perspectives

- 987 **Stretched: Protracted conflicts and the people living in the midst of it all**
- 993 **Fragmentation of armed non-State actors in protracted armed conflicts: Some practical experiences on how to ensure compliance with humanitarian norms**
Hichem Khadhraoui

Humanitarian Needs

- 1001 **Reconstructing infrastructure for resilient essential services during and following protracted conflict: A conceptual framework**
Alexander H. Hay, Bryan Karney and Nick Martyn
- 1031 **From Operation Iraqi Freedom to the Battle of Mosul: Fifteen years of displacement in Iraq**
Cédric Cotter

Humanitarian-development nexus

- 1051 **Q&A: The ICRC and the “humanitarian–development–peace nexus” discussion**
Filipa Schmitz Guinote

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

- 1067 Delivering water services during protracted armed conflicts: How development agencies can overcome barriers to collaboration with humanitarian actors**
Edoardo Borgomeo

The law

- 1091 The notion of “protracted armed conflict” in the Rome Statute and the termination of armed conflicts under international law: An analysis of select issues**
Dustin A. Lewis
- 1117 International humanitarian law in Colombia: Going a step beyond**
Marcela Giraldo Muñoz and Jose Serralvo
- 1149 Protecting the right to life in protracted conflicts: The existence and dignity dimensions of General Comment 36**
Mona Rishmawi

Selected articles

- 1171 The notion of “acts harmful to the enemy” under international humanitarian law**
Robert Kolb and Fumiko Nakashima

Books and articles

- 1201 Internationalized Armed Conflicts in International Law**
Kubo Mačák
Book review by Andrea Harrison
- 1207 Military Professionalism and Humanitarian Law: The Struggle to Reduce the Hazards of War**
Yishai Beer
Book review by Andrew Carswell

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

Reports and documents

- 1213 The development of guiding principles for the proper management of the dead in humanitarian emergencies and help in preventing their becoming missing persons: First Expert's Meeting**

EDITORIAL

PROTRACTED CONFLICTS: THE ENDURING LEGACY OF ENDLESS WAR

Ellen Policinski, Editor-in-Chief, and Jovana Kuzmanovic, Thematic Editor and ICRC Delegate*

There is no instance of a nation having benefited from prolonged warfare.

Sun Tzu, *The Art of War*¹

When we think about the passage of time, especially as we get older, we may measure it in events—the birth of a child, anniversaries, holidays, or perhaps significant cultural or political events that we have observed and lived through. For many caught in seemingly endless wars, the milestones that mark time passing are more sombre. In testimonies of people affected by armed conflict, we see time also marked by grim events such as the beginning of a siege, the destruction of a home, the death of a family member, or the number of times they have had to flee. In Iraq, Om Nawwar recounts: “We spent our life here but now there’s nothing. We have to start from scratch. We have nothing left”.² Rebuilding becomes a way of life—as Mohammed in Syria tells us, “I realized that life has to go on; the war will not stop suddenly. We resumed our work We became older”.³

Ancient mythologies highlight the often destructive effects of time. According to Cicero, Kronos, the king of the titans, was also the god of time.⁴ Kronos was a destructive force, devouring his own children. When combined, the destructive forces of war and time can cause devastating effects on the population, which become even more severe as the war drags on. Wars, and their all-consuming destructive force, are becoming longer, more intractable and less likely to be resolved politically.⁵ In 2019, the International Committee of the Red Cross (ICRC) identified the needs of the civilian population in increasingly long conflicts as one of the main challenges related to international humanitarian law (IHL).⁶ At the time of writing, the average length of time that the ICRC has been present in each of its ten largest operations is forty-two years.⁷

Although war should be an exceptional circumstance, one feature of protracted armed conflicts is that they progressively become normalized. Rosa Brooks warns of the danger of wartime rules bleeding over into situations where they are not meant to apply, saying: “The distinction between war and non-war

* Thanks to Helen Durham, Bruno Demeyere, Filipa Schmitz Guinote, Vanessa Murphy, Helen Obregón Gieseken, Michael Talhami, Eirini Giorgou, Tilman Rodenhauser, Sai Sathyanarayanan Venkatesh and Saman Rejali for their valuable feedback on an earlier draft.

may be arbitrary, but we want it to be sharp and clear, because many actions that are considered both immoral and illegal in peacetime are permissible—even praiseworthy—in wartime.”⁸ For populations affected by war for years on end, decades in some cases, children are born and grow up in run-down cities, surrounded by the sounds of explosions, seeing their families and neighbours leave everything behind, struggling to access water, food and education. This becomes the norm.

The consequences of protracted armed conflicts are varied, including the cumulative effects of hostilities on infrastructure and health-care systems (among other systems), prolonged displacement, increased barriers to accessing services and support for groups facing specific risks among the population (including persons with disabilities), and interruptions to education, to name just a few.

The duration of humanitarian operations in protracted conflict settings has caused humanitarian actors to rethink their way of working, questioning the “linear and sequential continuum consisting of emergency aid—rehabilitation—development” and asking “for how many years can a situation be qualified as an ‘emergency’?”⁹ In light of the human suffering caused by the *uroboros* of seemingly endless wars, the *Review* has dedicated this issue to protracted conflict.

“Protracted”: A matter of law or a matter of time?

The term “protracted conflict” is one that defies precise definition, but the concept is not new. “Protracted social conflict” is a term that can be traced back to the international relations scholar Edward Azar, who characterized protracted social conflicts in terms of their intractability and longevity.¹⁰

1 Sun Tzu, *The Art of War*, Chap. II, para. 6, available at: <https://suntzusaid.com/book/2>.

2 See “Stretched: Protracted Conflicts and the People Living in the Midst of It All”, in this issue of the *Review*.

3 “Life in a War-Torn City: Residents of Aleppo Tell Their Stories”, *International Review of the Red Cross*, Vol. 98, No. 901, 2016, p. 19.

4 Marcus Tullius Cicero, *On the Nature of the Gods*, Oxford University Press, Oxford, 1997 (first written 45 BC).

5 Sebastian von Einsiedel, “Civil War Trends and the Changing Nature of Armed Conflict”, United Nations University Centre for Policy Research, Occasional Paper No. 10, March 2017, p. 2, available at: <https://cpr.unu.edu/civil-war-trends-and-the-changing-nature-of-armed-conflict.html>.

6 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”, *International Review of the Red Cross*, Vol. 101, No. 911, 2019.

7 In 2019, the top ten largest ICRC operations (in terms of expenditure) were in the Syrian Arab Republic, South Sudan, Iraq, Nigeria, Yemen, the Democratic Republic of the Congo, Afghanistan, Ukraine, Somalia and Myanmar. For more information on ICRC operations, see its annual reports available at: www.icrc.org/en/annual-report.

8 Rosa Brooks, *How Everything Became War and the Military Became Everything*, Simon & Schuster, New York, 2016, p. 21.

9 Marion Haroff-Tavel, “Do Wars Ever End? The Work of the International Committee of the Red Cross when the Guns Fall Silent”, *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 469.

10 See Edward Azar, “Protracted International Conflicts: Ten Propositions”, *International Interactions*, Vol. 12, No.1, 1985; Edward Azar, Paul Jureidini and Robert McLaurin, “Protracted Social Conflict: Theory and

“Protracted armed conflict” is not a legal category or legal classification of armed conflict – but does that mean the word “protracted” has no significance for IHL applicability? In this issue, Dustin Lewis looks at “protracted conflict” as it affects international criminal law’s jurisdiction to prosecute war crimes in non-international armed conflicts (NIACs) under the Rome Statute of the International Criminal Court, reflecting on what might be the implications of recognizing a separate legal category or subcategory of protracted NIACs.¹¹

There is no standard for how long a conflict must go on to be considered “protracted” in the colloquy, nor whether hostilities need be continuous. “Protracted” armed conflicts may be episodic, cyclical, “frozen”, long-lived insurgencies, long-standing situations of occupation, or wars between States where violence simmers at a relatively lower level than one might traditionally associate with armed conflict. Conflicts may appear to be resolved but later “relapse”, as is increasingly the case for civil wars. In 2017, a United Nations (UN) University Centre for Policy Research paper found that 60% of conflicts that ended in the early 2000s re-ignited within five years.¹² None of these are new phenomena, but some particular trends can be observed in today’s conflicts, such as settings that are increasingly urban, the role of new forms of technology, and the fact that these conflicts attract a large humanitarian presence.¹³

In line with the trend of wars (including so-called “long wars”) increasingly being fought in urban settings, both the destruction and the creation of urban infrastructure have become part of the way war is waged. In a previous issue of the *Review*, architect Eyal Weizman gives an example of how the role of the built environment in protracted occupation may be interpreted in the occupied Palestinian territories:

Violence operates according to various scales in terms of duration and speed. For instance, there is the slow violence of the settlement project, the slow encroachment of the land – transforming it, draining its water – which is lethal and destructive, but happens over years, if not generations. That slow violence sometimes converts into kinetic violence. The settlement projects require their own security: to have a settlement, you must be guarding it. You also need to patrol it – you need to raid the next town to discourage its population from resistance. This results in kinetic incidents like shootings, arrests, destruction of homes, *et cetera*.¹⁴

Practice in the Middle East”, *Journal of Palestine Studies*, Vol. 8, No. 1, 1978, p. 50. See also Mona Rishmawi, “Protecting the Right to Life in Protracted Conflicts: The Existence and Dignity Dimensions of General Comment 36”, in this issue of the *Review*.

11 See Dustin A. Lewis, “The Notion of ‘Protracted Armed Conflict’ in the Rome Statute and the Termination of Armed Conflicts under International Law: An Analysis of Select Issues”, in this issue of the *Review*.

12 S. von Einsiedel, above note 5.

13 ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 12 June 2020, available at: www.icrc.org/en/publication/4265-protracted-conflict-and-humanitarian-action-some-recent-icrc-experiences.

14 “Interview with Eyal Weizman”, *International Review of the Red Cross*, Vol. 98, No. 901, 2016, p. 23. See also Eyal Weizman, *A travers les murs: L’architecture de la nouvelle guerre urbaine*, trans. Isabelle Taudière, La Fabrique, Paris, 2008.

The combined effect of this “fast” and “slow” violence is felt most by the civilian populations living in places where armed conflict, including occupation, lasts for years or decades. The effects become more severe as time goes on. Exposure to conflict in childhood has lifetime effects on health, and negative health effects have been shown to be passed down through generations. Interruptions to education and lower lifetime economic productivity mean that, in socio-economic terms, conflict will be felt far into the future.¹⁵

Even where IHL is respected, the effects of hostilities can be devastating – even more so in protracted armed conflicts, where the effects of consecutive attacks are compounded over time, increasing the vulnerability of civilians, and can lead to the disruption of essential services, which is particularly visible in urban areas. In conflicts that last for years or decades, the cumulative effects of hostilities may degrade essential services beyond repair. There is as of yet no consensus on how far into the future a reasonable commander should look to comply with the rules on proportionality and precautions in attack, but determining the reasonably foreseeable effects of an attack can be more complicated in protracted conflicts, where essential services may already be degraded and damage to civilian infrastructure will have a greater impact on the civilian population.¹⁶

For organizations, operating in protracted armed conflict presents a range of challenges that has already generated much reflection, intrinsically linked to the decades-old discussion of how to bridge the “humanitarian–development divide” previously framed in terms of a “continuum” and now broadened and reconceptualized as a “triple nexus” of humanitarian action, development and peace.¹⁷ The search for coherence and complementarity between humanitarian, development and peace efforts in protracted conflicts challenges many aspects of the traditional operational and financial architecture of aid. It also raises mindset and identity issues among many of the stakeholders involved in these efforts. This is discussed by Filipa Schmitz Guinote in this issue’s Q&A, where she outlines the ICRC’s pragmatic approach to the nexus as an “ecosystem of actors of influence, resources and expertise” that can help to build sustainable humanitarian impact with and for affected populations.¹⁸

15 Paul Corral, Alexander Irwin, Nandini Krishnan, Daniel Gerszon Mahler and Tara Vishwanath, *Fragility and Conflict: On the Front Lines of the Fight against Poverty*, World Bank Group, 2020.

16 See Mark Zeitoun and Michael Talhami, “The Impact of Explosive Weapons on Urban Services: Direct and Reverberating Effects across Space and Time”, *International Review of the Red Cross*, Vol. 98, No. 901, 2016; Isabel Robinson and Ellen Nohle, “Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas”, *International Review of the Red Cross*, Vol. 98, No. 901, 2016, p. 125.

17 See Hugo Slim, “Joining what Belongs Together? The Triple Nexus and the Struggle for Policy Synthesis”, *Rural 21*, Vol. 53, No. 2, 2019, available at: www.rural21.com/fileadmin/downloads/2019/en-01/Rural21_1_2019.pdf; Filipa Schmitz Guinote, “A Humanitarian–Development Nexus that Works”, *Humanitarian Law & Policy Blog*, 21 June 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/06/21/humanitarian-development-nexus-that-works/>. See also articles dealing with this topic in previous issues of the *Review*: Jonathan Moore, “The Humanitarian–Development Gap”, *International Review of the Red Cross*, Vol. 81, No. 833, 1999; Lucy Earle, “Addressing Urban Crises: Bridging the Humanitarian–Development Divide”, *International Review of the Red Cross*, Vol. 98, No. 901, 2016.

18 See the Q&A on “The ICRC and the ‘Humanitarian–Development–Peace Nexus’ Discussion” in this issue of the *Review*.

Given the pressures of providing adequate response over a long period of time, humanitarian action needs to be enabled to deal with the direct and indirect effects of protracted conflict. Relief, rehabilitation and development activities may occur concurrently based on the actual needs and capacities in a given context during a specific period of time.¹⁹ Indeed, which relief activities are humanitarian, in the sense that they are designed to respond to needs arising from an emergency, becomes impossible to define when conflicts last not only years but generations.²⁰ Nevertheless, some have raised concerns about blurring the lines between humanitarian and development work, emphasizing that their goals, methods and approaches differ.²¹ In this issue of the *Review*, Edoardo Borgomeo, in his article on delivering water services in protracted conflicts, considers just how delicate, yet important, the balance between the humanitarian and development spheres is prior to, during and after conflict for effective collaboration and coherent, mutually complementary programming. He unpacks the “barriers” that might impede a transition from emergency to development intervention and concludes that “an improved understanding and identification of these barriers can help development and humanitarian actors achieve better integration of their respective efforts and ultimately help them to accomplish their respective objectives without undermining each other’s work”.²²

With the trends of longer conflicts in mind and recognizing situations in which active hostilities have caused a real change in infrastructure and local population needs, Alexander Hay, Bryan Karney and Nick Martyn explore the topic of rehabilitation and resilience of essential infrastructure in their article for this issue of the *Review*. They propose a “common frame of reference for all stakeholders to ... understand what the current infrastructure situation is, and so inform the effective implementation of whichever rehabilitation approach is pursued”, thus enabling essential services that are resilient to temporary returns to violence and can support the overall rehabilitation of the local community.²³

Humanitarian actors are developing strategies to better respond to needs arising in protracted armed conflict, such as multi-year funding and programming, which can help to secure so-called “development holds”.²⁴ Similarly, development actors are looking for ways to do their work in conflict situations, to ensure that gains are not lost and that people’s lives do not descend into extreme poverty.

19 For more information, see the forthcoming report *Joining Forces: How Humanitarian and Development Actors Can Support Water Supply and Sanitation Service Providers to Deal with Protracted Crises* by the ICRC, World Bank and UNICEF.

20 See ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), para. 1324.

21 See, for instance, Marc DuBois, “Don’t Blur the Lines Between Development and Humanitarian Work”, *The Guardian*, 12 May 2016, available at: www.theguardian.com/global-development-professionals-network/2016/may/12/dont-blur-the-lines-between-development-and-humanitarian-work.

22 See Edoardo Borgomeo, “Delivering Water Services during Protracted Armed Conflict: How Development Agencies Can Overcome Barriers to Collaboration with Humanitarian Actors”, in this issue of the *Review*.

23 See Alexander Hay, Bryan Karney and Nick Martyn, “Reconstructing Infrastructure for Resilient Essential Services during and following Protracted Conflict: A Conceptual Framework”, in this issue of the *Review*.

24 ICRC, above note 13.

The humanitarian world can no longer be seen as one of agencies swooping in during armed conflicts with quick, immediate emergency programming, and then handing the work over to development agencies.²⁵ This is simply not reflective of the reality on the ground, where humanitarian organizations have sometimes been present for decades. Responding to protracted conflict can seem like a Sisyphean task. Where war lasts for years or even decades, the humanitarian response must do the same in order to preserve the lives and dignity of the affected population. The humanitarian–development–peace triple nexus is one theoretical framework for humanitarian and development actors thinking about how to ensure sustainable impact and engender resilience. Owing to the reality of protracted conflicts and the fact that humanitarian needs in chronic situations of violence can evolve over time, the ICRC has coined the concept of building “sustainable humanitarian impact with people affected”. This concept is oriented towards maintaining the relevance and effectiveness of the ICRC’s action.²⁶

The consequences of protracted armed conflicts

Why is it important for a humanitarian organization to think within a “protracted conflict” paradigm?

One cannot know in advance that a conflict will be protracted. The nature of needs and vulnerabilities caused by armed conflicts will not necessarily be different in itself; however, the exacerbating effect of long-term conflicts on those needs and vulnerabilities, and the response needed to adequately address them and alleviate suffering from both a humanitarian and a development point of view, deserve a more thorough examination.

One of the drivers of the ICRC and other humanitarian organizations is the needs caused by armed conflict. What happens if such needs last for a long period of time? When they are compounded with conflicts’ long duration, intractability, mutability and constantly changing nature, the innumerable needs arising as a result of armed conflict are further exacerbated. Persons with distinct needs or facing particular risks, like detainees, migrants, internally displaced persons (IDPs), city dwellers in an economically disadvantaged situation, and people who are older and/or isolated, must deal with issues such as loss of livelihood, barriers for persons with disabilities, and famine or other food insecurity, to list just a few.²⁷ In some

²⁵ *Ibid.*, p. 4.

²⁶ See the Q&A on “The ICRC and the ‘Humanitarian–Development–Peace Nexus’ Discussion” in this issue of the *Review*.

²⁷ “Famine is a symptom of protracted war. And when it manifests, it rarely manifests alone. Famine is accompanied by broken health systems, damaged infrastructure, and shattered economies, [and it] occurs when there is a basic disrespect for decency and the dignity of human life.” Peter Maurer, “Famine is a Symptom of Protracted War”, speech given at the UN General Assembly, 21 September 2017, available at: www.icrc.org/en/document/famine-symptom-protracted-war.

cases, infrastructure and essential services may deteriorate or even be completely destroyed.²⁸

Detainees are among the most vulnerable in any society, and this is particularly prominent in armed conflicts and other fragile contexts. Wars that seem without end can lead to detention that appears indefinite.²⁹ However, it is regrettably apparent that detention as a topic needs more of a spotlight in situations where the authorities are unable, unwilling or lack the resources to guarantee safe places of detention or proper treatment for detainees. This is especially true in situations where the detaining authorities are engaged in prolonged warfare, meaning that accompanying economic challenges are brought to bear on an often deprioritized penitentiary system.³⁰ The ICRC traditionally focuses on securing humane treatment and conditions of detention for all detainees, regardless of why they were arrested or detained.³¹ Detention should feature more prominently in ongoing discussions and implementation of humanitarian–development activities, but also in the triple nexus between humanitarianism, development and peacebuilding.

The ICRC has recognized the needs of the civilian population in increasingly long conflicts as one of the principle IHL challenges facing the world today, looking specifically at IDPs, the protection of persons with disabilities and access to education.³²

During armed conflicts, violence – whether in violation of IHL or not – generally triggers displacement, but IHL violations may make such displacement even more likely. Better respect for IHL can protect displaced people and contributes to reducing the scale of displacement.³³ Cédric Cotter looks at causes of displacement in Iraq in this issue, concluding that

[v]iolations of the IHL principles on the conduct of hostilities lead to displacement, both directly when civilians flee to save their lives, but also indirectly when the cumulative effect of the violations, for example on vital infrastructure, forces civilians to seek better living conditions elsewhere.³⁴

28 See ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, 6 October 2015, available at: <https://www.icrc.org/en/document/urban-services-protracted-conflict-report>.

29 See ICRC Commentary on GC III, above note 20, commentary on Art. 118.

30 Colin Walsh, “Deprived of Freedom: How Detainees in Conflict Zones Could Benefit from a ‘Triple Nexus’ Approach”, *Humanitarian Law and Policy Blog*, 9 July 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/07/09/detainees-triple-nexus/>.

31 ICRC, “Helping Detainees”, available at: www.icrc.org/en/what-we-do/visiting-detainees.

32 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019 (2019 ICRC Challenges Report), pp. 38 ff.

33 ICRC, *Displacement in Times of Armed Conflict: How International Humanitarian Law Protects in War and Why it Matters*, Geneva, 2019. This exploratory study, which does not necessarily reflect the institutional views of the ICRC, deals with the role and contribution of respect of IHL in relation to displacement.

34 See Cédric Cotter, “From Operation Iraqi Freedom to the Battle of Mosul: Fifteen Years of Displacement in Iraq”, in this issue of the *Review*.

Numbers show that at the end of 2019, there were 50.8 million IDPs worldwide; 45.7 million of these were living in internal displacement as a result of conflict and violence, which is the highest figure ever recorded.³⁵ Many have been displaced for long periods or forced to move multiple times, including due to protracted conflicts. As conflicts are becoming increasingly protracted, so is displacement; likewise, as the world's population becomes more urban, people are increasingly displaced to, between or within cities, where the delivery of essential services may already be under pressure and the host community may experience the presence of IDPs as a burden.³⁶ Damaged or overburdened infrastructure may also mean that IDPs are displaced yet again.

Another part of the civilian population of particular concern during armed conflicts are persons with disabilities, for whom wars can exacerbate or create physical, communicational, attitudinal or other barriers to accessing essential services, support and systems. Persons with disabilities can be at greater risk during hostilities because it is harder for them to flee, because they are at greater risk of attacks and violence, and because they may face different forms of discrimination due to their disability as well as to other factors like age or gender.³⁷ As we have seen, the consequences of armed conflicts grow more severe with time, as infrastructure and services are impacted by the cumulative effects of destruction and displacement.

Education is often profoundly disrupted during armed conflict, and as conflict becomes protracted this becomes more likely. When education is disrupted, the effects can last for generations. In principle IHL provides protection for civilian schools, educational personnel and students that can help to prevent or mitigate the disruption of education. In addition, it contains provisions requiring parties to conflict to facilitate access to education in certain circumstances.³⁸ Humanitarian actors can work with affected communities to ensure that parties to armed conflict uphold these obligations, as well as to re-establish education services.³⁹

The bleak picture presented in this editorial becomes even more worrisome when one considers the outbreak of the COVID-19 pandemic and the restrictive measures taken by many authorities to curb the spread of the virus. The response has varied in terms of the introduction of restrictive measures,⁴⁰ which have ranged from travel restrictions, border closures and evacuation of citizens living

35 Internal Displacement Monitoring Center, *Global Report on Internal Displacement 2020*, Geneva, April 2020, p. 2.

36 ICRC, *Displaced in Cities: Experiencing and Responding to Urban Internal Displacement Outside Camps*, Geneva, 2018, p. 45, citing Nicolas Crawford, John Cosgrave, Simon Haysom and Nadine Walicki, *Protracted Displacement: Uncertain Paths to Self-Reliance in Exile*, Humanitarian Policy Group, September 2015, available at: www.odhpn.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9851.pdf.

37 *Ibid.*

38 *Ibid.*

39 See Geoff Loane and Ricardo Fal-Dutra Santos, "Strengthening Resilience: The ICRC's Community-Based Approach to Ensuring the Protection of Education", *International Review of the Red Cross*, Vol. 99, No. 2, 2017.

40 See, for instance, the Coronavirus Government Response Tracker created by the Blavatnik School of Government and the University of Oxford, which provides an overview of policy responses by countries

outside of their home countries to specific measures within the health-care systems that have been overwhelmed in responding to serious cases. In situations where people and systems are already affected by conflict and violence, this pandemic creates even more pressure.⁴¹ The pandemic is not limited geographically, and as it spreads around the world, it compounds the fragility of places that have been entrenched in endless wars, which already have weakened health-care systems and where it may be very difficult to meet basic needs for clean water, or where physical distancing may be impossible (e.g. refugee camps or places of detention).

For the ICRC and some other actors, this might not be the first time they have provided support during an epidemic, and there are some lessons learned that may be useful in responding.⁴² Nevertheless, a pandemic of this magnitude can bring about horrifying consequences in already weakened contexts, making this public health crisis a humanitarian and development crisis as well. For this reason, the ongoing humanitarian, development and policy discussions have brought forth a request for an even more prominent “nexus approach” in dealing with the crisis.⁴³

Do endless wars end?

The nature of protracted conflicts makes it difficult to determine when they are over. When armed conflict drags on for years and then decades, the distinction between wartime and peacetime blurs and, especially in so-called “low-level” conflicts, the population is trapped in an Orwellian conundrum.

The point at which armed conflict ends for the purposes of determining the end of IHL applicability is still an underdeveloped area of the law. In this issue of the *Review*, Dustin Lewis looks at when wars end, cautioning that

an effort to encompass and address ‘the humanitarian–development–peace nexus’ within a legal (sub)category of ‘protracted armed conflict’ might operate in a way that unintentionally and/or unknowingly extends the applicability of IHL,

around the world, ranging from containment and closure policies to economic and health system policies. Available at: www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker.

- 41 ICRC, “Coronavirus: COVID-19 Pandemic”, available at: www.icrc.org/en/what-we-do/covid-19-pandemic.
- 42 For instance, the ICRC has experience in responding to disease outbreaks such as cholera in Yemen, Ebola in the Democratic Republic of the Congo, and tuberculosis in detention facilities in different contexts. See ICRC, “Responding to Disease Outbreaks in the Time of COVID-19”, 13 April 2020, available at: www.icrc.org/en/document/covid-19-coronavirus-disease-outbreaks-response. For a reflection on the 1918 Spanish flu and the lessons learned from it, see Cédric Cotter, “From the ‘Spanish Flu’ to COVID-19: Lessons from the 1918 Pandemic and First World War”, *Humanitarian Law and Policy Blog*, 23 April 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/04/23/spanish-flu-covid-19-1918-pandemic-first-world-war/>.
- 43 Damian Lilly, “What Happened to the Nexus Approach in the COVID-19 Response?”, *International Peace Institute Global Observatory*, 19 June 2020, available at: <https://theglobalobservatory.org/2020/06/what-happened-to-nexus-approach-in-covid-19-response/>. Also, for opinions on how imperative it is to develop a response to this crisis through a triple-nexus lens, see Sarah Dairymple, “Looking at the Coronavirus Crisis Through the Nexus Lens – What Needs to be Done”, *Development Initiatives*, 8 April 2020, available at: <https://devinit.org/blog/looking-at-the-coronavirus-crisis-through-the-nexus-lens-what-needs-to-be-done/>.

including its ‘enabling arrangements’, in lieu of other frameworks – such as [human rights law] – that might, on the whole, be considered to be more protective of, or otherwise beneficial to, affected populations.⁴⁴

Once the threshold of applicability is met, IHL applies regardless of the length of the conflict.⁴⁵ The difficulty comes in determining when the war is over and IHL no longer applies, which should not be done lightly, as the situation may relapse and violence may resurge.⁴⁶ Based on the ICRC’s experience on battlefields around the globe, there are a number of IHL rules that need to be applied to mitigate the long-term humanitarian consequences of protracted conflict.⁴⁷ In addition to those already mentioned, these norms include the prohibition of the destruction of objects essential for the survival of the population, including livestock, crops, water installations and irrigation works; the duty to protect the natural environment against widespread, long-term and severe damage; and the many rules protecting health care and the wounded and sick.⁴⁸

Another area where the duration of armed conflict may affect the way the law is applied is in situations of occupation. Occupations have traditionally been viewed as short-term, or temporary, but today there is no end in sight for many situations of occupation. Prolonged situations of occupation may affect how IHL is applied, and their long duration highlights the complementary role of human rights law in such circumstances.⁴⁹

Similarly, when non-State parties to armed conflicts control territory to the exclusion of *de jure* authorities over a long period of time, there are a variety of issues to consider, including which rules of international law apply to how these groups “govern” such territory. This has become particularly clear during the ongoing pandemic, as non-State actors have needed to take measures to protect

44 Dustin A. Lewis, “The Notion of ‘Protracted Armed Conflict’ in the Rome Statute and the Termination of Armed Conflicts under International Law: An Analysis of Select Issues”, in this issue of the *Review*. See also ICRC Commentary on GC III, above note 20, commentary on Art. 2, paras 307–317, and on Art. 3, paras 519–530; Dustin A. Lewis, Gabriella Blum and Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, Harvard Law School Program on International Law and Armed Conflict, Cambridge, February 2017, p. 1, available at: <https://dash.harvard.edu/handle/1/30455582>; Julia Grignon, “The End of International Armed Conflict and Non-International Armed Conflict for the Purpose of the Applicability of International Humanitarian Law”, doctoral thesis, University of Laval, 2016, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761840.

45 See Julia Grignon, “The Beginning of Application of International Humanitarian Law: A Discussion of a Few Challenges”, *International Review of the Red Cross*, Vol. 96, No. 893, 2015; Sylvain Vit  , “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 876, 2009.

46 See Marko Milanovic, “The End of Application of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 96, No. 893, 2015; ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, Geneva, 2015, pp. 7–12.

47 ICRC, above note 13, p. 11.

48 *Ibid.*

49 Vaios Koutroulis, “The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012. For an analysis of when occupation begins and ends, see Tristan Ferraro, “Determining the Beginning and End of Occupation under International Humanitarian Law”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012.

public health in territories they control.⁵⁰ In a previous issue of the *Review*, Kathryn Hampton explored the consequences for birth registration in areas controlled by insurgent groups,⁵¹ just one of many complexities that may arise in these circumstances. IHL continues to apply in these circumstances and provides essential rules on the protection of the population. However, there is some debate on whether and to what extent human rights law is relevant regarding measures taken by *de facto* authorities that are not governed by IHL.⁵²

Insurgencies are often perceived as an existential threat, and there can be a temptation to set aside the norms meant to prevent unnecessary suffering during times of war, especially when guerrilla tactics continue for decades. During such protracted insurgencies, people can end up fighting against compatriots, friends and loved ones. As Lt.-Col. Joven Capitulo of the Philippine Department of National Defense points out in his interview in this issue, “[t]he main challenge of the counter-insurgency campaign and the internal conflict [in the Philippines] is that it’s a war among Filipinos. ... It’s a long war, and the victims are the Filipinos themselves.”⁵³

Lt.-Col. Capitulo also observes the need for organizations like the ICRC to work with non-State armed groups in order to ensure those groups’ knowledge of, and induce their compliance with, IHL.⁵⁴ The ICRC has been engaged in this work for decades. Another organization that engages with non-State actors is Geneva Call, whose Director of Operations Hichem Khadhraoui writes about the lessons learned in developing and sustaining a meaningful protection dialogue. Such a dialogue needs to take into account the changes undergone by non-State groups, which may split, mutate or join larger movements. This can be challenging “when rapid mutations occur during armed conflicts that tend to last longer and longer”,⁵⁵ something the ICRC has also observed.⁵⁶

In times of war, when suffering is inevitable, IHL provides fundamental protection to those that are affected and allows humanitarian organizations to provide protection and assistance. Colombia has contributed greatly to the development of IHL norms in practice going back as far as 1820,⁵⁷ and in 2019 there were no less than five ongoing NIACs in Colombia, even after the signing of a peace agreement between the Colombian government and FARC-EP.⁵⁸ Decades of conflict have led Colombia to explore the protection of minors, the

50 See Geneva Call’s COVID-19 Armed Non-State Actors’ Response Monitor, available at: www.genevacall.org/covid-19-armed-non-state-actors-response-monitor/.

51 Kathryn Hampton, “Born in the Twilight Zone: Birth Registration in Insurgent Areas”, *International Review of the Red Cross*, Vol. 101, No. 911, 2019.

52 See 2019 ICRC Challenges Report, above note 32, p. 53.

53 See the interview with Lieutenant-Colonel Joven D. Capitulo PA in this issue of the *Review*.

54 *Ibid.*

55 See Hichem Khadhraoui, “Fragmentation of armed Non-State Actors in Protracted Armed Conflicts: Some Practical Experiences on How to Ensure Compliance with Humanitarian Norms”, in this issue of the *Review*.

56 See 2019 ICRC Challenges Report, above note 32, p. 51.

57 See Marcela Giraldo and Jose Serralvo, “International Humanitarian Law in Colombia: Going a Step Beyond”, in this issue of the *Review*.

58 ICRC, “Colombia: Five Armed Conflicts – What’s Happening?”, 30 January 2019, available at: www.icrc.org/en/document/colombia-five-armed-conflicts-whats-happening.

meaning of the principle of precaution, the compensation of armed conflict victims and the creation of some rather sophisticated transitional justice mechanisms that can serve as an example for other States. Marcela Giraldo Muñoz and Jose Serralvo discuss these contributions in detail in their article for this issue of the *Review*.⁵⁹

The purpose of IHL is to balance military necessity with humanity, thus sparing the civilian population from unnecessary harm. The longer a conflict lasts, the greater is the likelihood that other bodies of law, especially human rights law, will be read into the situation to fill gaps in the law.⁶⁰ In this issue of the *Review*, Mona Rishmawi examines the right to life in protracted armed conflict, looking specifically at the UN Human Rights Committee's General Comment 36, which clarifies that individuals are entitled not only to be protected from acts or omissions that could cause unnatural or premature death, but also to enjoy a life with dignity.⁶¹

Unpacking the realities of armed conflict can make addressing the challenges discussed in this issue seem an impossible task—but at the bottom of Pandora's box is hope that the future will bring lasting solutions.



Also in this issue are contents that are not related to the main theme but which nonetheless make significant contributions to the discussion of international humanitarian law, policy and action. Robert Kolb and Fumiko Nakashima examine “The Notion of ‘Acts Harmful to the Enemy’ under International Humanitarian Law”, making specific recommendations on how the law governing the special protection of hospitals should be interpreted. Andrea Harrison reviews Kubo Mačák's *Internationalized Armed Conflicts in International Law*, which she concludes demonstrates why conflict classification, far from being an abstract exercise, is “both meaningful and necessary”, in addition to proposing a new approach to determining the applicable legal regime in “internationalized” armed conflicts. Andrew Carswell reviews Yishai Beer's *Military Professionalism and Humanitarian Law: The Struggle to Reduce the Hazards of War*, which re-examines some of the most basic underpinnings of international law governing armed conflict in light of the gap between the law and the practice of State militaries. Last but not least, the report of the first expert meeting on “The Development of Guiding Principles for the Proper Management of the Dead in Humanitarian Emergencies and Help in Preventing Their Becoming Missing Persons” (30 November–1 December 2018) highlights the need for guidance to help practitioners and decision-makers ensure respect for dead persons and human remains in humanitarian contexts.

59 See Marcela Giraldo Muñoz and Jose Serralvo, “International Humanitarian Law in Colombia: Going a Step Beyond”, in this issue of the *Review*.

60 For more on how IHL and human rights law complement each other, see Cordula Droegge, “Elective Affinities? Human Rights and Humanitarian Law”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008.

61 See Mona Rishmawi, “Protecting the Right to Life in Protracted Conflicts: The Existence and Dignity Dimensions of General Comment 36”, in this issue of the *Review*.



Interview with Lieutenant-Colonel Joven D. Capitulo PA

Military Assistant to the Office of
the Undersecretary for Defense
Policy, Department of National
Defense, Republic of the
Philippines*

Protracted conflicts are a major source of human suffering and can cause long-term displacement and development reversals. Although protracted conflicts can take many forms, they are generally characterized by their longevity, intractability and mutability. Authorities involved in situations of protracted conflict face complex challenges, particularly when it comes to ensuring that international humanitarian law (IHL) is respected by their armed forces.

The government of the Philippines has been involved in multiple non-international armed conflicts against insurgent groups for more than fifty years. In this interview, Lieutenant-Colonel Joven Capitulo, who works to implement the policies, activities and programmes of the Philippine Department of National Defense and Philippine Department of Defense initiatives on national legislation pertaining to compliance with IHL, shares the perspective of a State dealing with several protracted situations of non-international armed conflict. He tells the Review about some of the IHL considerations involved when a military is engaged in counter-insurgency on its own territory over a period of decades.

Keywords: protracted armed conflict, insurgency, NIAC, IHL.

: : : : : :

Tell us about your role at the Department of National Defense. What are the main activities of the Office of the Undersecretary for Defense Policy?

I've been in the Department of National Defense for almost nine years now. I work in the Office of the Undersecretary for Defense Policy where, as the military assistant, I assist and advise the undersecretary on military matters, particularly related to the Armed Forces of the Philippines. I am also currently heading the technical working group of the IHL Ad Hoc Committee, an inter-agency body which is being co-chaired by the Department of National Defense and the Department of Foreign Affairs.¹

Apart from heading the IHL Ad Hoc Committee, the Department of National Defense, through our office, also participates as an active member of the inter-agency committee created under Administrative Order No. 35 [AO 35].² The AO 35 Committee is an inter-agency body chaired by the Department of Justice that looks into issues of extrajudicial killings, enforced disappearances, torture, and other high crimes. This mechanism also covers violation of IHL under our national legislation enacting IHL into Philippine domestic law through Republic Act 9851.³ As one of the active members of the AO 35 mechanism, together with the Armed Forces of the Philippines Human Rights Office, we look into matters, review cases and make recommendations to the Committee regarding coverage under the AO 35 mechanism for issues such as enforced disappearances, torture, and other violations of IHL.

The Department of National Defense is also a member of the National Committee on Human Rights. This is also an inter-agency body, chaired by the Commission on Human Rights, which is an independent constitutional body. As part of that team, we work to ensure that human rights are respected.

The Department of National Defense is also spearheading a committee dealing with the protection of the red cross, red crescent and red crystal emblems. This is based on national legislation under Republic Act 10530, which criminalizes the misuse of these emblems and holds those offenders criminally liable under Philippine law. The law mandates the Department of National

* This interview was conducted in Manila on 4 March 2020 by Ellen Policinski, Editor-in-Chief of the *Review*. Special thanks to Katerina Kappos, Jeffrey Michael Sison and Ethel Avisado from the ICRC delegation in Manila and to Sai Sathyanarayanan Venkatesh from the *Review* team for their help in preparing this interview.

1 The IHL Ad Hoc Committee was created by Executive Order No. 134, 1999, available at: www.officialgazette.gov.ph/1999/07/31/executive-order-no-134-s-1999/ (all internet references were accessed in July 2020).

2 Administrative Order No. 35, "Creating the Inter-Agency Committee on Extra-Legal Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty and Security of Persons", 2012, available at: www.officialgazette.gov.ph/2012/11/22/administrative-order-no-35-s-2012/.

3 Republic Act No. 9851, "An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and Other Crimes against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes", 2009, available at: www.officialgazette.gov.ph/2009/12/11/republic-act-no-9851/.

Defense to look into the protection of these emblems.⁴ The International Committee of the Red Cross [ICRC] is part of the consultative body that drafted the operational guidelines implementing Republic Act 10530, published in our own official gazette in 2019. The operational guidelines are intended to help the security, health and business sectors to understand what should be protected, what should not be done and why these emblems need to be protected. So, the challenge on our part is of course how to cascade this down to the lowest-ranking members of the Armed Forces of the Philippines, how to educate health workers and administrators and how we can cover the business sector despite the limited resources available.

Can you tell our readers a little about the situation in the Philippines, especially in Mindanao?

In Mindanao, there are several different armed groups that we are currently addressing. One is, of course, the secessionist movement in the Muslim-dominated part of the Southern Philippines. At present, we have a very important task with the secessionist movement in view the passage of the Bangsamoro Organic Law.⁵

The Bangsamoro Organic Law, which was signed by the President of the Republic, is geared towards the implementation of an autonomous region in some parts of the Southern Philippines. So, we are already at the normalization stage involving the security aspect and the subsequent decommissioning of the Moro Islamic Liberation Front forces and their weapons. It is in this context that socio-economic development programmes play a vital role in assuring that the governance of the region will be administered by its people.

Following the passage of the Law, the Bangsamoro transitional government is addressing concerns related to the secessionist movement in the Southern Philippines, including cultural, ethnic and religious differences in that region. Everybody looks forward to a smooth transition in governing that particular region of the Southern Philippines.

The passage of the Law was a primary effort of the government. Of course, the Armed Forces of the Philippines and the Department of National Defense are very supportive. We want to bring peace in that region because we've been addressing the armed conflict in that region for quite some time. So, with this Bangsamoro transitional government and the establishment of the autonomous Bangsamoro region, everyone is hopeful that there will be a lasting peace.

In the eastern part of Mindanao, we have another conflict involving the armed group of the Communist Party of the Philippines [CPP], the New People's

4 Republic Act No. 10530, "An Act Defining the Use and Protection of the Red Cross, Red Crescent, and Red Crystal Emblems, Providing Penalties for Violations Thereof and for Other Purposes", 2013, available at: www.officialgazette.gov.ph/2013/05/07/republic-act-no-10530/.

5 Republic Act No. 11054, "An Act Providing for the Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao", 2018, available at: www.officialgazette.gov.ph/2018/07/27/republic-act-no-11054/.

Army [NPA]. Recently, the government, through our president, issued Executive Order No. 70 establishing a National Taskforce to End Local Communist Armed Conflict.⁶ The very purpose of the executive issuances made by the president is to localize the peace negotiation. As you all know, we have been trying to negotiate a peace accord with the top brass of the CPP, the NPA and National Democratic Front [NDF]. You can read in the papers that Norway is facilitating peace talks between the Government of the Republic of the Philippines and the CPP-NPA-NDF in the Netherlands, but unfortunately, for almost a year, these talks have largely been a failure. So the government came up with the decision to have peace negotiations at the local level, because there are complexities on the ground. What the government did is to come up with this executive order and introduce different programmes and approaches. The Department of National Defense is spearheading one of the programmes on the integration of combatants into society. As part of this programme, we are giving surrenderees reintegration packages, in the form of firearms remunerations, livelihood programmes and the like, whenever they decide to start their normal lives. Particularly, the government gives them some cash to sustain their livelihoods and has introduced capacity programmes to train them—for example, to start a business or learn a new way of farming. All of this is being addressed under Executive Order No. 70. Our hope is that in the very near future, we could address the NPA conflict with this programme.

The Philippines has a very volatile and porous boundary down south, and we did not predict that terrorism and terrorist groups would start spreading. They even tried to establish an Islamic regime under Daesh in that southern part of the region. We have several terrorist groups, the biggest of which is the Abu Sayyaf Group [ASG]. The ASG engages in various kidnap-for-ransom activities, bombings, beheadings, assassinations and extortion. The recent Marawi siege is the most serious militant action by this terrorist group. Isnilon Hapilon, an ASG leader who subsequently became the “Emir of all Islamic State Forces in the Philippines”, joined forces with the Maute Group in their lair in Butig, Lanao del Sur, and tried to occupy Marawi City. The occupation of Marawi City by the terrorist group was preceded by a joint law enforcement operation of the Armed Forces of the Philippines and the Philippine National Police when they attempted to serve a warrant of arrest and capture for Hapilon. The Marawi siege is a classic example of a complex military situation because during the military operation, the security forces found out that there were a lot of foreign fighters fighting along with Hapilon and the Maute Group. Thus, again, a big challenge on the part of the Department of National Defense in addressing this kind of conflict.

We have several strategic platforms for addressing all this. Cooperation among the neighbouring countries is key to addressing the problem and

6 Executive Order No. 70, “Institutionalizing the Whole-of-Nation Approach in Attaining Inclusive and Sustainable Peace, Creating a National Task Force to End Local Communist Armed Conflict, and Directing the Adoption of a National Peace Framework”, 2018, available at: www.officialgazette.gov.ph/2018/12/04/executive-order-no-70-s-2018/.

controlling this border. At present, we have a trilateral agreement with Indonesia and Malaysia, securing the border in the south. The agreement, through a joint patrol, seeks to address or mitigate the entry of some of these foreign terrorists into our territory.

How have things changed over time as the insurgency has become increasingly protracted?

I think the recent paradigm shift adopted by the Department of National Defense through the Armed Forces of the Philippines, which is implementing Development Support and Security Plan entitled “Kapayapaan”,⁷ is a big change in addressing the insurgency problem. *Kapayapaan* is a Filipino word for “peace”. The precursor of this plan was the Internal Peace and Security Plan entitled “Bayanihan”.⁸

The “Kapayapaan” plan considers that military operations alone cannot address the insurgency problem here in the Philippines. It should be a whole-of-nation approach. This was a paradigm shift that we adopted. Before, the security forces of the government focused more on military operations or campaigns, neutralizing the enemy, and dealt more with the technical aspects of military operations. Nowadays, we have incorporated development into the counter-insurgency campaign of the government. Under the whole-of-nation approach, we make sure that concerned government stakeholders like the Department of Social Welfare, the Department of Public Works and Highways and the Department of Agrarian Reform will be part of the team. Because after securing the countryside, we need to develop and sustain the community. Of course, the development phase or operation is no longer part of the mandate of the Department of National Defense. Development will be done by other concerned departments of the government. So, we make sure that everybody will be equipped and capacitated in order to sustain peace in the area. It is a lot of coordinative work, but we’re doing it, integrating the different government stakeholders one by one.

In your view, what are the main challenges in applying IHL in counter-insurgency situations like the ones that you see in the Philippines?

One of the main challenges that we encounter is ensuring that non-State actors appreciate and observe the principles of IHL. For this big challenge, we need someone to educate the non-State actors. Of course, the Department of National Defense or the Armed Forces of the Philippines cannot do it.

Another problem we are facing here in the Philippines is addressing terrorist groups such as the ASG in the regions of Sulu, Tawi-Tawi, Jolo and Basilan. How can

7 Armed Forces of the Philippines, *AFP Development Support and Security Plan “Kapayapaan” 2017–2022*, 2017, available at: <https://mronline.org/wp-content/uploads/2018/09/AFP-Development-Support-and-Security-Plan-Kapayapaan-2017-2022.pdf>.

8 Armed Forces of the Philippines, *Internal Peace and Security Plan “Bayanihan”*, 2010, available at: www.army.mil.ph/home/images/bayanihan.pdf.

we relate to them and educate them on the principles of IHL? It's a sad reality that these groups are not fighting for any political or socio-economic cause; they are simply big groups of bandits. So, again, how can we educate this armed group and teach them to respect and observe IHL principles? And who will educate these people about IHL? It's hard to think of who could influence them and how to incentivize their compliance with IHL. An independent organization or group will certainly play a significant role in educating these people. In my personal view, the ICRC can play a big role in this huge endeavour.

On the other hand, the continuous advocacy campaigns on IHL among members of the Armed Forces of the Philippines are still a challenge because of the huge number of such members. We have incorporated subjects on human rights and IHL as part of their regular military career courses. Other advocacy campaigns or programmes are also being undertaken, in partnership with the ICRC, considering that we have limited resources to manage.

The main challenge of the counter-insurgency campaign and the internal conflict is that it's a war among Filipinos. The victims of this war are not foreign individuals or groups – they are Filipinos. That's the saddest and hardest part. Of course, the counter-insurgency campaign is not just an issue of a military operation. It's an issue of how we Filipinos embrace the humanitarian side, and this could be achieved through peaceful means. Counter-insurgency has been going on for more than five decades now. It's a long war, and the victims are the Filipinos themselves.

What are some of the IHL-related lessons learned as the insurgencies in the Philippines have become increasingly protracted?

We have seen a paradigm shift insofar as the counter-insurgency campaign is concerned. We've realized that military operations alone cannot address the counter-insurgency. We need to invite other stakeholders from the concerned government agencies and NGOs to help us in this campaign.

The act of neutralizing the armed component of an insurgent group will not end the armed conflict. All they need to do is to recruit, train and organize, and then more insurgents will resurface. So, it's a never-ending campaign. The "Kapayapaan" plan aims to address the issue. Peace and order is just one of the components. Development should be incorporated, followed by capacity-building; this would certainly ensure lasting peace and development.

You mentioned advocacy campaigns to promote respect for IHL by the Armed Forces of the Philippines. What measures has the Philippines government put in place to ensure that its forces comply with IHL?

One way of doing this is being part of the IHL Ad Hoc Committee. The Committee often meets to discuss programmes and activities that will promote IHL. It is a participatory way to get the involvement of every member of the Committee.

Another way is through an annual oath by the security sector of the government – the Armed Forces of the Philippines, the Philippine National Police and the Philippine Coast Guard. We, the uniformed armed services, usually conduct an IHL oath every year, from the general headquarters, to the division or unit headquarters, and down to the battalion or similar unit level. Soldiers are required to take this IHL oath and re-dedicate themselves to observing the principles of IHL. Personally, I think one of the best practices that we’re doing is the constant reminders to our troops relative to these principles. So we make sure that all our troops take their IHL oath every year, for them to be reminded of the principles of IHL.

As I have said, apart from the oath, all members of the security forces are trained and educated to uphold the principles of IHL and human rights all throughout their careers. Upon their recruitment, we incorporate IHL principles and human rights subjects into their programme of instruction. These subjects and principles are being taught and incorporated into the training modules undertaken by the different military training schools; they are taught starting from the recruitment of the candidate soldier and all through their career. In the officers’ corps, we assure that all our officers have adequate knowledge as far as the implementation and principles of IHL are concerned. This is important because they lead these fighting armed men, so we need to capacitate and educate them.

This is over and above the advocacy activities undertaken by the Armed Forces of the Philippines Human Rights Office. We have Human Rights Offices in the Army, in the Navy, and in the Air Force – and down to the battalion level, we have a human rights officer, whose role is to monitor compliance with IHL and human rights.

The Department of National Defense is performing its role of relaying IHL principles to the troops. In fact, the Department is mandated by law, under Republic Act 10530, the Emblem Law, to act as the chair of an inter-agency committee for implementing the protection accorded in the usage of the so-called “Emblems of Humanity”.

Can you tell us more about the IHL Ad Hoc Committee? What are its main activities?

The IHL Ad Hoc Committee is an inter-agency body which has external participation from organizations such as the ICRC, the Philippine Red Cross and other civil society organizations who are also members of the Committee. All the different security sectors in the Philippines are also members of the Committee, including the Philippine Coast Guard and the Philippine National Police.

The IHL Ad Hoc Committee was initially created purposely to spearhead activities for the yearly IHL celebration that begins every 12th of August, “IHL Month”. The IHL Month celebration begins with an opening ceremony commemorating IHL Day on 12 August. The Committee is co-chaired by the Department of National Defense and the Department of Foreign Affairs, and

celebrations are held either in the Department of National Defense or the Department of Foreign Affairs.

The activities of the Committee have developed over time, and we make sure every year to innovate through a series of activities. Last year, members of the diplomatic corps, including the ICRC's head of delegation in Manila, were invited to attend the national commemorations on IHL.

Also last year, we tapped the services of one of the most famous people in Philippines show business, Piolo Pascual, to promote IHL in an infomercial focused on advocating for the principles of IHL. It was shown on our official IHL Facebook account and major social media platforms. By tapping some famous showbiz personalities, we can effectively influence individuals who are very fond of such personalities. Imagine that you could see Hollywood stars campaigning for IHL – that is the idea.

Also part of the advocacy campaign is a yearly IHL fun run. All members of the IHL Ad Hoc Committee are represented in this run for IHL. It builds team spirit, not only within the security forces but with other organizations that are part of the Committee, such as the ICRC.

With many activities being proposed by its members, the IHL Ad Hoc Committee realized that the activities cannot be achieved in only a month. So, the Committee agreed to conduct IHL-related activities for the whole year. Currently, we are preparing our advocacy campaign for arms bearers, as they are on the front lines in conflict-affected areas and are the ones that encounter IHL-related challenges while in the field. We need to continue capacity-building, starting from the lowest-ranking enlisted personnel and going right up to the officers' corps, to make sure that everyone has basic knowledge of the principles of IHL, the rule of law, and human rights issues.

How often do you work with the ICRC? What is your relationship with the ICRC like? What is the added value of the ICRC to your work?

With all the work on IHL matters, we have an open communication with the ICRC together with our national society, the Philippine Red Cross. In fact, we use social media platforms and have created a chat group to discuss IHL concerns, recommendations and proposed programmes. The advantage of using all this technology nowadays is that we can come up with decisions or recommendations that matter, without needing to physically meet; this saves both time and effort.

The ICRC's involvement is very much appreciated by the Department of National Defense. It has helped us in harmonizing our programmes and guidelines and managing our operational tempo, particularly in addressing both our counter-insurgency campaign and our other national security operations. The ICRC's perspective and views are being considered in the planning and execution of these campaigns. We are in constant coordination and are always consulting with the ICRC on IHL-related issues, thus establishing an open communication. Even in the middle of the night, they can text me or they can call me and bring

their concerns and try to address issues at our level. I think it is a 24/7 IHL open line on my part as well as on the part of the Department.

Do you have any other message that you would like to share with our readers?

As mentioned earlier, the counter-insurgency campaign is an internal conflict, which is a sad reality. I must reiterate this, because the counter-insurgency campaign is not a war against somebody else; it's a war among the Filipino people. Chances are, your enemy will be one of your friends or even relatives. We may have differences in political ideologies or beliefs, but at the end of the day and when the firefight is over, victims brought out from the battlefield are still Filipinos.

I think addressing the counter-insurgency must reach its final goal: ending the insurgency and having a lasting peace. The victims here are the Filipinos themselves. It's the country that suffers. It's the people who weep. That's what we are trying to address by offering a solution for lasting peace.

VOICES AND PERSPECTIVES

Stretched: Protracted conflicts and the people living in the midst of it all

: : : : : :

Situations of protracted armed conflict, whether one armed conflict or a succession of several armed conflicts over a long period of time, subject the affected population to both short-term and long-term effects of warfare. Below are two timelines tracing the experiences of two women during situations of protracted conflict in two countries: Sheringul in Afghanistan, and Om Nawwar in Iraq.¹ Their experiences show that life continues in such contexts, despite violence and instability.

Iraq has experienced violence for more than fifty years; the International Committee of the Red Cross (ICRC) has been working in that context since 1980. Afghanistan has experienced violence for more than forty years; the ICRC has been working there since 1978.

Humanitarian organizations need to take into account the needs of populations affected by protracted conflict. Ultimately, however, only political solutions will bring an end to the violence and destruction.²

¹ Some names have been changed to protect the identities of the individuals concerned.

² These testimonies first appeared in the temporary exhibition *Stretched*, which appeared at the ICRC's Humanitarium in Geneva, November 2018–April 2019.



SHERINGUL

Afghanistan

1991

Her third daughter is born.

1992

Her first son is born. Because of the fighting, Sheringul moves from Helmand to Peshawar, Pakistan, where she will live for twelve years.

1979

Sheringul gets married at 14 years old. She does not have children for over ten years.

1997

Her fourth daughter is born.

1990

Her second daughter is born.

1995

Her third son is born.

1994

Her second son is born.

1993

Her fourth daughter is born.

1989

Sheringul's first daughter is born.

1987

Sheringul's husband is injured.

2005

Sheringul's fourth daughter dies in Pakistan through illness and lack of access to medical care.

2016

Sheringul begins vocational training with the ICRC. She is the only breadwinner among the seventeen members of her family. Her husband is old and was injured in the violence in Afghanistan. He has one kidney and has diabetes and heart problems, too. Sheringul, through the ICRC's vocational training programme, learns tailoring and embroidery. Before taking part in the programme in Helmand, she did not know how to sew clothes.

2015

Sheringul and her family come back to Afghanistan; they live in a rented house in Lashkar Gah, a city in Helmand Province.

2008

Her 26-year-old son loses his leg in a suicide attack near their house; he is left bedridden and unable to move.

2017

Sheringul is selected to work for the ICRC as a vocational trainer, teaching other women like her. The training course begins in February 2017, but is then put on hold when the ICRC has to suspend its activities due to the security situation. The course restarts in August 2017 and ends in October. Sheringul teaches tailoring and embroidery to twenty illiterate women. After the training course ends, she and her four daughters start making clothes at home to sell on the market. They sew six, sometimes seven items of clothing a day. Now everyone in my family sees me as a heroine – even my brother-in-law, who was not happy when I started the course with the ICRC last year. But even he now wants his wife to come and learn tailoring from me.



OM NAWWAR

Iraq

1991

Her cousin's husband goes missing.

1989

Her second son, Anmar, is born.

1965

Om Nawwar is born on 1 July. Her official name is Muntaha Badran, but in many Arabic-speaking countries, it is traditional to call people by another name that incorporates the name of their eldest son. In Arabic om means mother, so Om Nawwar means Mother of Nawwar.

1982

Om Nawwar gets married. She is 17 years old; her husband, Ali El Najm, is 30. Ali is an employee in the national electricity company but is conscripted into the army to fight in the Iran-Iraq War. He is put in charge of operating the sirens that warn of Iranian air strikes. Om Nawwar leaves her house for a few weeks to stay with her parents-in-law, as it is safer for a young woman not to stay alone with small children while her husband is away.

1984

Her husband's nephew is killed in the war. In July, her first son, Nawwar, is born.

2017

From mid-February to the end of March, Om Nawwar lives during the siege of Mosul in her tiny cellar under her house with forty other people. One day shrapnel hits the walls inside. In April, she is displaced to the al-awra neighbourhood.

On 21 April, Om Nawwar and her family decide to flee to an area controlled by the Iraqi security forces. However, her son Nawwar reaches the area but cannot find his mother, brother and sisters. He asks his wife to take the kids and wait for him with her family while he goes back. An officer warns him of the danger they are in, because they are on the front line between the army and the Islamic State group.

Nawwar insists he has to go back. A soldier volunteers to guide him part of the way and then wait for him for thirty minutes; if he has not come back by then, the soldier will leave. The son agrees and finds his family, but while they are running back, Om Nawwar falls

and injures herself. On 23 April, her son Selwan goes back to school for the first time in three years. In June, her brother Ali is killed when a mortar bomb hits his house. His wife and daughter are injured. In the same month, Om Nawwar's brother Ahmed is killed – his hands and feet are chopped off.

In July, Om Nawwar visits her home in Mosul for the first time since the end of hostilities. She finds her house damaged by the shelling and her old family home nearby destroyed. All the objects that her husband collected over twenty years and kept in a room he built on the rooftop have been scattered and burnt by a mortar bomb. She comes back almost every week to clean and take care of the house, but cannot stay because the neighbourhood is too damaged; some houses are close to collapse and the road is obstructed by rubble. Each time she and her family come back, they clean and remove rubble from a different part of the house.

2002

Om Nawwar gives birth to her first daughter, Manar.

2007

Om Nawwar's youngest son, Selwan, is born.

1994

Her third son, Ammar, is born. Because of years of economic sanctions (1990–2003), when one of Om Nawwar's sons falls ill and loses all his hair, she cannot afford to pay for proper medical treatment. His medical condition later worsens, affecting his liver and sight. He is still living with the consequences.

2016

In February, Om Nawwar's nephew, Bassam, is killed. In March, another nephew and a niece of hers are killed by a mortar bomb. In September, her husband dies at home from a stroke and heart attack, because he was thinking too much, she says.

He was constantly worried and suffered from ill health. We couldn't go out; we were always afraid for the children. We feared someone would take them away and kill them, because these things were happening.

2018

In the spring of 2018, Om Nawwar comes back to her house to stay, but finds it has been looted. Only a very few objects remain, such as her husband's home-made radio. It is difficult to come back to this house where my husband died. We spent our life here but now there's nothing. We have to start from scratch. We have nothing left. They even took our clothes.

VOICES AND PERSPECTIVES

Fragmentation of armed non-State actors in protracted armed conflicts: Some practical experiences on how to ensure compliance with humanitarian norms

Hichem Khadhraoui

Hichem Khadhraoui is Director of Operations at Geneva Call.

Abstract

For almost two decades now, Geneva Call has been engaged in developing humanitarian dialogue with some 150 armed non-State actors (ANSAs), with the aim of increasing their knowledge and respect of humanitarian norms. Developing a protection dialogue with ANSAs is not an easy task, and it becomes more complex when groups split, mutate or join larger movements. Humanitarian organizations need to adapt their analysis to a more frequent timescale, keeping in touch constantly with a wide range of key stakeholders in order not to lose track of the current groups' status and structure. In this note, Geneva Call's Director of Operations discusses some of the organization's experiences and lessons learned.

Keywords: armed non-State actors, humanitarian norms, engagement, compliance, armed conflict, Geneva Call.

: : : : : :

Introduction

For almost two decades now, Geneva Call has been engaged in developing humanitarian dialogue with armed non-State actors (ANSAs) around the globe, with the aim of increasing their knowledge of and respect for international humanitarian law (IHL). As of 2019, around 150 ANSAs¹ have been engaged on themes such as the protection of children, the prohibition of sexual violence and gender discrimination, the prohibition of landmines, and the norms governing the conduct of hostilities.² In recent years, an increasingly present phenomenon can be seen in the fragmentation of organized ANSAs.³ Based on the experience gathered by Geneva Call, this can be linked to different causal explanations, such as the existence of conflictive goals or strategies inside a group, or the lack of a sense of unity within its members. While this phenomenon is not new, recent conflicts such as those in Syria and Yemen have confirmed some trends, including the inability of ANSAs to remain united during armed conflict.⁴

Fragmentation of organized ANSAs, coupled with increasingly protracted conflicts, brings a series of challenges to humanitarian actors.⁵ Developing a sustainable protection dialogue becomes a struggle in this type of conflict, as humanitarians tend to rely on engaging with structured and stable armed actors – who aim at systemic change – starting from the leadership level. Access to fragmented groups for delivery of humanitarian aid is more difficult, as many stakeholders need to be engaged to obtain the required security guarantees.

As the International Committee of the Red Cross (ICRC) mentioned in its 2016 report *Protracted Conflict and Humanitarian Action*, lack of respect for IHL is a major source of human suffering in protracted conflicts, and ANSAs are the main actors of today's conflicts.⁶ Apart from the increasing participation of these non-State entities, other elements have been used to describe current violent scenarios.

- 1 Geneva Call has been engaging with over 150 ANSAs since its creation. For more information, see: www.genevacall.org (all internet references were accessed in December 2019).
- 2 For different explanations on how Geneva Call works, see Ezequiel Heffes, "Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs", in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, T. M. C. Asser Press and Springer, The Hague, forthcoming 2020; Pascal Bongard and Jonathan Somer, "Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment", *International Review of the Red Cross*, Vol. 93, No. 883, 2011.
- 3 Fragmented ANSAs have been defined as those that "have weak coercive capacity for enforcing organizational decisions and little unity of purpose among leaders. They exist as loose collections of small factions and individuals but are unlikely to summon unity and institutionalized discipline for any substantial period of time." Paul Staniland, *Networks of Rebellion: Explaining Insurgent Cohesion and Collapse*, Cornell University Press, Ithaca, NY, 2014, p. 8.
- 4 Kristin M. Bakke, Kathleen Gallagher Cunningham and Lee J. M. Seymour, "The Problem with Fragmented Insurgencies", *Washington Post*, 13 May 2015, available at: <https://tinyurl.com/yx42svc8>.
- 5 When referring to "humanitarian actors", this piece includes all those civilian organizations, whether national or international, which have a commitment to humanitarian principles (neutrality, impartiality and independence) and are engaged in humanitarian action, defined here as encompassing humanitarian assistance and protection.
- 6 ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, August 2016, p. 5.

These include the parties' goals and identities, as numerous armed conflicts are fought in the name of identity – ethnic, religious or tribal – rather than for political ideas or geopolitical goals. Moreover, the participants of these “new wars”, as defined by Chinkin and Kaldor, are often loose and fluid networks of State and non-State actors that cross borders, in contrast to the “old wars” that were fought by regular armed forces wearing uniforms. Also, Chinkin and Kaldor explain that in these conflicts, the main violence is directed towards civilians, and battles between parties are actually rare. Armed groups, in this sense, “take over areas where the state presence is weak and then use further violence as a form of intimidation”. The forms of finance involved – as new wars' economies are decentralized and open to the global economy – and the logic of persistence and spread, in which hostilities are difficult to end, are also features of current conflicts.⁷

Considering these factors, one needs to know how to influence these ANSAs in order to improve their respect for IHL, while taking into account the challenges inherent to protracted conflicts, including the lack of a deterrent effect of sanctions when violations of humanitarian norms are committed⁸ and the degradation of basic infrastructure and service provision related to education and health care.⁹ Based on Geneva Call's experience, armed groups have a short lifespan and it is rare to witness them remaining with the same structure and leadership over the years.¹⁰

This article will share some decontextualized examples that Geneva Call has faced in the field when dealing with fragmented groups. Two situations of particular importance today will be presented: one in which the ANSAs split into two distinct factions, and another in which groups join an “umbrella group” formed by various armed groups. Via these scenarios, the article will attempt to draw some conclusions on how to overcome the humanitarian challenges presented by the fragmentation of ANSAs. As the following pages will show, change does not come overnight – especially change in the behaviour of armed actors that are often uneducated and untrained, and that follow different sets of rules (e.g., religious, cultural). From Geneva Call's experience, it has become clear that imposing norms on this type of actor is not effective. However, efforts to ensure that these groups develop a sense of ownership of humanitarian norms has reinforced their understanding of those norms, and consequently acceptance of and respect for IHL.

7 Christine Chinkin and Mary Kaldor, *International Law and New Wars*, Cambridge University Press, Cambridge and New York, 2017, pp. 5–19.

8 Weinstein has affirmed that “[m]echanisms of deterrence depend on the fact that individuals care about the future”. Jeremy Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, Cambridge, 2006, p. 350. In protracted conflicts with fragmented ANSAs, in which attribution for violations of basic norms is extremely difficult, Geneva Call's experience has shown that an approach based on punishment and sanctions is not always conducive, and direct engagement with leadership is preferred.

9 As the ICRC has explained, protracted conflicts demand that humanitarian organizations engage “more deeply with the social and economic needs of communities enduring the entrenched impoverishment and deprivation brought about by long conflict”. ICRC, above note 6, p. 12. The existence of these demands can be quite challenging when engaging ANSAs, as they will prefer to receive assistance for their members rather than talking about humanitarian norms.

10 See also P. Staniland, above note 3, p. 8.

Example 1: Split of armed groups

Sitting under the shade of a rustic shelter, tired from walking long hours before reaching the camp of the armed group, a representative of Geneva Call dialogued with the leadership of a faction that had signed the Deed of Commitment on the prohibition of the use of anti-personnel landmines¹¹ on how to implement the public commitment he had made on behalf of his movement. As part of its assessment, Geneva Call was convinced that the ANSA's organizational capacity was sufficient to enforce the Deed amongst its ranks. A few years later, a split occurred and another rival faction emerged, with the chief of staff challenging the authority of the original movement's chairman. Understandably, the question that arose within Geneva Call was how to make sure that the general commitment which the group had undertaken to respect international norms and the Deed of Commitment, as well as IHL trainings and monitoring processes carried out by Geneva Call, were not lost.

In such situations, engaging one faction alone is not sufficient, as any commitment made would not necessarily bind all the movement's fragmented factions. If these various factions considered the leaders of the former ANSA to be their enemies, to what extent would it be possible to attain their compliance with rules imposed by those they were now fighting against? It therefore is crucial to engage all the splinter factions separately. What is interesting in this particular example is that both leaders expressed that they *felt* committed to the engagement which the original group had undertaken with Geneva Call. They both wanted to show their "legitimacy" as being the official armed group.¹²

Different challenges can be identified when ANSAs split. First, the question of how to deal with ANSAs that have strong internal divisions or fragmented command structures remains a difficult one to address. Armed groups' collapsing structures make any internalization, enforcement and dissemination of humanitarian norms highly challenging. Some movements have split into multiple factions – between their political and military wings as well as within these wings – which routinely fight each other. In these situations, it becomes very difficult to maintain a structured humanitarian dialogue and monitor respect for the group's engagement in the Deed of Commitment. Second, in the context of armed groups' fragmentation, obtaining access and security can be extremely difficult for humanitarian workers. As there is no consistency in the command structure, while a commander can give security guarantees one day, a few months later new security guarantees would have to be granted by the new person in

11 The Deed of Commitment is an innovative tool developed by Geneva Call. It is a humanitarian agreement signed by the ANSA leadership that includes international humanitarian provisions to be respected by armed actors during armed conflict. As of today, four thematic Deeds exist covering themes of prohibition of anti-personnel mines, protection of children, prohibition of sexual violence and gender discrimination, and protection of health care.

12 Some studies indicate that "legitimacy-seeking" ANSAs tend to be more respectful than those that are "legitimacy-indifferent". In this sense, see Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, Cambridge, 2015.

charge. This happened recently when Geneva Call had to renegotiate access to an area that was easily accessible only a month before. A newly created splinter group was controlling a portion of the area at the entrance of the zone, and an individual who was previously known as only a mid-level officer suddenly presented himself as the new leader.

As can be seen, engaging with splitting ANSAs is extremely challenging. The above account is based on Geneva Call's experiences, but most humanitarian organizations trying to access people living in territories controlled by armed groups face similar difficulties. There are at least two conclusions that can be drawn when dealing with these cases: (i) humanitarians should not be afraid that engaging the splinter group could put their relationship with the commanders of the original ANSA at risk, and clear messages on the pragmatic reasons for doing so should be delivered to the latter; and (ii) the existence of fragmented ANSAs shows the importance of engaging in a humanitarian dialogue not only with the highest ranks but also with other members of the group, as they could potentially be leading other ANSAs in the near future.

Example 2: Umbrella groups

Another phenomenon that Geneva Call has witnessed is the situation where in the course of the conflict, ANSAs that were initially independent joined other groups without sharing the same ideology, methods of warfare or level of knowledge of IHL. These coalitions are usually opportunistic and are at times driven by external factors such as the involvement and support of States, or the coalitions' relationships with local communities. The formation of an umbrella coalition of ANSAs usually results in a fragmented command structure with factions that operate autonomously according to their own interests. Sustained humanitarian dialogue with such groups is likely to be challenging, mainly because the leadership often changes and does not necessarily have the capacity to enforce its decisions on its rank and file.

One of Geneva Call's recent experiences included ANSAs that signed the Deed of Commitment in relation to the protection of children. Geneva Call had negotiated plans of implementation and monitoring with each leader, as established by the Deed. Only a few months later, however, these ANSAs nonetheless decided to join a larger umbrella organization which included groups that were well known for violating children's safeguards, as well as groups with a radical ideology. Consequently, there was a risk that this heteroclite coalition of groups, which did not have many shared values or a shared ideology, could have resulted in a dilution of those commitments taken individually, and this could have severely affected the protection of children.

For this reason, each ANSA's leader was approached individually by Geneva Call with a clear insistence that despite the fact that they had joined this umbrella organization, each group remained individually responsible for its own behaviour due to the commitments undertaken before. After long hours of

negotiations, guarantees were provided that the commanders and their troops would remain loyal to their words, with the leaders insisting that regardless of their decision to join this larger umbrella group for operational and military reasons, they did not automatically share the views of all the group's members.

Interestingly, other groups' members not familiarized with Geneva Call wanted to know more about its work and IHL following their discussions with those groups in the coalition that had initially signed the Deeds. On some occasions, when ANSAs already engaged in a dialogue with Geneva Call joined a coalition of groups, this created opportunities for other groups to get interested in IHL, which opened paths for dialogue with Geneva Call. The way in which commitments by parties to armed conflicts may encourage allies or enemies to also commit to humanitarian norms is an issue that often remains neglected, even when ANSAs' decisions may have an influence on States. For instance, ANSAs' decisions to abstain from using landmines facilitated the accession of States to the 1997 Ottawa Convention, "as social pressure on the State government built up once a local non-State armed actor had signed [Geneva Call's] Deed of Commitment".¹³

Although umbrella organizations are often analyzed in relation to the difficulties they present when attempting to being engaged, they could actually open doors in terms of peer pressure and peer engagement that should be further explored. Certainly, the lack of shared values and common understanding of IHL makes it harder for humanitarian actors to pursue a sustained dialogue, but once this is achieved, other members of the same coalition can be engaged.

Adapting to trends in increasingly protracted conflicts

The experiences above have allowed Geneva Call to draw some lessons in dealing with armed groups, especially when rapid mutations occur during armed conflicts that tend to last longer and longer.

It is important to adopt an inclusive approach when starting a dialogue with armed groups. One should avoid limiting contacts and interaction only to the current leadership, as other fighters may become leaders of new factions later on if the movement splits. During IHL trainings carried out with the groups' leadership, Geneva Call tries to make sure that both the top leadership and middle-rank fighters are present (usually the ones that may head splinter factions in the event that the group splits). In addition, in some groups political leaders have limited authority over military commanders because they are far from the battlefield or are based in exile in foreign countries. It is therefore essential for humanitarian actors to adopt a grass-roots approach, being as close as possible to

13 Ulrich Schneckener and Claudia Hofmann, "The Power of Persuasion: The Role of International Non-Governmental Organizations in Engaging Armed Groups", in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge University Press, Cambridge, 2015, p. 102.

local conflict actors and beneficiaries, which also allows them to keep track of potential changes in the group's structure. In addition to armed groups, Geneva Call engages other societal actors such as religious and local leaders and community elders; this serves to overcome the challenge of fragmentation, as they might influence an ANSA's behaviours regardless of its leadership at any given moment.¹⁴

Further, it is imperative to build trust and dialogue with key community leaders that have an influence on armed groups. Experience shows that such interlocutors interact regularly with armed groups. There is general agreement that armed groups' survival largely depends on maintaining a degree of popular consent.¹⁵ When groups are fragmented and therefore harder to reach or to talk to, sometimes the only channel of communication remains the communities themselves. It is important not to overlook these communities as passive victims of the conflict; rather, they should be seen as actors that have the power to influence fractioned armed groups.

Also, one should adopt a "patient" mid-term approach when aiming at sustainable changes in armed actors' behaviour. Achieving an effective impact on the protection of civilians requires humanitarian actors to work with a long-term perspective rather than looking for "quick fix" actions – a characteristic too often present in emergency humanitarian work.¹⁶ A meaningful protection dialogue and engagement with ANSAs should be sustained, taking the necessary time to develop a sound understanding and analysis of the group's structures and behaviour. Especially in long, drawn-out conflicts, engagement should be done with a mid- to long-term approach, as a minimum of three to five years are usually needed to start seeing changes in behaviour and increased respect for the basic rules of war.¹⁷

Developing a protection dialogue with ANSAs is not an easy task, and it becomes more complex when groups split, mutate or join larger movements. Humanitarian organizations need to adapt their analysis to a more frequent

14 On the role of religious leaders in this context, see Ioana Cismas and Ezequiel Heffes, "Can Religious Leaders Play a Role in Enhancing Compliance with IHL?", *ICRC Humanitarian Law and Policy Blog*, 20 December 2017, available at <http://blogs.icrc.org/law-and-policy/2017/12/20/can-religious-leaders-play-a-role-in-enhancing-compliance-with-ihl-2/>. See also ICRC, *The Roots of Restraint in War*, Geneva, 2018, which acknowledges the role of religious leaders in influencing the behaviour of community-embedded armed groups and those with a decentralized nature.

15 Sophie Haspeslagh and Zahbia Yousuf (eds), *Local Engagement with Armed Groups: In the Midst of Violence*, Accord Insight No. 2, Conciliation Resources, London, May 2015, p. 5.

16 Bangerter has explained in this sense that persuading ANSAs to respect IHL can only take place in the frame of a dialogue, for which time spent is essential: "[P]ersuasion is a lengthy process as well as a labour-intensive one. Sowing doubt first is often a better tactic than aiming for a quick breakthrough. This allows members of the armed group to rethink their position by themselves. Asking questions is a powerful tool to help this process, apart from the fact that it shows genuine interest. And time allows enhancing one's credibility. Persistence and coherence between words and deeds can only be experienced over time, and they are in the eye of the beholder, that is, the armed group." Olivier Bangerter, "Comment: Persuading Armed Groups to Better Respect International Humanitarian Law", in H. Krieger (ed.), above note 13, p. 122.

17 This suggested time span is drawn from Geneva Call's experience dealing with behaviour changes in ANSAs.

timescale, keeping in touch constantly with a wide range of key stakeholders in order not to lose track of the current groups' status and structure. As the world becomes more globalized and fast-paced, so do conflict actors. Fragmented ANSAs create a series of challenges when addressing IHL violations in order to reduce civilian harm. Efforts need to be made to create dynamic mappings of the various armed actors and establish dialogue with key community members, thus helping humanitarian actors to keep up with the pace of fragmentation, splitting and alliances that forms the rhythm of the life of armed actors.

Reconstructing infrastructure for resilient essential services during and following protracted conflict: A conceptual framework

Alexander H. Hay, Bryan Karney and Nick Martyn

Alexander H. Hay is Adjunct Professor at the University of Toronto Centre for Resilience of Critical Infrastructure.

Bryan Karney is Associate Dean of Cross-Disciplinary Programs, at the Faculty of Applied Science & Engineering, University of Toronto.

Nick Martyn is Founder and Chief Executive Officer of RiskLogik Inc.

Abstract

The rehabilitation of essential services infrastructure following hostilities, whether during a conflict or post-conflict, is a complex undertaking. This is made more complicated in protracted conflicts due to the continuing cycle of damage and expedient repair amid changing demands. The rehabilitation paradigm that was developed for the successful post-World War II rehabilitation of Germany and Japan has been less successful since. There are a myriad of conflicting interests that impede its application, yet the issue consistently comes down to a lack of systems-level understanding of the current situation on the ground and a lack of alignment between what is delivered and the actual local need. This article proposes a novel conceptual framework to address this, affording a greater “system of systems”

understanding of the local essential services and how they can be restored to reflect the changed needs of the local population that has itself been changed by the conflict. The recommendations draw on heuristic practice and commercially available tools to provide a practicable approach to restoring infrastructure function in order to enable essential services that are resilient to temporary returns to violence and support the overall rehabilitation of the affected community.

Keywords: essential services, post-conflict, cities, resilience capacity, reconstruction, rehabilitation, critical infrastructure.

.....

Introduction

The international community seeks greater alignment of post-conflict reconstruction and development with local needs. Articulated in the Paris Declaration on Aid Effectiveness of 2005 and the subsequent Accra Agenda for Action of 2008,¹ this “alignment” is proving particularly difficult to realize. Despite determination to succeed, there appears little recognition of the socio-economic changes that typically occur throughout conflict and in the quasi-stability that follows the cessation of hostilities.² A policy default of “build back as before”³ supposes that the actual condition of the infrastructure *ante bellum* is known and understood, and also that the population as a whole will generally return to their former patterns of life.

The effects of conflict are felt most at the local level, yet this perspective is rarely represented. Indeed, perspectives are often fundamentally different in each stakeholder. How each stakeholder perceives the need for infrastructure, and priorities for reconstruction, will naturally be based on their respective vision of what the desired outcome should be rather than on an accurate understanding of what exists. It seems obvious that if a common understanding of the current situation on the ground could be established, it would be much easier to also come to agreement on what the incremental needs are.

- 1 “Alignment. Donors base their overall support on partner countries’ development strategies, institutions and procedures.” Organisation for Economic Cooperation and Development, *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action*, Paris, 2008, pp. 3 ff, available at: www.oecd.org/dac/effectiveness/34428351.pdf (all internet references were accessed in May 2020).
- 2 C. Leigh Anderson, *Evaluating Donor-Level Results Measurement Systems*, EPAR Request No. 300, Evans School of Public Affairs, University of Washington, 21 August 2015; Homi Kharas, “Measuring Aid Effectiveness Effectively: A Quality of Official Development Assistance Index”, *Brookings*, 27 July 2011, available at: www.brookings.edu/opinions/measuring-aid-effectiveness-effectively-a-quality-of-official-development-assistance-index/; Stephen Knack, Halsey F. Rogers and Nicholas Eubank, *Aid Quality and Donor Rankings*, Policy Research Working Paper 5290, World Bank, Washington, DC, 2010.
- 3 This approach often results in reconstruction of the infrastructure to its *de jure* laydown *ante bellum* rather than its *de facto* laydown and condition *ante bellum*, but it remains attractive due to its apparent simplicity. Best illustrated by the declaration following the Cairo Conference on Palestine: Reconstructing Gaza, 12 October 2014. The term “laydown” refers to the spatial arrangement of the infrastructure as it can be used, observed and measured.

There are many approaches to post-conflict rehabilitation that identify infrastructure requirements based on community needs. Indeed, each country engaged in such work has its own subtle variation in approach according to its domestic and foreign policy influences. There are other approaches pursued by international and commercial organizations.⁴ Community rehabilitation needs are absolutely the right driver for identifying infrastructure requirements, but it is less clear how this is informed. If one is to develop infrastructure for a particular purpose, it is generally accepted that one needs to understand what currently exists, in context, and any constraints and limitations on its development. This does not always appear to be the case – infrastructure reconstruction projects that result in stranded assets and contribute little if anything to rehabilitation are all too common. The various rehabilitation approaches need to be enabled, and that is what this article is about.

This article explores the requirement for post-conflict rehabilitation as it applies to the reconstruction between periods of violence in a protracted conflict. Developed out of a study into post-conflict infrastructure rehabilitation at the University of Toronto,⁵ it is written from an infrastructure planning perspective. It offers a framework for improved common understanding of the current situation that is practicable, drawing on existing tools and heuristic practices. It centres on recognizing the current purpose and capacities of infrastructure systems, both natural and built, that enable existing essential services. By extension, this also provides an understanding of what the built and natural infrastructure can support through the rehabilitation process.

Before becoming preoccupied by details, it is useful to define what this article means by “infrastructure”. Certainly a whole range of specific infrastructures exist in urban areas, and these component systems relate to everything from housing and communication systems to transport systems and structures that permit the supply of water, food and energy. But more generally, “infrastructure” is used here as a system that enables a purpose. It may comprise a river that is used as a navigation for shipping or a series of built structures that house specific functions. However, the concept of infrastructure extends far beyond one or more assets, and centres on how all these individual components function together as a system to enable a purpose. For example, the purpose of

4 There is a wealth of critical commentary on approaches to post-conflict rehabilitation, particularly in the *Journal of Humanitarian Assistance* (available at: <https://sites.tufts.edu/jha/>), though the most notable approaches are those of the World Bank and UN Habitat, and regional and national views (typically those of the primary donor countries). The Organization for Security and Cooperation in Europe continues to develop its position, policy and approach (see: www.osce.org/cpc/77284), while focus organizations have also contributed, such as ICARDA with agriculture advice (see: www.icarda.org/impact/impact-stories/post-conflict-rehabilitation).

5 The study into post-conflict infrastructure rehabilitation was the core of a doctoral research project by Alexander Hay, supervised by Bryan Karney. The aim of the research was to determine how infrastructure rehabilitation in conflict areas can deliver better outcomes for the local population. Drawing upon available literature and observations of conflicts across Africa, the Middle East and Central Asia since World War II, as well as field experience of reconstruction in conflict areas, an hypothesis was developed and tested in the Gaza Strip. Alexander H. Hay, “Post-Conflict Infrastructure Rehabilitation”, University of Toronto, ProQuest Publication No. 13882374, 2019.

water infrastructure may be the supply of potable water, but that purpose is only fulfilled by many assets and activities functioning in synergy as a system. This *water system* will extend from the water's source to its eventual disposal, comprising each component that enables pumping from rivers and wells, treatment, transmission and distribution, waste water collection, and processing and discharge. It also means that when one considers the possible failure of any component or activity, it does not necessarily mean that the entire system fails. Thus, if a booster pump on a water system fails, gravity may be sufficient to provide a minimum level of water supply to an area. Each situation will be different, and the infrastructure system in question will be defined by its purpose in context. In this article, infrastructure systems are the enablers of essential services such as water and sanitation.

The term “post-conflict” is used here in its operational sense, rather than implying the legally defined end of a conflict. Operationally, “post-conflict” refers to the period following an end of active hostilities, whether a final cessation has occurred or the conflict is experiencing an extended pause. This application of the term therefore recognizes that a state of war may still exist, and can be equally applied to protracted conflict areas. Much of the literature around this subject uses the term “post-conflict” in its operational sense, and this is continued in the present article.

This article explores the requirement for rehabilitation in post-conflict and/or protracted conflict areas, and how the existing approaches meet the local needs in a sustainable and resilient way. This raises the core issue of what can be understood about the current situation and the evidence-based interpretation of actual needs for intervention planning. The scope of what can be known about the local situation through investigation and direct observation is discussed, including the significant advantages offered through stand-off recognition.⁶ The authors present a unifying concept of infrastructure that allows effective interpretation of what can be known, and how this can be represented for reconstruction planning. These threads of discussion are then drawn together around the practicable implementation of proposed reconstruction projects, centring on how the projects are delivered. The article concludes that one can readily understand the actual condition and needs of the post-conflict and/or protracted conflict area, that reconstruction can be better aligned with local needs without compromising donor interests, and that better outcomes are readily achievable.

The rehabilitation paradigm

The approach to rehabilitation created in the aftermath of World War II successfully enabled the rehabilitation of post-war Germany and Japan, as it was designed to do.⁷

⁶ See the section on “The Growing Role of Stand-Off Recognition”, below.

⁷ World Bank, *Post-Conflict Reconstruction: The Role of the World Bank*, International Bank for Reconstruction and Development, Washington, DC, 1998.

Popularly known as the Marshall Plan,⁸ this approach combined aid, reconstruction and development to return countries to financial normalcy. This patterned approach, which we will call the rehabilitation paradigm, set a model for the rehabilitation of subsequent conflict areas, but its application has been less successful since.⁹ Investigating this lack of successful rehabilitation in post-conflict countries, Girod identified two impediments, created by donor countries, that effectively reinforce exploitative institutions.¹⁰ These are resource rents and strategic interest.¹¹ Girod identified some “Phoenix” countries¹² that, in successfully rehabilitating, proved the exception, but these can be listed on the fingers of one hand. Nor is the issue a minor one. Since 1980, almost half of all low-income countries have experienced major conflict, and since 1990, almost all of these have been located in Africa.¹³ In his forward to *Post-Conflict Reconstruction: The Role of the World Bank*, James D. Wolfensohn, president of the World Bank in 1998, said “the sustainable reconstruction of countries emerging from long periods of conflict is a challenge we ignore at our peril”.¹⁴

So, why would a programme that was so successful in post-World War II Germany and Japan prove less so since? A comparison of conditions and, by extension, underlying assumptions is instructive. In post-World War II Germany and Japan, the social and professional/trade institutions were largely intact and the population generally returned to their pre-war occupations. These institutions provided the essential fabric that allowed former combatant reintegration, community reconciliation and reconstruction around a shared purpose and benefit.

In most modern conflicts, however, professionals and others with liquid assets will generally find ways to leave the conflict area. The longer the conflict continues, the less likely they are to return, either quickly or at all. Similarly, the longer the conflict, the less the working-age population remember what normalcy is like. This causes an erosion of the social and economic institutions that are necessary for reconstruction, particularly social capital. Social capital is the system of “networks and resources available to people through their connections to others”¹⁵ and is far more than simply community cohesion and shared identity,

8 The Marshall Plan, named after then US Secretary of State George C. Marshall, was approved by Congress and signed into law by President Harry S. Truman in 1948 as the European Recovery Plan to aid the economic recovery of Western Europe. The United States had a similar [rehabilitation paradigm] aid program for Asia and Japan, though not part of the Marshall Plan.

9 World Bank, above note 7; Desha M. Girod, *Explaining Post-Conflict Reconstruction*, Oxford University Press, Oxford, 2015.

10 D. M. Girod, above note 9. Extractive institutions benefit a small group of people at the expense of the many, whereas in inclusive institutions the many are included in governing for the benefit of all. See Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, Profile Books, London, 2012.

11 D. M. Girod, above note 9.

12 *Ibid.* In identifying the “Phoenix” countries, Girod did not identify any common characteristics (geographic, cultural, socio-economic or political) beyond that they did indeed recover to normalcy after the conflict.

13 World Bank, above note 7.

14 *Ibid.*

15 Daniel P. Aldrich, *Building Resilience: Social Capital in Post-Disaster Recovery*, University of Chicago Press, Chicago, IL, 2012, p. 2.

though these do influence it. It has been shown to be particularly important for post-disaster recovery in communities.¹⁶

Many professionals remained during the Iraq War (2004–05), yet were then removed from vital professional/trade institutions under the de-Ba'athification policies in Coalition Provisional Authority Order 1.¹⁷ Membership of the State political party in a dictatorship is often a prerequisite for professional advancement, whether membership of the Nazi Party in 1930s Germany, the Communist Party in the former Soviet Union or the Ba'ath Party in Syria and Iraq.¹⁸ Guiding a post-conflict country to financial normalcy requires a nuanced understanding of the situation and the wisdom to recognize when outcome is more important than process.¹⁹ However, those in international organizations with such competency are few and typically occupy senior management positions; they are not involved in the specifics of a particular country file, raising the critical importance of the country watching brief.²⁰

The recurring challenge to any rehabilitation approach is that the relationship between individuals/communities and infrastructure is not well understood. It is possible to identify some general links, such as a contaminated water pump with an outbreak of cholera.²¹ However, identifying why a newly installed water pump would not be adopted by the local population, despite the obvious and immediate need for water, is often far more nuanced and can only really be learned afterwards through participatory learning.²² Recognizing that post-conflict rehabilitation is multifaceted, encompassing each aspect of the socio-economic fabric of the population, it is important to explore the value of infrastructure and the role it plays.

Exploring the purpose of infrastructure

All infrastructure is designed and constructed for specific purposes. Infrastructure is built to enable an operation, and when that operation is particularly important or high-value, the infrastructure is designed to enable continued operation even if one component asset or function fails. In a few cases, this may mean duplication of a critical component. More typically it means that alternative systems are employed to enable the same critical capability in an emergency, even if that isn't the alternative system's primary purpose. For example, a medical warehouse has diverse energy sources, from generators to solar panels to windmills. The generators are for the refrigeration units, because they provide reliable, steady

16 *Ibid.*

17 Bob Woodward, *State of Denial: Bush at War, Part III*, Simon & Schuster, New York, 2006.

18 *Ibid.*

19 Alexander H. Hay, "Post-Conflict Infrastructure Rehabilitation Requirements", *Proceedings of the Institution of Civil Engineers – Infrastructure Asset Management*, Vol. 4, No. 4, 2017.

20 World Bank, above note 7, pp. 40–43. A watching brief is an instruction to continuously monitor a location or situation for indicators of an impending change or instability.

21 John Snow, *On the Mode of Communication of Cholera*, 2nd ed., John Churchill, London, 1855, pp. 38–40.

22 Robert Chambers, *Whose Reality Counts? Putting the First Last*, Intermediate Technology Publications, London, 1997.

electricity; all other functions draw on alternative sources. During an interruption to the fuel supply, the critical functions (refrigeration units) normally supplied by the generator can be supported by solar panels, in combination with battery storage, until the fuel supply is resumed. In defining the purpose of a facility, one is able to prioritize what is critical. This is typically specified as how the facility should perform and how it must be capable of performing in the event of some failure in the supporting services or infrastructure; it is the basis of Level 5 commissioning,²³ used in much of the developed world for facilities that must continue to function in an emergency. This reflects the fact that infrastructure is part of a system of operations rather than simply a collection of assets.

To understand infrastructure and what it is for, it needs to be thought of as a system. The system is based around an operation that fulfils a purpose; that purpose can be to support movement, industry, commerce, or municipal functioning. Ultimately, these operations all enable our society and its progress; they all contribute to health.²⁴ Whether supporting social, mental or physical well-being, the role of infrastructure is indivisible from how people live their lives. Those operations that directly affect health are typically termed “essential services.” Essential services provide communal support to the physical well-being of human beings. They encompass the provision of clean water, sanitation, vaccinations, nutrition, heat and light, and shelter; they provide for the physiological and safety needs of human beings.²⁵ Essential services are essential to effective rehabilitation, whether rural or urban. Each essential service is enabled by infrastructure, whether the water network that delivers potable water, the generator farm that provides electricity to the clinic, or roads that allow food to be brought into the community.

Infrastructure that enables an essential service is termed “critical”.²⁶ These categories of function and infrastructure are directly relevant to the post-conflict

23 Level 5 commissioning is the testing associated with the highest level of confidence that the facility will perform as needed through an emergency. The facilities where this is necessary are termed “mission-critical” and can be as diverse as data centres, fire halls and hospitals. A “mission-critical” facility is any facility designated as such by the local authority that is capable of continued operations irrespective of which resources and dependencies are compromised. Level 5 commissioning is the testing of integrated systems. The levels are: 1, Factory Acceptance (basic factory quality control); 2, Component Start-Up (the installed equipment starts when activated); 3, Equipment Operation (the installed equipment functions the way it is supposed to); 4, System Operation (the system in which the equipment is installed functions as it should), and 5, System of Systems Operation (the operation of the whole facility continues irrespective of induced faults and failures in one or more component systems).

24 The World Health Organization (WHO) defines of “health” as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. WHO, “Frequently Asked Questions”, available at: www.who.int/suggestions/faq/en/.

25 Abraham Maslow identified five distinct levels of basic human need that dictate behaviour. They follow a strict sequence, and each must be satisfied before behaviour will change. Human beings will prioritize their physiological/survival needs before they are concerned about their safety, which will take priority over their need to belong and find a partner, which will in turn take priority over their self-esteem, and finally their self-actualization. Maslow’s hierarchy of needs provides a useful structure against which to measure the transition from self-interest to communal interest. Abraham Maslow, “A Theory of Human Motivation”, *Psychological Review*, Vol. 50, No. 4, 1943.

26 There are many variations on the basic definition of critical infrastructure as the systems that enable essential functions/operations; this definition is more typically used at the national level. Public Safety

situation, because they directly affect public health. Many acute and chronic diseases can be directly linked to critical infrastructure systems performance, particularly around water and sanitation. Infrastructure also influences mental and social well-being by spatially defining the world around us.²⁷ Essential services and the critical infrastructure that enables them are a fundamental building block of rehabilitation, and it should be unsurprising that they attract the funding they do.

When something is essential, it clearly should be protected. Typically, a cessation in hostilities rarely means that there will not be a subsequent return to violence, however brief. If infrastructure is critical to the provision of an essential service, it is, by extension, critical to effective rehabilitation. Infrastructure is particularly vulnerable to damage during a return to violence, whether through collateral effects or directly targeted. Infrastructure is rarely hardened against conflict damage, unless specifically constructed to operate during conflict. Consequently, it is rare for critical infrastructure not to be damaged, with predictable consequences for the essential services that it enables.²⁸ The role of the critical infrastructure system, then, is not simply to enable operations during peace, but to have the capacity to enable continued functionality during a return to and during protracted violence. This means that the infrastructure systems must be resilient.²⁹

“Resilience” is a term now used widely in various contexts, and sometimes with quite varied meaning. Yet for many, Holling’s 1973 ecology paper³⁰ has played a significant role. As Holling used the term, resilience refers to the ability of an ecosystem to adapt and respond to changes in its environment and to recover from shocks. This could as easily describe a planning approach used by Cyrus the Great when he laid out the Persian Empire,³¹ government command facilities that were designed to continue operations during a nuclear conflict in the Cold War, or disaster-designated facilities that are designed today to provide response capability in an emergency. In this article, the concept of resilience has both a

Canada defines critical infrastructure as “processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government” (Public Safety Canada, “Critical Infrastructure”, available at: www.publicsafety.gc.ca/cnt/ntnl-scrtr/crtcl-nfrstrctr/index-en.aspx), while according to the US Department of Homeland Security, “[c]ritical infrastructure describes the physical and cyber systems and assets that are so vital to the United States that their incapacity or destruction would have a debilitating impact on our physical or economic security or public health or safety. The nation’s critical infrastructure provides the essential services that underpin American society.” Department of Homeland Security, “Critical Infrastructure Security”, available at: www.dhs.gov/topic/critical-infrastructure-security.

- 27 Joseph Aicher, *Designing Healthy Cities: Prescriptions, Principles and Practice*, Krieger, Malabar, FL, 1998; Jane Jacobs, *The Death and Life of Great American Cities*, New Edition, Random House, Toronto, 1997.
- 28 International Committee of the Red Cross, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, 2015.
- 29 A system or operations may be described as being resilient – that is, having the ability to adapt to, absorb, respond to and self-recover from changes to its environment. Resilience is a property of the system. The term can be applied to individuals, communities and organizations.
- 30 C. S. Holling, “Resilience and Stability of Ecological Systems”, *Annual Review of Ecology and Systematics*, Vol. 4, 1973.
- 31 Xenophon, *Cyropaedia* (trans. Walter Miller), Vol. 2, Books 5–8, Harvard University Press, Cambridge, MA, 1914.

community and an operational aspect. The operational resilience of the essential services (and critical infrastructure systems) is one of several enablers of community resilience. When the community is resilient, it can access and benefit from the essential services. One cannot deliver the other, but neither can be developed in isolation of the other. This article focuses on the operational resilience of critical infrastructure systems as the enabler of community resilience. The definition used in this article is the one developed by the University of Toronto Centre for Resilience of Critical Infrastructure, which refers to operational resilience as “that essential ability of an operation to respond to and absorb the effects of shocks and stresses and to recover as rapidly as possible normal capacity and efficiency”.³²

What is required of infrastructure reconstruction for community rehabilitation?

Having identified what the rehabilitation paradigm is, why it is not as effective as it was when first devised, and the role of the essential services and enabling infrastructure, it is important to define what is required of it. The ultimate purpose of returning a post-conflict society to financial normalcy is unchanged.³³ In order to do this, the rehabilitation paradigm needs to be applied to the current situation and not to some external projection of what it is known in another country. It is necessarily local and bespoke to the context in which it is applied. The paradigm must provide an integrated approach that allows for the concurrent provision of aid, reconstruction and development, and the incremental restoration of essential services. This requires an integrated strategy that builds community resilience in concert with resilient essential services. Infrastructure has a key role to play, both during construction and in operation.

Both this discussion and experience suggest that how infrastructure projects are delivered is as important for community rehabilitation as their purpose. Enabling the local community to work on infrastructure rehabilitation projects by maximizing the use of local trade skills, affording local access to works, using local supply lines and providing a broad range of responsible paid employment typically leads to a greater sense of ownership and more inclusive institutions. When international donors require that work be done by their own nationals as a condition of fund release, this local-process benefit is lost.

Some key challenges to infrastructure project delivery

There are clearly challenges, otherwise there would be more successful international interventions in post-conflict areas. Several commentators and international

32 Centre for Resilience of Critical Infrastructure, “Frequently Asked Questions”, para. 2, available at: www.crci.utoronto.ca/about/faqs.

33 The question of whose definition of “financial normalcy” should be used is not explored in this article.

organizations speak of adaptive capacity³⁴ and absorptive capacity,³⁵ coming down for or against the need for capacity-building.³⁶ This often presupposes that the local population defines capacity in the same way as the donor nation or agency.

In extreme cases, “capacity” can be interpreted as professional qualifications, which really only provide the means for newly qualified locals to escape to a new life in the donor country rather than contribute to the rehabilitation of their own society. Consequently, the local community loses the ability to interpret its actual needs as reconstruction or development requirements. Therefore, it falls to the international community’s infrastructure engineer to interpret a locally identified community requirement, in its socio-economic context, as an infrastructure requirement that supports resilient essential services delivery. Quoting James D. Wolfensohn again, “we will not have peace without economic hope. We must approach the challenge with humility and constant review.”³⁷ This is particularly acute for the international infrastructure engineer, who is often required to plan in the absence of any real understanding of the situation and local needs, and so will perceive a need and associated infrastructure deficiencies that reflect what is personally familiar. This can lead to the construction of major capital assets (and monolithic systems) that create a single point of failure³⁸ during a return to violence. For example, if one replaces all local sewage processing with a single, centralized plant for the whole city, the loss of operation at that plant will compromise sewage treatment for the whole city. If sewage processing hadn’t been centralized, the loss of a single plant would only have a local effect. The difference is simply the scale of impact, but this can become the determining factor when planning infrastructure in areas that may experience a return to violence. Better solutions require a highly nuanced balance between centralization of some functions and decentralization of

34 Adaptive capacity is “[t]he ability of systems, institutions, humans, and other organisms to adjust to potential damage, to take advantage of opportunities, or to respond to consequences”. Intergovernmental Panel on Climate Change, “Glossary”, in *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge, 2014, p. 1251, available at: www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_annex-i.pdf. In post-conflict areas, the term is generally used to describe the capacity of a local population to adjust its routine to change, whether arising from conflict damage or reconstruction.

35 Absorptive capacity is the capacity of an organization to “identify, assimilate, transform, and use external knowledge, research and practice”. “Absorptive Capacity: Definition and Explanation”, *Oxford Review*, available at: www.oxford-review.com/oxford-review-encyclopaedia-terms/encyclopaedia-absorptive-capacity/. In post-conflict reconstruction, the term refers to the ability of the local population to accept, adopt and use tools and reconstruction to their own benefit.

36 Asmita Tiwari, *The Capacity Crisis in Disaster Risk Management: Why Disaster Management Capacity Remains Low in Developing Countries and What Can Be Done*, Springer, New York, 2015; Susanne Koch and Peter Weingart, *The Delusion of Knowledge Transfer: The Impact of Foreign Aid Experts on Policy-making in South Africa and Tanzania*, African Minds, Cape Town, 2017; William Easterly, *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good*, Oxford University Press, Oxford, 2006; USAID, *Policy for Trade Capacity Building*, Washington, DC, 2016.

37 World Bank, above note 7.

38 A single point of failure is an asset or function that is critical to the conduct of a system’s operation and the loss of which would cause total system failure.

others; without local understanding, it is impossible to develop a balanced approach that provides localized essential services along with a centralized capacity.

Elsewhere, one often finds infrastructure planning that has been deferred entirely to locally justified project requirements which are themselves a response to international aid and funding processes. For example, the Quick Impact Project (QIP) system in Afghanistan sought to stabilize areas by providing the essential infrastructure projects that the locals requested. In fact, QIPs became a cause of attacks on the security forces because they would lead to schools and other infrastructure.³⁹ There is a real role for a situationally intelligent partnership between the infrastructure engineers from the international community and local engineers in all parts of the rehabilitation paradigm. This is not always realized. For the reasons already discussed, the professional understanding of infrastructure systems capacity and laydown⁴⁰ is often lacking, even though the local community will have a clear understanding of the essential services deficiencies. Locals and international officers need some form of situational common reference to inform requirement.

Returning briefly to the centralized/decentralized sewage process example, one can see the benefit of dispersion of function as a mitigation of the risk of direct damage. Dispersion of function does not necessarily mean increased cost, and can become more manageable in terms of energy. For example, if the dispersed sewage processing was for first-stage processing, which could be achieved using no more than the electricity generated by a modest local solar power system, the overall resource burden is reduced. Conversely, the centralized plant will need a reliable grid supply of electricity, creating a supplementary dependency, as well as an increased resource burden. It is not unusual for communities in protracted conflict areas to have unreliable electrical supplies, even if they are connected to the grid. This reflects basic infrastructure protection concepts of dispersion of function and duplication of assets.⁴¹ The first principle of infrastructure protection is to do no harm, meaning that one must not make the situation worse.⁴² A simple whole cost of risk calculation, comparing the inherent risks in the existing situation with the proposed infrastructure solution cost and residual risk, will quickly indicate whether the proposed solution is viable. To take an example, assume the international community is considering the restoration of a cold-chain warehouse used to bring in frozen foodstuffs for the population. The

39 Mark Ward, "Quick Impact Projects Slow Progress in Afghanistan", *Boston Globe*, 15 October 2009, available at: http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/10/15/quick_impact_projects_slow_progress_in_afghanistan/.

40 For a definition of the term "laydown", see above note 3.

41 The three "d's" of critical infrastructure protection are deception, duplication and dispersion of function. Deception is where the function of an asset is disguised, often by making all buildings identical so that one cannot distinguish between pump house, office, storage and dosing plant in a water distribution network. Duplication refers to installing multiple assets for the same critical function so that operations are unaffected by the loss of any single asset. Dispersion is the physical separation of assets in a system so that damage to one asset does not cause collateral damage to another. It is an effective way of limiting the harm of an attack and making the response more manageable.

42 The three principles of protection are do no harm, no protection is absolute, and everything will change. Alexander H. Hay, *After the Flood*, Friesen Press, Vancouver, 2016.

existing plant has an ammonia refrigeration system installed. The area is still at risk of a return to violence, and the cost of repairs to replace like with like over the planned operational life of the refrigeration system is slightly cheaper for a new ammonia system than a carbon dioxide system. Both options are locally resourceable. In the event of damage to the warehouse, there is the associated risk of a catastrophic release of refrigerant. Ammonia is highly toxic, forcing the evacuation of the neighbouring areas; carbon dioxide does not require local evacuation. The disruption caused by either option and the associated costs of the risk being realized tip the balance in favour of a carbon dioxide refrigeration system being installed during the restoration works.

Common to each challenge is the lack of genuine understanding of the situation – that is, an understanding which is informed by the evidence of local circumstances, infrastructure condition and function, and local requirements. Aside from the need for professional humility by reconstruction planners and infrastructure engineers, that *de facto* understanding of the current situation must remain independent of any projections of bias or familiar solutions. This means that more than simply recognizing what exists, there needs to be a way of interpreting what it means for the local population, leading to a realization of what needs to be done, and how, and in what sequence. There needs to be a unifying concept of infrastructure that allows interpretation and is readily adaptable to emerging machine learning technologies, which will increasingly be able to automate much of the analysis over the coming years.

A lack of situational understanding also prevents effective intelligent resourcing. The concept of intelligent resourcing, first described by Vitruvius,⁴³ calls for the adaptation of concept designs to suit local resource supply and trade. This means that the essential performance of the concept design is retained, while the construction and finished product are locally resourceable. Further, if a new infrastructure can be maintained (i.e., serviced, operated and repaired) using local labour and materials, it is more likely to be so. When the routine operation and maintenance of infrastructure depends upon other nationals being contracted and deployed, or specialist materials that need to be imported from overseas, maintenance is likely to be lacking and eventually the facility fails. Take the example of a new water treatment plant in the Caribbean. The original 1950s plant was a sand-bed filtration system that could be easily operated and maintained using local skills and materials. When the new membrane plant was built, the local skills and materials were not available and the plant was soon bypassed in the water supply system. It became a stranded asset, and the local population did not benefit. There are many examples of critical infrastructure that relies on external skills and specialist equipment for maintenance and so is rarely repaired when broken and is not adopted by the local community.⁴⁴

43 Vitruvius, *Ten Books of Architecture* (trans. Morris Hicky Morgan), e-Kitap Projesi, Istanbul, 2014.

44 The Great Man-Made River (see: https://en.wikipedia.org/wiki/Great_Man-Made_River) in Libya is such an example. While locally conceived and delivered, it depends entirely upon specialized foreign material and skills to operate and maintain; its operation and maintenance cannot be sustained locally. Mohamed Nasar Nasar, "Survey of Sustainable Development to Make Great Man-Made River Producing Energy and Food", *Current World Environment*, Vol. 10, No. 3, 2015.

The concept of intelligent resourcing also recognizes scale and developing the capacity of the supply chain without forcing prices out of local reach. Not all international donors practice intelligent resourcing, whether due to national constraints that reconstruction contracts must be given to their own companies or simply because it requires more design effort.

Understanding the current situation

At a minimum, infrastructure planners and engineers need to understand what infrastructure currently exists in a region and both its physical and social context. Working from a map with overlays depicting historical survey data is not representative of the current situation on the ground. This understanding must be current to properly inform planning and decision-making. Practicably, one would wish to understand the critical infrastructure laydown in its socio-economic context. In this regard, several key considerations come into play.

The most immediate consideration is to determine what is locally resourceable, to inform intelligent resourcing practice. This goes beyond what materials can be procured locally through the existing supply chains, extending to the availability of heavy equipment, trades and professional skills and competencies. External dependencies for materials and skills will rarely result in sustainable operation, any local sense of ownership, or stable recovery. These are essential when the community is again under stress, such as during a resumption of hostilities. Similarly, the community governance structures must be capable of communicating to the whole community, managing the disbursement of reconstruction funds, and the coordination and control of rehabilitation activities, whether at a local community, corporate, institutional or regional government level. The system of governance again needs to be inclusive for rehabilitation progress to stick and endure a resumption of hostilities. These aspects will also be set against a recognition of how the current needs of the local population have changed, which may be different to the previous pause in hostilities and different again from the situation before the conflict began.

The other considerations centre on the inherent risk profile of the area. The infrastructure laydown and the communities served may face inherent perils ranging from extreme weather events, seasonal flooding and drought to earthquakes and endemic diseases, as well as the risks associated with the actual damaged condition of the area. Given the nature of infrastructure and that its life extends beyond the immediate period of the pause in hostilities or even the conflict as a whole, these contextual risks will determine what solutions and approaches are sustainable. An expedient solution has little value if it is subsequently washed away in the seasonal rains. Where infrastructure rehabilitation fits the inherent risk context, it is more likely to endure and provide a foundation for subsequent rehabilitation efforts. Finally, it is important to understand how the infrastructure connects to other infrastructure systems,

how the local communities connect to their neighbours, and the relationship between all users of the infrastructure and the authority controlling the infrastructure.

While the topography is unlikely to have changed significantly over the course of the conflict, what is discernible of the infrastructure will have. The infrastructure systems or networks may well have been damaged, and there will be rubble and other conflict debris to account for. One also needs to understand the physical environment, natural and built. This will allow one to determine inter-systems connectivity and can expose emergent patterns of life, such as the routes that people take between functions. One would also wish to know where people are and how they are living. This provides demand density profiles and distributions across the area, and hence an inferred relationship between the observable infrastructure and the demand. The closer to the conflict this situational observation begins, the more existential the relationships are. The behaviours and routines of the population will closely parallel Maslow's hierarchy of needs.⁴⁵ Where the needs are centred on food and shelter and basic survival, the adoption of the rehabilitation process and contribution to collective benefit is minimal. Conversely, when the existential needs are met, there is more active engagement in community rehabilitation and intellectual ownership over the direction and priorities. Parallel investigation of the available literature would provide some idea on geology, soils, hydrology, climate, and meteorological conditions.

From these investigations and through deductive reasoning, one can derive an inherent risk profile for the area in terms of natural hazards and the environmental limitations on any intervention, as well as an initial impression of scale of need, infrastructure function and community dynamics. Building this initial understanding is typically conducted using all available sources, from pre-conflict maps and surveys through to online mapping and sometimes crowd-sourced information such as the Ushahidi platform.⁴⁶ The process is typically iterative, as each new piece of information either fills a gap or corroborates/challenges an assumption. However, the conventional open source search has its own challenges, with questions over the quality of some of the reporting that one finds. It is not unusual for researchers to reject 40% of the open-source reports due to an apparent bias; statistical data may have been selectively included to support the author's agenda or may simply be absent of fact. While these reports may not provide auditable and objective assessment, they can still provide thematic value by highlighting the issues perceived by the author.

45 See above note 25.

46 Ushahidi, meaning "testimony" in Swahili, is a not-for-profit company that was established to map the violence following the 2007 Kenya elections using real-time crowd-sourced data. It has since provided real-time crowd-sourced reporting in many humanitarian missions, in election monitoring, and during natural crises. See the Ushahidi website, available at: www.ushahidi.com/impact-report/history. Ushahidi was also used by Al Jazeera to collect eyewitness reports during the 2008–09 conflict in the Gaza Strip. See Ushahidi, "Ushahidi – 1 Year Later", available at: www.ushahidi.com/blog/2009/01/08/ushahidi-1-year-later.

To satisfy the need for up-to-date information, aerial imagery has been obtained in some situations, where it was safe to do so. This generally meant an association with the security forces, which is not always practicable or desirable, particularly for humanitarian organizations. When obtained, aerial images would be analyzed to lend the desk-top study currency. However, more recent developments in satellite imagery capabilities, particularly from multi-spectral, hyper-spectral and radiometric sensors, provides a more powerful analytical tool for the infrastructure planner, and the data is generally commercially available. Satellite imagery, at suitable resolution, can provide the core of the analysis framework, rather than serving as a supplement to desk research.⁴⁷

The growing role of stand-off recognition

This ability to recognize infrastructure assets and function remotely is generically known as stand-off recognition. It is virtually impossible to develop effective plans to address problems if one has not understood what the challenges are. This is where stand-off recognition comes in. Stand-off recognition is a technique used to recognize the presence, function and operating context of infrastructure assets using a variety of remote-sensing technology platforms.⁴⁸ This enables the analyst to gain deeper initial insight before going onto the ground to conduct field research. In some cases, stand-off recognition can replace field research where conditions are unsafe due to damaged structures and/or a lack of security for the field team. However, field validation, or “ground truth”, is always preferable since remote-sensing results that have not been verified cannot usually be classified as “authoritative”. Stand-off recognition is a tool typically used in military planning, although similar tools and techniques are applied in a wide range of other domains such as disaster assessment, urban planning and precision agriculture.⁴⁹ It is based on the idea that given certain “tells” or indicators, one is able to recognize and interpret meaning from what can be observed. From this basic interpretation of the evidence, one may draw reasonable planning conclusions, based on typical patterns or trends founded in other evidence. For example, a military image analyst will look at an aerial image of some enemy tanks behind a hill on a battlefield and, recognizing various vehicle characteristics and features (or tells), he or she will be able to identify what type of tank they are, and their capabilities. From this the analyst will be able to deduce the type of unit the tanks belong to, their operational posture and their probable intentions. The same techniques can be applied to post-conflict stand-off recognition of

47 Through the advent of artificial intelligence and the accuracies that are now being achieved through remote sensing, it is increasingly possible to provide reliable estimates of damage arising from lateral forces, such as seismic, blast and flooding, that have caused some deformation or translation of the structure, although such measurements do depend on there being a reliable baseline model against which to assess change.

48 A. H. Hay, above note 5.

49 Thomas M. Lillisand, Ralph W. Kiefer and Jonathan Chipman, *Remote Sensing and Image Interpretation*, 7th ed., John Wiley & Sons, Hoboken, NJ, 2015.

infrastructure to determine its condition, vulnerabilities, and ability to contribute to post-conflict reconstruction.

During the Second Gulf War, British military engineers discussed the Iraqi electrical infrastructure with the German company originally involved in its laydown and identified various tells that would show how the electrical distribution was laid out. The infrastructure laydown had changed significantly in the intervening twenty-five years, but the configuration was unlikely to have changed significantly. In one case, the assessment was as simple as counting the number of insulators on the transmission and distribution poles to see what electrical power was distributed where, comparing this with the domestic demand, and so identifying any unusual power demands. It was possible to do this from aerial/satellite imagery. Immediately following the conflict, field teams would verify the insulator count and update the electrical distribution maps to inform reconstruction planning.

The application of multi-spectral satellite imagery, as one example, provides even more opportunities to inform our understanding of infrastructure capacity to contribute to post-conflict reconstruction. Multi-spectral imagery makes use of both the visible and non-visible light spectra, to detect different features on the ground that would otherwise go unnoticed. It is especially useful in understanding agricultural capacity and is used extensively in precision agriculture applications. Using principles similar to chromatography,⁵⁰ multi-spectral image analysis detects the unique light reflectance signature of each feature on the ground. Knowing what the signature of most ground cover features are, specialized software can classify each feature and present it visually in geospatial information system (GIS) software for analysis. Normalized difference vegetation index (NDVI) is especially useful in understanding food security potential or vulnerability in an affected area. At various times during the agricultural cycle (germination, cultivation and harvest), NDVI products can inform us about crop health, crop type and potential crop yield. When compared to food requirements by population, this information provides a useful gauge of near-term food security. The same techniques can be used to determine crop health and crop yield early in the germination phase, allowing targeted interventions as required. Further exploitation of NDVI ventures into the field of hyper-spectral imaging⁵¹ and spectral cube analysis,⁵² which extends beyond the scope of this article but presents a valuable analysis tool for complex situations in the future.

Stand-off recognition is also especially useful in understanding land use patterns and detecting change. Land use and land management are particularly complex issues, and the factors governing them are unique to each culture. There

50 Chromatography is a process whereby a substance is burned and light is passed through the vapour and then a prism to project a unique spectral signature for each substance. The chemical compounds in different plants have unique spectral signatures, which vary in both intensity and signature as crop health changes. Different crops reflect unique light signatures that identify the crop type, crop health, potential yield, pesticide residue and moisture content.

51 Hans Grahn and Paul Geladi, *Techniques and Applications of Hyperspectral Image Analysis*, John Wiley & Sons, Chichester and Hoboken, NJ, 2007.

52 Chein-I Chang, *Hyperspectral Imaging: Techniques for Spectral Detection and Classification*, Springer, New York, 2013.

are, however, some enduring constants that cross all these boundaries, and which prove critical to our understanding of post-conflict recovery potential. Stand-off recognition can detect and expose these for analysis. The most obvious is that man-made structures preclude agricultural activity unless they are for the purpose of intense agriculture, such as automated dairies, poultry operations, or intensified horticulture or aquaculture. In post-conflict situations where large numbers of either refugees or internally displaced persons (IDPs) occupy previously productive agricultural land, that land and its output are removed from the food security calculation. Elsewhere, IDPs may be accommodated in existing urban areas. This sudden increase in demand density and the accompanying aid provision will stress the existing carrying capacities of the critical infrastructure. Over time, the IDPs will move out into new areas or sometimes displace the original residents, who will develop new conurbations. Where these temporary displacements become longer-term informal settlements, it becomes increasingly difficult to return the land to agricultural purpose, thus having a longer-term impact on food security and recovery capacity. Multi-spectral imagery collected on a frequent and persistent programme, properly calibrated to detect man-made structures, can detect such encroachments rapidly through the use of artificial intelligence (AI) change detection algorithms. Extrapolation of the resulting agricultural impact can be used to project the increasing vulnerabilities of the population to future reductions in the local food supply. For example, the publicly released maps for the Gaza Strip, generated by the local government and UN agencies, show that 178 km² of the 358 km² within the borders is under cultivation. Using multi-spectral satellite imagery, one can see that it is actually less than 100 km². Much of this was subsequently compromised during the 2018–19 Great Return March demonstrations. Such analysis can significantly address many of the assumptions made in reconstruction planning.

Water is the frequent locus for refugee and IDP concentration. Each water source, surface water or ground water, has a natural carrying capacity most often determined by its recharge rate. Overuse of a water resource depletes the natural recharge capacity, often upsetting the natural hydraulic balance of the aquifer that supplies it, sometimes irrevocably. This is especially true in coastal regions, where there is a delicate natural balance between fresh water recharge pressure and sea water infiltration pressure. Overuse of the aquifer reduces the freshwater recharge pressure to a level below that needed to prevent sea water intrusion. Salination of the aquifer occurs, making the water brackish, even non-potable without the deployment of water treatment and desalination equipment. Various remote sensing techniques can be used to determine the natural carrying capacity of water sources as well as to discover overuse. Depending on the depth of the aquifer, ground-penetrating radar⁵³ can detect the presence and extent of ground water, while multi-spectral imagery and specialized analysis can determine surface water quality and contamination. By correlating local weather and precipitation

53 Madan Kumar Jha, Alivia Chowdhury, V. M. Chowdary and Stefan Peiffer, “Groundwater Management and Development by Integrated Remote Sensing and Geographic Information Systems: Prospects and Constraints”, *Water Resources Management*, Vol. 21, No. 2, 2007.

data with the man-made structure overlay and using typical factors for surface porosity and evaporation, it is possible to calculate the surface precipitation recharge rate for the aquifer and from this to heuristically infer the carrying capacity of a water source. Ultimately, though, the degree of aquifer salination is determined by well-head testing. Recognizing through stand-off recognition that there is likely an issue, and where the areas of concern are, can focus the field teams' efforts and provide a contextual understanding of problem scale and scope that informs strategy development.

Synthetic-aperture radar (SAR)⁵⁴ imagery is a system of satellite or airborne land survey that uses radar and so is largely unaffected by weather conditions such as cloud. By observing the land surface obliquely (at an angle) from different positions along a flight path, it can build a very accurate three-dimensional model of the area. This ability to build highly accurate and compelling models without depending on obsolete or falsified mapping information dramatically enhances real-time understanding and decision support in post-conflict reconstruction. When these models are combined with thematic data layers, one can create interactive "virtual reality" tableaux at an affordable cost. Radar interferometry⁵⁵ is the practice of comparing SAR imagery from different time periods to identify changes (known as deformations) in the surface of the Earth, in sizes ranging from millimetres to metres. By comparing SAR data before and after events/violence, one may detect and monitor change in many of the important infrastructure dimensions, such as displacements in the structural supports to a bridge or other critical infrastructure. Such data also informs changes in patterns of use, because of the evidence of recent changes in repeated human behaviour, and as such represents a step change in the decision support capability that stand-off recognition can offer.

Machine learning, both supervisory and non-supervisory, is already employed for image classification and feature extraction in advanced GIS applications. While these capabilities enhance data processing speed and accuracy, strong AI tools will enable high-fidelity, and potentially fully immersive, simulation tools that are able to simulate the effects of proposed reconstruction interventions. Such tools will allow deeper investigation of infrastructure project consequences, including unintended ones, before funds and effort are committed.

There are three levels of understanding that stand-off recognition can potentially inform.⁵⁶ The first is the physical laydown and position of the infrastructure systems, the second is the relationship between local demand and infrastructure carrying capacity, and the third is how the infrastructure influences community functions and behaviour. Depending on how reliable these three findings are, stand-off recognition can inform an intelligent approach to post-

54 Alberto Moreira, Pau Prats-Iraola, Marwan Younis, Gerhard Krieger, Irena Hajnsek and Konstantinos P. Papathanassiou, "A Tutorial on Synthetic Aperture Radar", *IEEE Geoscience and Remote Sensing Magazine*, Vol. 1, No. 1, 2013.

55 Roberto Tomás, Javier García-Barba, Miguel Cano, Margarita P Sanabria, Salvador Ivorra, Javier Duro and Gerardo Herrera, "Subsidence Damage Assessment of a Gothic Church Using Differential Interferometry and Field Data", *Structural Health Monitoring*, Vol. 11, No. 6, 2012.

56 A. H. Hay, above note 5.

conflict areas at the initial stages, potentially preventing the often incompatible relief and reconstruction approaches that are not aligned with local need. It is instructive to explore each level of understanding.

- **Physical laydown:** Understanding where infrastructure assets are located, and therefore being able to observe or derive the infrastructure network, provides the basis for comparing the infrastructure laydown with demand clusters, political boundaries, supply chains and battle damage.
- **Carrying capacity:** Carrying capacity is normally bounded by how much demand the infrastructure can physically support and what is financially sustainable in terms of receipts for resources consumed against the cost of operating and maintaining the infrastructure. In a post-conflict and/or protracted conflict situation, these bounds are less relevant than the equilibrium that is reached between the demand and the infrastructure.
- **Influence:** How the infrastructure systems influence the behaviour and organization of the local communities has traditionally been a function of the analyst's professional experience and familiarity with the regional culture and social norms. However, a generic concept of infrastructure would provide the means to interpret what is recognized.

When the traditional desk research with supplemental imagery analysis was compared with stand-off recognition of the Gaza Strip, the findings were much as expected, though with some surprises.⁵⁷ Of particular note is that the stand-off recognition identified aspects that were not immediately discernable on the ground without extensive testing, such as soil and seawater contamination levels. It also identified stranded assets that were either no longer functional in the infrastructure network or simply lost from the corporate knowledge of the local utilities. The stand-off recognition provided far greater reliability in positional accuracy and network laydown than the traditional approach, yet it cannot replace the essential understanding of how the utilities operate and respond to incidents and crises. The authors see stand-off recognition as supplementary, providing framework information and whole systems perspective that enhances field engagement. In the Gaza case, it also provided a valuable initial assessment of the profile and density of demand across the area. This raises the issue of how one reconciles demand with carrying capacity – after all, the relationship is rarely, if ever, binary. There are levels of demand that must be met now, and others that can be addressed later. Those engaged in rehabilitation need to understand the thresholds of performance that the infrastructure systems must enable.

What is the minimum acceptable performance of essential services?

The level of essential services provision will depend upon what can be supported by the infrastructure. The local population can tolerate reduced levels, up to a point. That point may be dictated by the amount of time without a particular essential

⁵⁷ *Ibid.*, p. 114.

service. Electrical supply is one such example, where restricted periods of use are not uncommon, but are tolerated because the overall net level of essential service provision just satisfies essential needs. From this one can derive what the infrastructure must be capable of supporting. A key challenge in this domain is to understand what the critical priorities and goals are. Understanding what the minimum acceptable levels of performance (meaning essential service provision) are requires an understanding of what the available resources can support and what the envelope of needs are.

The incident sequence graphic tool seen in [Figure 1](#) provides a useful illustration of performance levels and the local tolerances of service interruption. When an operation, any operation, fails, its performance will drop to zero or close to it. The system of systems⁵⁸ that enables the operation will have a natural elasticity which reactively restores those essential functions necessary for survival, irrespective of what caused the failure or if the incident is ongoing. That natural elasticity is a feature of complex adaptive systems, which communities typically are.⁵⁹ This survival level of performance is known as the minimum operating capability (MOC). It will typically draw on resources that are not usually required for normal operations, such as diesel used for a stand-by generator when normal operation relies on grid-supplied electricity. Timing is critical, and the reaction must be followed up with a deliberate response. This is situationally dependent and requires clear direction on prioritization of function restoration and resource allocation to achieve a sustainable level of performance. This sustainable level of performance is known as the minimum sustainable capability (MSC). This is the natural stability of the operation. It is neither growing nor shrinking, and can theoretically continue indefinitely. In financial terms, the cost of operation is equal to the revenue received and is therefore cash-neutral. This means that the infrastructure performance is locally sustainable and not dependent upon external support. Understanding what level of performance represents the threshold of sustainability informs the types and scale of reconstruction project that can be transferred to local control, and helps to determine which projects will create a prolonged operational burden on donors.

Both the MOC and MSC have particular resource requirements, which can be determined ahead of the crisis and pre-positioned under an emergency management plan. For example, consider a water treatment plant. Under normal conditions it is powered from the grid supply. The energy required to maintain MSC during periods of stress can be calculated and prioritized in the grid supply to maintain essential services to the community. This could also be provided by an alternative supply, typically a stand-by diesel generator. However, in the event of a total grid failure and an absence of district storage, one may calculate how much energy is required to achieve MOC levels of water supply, for hospitals etc.,

58 David N. Bristow, "Asset System of Systems Resilience Planning: The Toronto Case", *Proceedings of the Institution of Civil Engineers – Infrastructure Asset Management*, Vol. 2, No. 1, 2015.

59 Scott E. Page, *Uncertainty, Difficulty, and Complexity*, SFI Working Paper 1998-08-076, Santa Fe Institute, 1998.

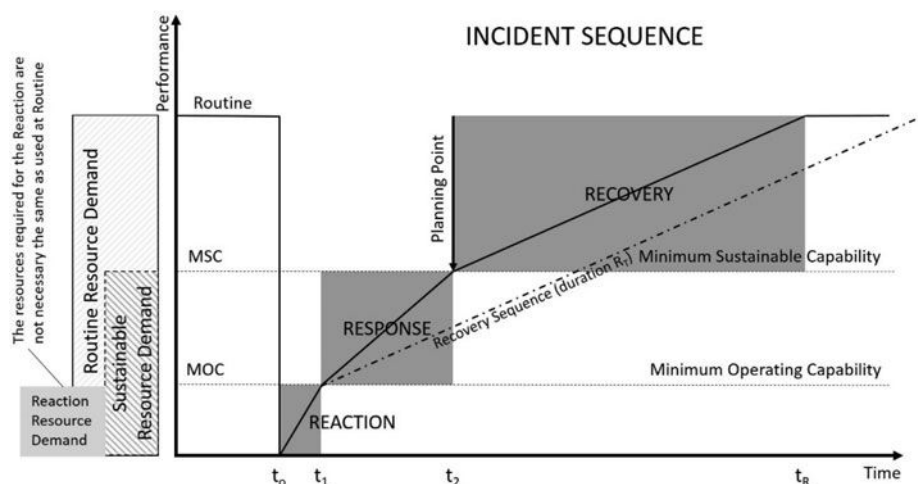


Figure 1. Incident sequence graphic tool. This shows the relationship between performance of an operation and time over an incident. The performance is shown as routine prior to the incident, followed by failure and the gradual restoration of functionality through reaction and response, then eventual recovery back to a routine level of performance. The resources needed for each level of performance can be calculated, as can the maximum duration of interruption to the operation, sequencing of component function restoration and other risk planning criteria. By comparing the area under the graph with one for a proposed infrastructure development option, one is able to produce the difference in whole cost of risk, which indicates whether a proposed project is technically/operationally worth the investment or not. Source: Alexander H. Hay, "The Incident Sequence as Resilience Planning Framework", *Proceedings of the Institution of Civil Engineers – Infrastructure Asset Management*, Vol. 3, No. 2, 2016, p. 57.

which might be provided by alternate power sources ranging from solar energy and battery storage to stand-by diesel generators. Each alternative source comes with its own maintenance and resource burden; this is knowable and can be set aside or prioritized for planned durations. When stress is applied for an extended period, communities will find a natural equilibrium and will stabilize within the available resources, irrespective of where they were previously. This is particularly true of community patterns of behaviour around infrastructure-supplied essential services. Interestingly, when there is an extended aid program, stability can be achieved, but only below MSC, because the productivity of the operation is below MSC and so its response capacity is limited to the quasi-stable level of performance. The flow of aid supports a stable community, but below its MSC.

The MSC is generic to all operations. It indicates quite literally an economically self-sustaining community, no more and no less. However, the MOC is less generic and can be difficult to assign. At its most basic definition it is the threshold of crisis, the level of performance below which there is complete social breakdown and acute outbreaks of disease. For the essential services, one would ordinarily focus on basic levels of public health, such as the conditions for cholera outbreaks. However, MOC is also influenced by regional and cultural

norms. It would be lower for a low-density provincial town than an highly densified city. The planning agency must identify the point for a given region and conflict area where this threshold of crisis is – what crisis actually looks like, and not the hyperbole used for fundraising. While developed to indicate whether an emergency actually exists, the Office of the United Nations High Commissioner for Refugees (UNHCR) emergency indicators⁶⁰ provide a useful defined threshold of minimum levels to sustain human life and are internationally recognized; they also have the added advantage that they are relatively simple to measure. Conversely, such reference will likely attract political and legal complaints when the subject communities are internally displaced or the conflict is viewed as an internal matter. Alternately, the MOC criteria can be defined specifically for a given area but should be commonly agreed by all humanitarian actors involved to prevent arguments over whether or not a crisis is occurring.

Once the MOC and MSC are defined, estimating the current level of performance is a question of comparing demand density with the carrying capacity of the essential services. Practically speaking, the need for a resource is compared with its availability. As outlined above, stand-off recognition can provide both the infrastructure laydown and a reasonable sense of the demand density. This identifies whether concentrations of need (local communities) are served by the critical infrastructure that enables the local essential services. In practice, identifying an area of accessibility around the infrastructure laydown provides a sense of whether the essential service could be accessed by the local community. What is less clear is the condition of the infrastructure and ultimately its carrying capacity. Ideally, determining infrastructure carrying capacity is done through direct personal interaction between the infrastructure engineer and the local utility.

Stand-off recognition and incident sequencing can focus the discussions. Direct personal interaction is not always possible, but it is possible to still achieve some sense of the infrastructure carrying capacity by observing whether the local community's pattern of life is stable or not. One needs a way of interpreting what is observed to understand what it will likely mean. In effect, one needs a Rosetta Stone to provide meaning to recognition. The present authors propose a unifying concept of infrastructure to establish some simple protocols for interpreting meaning from what is recognized of the infrastructure.

A proposed unifying concept of infrastructure

This article proposes a unifying concept of infrastructure that comprises some simple protocols for interpreting how the infrastructure is arranged and its current functions and performance from the available evidence. For the time being these protocols provide a useful sequence of analysis, but ultimately they can be used to inform machine learning and AI interpretation. Focusing on the

60 UNHCR, *Handbook for Emergencies*, 3rd ed., Geneva, 2007, p. 64, Table 1.

purpose of infrastructure, the role of infrastructure is more clearly defined around the essentials of life in conflict and post-conflict areas. One can reasonably assume that follies and theatres will not be built in preference over water supply and sewerage. That is not to say that there will be no theatre, as this is a common way of communicating with the population when literacy levels may be low in rural areas, for example. Nevertheless, such activities are more likely to make temporary/makeshift use of another existing facility. The purpose common to all infrastructure is ultimately health.⁶¹ Out of this, one can see how infrastructure directly and/or indirectly supports that purpose and the essential services that deliver it. The interpretive analysis is more closely focused on public health in relation to infrastructure and where there may be a link to incidents of acute and chronic disease.

When infrastructure is viewed within the *vitae* system of systems,⁶² one can consider the systems' inter- and intra-actions, and how each contributes to the community's health within its operating and environmental context.⁶³ Drawing the key components of infrastructure function together and applying first principles, these authors have come to a long but crucial list of assertions:

- a. Infrastructure is defined by its purpose; the continued fulfilment of that purpose defines the infrastructure requirement, and hence the design brief and specifications.
- b. The value of the infrastructure is directly related to its use, performance and/or response capability. Therefore, irrespective of its configuration or expense in construction and operation, value will be defined by the local benefit.
- c. The value must exceed the cost over the life of the infrastructure if the system is to be socio-economically viable.
- d. Infrastructure changes the environment in which it exists and therefore also its own use over time. It is both the product and enabler of its context, influencing socio-economic change and market perceptions. Infrastructure risk and value are therefore dynamic; outcomes do not necessarily follow what is planned.
- e. Infrastructure networks are complex adaptive systems.⁶⁴
- f. Infrastructure systems design is optimized when the least energy is expended in reliably delivering a resource to its point of consumption.
- g. The balance of the infrastructure domains with the human domain determines value and the capacity for resilience, since each domain may compensate for temporary deficiencies in others until a new balance is attained.⁶⁵

61 See above note 24.

62 Keith W. Hipel, D. Marc Kilgour and Liping Fang, "Systems Methodologies in Vitae Systems of Systems", *Journal of Natural Disaster Science*, Vol. 32, No. 2, 2011; Norio Okada, "City and Region Viewed as Vitae System for Integrated Disaster Risk Management", *Annals of the Disaster Prevention Research Institute*, Vol. 49(B), 2006.

63 An operation is enabled by its personnel, organization and infrastructure. Each of these components is connected to and an extension of the risk context, which comprises the operating environment and context and all hazards.

64 S. E. Page, above note 59; John A. Warden III, "The Enemy as a System", *Airpower Journal*, Vol. 9, No. 1, 1995.

65 K. W. Hipel, D. M. Kilgour and L. Fang, above note 62.

- h. The measure of any infrastructure system is based on its outcome; the measure of whether infrastructure is likely to deliver the planned-for outcome is based on a convergence/coincidence of indicators of the anticipated outcome through its construction and operation. This measure is therefore based on the infrastructure purpose and is necessarily relative within a locally changing context over time, rather than any absolute measure.
- i. The use and operation of essential services infrastructure is dictated by how it meets the community health purpose within the available resource capacity. The corollary of this is that the essential services infrastructure that is intelligently resourced will have the highest inherent capacity for rapid restoration of purpose.
- j. The community need for health preservation in post-conflict communities will rapidly drive a new synergy between the infrastructure and human domains, resulting in a new local and regional equilibrium between communities and with infrastructure networks. This means that the new equilibrium will respond to relief aid as a contextual stress that changes inherent capacity for response and recovery.

Applying this unifying concept to stand-off recognition and ground survey, one is able to understand how the infrastructure enables essential service capability. In effect, one can develop an understanding of what the observed infrastructure networks actually mean in terms of function and capacity. It now just remains to make that understanding intelligible to others.

The common operating picture as common reference

The common operating picture (COP) is the common reference for all stakeholders, depicting the actual current situation; it is how this understanding of the infrastructure systems is represented. This is akin to the green LEGO board that is used to define a diorama model by positioning each item in space and, as it is played with, in time. The COP is effectively the LEGO board for the post-conflict and/or protracted conflict planning in the region. It provides an evidential representation of what currently exists. It will include the essential services infrastructure laydown in its topographical context, with associated hydrological, geological and meteorological data. The demand density distribution across the area is shown as a map overlay, as it is recognized from the geospatial analysis and interpolation between infrastructure and conurbation. The operation of essential services can then be overlaid again, showing the availability of essential services to the areas of demand density. These availability overlays will be based on the norms determined for the local area and region. For example, one might determine access to a central source of potable water, such as a standpipe, during a crisis in a UK city, measured in tens of metres or minutes of walking. Conversely, a similar situation in a sub-Saharan township may serve a far larger catchment. The combination of physical demand and social expectation will drive the need for accessibility.

The final overlay is of resource availability – that is, the resources necessary to support the essential services. The essential service of potable water is enabled by infrastructure, but the water has to come from somewhere. Therefore, the resource overlay for the water infrastructure will include the water sources and often an aquifer representation, if known. This knowledge informs alternative essential service provision such as through the use of tanker trucks if the water infrastructure networks are compromised. Together, this LEGO board and the overlays are the foundation of the COP, known as the “tableau”. It provides a common reference of what exists, and can be refined and developed with each new report and asset development. What it does not describe are the socio-economic, operational dynamics and the epidemiological overlays. In short, it provides a common reference of what is currently known about an area and not what is inferred.

The other part of the COP is the understanding of what the tableau means in context. This interpretation of meaning is analytical and judgement-based.⁶⁶ To be effective, it must have an evidential base to the understanding rather than being based on an opinion, expert or otherwise, that is not connected to the tableau. These interpretative overlays are situation- and mission-defined, but will typically include the identification of areas unserved by essential services or on the periphery of access. Most usefully, the contextual interpretation provides the connection between the built and natural domains and the human and virtual domains;⁶⁷ it provides the connection between tableau and operations. There are many operations modelling tools. By preference, the authors use a causal chain representation of the operation and its dynamics.⁶⁸ This maps the dependencies of each component function and the associated assets and services to the nth order of removal.

Importantly, this approach allows the analyst to capture the nature of complex adaptive systems, while remaining evidence-based, repeatable and entirely auditable. Applying the service thresholds of MOC and MSC allows estimation of a community’s performance and its capacity to respond to a subsequent brief return to violence or other crises. One can achieve a qualitative assessment with such

66 Judgement is a deliberate consideration of the available evidence and is distinct from opinion, which is not. For a detailed explanation, see Baruch Fischhoff, “Risk Perception and Communication Unplugged: Twenty Years of Process”, *Risk Analysis*, Vol. 15, No. 2, 1995.

67 There are four domains that support a *vita*e system of systems: they are the natural, built, virtual and human. The natural domain is what exists naturally but which we use for a societal purpose, such as drawing water from a lake or using a river as a navigation. The built domain is everything that we have physically created, from roads and bridges to the Internet. The virtual domain is what we have imagined and commonly agree to, such as laws, organizational structures and money. The human domain is how we live and use the world in which we exist. When the domains are in synergy with each other, each can compensate for a failure in another, for a period of time. After time a new balance is achieved between the domains, but as it is less than the optimized synergy that enables a vibrant, vital and survivable community which is developing sustainably, it is a lesser stability.

68 This refers to the RiskOutLook application, which uses graph theory to represent the functions, assets and relationships of the operation in question. When used in conjunction with GeoLogik, it provides a way of applying any natural or human threat to the system, applied at a point or across an area, in order to assess the direct and indirect impact to the operation and the community.

modelling very quickly, but achieving quantitative assessments requires significant amounts of data that will rarely be available early post-conflict, particularly in protracted conflict. This data collection issue is particularly acute when the international community's focus is necessarily crisis response and aid, rather than preparing for the next crisis. The unifying concept of infrastructure allows one to make the functional connections between the causal chain model and the tableau, providing the means to fully evaluate inherent risk across the *vitae* system of systems and the efficacy of proposed interventions.

The need for engagement

Equity of access: A critical infrastructure planning concept

Any humanitarian engagement, particularly one involving critical infrastructure, must not increase the vulnerability of the area or cause harm, directly or indirectly. Indeed, this is the first principle of infrastructure protection, which is “do no harm”, and requires a careful assessment of what new infrastructure means and the value that it represents – recall the centralized waste water treatment plant example discussed earlier. This is not to assume that a return to violence is inevitable, but rather that the progressive reconstruction and recovery of the essential services should not be compromised by it. Avoiding any increase in vulnerability, either through exposure to loss or the impact of loss, is consistently relevant in post-conflict situations, whether the focus is on crisis preparation and repair of existing facilities, development of new facilities, or something in between. There is also the question of whether in addressing an acute or crisis issue, the new or reconstructed infrastructure worsens the chronic disease profile of the population, such as through the provision of contaminated water. This is often a matter of working to a common purpose in aid, reconstruction and development planning. The delivery of this common purpose is what defines the value of the infrastructure. It must sustainably increase over the projected life of the infrastructure, immediately through construction to operation and into the future. That value is only realized if the infrastructure is accessible. Use of local labour during the infrastructure construction will reinforce access to employment and the collective ownership of the finished works. However, access to this work is less about the proximity of the labour force to the work site as it is about the ability of many working-age adults to work. Widowed households with young children are particularly vulnerable to losing out on work opportunities. The provision of community-based early-years education means that such households do not need to prioritize employment over childcare, for example. This has proved successful in different high-poverty-risk locations, and community-based early-years education is promising in addressing intergenerational trauma.⁶⁹

69 Bruce D. Perry, “Incubated in Terror: Neurodevelopmental Factors in the ‘Cycle of Violence’”, in Joy D. Osofsky (ed.), *Children, Youth and Violence: Searching for Solutions*, Guilford Press, New York, 1995.

During the operation of the infrastructure, there has to be a beneficiary of the essential service that the infrastructure enables for it to have value. Value is a measure of use, and if the local population cannot access the essential services, the infrastructure investment has no value, irrespective of how much it might have cost. Value can be equated with the degree of local ownership to ensure continued function. Therefore, access is important at each stage of the infrastructure life cycle.

For the whole of community engagement, including the promotion of former combatant reintegration and reconciliation, it is important to provide that community focus where everyone is engaged around a common purpose. This requires an equity of access which makes allowance for individual circumstance. Equal access may simply be defined as everyone being within a defined catchment of an essential service, but equity of access is about everyone within that catchment being able to access the essential service. The challenge is to enable equity of access for the most vulnerable, who are often made more vulnerable by their lack of access. This can be due to physical or mental impairment, social isolation arising from their role in the conflict, or simply their physical location. Increasingly, urban conflict can isolate those in high-rise buildings, where the need to ascend multiple flights of stairs while carrying water is more onerous than the person who walks the same distance along the street. This can change the prioritization of reconstruction works, despite not being apparent when the problem set is defined by observations of deficiency without understanding.

Tableau(x) projection of resilient operations can stabilize systems

The need for aid and reconstruction projects to contribute to the overall resilience of the essential services and the community as a whole has been discussed above. Infrastructure reconstruction projects provide a useful tool to facilitate this. They could function similarly to a franchise operation, where the essential functions of the franchise define the brand value and are stipulated in the franchise agreement, and where the franchisee provides a facility that can support the essential requirements of the franchised operation. Similarly, with a reconstruction project, the performance and function of the restored infrastructure is defined, but it is adapted to and enabled by the local application of resources.

When projecting an essential service to an area, it is useful to define it as an operation. The operation will have its own tableau. This tableau is specific to the operation, providing only those components that the operation depends upon. When the operation is resilient, its essential requirements will be provided for by components that support a particular performance and enable a response and recovery capability. This operational tableau can then be projected to the area in question.⁷⁰ Any mismatch between the operational tableau and the host tableau

70 Jennie Phillips and Alexander H. Hay, "Building Resilience in Virtual and Physical Networked Operations", *Proceedings of the Institution of Civil Engineers – Infrastructure Asset Management*, Vol. 4, No. 2, 2017.

will define what the infrastructure shortfall is and whether addressing the shortfall is achievable. Furthermore, this approach enables intelligent resourcing so that the essential service is delivered using locally resourceable materials and labour. Understanding the local situation enables tableau projection, building essential services, in post-conflict areas, that are locally aligned and sustainable in the current risk context.⁷¹

Conclusion

There can be many reasons for an unsuccessful post-conflict rehabilitation strategy, ranging from simple staff obfuscation to donor nation self-interest. Nonetheless, what is proposed in this article is a common frame of reference for all stakeholders to at least understand what the current infrastructure situation is, and so inform the effective implementation of whichever rehabilitation approach is pursued. The proposed approach does not default to a situation *ante bellum*, but recognizes that the conflict has caused real change. For instance, populations may be displaced and separated, leading to changed ethnic and cultural composition of communities. Infrastructure systems and demand distributions therefore need to contribute to a new stability, and there will likely be a paucity of experienced professionals.

This common frame of reference for infrastructure engineers draws on leading heuristic practice and commercially available tools, so that it remains practicable. However, the practice of establishing a common reference is not exclusive to infrastructure engineers. The tableau that forms the basis of the COP is the most basic common reference and is developed by geospatial analysts, as required. The team within the International Committee of the Red Cross that works on the direct and indirect and cumulative impact of armed conflict and other situations of violence on essential services is building its geospatial and systems mapping capabilities to take advantage of stand-off recognition and the improved understanding that it affords. Tools such as stand-off recognition significantly inform all humanitarian engagement, especially infrastructure engineering in post-conflict areas, supplementing an asset-based field perspective with a holistic “system of systems” framework. They cannot replace the humanitarian actor, but by providing the humanitarian actor with a clear evidential common reference, decision-making and local engagement can be better informed, enabling greater and more effective alignment between projects and local needs.

There are several relevant emergent lines of research arising from this study, which are being pursued at the University of Toronto and elsewhere. These include the development of the unifying concept, geospatial analysis and post-conflict rehabilitation concepts.

71 “Sustainability” here encompasses what is socially, economically, environmentally and operationally sustainable, as may be relevant and practicable for the situation.

Infrastructure engineers can and should inform the debate around rehabilitation strategies by providing the boundaries of possibility. These boundaries are defined by what is possible given the current situation, rather than a projection of what is familiar from elsewhere, and recognizing the rehabilitation principles. Improved common understanding of the situation informs better strategy integration between departments and agencies, and hence mission efficiencies, as well as making greater alignment of humanitarian engagement with local needs possible. This is particularly important in the alignment of different humanitarian mandates, from crisis preparation through to reconstruction and development. They are part of the same continuum and must be coordinated around a common risk-balanced strategy.

From Operation Iraqi Freedom to the Battle of Mosul: Fifteen years of displacement in Iraq

Cédric Cotter*

Cédric Cotter is a Researcher at the International Committee of the Red Cross (ICRC). He worked for the ICRC in various positions at headquarters before joining the University of Geneva as a Research Associate from 2012 until 2016. He has authored around twenty publications on various issues related to the history of humanitarian action, the First World War and international humanitarian law. He holds a PhD in history from the University of Geneva.

Abstract

The displacement of civilians during a protracted war is a difficult issue that deserves our attention, and Iraq is unfortunately an emblematic example of this phenomenon. Based on the literature produced by humanitarian organizations and academia, this article aims at analyzing what triggers displacement in protracted conflict, highlighting the role of international humanitarian law (IHL) violations. It discusses how Iraq has been struggling with acts of violence, hostilities and IHL violations that have generated displacement and human suffering.

Keywords: displacement, international humanitarian law, IDPs, refugees, conduct of hostilities, Iraq.

: : : : : :

* The opinions expressed in this article are those of the author and do not necessarily reflect the ICRC's point of view. The author would like to thank the *Review* team and the article's peer reviewers for their invaluable input.

Introduction

In recent years, humanitarian organizations have consistently emphasized the long duration of many armed conflicts and the ways in which that duration affects humanitarian aid. In a report published in 2016, the International Committee of the Red Cross (ICRC) stated:

The ICRC spends about two-thirds of its budget on protracted conflicts. The average length of time the ICRC has been present in the countries hosting its ten largest operations is more than 36 years. Protracted conflicts are a major source of human suffering and a cause of protracted displacement, migration and development reversals.¹

Long wars are not a new phenomenon – there are historical conflicts with evocative names such as the Thirty Years' War and the Hundred Years' War, and the twentieth century also saw many long-running conflicts. In fact, this kind of war is as old as humanity itself. Recently, however, “protracted conflict” has become a concept in its own right, and there is now an awareness that such conflicts change the nature of humanitarian aid. They require responses that go beyond the usual ways of providing protection and assistance: they require a response in which the boundary between humanitarian aid and development is much more blurred, and in which different time frames coexist, for example by combining emergency aid with long-term programmes. As the ICRC report mentions, the displacement of civilians during a protracted war is a difficult issue that deserves our attention. How does a protracted conflict affect displacement? Does a protracted conflict automatically lead to protracted displacement? To what extent is the displacement in these conflicts linked to violations of international humanitarian law (IHL) rather than other factors? How do those violations affect patterns of displacement? This article seeks to provide some answers to these questions, focusing on the example of Iraq from 2003 to the present day.

Modern Iraq gives the impression that it is constantly dealing with internal population movements, whether they are caused by armed conflicts – international or domestic – or by other violence. The ICRC has taken action repeatedly in Iraq since 1950, and that action has become much more diverse since 1991.² Between 1980 and 2003, the country suffered three conflicts: the Iran–Iraq war (1980–88), the Gulf War (1990–91) and the aftermath of the invasion by a US-led coalition (2003).³ The international sanctions that followed the Gulf War also affected the country's infrastructure and generated many humanitarian problems, which have

- 1 ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, 20 June 2016, available at: www.icrc.org/en/document/protracted-conflict-and-humanitarian-action (all internet references were accessed in June 2020).
- 2 Daniel Palmieri, “Crossing the Desert – the ICRC in Iraq: Analysis of a Humanitarian Operation”, *International Review of the Red Cross*, Vol. 90, No. 869, 2008.
- 3 Nasir Ahmed Al-Samaraie, “Humanitarian Implications of the Wars in Iraq”, *International Review of the Red Cross*, Vol. 89, No. 868, 2007.

cost the Iraqi people dear. Worse still, the country has been in a constant state of war since 2003.

It is true that the classification of the conflict, the parties to the conflict and the methods of warfare have evolved over the last fifteen years. For instance, the 2003 conflict has been qualified as an international armed conflict. It preceded a period of occupation that lasted until 28 June 2004. After that date, hostilities were classified as non-international armed conflict.⁴ Although children, women and men are still being killed every day, the reasons have changed significantly and new participants have appeared over time, with fronts developing as alliances are formed and dissolve. Whether the confrontations are logically connected and interdependent or have little to do with each other, the fact is that Iraq has not seen any real let-up in the violence since 2003. Episodes have merged together to form a long war that has affected large swathes of the Iraqi people indiscriminately, for varying lengths of time. Whatever the reasons behind the fighting and regardless of the changing alliances, the country's never-ending conflict has taken a heavy toll on Iraq's people.⁵ The same is true of displacement. Waves of internal displacement – people and communities forced to move by the parties to the conflict – and refugees have left an indelible mark on the country in the last fifteen years, and Iraq's internal organization has been in a state of constant flux. The Syrian conflict has also had consequences in Iraq. As it suffers from a protracted conflict and the accumulated effects of various conflicts with no prospect of peace in sight, Iraq unfortunately provides a good case study of displacement in this kind of conflict.

This article aims at analyzing what triggers displacement in protracted conflict, highlighting the role of IHL violations. It focuses on the case of Iraq and is based on various pieces of literature issued both by humanitarian organizations and by academia. To better understand displacement in the Iraqi context, the article will first look at the challenges that displacement creates for humanitarian aid. After briefly showing how displacement is a fact of life in modern Iraq, it will provide a more detailed history, looking at the various waves of displacement from 2003 to the present time. Next, by looking at the role of violence and of IHL violations in causing and triggering displacement, the article will show how lack of respect for the law can cause civilians to flee. The subsequent two sections describe the various types of violence in Iraq, including IHL violations, and how they have caused different patterns of displacement. The final section will look at the role that cumulative IHL violations play in protracted conflicts. The article

4 Knut Dörmann and Laurent Colassis, "International Humanitarian Law in the Iraq Conflict", *German Yearbook of International Law*, Vol. 47, 2004, available at: https://www.icrc.org/en/doc/assets/files/other/ihl_in_iraq_conflict.pdf.

5 On this subject, several articles from 2007 were already making clear how devastating the various consequences of the war were for Iraq. See Ekmeleddin Ihsanoglu, "Assessing the Human Tragedy in Iraq", *International Review of the Red Cross*, Vol. 89, No. 868, 2007; N. A. Al-Samaraie, above note 3; Beth Osborne Daponte, "Wartime Estimates of Iraqi Civilian Casualties", *International Review of the Red Cross*, Vol. 89, No. 868, 2007.

will conclude with some reflections on the nature of protracted conflicts and their impact on displacement.

Displacement: Challenges for humanitarian aid

Displacement during a protracted conflict creates a number of challenges for humanitarians. When a conflict is protracted, its very nature as an armed conflict is unclear: there may sometimes be a clear number of belligerent forces which, unable to achieve superiority on the ground, engage in a long-term conflict. In other circumstances, as in Iraq, the situation is more complicated. Looking back over the last fifteen years, Iraq has been in a continuous state of conflict, but what is at stake, the parties involved and the ways in which war has been waged have changed. Iraq's protracted conflict can be seen as an accumulation of crises that are interrelated to varying extents and sometimes coincide, but do not always feature the same parties. For humanitarian organizations, therefore, one of the main challenges is to establish and maintain a dialogue with all parties to the conflict as they emerge.⁶ That dialogue is necessary as a way for humanitarian organizations to remind the parties to the conflict of their legal obligations, to ensure that humanitarian organizations can access areas under the parties' control, to make the parties understand role and remit of humanitarian organizations, and to ensure those organizations' acceptance and safety.

The second challenge is to identify those displaced – especially within host communities in major urban areas – and their real needs.⁷ In general, displacement patterns vary widely depending on the situation.⁸ Displacement may take place *en masse* – for example, following large-scale military operations. Sometimes displaced people may go to camps, but in many cases they take shelter with friends or family, or move to urban areas. At first glance, it would appear much harder to identify and assess the needs of displaced people who do not move to camps. For those people, recent displacement studies by the ICRC show that humanitarian action is often driven by assumptions that are not necessarily based on fact, making it harder to ensure that the response accurately addresses their real needs.⁹ In addition, the challenge arising from displaced people moving to cities is especially great since urban areas have their own specific characteristics

6 Regarding the acceptance of humanitarian aid in Iraq, see Greg Hansen, "The Ethos-Practice Gap: Perceptions of Humanitarianism in Iraq", *International Review of the Red Cross*, Vol. 90, No. 869, 2008; Karl Mattli and Jörg Gasser, "A Neutral, Impartial and Independent Approach: Key to ICRC's Acceptance in Iraq", *International Review of the Red Cross*, Vol. 90, No. 869, 2008.

7 For an overview of the possible consequences of displacement, see ICRC, *Displacement in Times of Armed Conflict*, Geneva, 2019, pp. 17–23.

8 *Ibid.*, pp. 43–49.

9 See ICRC, *Displaced in Cities: Experiencing and Responding to Urban Internal Displacement Outside Camps*, Geneva, December 2018; Angela Cotroneo, "Specificities and Challenges of Responding to Internal Displacement in Urban Settings", *International Review of the Red Cross*, Vol. 99, No. 904, 2017; Catherine-Lune Grayson, "Internal Displacement: Some Reflections on Cracking the Urban Challenge", *Humanitarian Law and Policy Blog*, 23 September 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/09/23/internal-displacement-reflections-cracking-urban-challenge-2/>. Regarding

and difficulties. In particular, the ICRC has looked at how services are provided in cities in the context of protracted conflicts, using Iraq as a case study.¹⁰ In any case, the communities hosting displaced people must be taken into account, and their needs must be factored into the humanitarian response. The longer a war lasts, the more those communities will be under pressure and will require support from humanitarian organizations. According to the ICRC's experience, unless ethnicity, political affiliation (real or perceived) or religion make their attitude towards the newcomers more hostile or unwelcoming, host communities are usually generous first responders. The problem starts when people who were supposed to stay for days or weeks end up staying for months or years. This is when generosity turns to frustration and exhaustion, and when tensions related to sharing scarce resources and overwhelmed services become more acute.

A protracted conflict, where it results in prolonged displacement, changes the nature of humanitarian aid. When people are suddenly forced to flee, this requires emergency aid that is in theory temporary, such as water, food, shelter and medical care depending on the context. To remain in contact with their loved ones, displaced people also need access to modern methods of communication: for example, they need to be able to charge their mobile phones or get online.¹¹ Very often, however, displaced people cannot or do not want to return home in the short, medium or long term. In some situations, those displaced take up residence in cities for an extended period, while still having urgent needs.¹² In protracted conflicts, emergency relief is no longer enough, and all civilians – but particularly displaced people – need other types of help.

When a conflict becomes protracted, the State can struggle to provide basic services such as health care, water, electricity and education, and these needs are sometimes partly addressed by humanitarian organizations. Three examples can be provided to illustrate this. Firstly, children who have had to leave home can no longer go to school, and may miss out on education for a long time if they cannot be integrated into host communities. In Iraq in 2007, more than half a million children were displaced, and a large proportion of them no longer had access to education.¹³ In line with the work done by organizations such as UNICEF and Save the Children, the ICRC is paying increasing attention to the education of displaced children.¹⁴ Secondly, emergency support for hospitals

the specific costs and challenges of hosting Iraqi refugees, see Andrew Harper, "Iraq's Refugees: Ignored and Unwanted", *International Review of the Red Cross*, Vol. 90, No. 869, 2008, pp. 177 ff.

10 ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, September 2015, available at: <https://www.icrc.org/en/document/urban-services-protracted-conflict-report>.

11 International Federation of Red Cross and Red Crescent Societies, "World Humanitarian Day – 10am: Low Battery Anxiety?", 18 August 2016, available at: <http://media.ifrc.org/ifrc-pages/2016/08/18/world-humanitarian-day-10am-low-battery-anxiety/>.

12 ICRC, above note 9, pp. 44–45.

13 E. Ihsanoglu, above note 5, p. 922.

14 ICRC, "Access to Education", available at: www.icrc.org/en/access-education; Elizabeth Ferris and Rebecca Winthrop, "Education and Displacement: Assessing Conditions for Refugees and Internally Displaced Persons Affected by Conflict", Background Paper commissioned for the *Education for All Global Monitoring Report 2011, 2010*; Sarah Dryden-Peterson, "Conflict, Education and Displacement",

sometimes becomes more permanent, and health-care services set up close to camps can become established facilities, treating both displaced people and local communities. Finally, in Iraq, the ICRC is involved in restoring water supplies. In 2016, more than two million people enjoyed renewed access to drinking water following repair or construction work by the ICRC.¹⁵ These three examples show how humanitarian organizations have a role to play in supporting essential services, and how they can help displaced people to regain their independence.¹⁶ However, ongoing adjustments are needed to ensure that the response matches the needs.

Displacement in modern Iraq

Although this article focuses mainly on the situation in Iraq since 2003, it should not be forgotten that displacement has been a constant theme in Iraq's history, and not just because of the series of conflicts it has suffered during that time.¹⁷ Displacement dates back to the colonial era, caused by clashes between British forces and dissident movements in the 1930s and 1940s.¹⁸ More recently, population movements have been caused by wars and political events. During the 1980–88 Iran–Iraq War, hundreds of thousands of civilians were displaced. The Kurdish people were the ones most affected by the conflict: thousands of villages were destroyed, leading to the formation of camps containing hundreds of thousands of people,¹⁹ and more than half a million Kurdish civilians were forced to move to detention camps or to find new homes.²⁰ In March 1988, the Iraqi army carried out a chemical attack on the city of Halabja, occupied by Iran, in breach of the 1925 Geneva Protocol and the ban on the use of chemical weapons under customary IHL.²¹ Around 5,000 civilians were killed, while others were seriously injured or fled.²² Repeated violations of the law during the conflict—publicly criticized by the ICRC on numerous occasions—were directly responsible for some of the displacement and a great deal of other suffering. Moreover, according to military historian Pierre Razoux, “[t]he massive violations of the laws of war and

Conflict & Education, Vol. 1, No. 1, 2011, available at: https://wcfia.harvard.edu/files/wcfia/files/sdryden-peterson_conflict_education_and_displacement.pdf.

15 ICRC, *Iraq Activity Report 2016*, 2017, p. 7, available at: www.icrc.org/en/document/iraq-activity-report-2016.

16 ICRC, above note 9, p. 46.

17 Joseph Sassoon, *The Iraqi Refugees. The New Crisis in the Middle East*, I. B. Tauris, New York, 2011, p. 99.

18 *Ibid.*, pp. 97–98.

19 Ina Rogg and Hans Rimscha, “The Kurds as Parties to and Victims of Conflicts in Iraq”, *International Review of the Red Cross*, Vol. 89, No. 868, 2007, pp. 827–828.

20 Karin Mlodoč, “The Indelible Smell of Apples: Poison Gas Survivors in Halabja, Kurdistan-Iraq, and Their Struggle for Recognition”, in Bretislav Friedrich *et al.* (eds), *One Hundred Years of Chemical Warfare: Research, Deployment, Consequences*, Springer, Cham, 2017.

21 I. Rogg and H. Rimscha, above note 19. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, Practice relating to Rule 74, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule74.

22 K. Mlodoč, above note 20.

international humanitarian law did not give either the Iranians or the Iraqis any decisive advantage”.²³ IHL violations were senseless from a legal, strategic and human perspective, and they definitely triggered displacement and made the situation worse for people affected by the conflict.

Shortly after the Iran–Iraq War ended, another war shook the region. After Iraq invaded Kuwait in August 1990, coalition forces started a military operation in early 1991. Operation Desert Storm was short-lived, and most of the displacement took place after it ended. After the 1991 ceasefire, Kurdish fighters opposed to the central government staged an armed uprising. They quickly took control of a large part of Iraqi Kurdistan. But they were not well trained or prepared, and Saddam Hussein, who had remained in power, crushed the uprising, as well as suppressing certain Shia groups in southern Iraq. In March, the rebellion was defeated and the subsequent repression caused hundreds of thousands of Kurds to flee to Iran and Turkey.²⁴ The ICRC started to provide assistance in Iraqi Kurdistan in 1991, and continued to do so for a long time.

For many years, the regime in power at the time had been carrying out “Arabization” campaigns, seeking to change the population’s ethnic and religious make-up. It expelled first hundreds and then thousands of families, replacing them with others. Kurds, Shia Muslims and religious minorities were the worst affected.²⁵ Those expulsion campaigns took place in several waves, for example between late 1996 and mid-1997, when the ICRC helped more than 5,000 displaced families.²⁶ In the second half of 2001, Arabization campaigns resumed in the Kirkuk and Mosul regions. When the Gulf War ended, a much more short-term type of displacement began in Iraqi Kurdistan. Frequent artillery fire and aerial bombing in that region during summer 2001 led to brief episodes of displacement. They took place periodically, in several waves, with low-intensity artillery fire preventing displaced people from returning home in some cases, although some went back and forth to maintain their businesses while others left their homes at night and came back in the morning.²⁷

Various estimates suggest that in 2002, there were between 600,000 and 800,000 internally displaced persons (IDPs) in the north of the country, along with 300,000 in the centre and the south.²⁸ This means that even before the start of the 2003 war, Iraq already had between 700,000 and 1 million IDPs.²⁹ When the 2003 war started, the Iraqi population had already experienced the

23 Pierre Razoux, *La guerre Iran–Irak 1980–1988*, Tempus, Paris, 2017, p. 729.

24 I. Rogg and H. Rimscha, above note 19, p. 829.

25 J. Sassoon, above note 17, p. 96.

26 ICRC, *Annual Report 1997*, Geneva, 1998, pp. 260–266.

27 Walter Kälin, “A Tragedy of Increasing Proportions: Internal Displacement in Iraq”, *Forced Migration Review*, Special Issue, “Iraq’s Displacement Crisis: The Search for Solutions”, 2007.

28 Roberta Cohen and John Fawcett, *The Internally Displaced People of Iraq*, Memo No. 6, Saban Center, Brookings Institution, Washington, DC, November 2002; John Fawcett and Victor Tanner, *The Internally Displaced People of Iraq*, Brookings-SAIS Project on Internal Displacement, October 2002, cited in Roberta Cohen, “Iraq’s Displaced: Where to Turn?”, *American University International Law Review*, Vol. 24, No. 2, 2008, available at: <https://www.brookings.edu/articles/iraqs-displaced-where-to-turn/>.

29 Norwegian Refugee Council, *Profile of Internal Displacement: Iraq*, June 2002, p. 24.

consequences and struggle of several armed conflicts and was already facing massive displacement.

Armed conflicts since 2003 and their consequences

The military operations carried out by the US-led coalition in 2003 could have prompted large-scale displacement. As the invasion was being prepared, the ICRC, many other humanitarian organizations and several States made forecasts in order to anticipate the humanitarian assistance required.³⁰ The displacement estimates varied hugely, ranging from a few tens of thousands to several million in the case of a protracted conflict. This shows how hard it is to predict the consequences of an armed conflict with any accuracy. In the end, population movements directly caused by the 2003 invasion remained limited.³¹ Various theories could explain why large-scale displacement failed to materialize. Firstly, the hostilities were short and targeted; except for a small number of people caught between the warring parties, the Iraqi people largely avoided any direct damage. There was no acute humanitarian crisis and little urgent need, and few people had to flee their homes. In northern Iraq, the ICRC saw some pre-emptive movement out of cities to more rural areas. Fifteen years after the Saddam Hussein regime's chemical attack on the city of Halabja, the memory of the event and the fear of its recurrence were still strong enough to trigger some pre-emptive displacement. However, it was short-lived.

Once the US-led coalition effectively occupied Iraq, other, larger waves of displacement began. Firstly, hundreds of thousands of people displaced during the Arabization campaigns tried to return home, sometimes after decades of displacement either internally or abroad.³² Some members of the elite and technocrats from the previous regime also left, either anticipating trouble or because they suffered direct political persecution.³³ In addition, the occupation did not mark the end of all hostilities, and fighting between the coalition and insurgents also caused displacement,³⁴ the scale of which varied according to the military operation in question. For example, the Second Battle of Fallujah in November 2004 forced between 150,000 and 200,000 people to leave over a period of around ten days.³⁵ Finally, displacement resulted from the general security situation, as ethnic and religious groups came under threat. For all of

30 See, for example, ICRC, *Overview of Operations 2003*, Geneva, 2002, pp. 3, 22, available at: www.icrc.org/en/doc/assets/files/other/over2003_bkmk.pdf.

31 J. Sassoon, above note 17, p. 10.

32 *Ibid.*, p. 11.

33 Nabil Al-Tikriti, "There Go the Neighbourhoods: Policy Effects vis-à-vis Iraqi Forced Migration", in Dawn Chatty and Bill Finlayson (eds), *Dispossession and Displacement: Forced Migration in the Middle East and North Africa*, Oxford University Press, New York, 2010, pp. 267–268.

34 Regarding Iraq's ethnic and religious make-up, see Pierre-Jean Luizard, "Islam as a Point of Reference for Political and Social Groups in Iraq", *International Review of the Red Cross*, Vol. 89, No. 868, 2007.

35 J. Sassoon, above note 17, p. 11; Mary Kaldor, "From Just War to Just Peace", in Charles Reed and David Ryall (eds), *The Price of Peace: Just War in the Twenty First Century*, Cambridge University Press, Cambridge, 2009, p. 265.

these reasons, hundreds of thousands of civilians were displaced between April 2003 and December 2005. In central and southern Iraq, until 2006, displacement was directly related to military operations and, for many of those affected, did not last for long. After each battle, several thousand families that had fled the violence and fighting returned home.³⁶

The situation became much worse in February 2006. The attack on the Al-Askari Mosque in Samarra marked the start of very violent clashes between Shias and Sunnis, resulting in a new wave of displacement.³⁷ In October of the same year, tens of thousands more people were displaced internally.³⁸ In 2007, the ICRC publicly voiced its concern about the consequences of the fighting:

Since the bombing of the sacred Shiite shrine of Samarra in February 2006 and the subsequent increase in violence, the problem of displacement in Iraq has become particularly acute. Thousands of Iraqis continue to be forced out of their homes owing to military operations, general poor security and the destruction of houses. And the outlook is bleak, particularly in Baghdad and other areas with mixed communities, where the situation is likely to worsen. The Iraqi Red Crescent estimates that approximately 106,000 families have been displaced inside the country since February 2006. It estimates that two-thirds of the displaced are women and children, often living in female-headed households.³⁹

A 2007 report by the International Organization for Migration (IOM) stated that 89% of displaced people surveyed said they were forced to leave because of their religious or ethnic identity.⁴⁰ In that same year, the Internal Displacement Monitoring Centre found that 2.5 million people had been internally displaced in Iraq.⁴¹ Also in 2007, it was estimated that around 60,000 Iraqis had to leave their homes every month.⁴² Overall, 2.7 million civilians were displaced within Iraq between 2003 and 2008.⁴³ That was in addition to the Iraqi refugees in other countries,⁴⁴ most of whom were in Syria (1.4–1.5 million), Jordan (700,000–750,000), the Gulf states (200,000), and Egypt, Lebanon and Iran (175,000–

36 Dina Abou Samra, “Military-Induced Displacement”, *Forced Migration Review*, Special Issue, “Iraq’s Displacement Crisis: The Search for Solutions”, 2007, p. 37.

37 J. Sassoon, above note 17, p. 10; N. A. Al-Samaraie, above note 3, pp. 938 ff.

38 Philip Marfleet, “Displacement and the State – the Case of Iraq”, in Khalid Koser and Susan Martin (eds), *The Migration-Displacement Nexus: Patterns, Processes, and Policies*, Berghahn Books, New York, 2011.

39 ICRC, *Civilians without Protection: The Ever-Worsening Humanitarian Crisis in Iraq*, Geneva, 2007.

40 IOM, *Iraq Displacement 2007 Mid-Year Review*, 2007, p. 2, available at: <https://tinyurl.com/ydfbu2af>.

41 Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2007, 2008*, available at: www.internal-displacement.org/sites/default/files/publications/documents/2008-global-overview2007-global-en.pdf.

42 Roberta Cohen, “Iraq’s Displaced: Where to Turn?”, *American University International Law Review*, Vol. 24, No. 2, 2008, available at: www.brookings.edu/articles/iraqs-displaced-where-to-turn/.

43 P. Marfleet, above note 38; A. Harper, above note 9.

44 See Lahib Higel, *Iraq’s Displacement Crisis: Security and Protection*, Ceasefire Centre for Civilian Rights and Minority Rights Group International, March 2016, p. 8; Chris Champman and Preti Taneja, *Uncertain Refuge, Dangerous Return: Iraq’s Uprooted Minorities*, Minority Rights Group International, 2009, pp. 11–13. These sources estimate the number of Iraqi refugees in other countries at 2.2–2.4 million, but no precise figures are available.

200,000 combined).⁴⁵ According to Andrew Harper and Joseph Sassoon, the eighteen months of ethnic conflict that began in February 2006 caused the Middle East's largest population displacement since 1948.⁴⁶

Starting in 2008, the violence in Iraq diminished but did not stop. However, the improvement was enough that the number of displaced people also went down. Some considered going back for good, having up to this point returned home only for short periods of time.⁴⁷ The improved security situation led to a clear trend of people returning home starting in 2009, which continued until 2012. However, ethnic tensions and the resulting violence continued to cause displacement. Hundreds of families left Kirkuk in 2008, while thousands of Christian families fled the Mosul region between 2008 and 2010. Similarly, attacks on American property and bases, along with tensions during election periods, also caused waves of displacement.

A few years later, in 2013, violence flared up again during anti-government demonstrations and in ethnic and religious clashes, prompting further waves of displacement. In April of the same year, violence increased after months of demonstrations against the central government. The situation worsened in 2014: the regions of Fallujah, Anbar and Mosul saw particularly large numbers of civilians displaced, fleeing ongoing or anticipated violence and hostilities.⁴⁸ In June, it was announced that

Iraq has one of the largest internal population displacements in the world. Over 1.2 million people have been displaced since January 2014 (as of 25 June 2014). This is in addition to approximately one million people displaced from previous conflict and over 220,000 Syrian refugees.⁴⁹

In spring 2015, when the cities of Tikrit and Saladin were recaptured from the so-called Islamic State group (ISG), 20,000 families were displaced.⁵⁰ In 2015 and 2016, the city of Ramadi also saw two waves of displacement when it was taken and then lost by ISG. A 2017 report stated that around a million people fled Mosul and its surrounding areas after the capture of the city and the resulting fighting.⁵¹ Finally, battles to regain West Anbar also caused tens of thousands of people to be displaced.⁵²

45 Brookings Institution, "Iraq Index Tracking Variables of Reconstruction and Security Post-Saddam Iraq", Washington, DC, 29 October 2007, p. 29, cited in E. Ihsanoglu, above note 5, p. 920.

46 A. Harper, above note 9, p. 170; J. Sassoon, above note 17, p. 4.

47 Géraldine Chatelard, "What Visibility Conceals: Re-embedding Refugee Migration from Iraq", in D. Chatty and B. Finlayson (eds), above note 33.

48 L. Higel, above note 44, p. 11.

49 ACAPS, *Iraq Displacement Profile*, 4 July 2014, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/iraq_displacement_profile_4_july_2014.pdf.

50 L. Higel, above note 44, p. 15.

51 Antonio Massella, *We Have Forgotten What Happiness Is: Youth Perspectives of Displacement and Return in Qayyarah Subdistrict, Mosul*, Oxfam, 2017, p. 10.

52 IOM, "UN Migration Agency Assists Thousands of Iraqis Newly Displaced from West Anbar", 10 March 2017, available at: www.iom.int/news/un-migration-agency-assists-thousands-iraqis-newly-displaced-west-anbar.

Although not comprehensive,⁵³ this overview of displacement in Iraq between 2003 and 2017 shows a close correlation between waves of violence and waves of displacement. It is therefore worthwhile to look at the possible causation underlying that correlation.

Triggers of displacement

Although displacement is caused by many factors – from socio-economic problems to more personal considerations – violence is often the first factor that people mention as the trigger for their displacement.⁵⁴ Iraq is no exception. To better understand this phenomenon, it is necessary to take the analysis further by asking which types of violent events prompt displacement and whether they necessarily constitute IHL violations, or whether they are simply the unfortunate but inevitable consequence of war.

Existing research about Iraq gives us a good idea of what causes displacement. Although the studies are based on relatively small samples, they give a fairly broad overview. They clearly show that displacement is caused by several factors, including several types of violence.⁵⁵ For example, in a 2007 study on Iraqi refugees in Syria, more than 70% of those surveyed said that violence was the main reason for their departure.⁵⁶ A July 2014 report was even more clear-cut. IDPs from 296 different locations were surveyed. For 90% of them, armed conflict and general violence were the main reasons for their displacement.⁵⁷ A third study revealed that, of those surveyed, 77% had been affected by the use of explosive weapons, 72% had witnessed a car-bomb attack, 75% knew someone who had been killed in the conflict and 68% had been interrogated or harassed.⁵⁸ Although not all of those factors necessarily represent IHL violations – this can only be established through a case-by-case analysis – some of them have been identified as such. The ICRC was already highlighting the wide array of displacement triggers more than ten years ago. In a report published in 2007, it gave details of certain factors that trigger displacement:

Shootings, bombings, abductions, murders, military operations and other forms of violence are forcing thousands of people to flee their homes and seek safety elsewhere in Iraq or in neighbouring countries. The hundreds of thousands of

53 This overview has focused on the violence in Iraq itself, and not on the Syrian refugees who fled the conflict in their own country, taking refuge in Iraq.

54 ICRC, above note 7, pp. 21–23.

55 L. Higel, above note 44, p. 11.

56 Ashraf Al-Khalidi, Sophia Hoffman and Victor Tanner, *Iraqi Refugees in The Syrian Arab Republic: A Field-Based Snapshot*, Brookings Institution–University of Bern Project on Internal Displacement, 2007, p. 46, available at: www.brookings.edu/research/iraqi-refugees-in-the-syrian-arab-republic-a-field-based-snapshot/; J. Sassoon, above note 17, p. 62.

57 ACAPS, above note 49.

58 United Nations Office of the High Commissioner for Refugees, “Trauma Survey in Syria Highlights Suffering of Iraqi Refugees”, press release, 2008; A. Harper, above note 9, p. 173; J. Sassoon, above note 17, p. 72.

displaced people scattered across Iraq find it particularly difficult to cope with the ongoing crisis, as do the families who generously agree to host them.⁵⁹

The same year, the ICRC even took the view that these factors were “in clear violation of international humanitarian law”.⁶⁰ Looking more specifically at the actions that trigger displacement, violations of IHL have obviously occurred in some cases, and appear probable in others.

Displacement and military operations

The fighting between Iraqi forces and the US-led coalition in 2003 was short-lived, as was the displacement it caused. The brief nature of the displacement was partly because of the obvious asymmetry between the two sides: the coalition forces were vastly superior to the Iraqi troops, facing a “traditional” enemy that they quickly defeated. This kind of confrontation between two armed forces has become fairly rare – most modern conflicts are very different, involving much more asymmetric and protracted clashes, and their outcome (and length) is much more uncertain.

In the years that followed, military operations caused displacement both directly and indirectly, whether or not there were IHL violations during the hostilities. The best examples are probably the various battles that ravaged several Iraqi cities. From Basra to Mosul to Fallujah, episodes of violence naturally caused hundreds of thousands of civilians to flee, fearing for their lives. Several studies have confirmed that the use of explosive weapons in urban settings is a trigger for displacement.⁶¹ For instance, some families had remained in Mosul after it had been taken by ISG, but they subsequently had to flee from the fighting, including the threat posed by the use of artillery in military operations.⁶² Displacement may thus be caused by IHL violations such as acts of war that do not comply with the conduct of hostilities principles; the ICRC highlighted these types of acts in Iraq when it noted that “[m]ass explosions and indiscriminate attacks are claiming the lives of hundreds and leaving thousands more wounded every month”.⁶³ When warring parties carry out indiscriminate attacks, when they fail to take the necessary precautions to protect civilians and their property, when the choice of weapons is inappropriate and the means of warfare are disproportionate, civilians are directly or indirectly affected and must flee.

59 ICRC, above note 39.

60 ICRC, “Iraq: An Ever-Worsening Crisis”, Press Release No. 07/49, 11 April 2007.

61 See, in particular, articles in the “War in Cities” issue of the *International Review of the Red Cross*, Vol. 98, No. 901, 2016; ICRC, “Explosive Weapons in Populated Areas”, available at: www.icrc.org/explosive-weapons-populated-areas-1; Ellen Nohle and Isabel Robinson, “War in Cities: The ‘Reverberating Effects’ of Explosive Weapons”, *Humanitarian Law and Policy Blog*, 3 March 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/03/02/war-in-cities-the-reverberating-effects-of-explosive-weapons/>; L. Higel, above note 44, p. 11; J. Sassoon, above note 17, p. 72; Simon Bagshaw, “Driving Displacement: Explosive Weapons in Populated Areas”, *Forced Migration Review*, No. 41, 2012, p. 12.

62 A. Massella, above note 51, p. 17.

63 ICRC, “Iraq: Ongoing Conflict Claims Hundreds of Civilian Lives Every Month”, press release, 12 August 2009, available at: <https://reliefweb.int/report/iraq/iraq-ongoing-conflict-claims-hundreds-civilian-lives-every-month>.

The duration of the displacement can vary according to the duration of the military operations and the extent of the destruction they cause. The displacement may end when people think the security situation is sufficiently safe, after the fighting, for civilians to be able to return home, or when those displaced find other long-term solutions such as integrating within their host community or elsewhere. In Mosul, civilians fleeing the city and its surrounding areas mainly went to camps for IDPs, where conditions were sometimes very precarious. In 2017, of the million people displaced by the battle for Mosul, around 200,000 were able to leave those camps and return home, while others decided to remain displaced or to move and integrate elsewhere, including elsewhere within the city of Mosul.⁶⁴ This is clearly shown by the two phases of the battle led by Iraqi forces to take back the city:

Large-scale displacement in the district of Mosul began in late 2016, with the start of a military operation to retake the city from the Islamic State group. Displacement reached a first peak between November 2016 and January 2017, as military operations were unfolding in the eastern part of the city. A second and greater peak occurred between February and June 2017 when the fighting concentrated on West Mosul, after East Mosul had been retaken. People who were displaced from East Mosul were mostly hosted in camps, whereas most of those displaced from West Mosul stayed outside camps as they moved in large numbers to East Mosul or other safer areas. By the end of June 2017, the city of Mosul was hosting nearly 384,000 displaced persons from Mosul itself. Many who had fled East Mosul at the outset of the military operation returned in the first few months of 2017 and are now hosting displaced persons.⁶⁵

It would be easy to imagine that large numbers of people fleeing violence, sometimes urgently, would result in large camps of displaced people or refugees, where humanitarians would then come to provide protection and assistance. In Iraq, however, things were not so simple. It is true that large refugee camps were set up during and after the 1991 war. Camps have also been formed when civilians fled major battles to take control of cities since 2003. However, when the displacement is short-term, there is very little pre-existing assistance infrastructure. Many times, the ICRC has reported civilians flooding into neighbouring areas when clashes take place.⁶⁶ The choice of destination must be made very quickly, and it is often close by or somewhere where family members live. This choice is made by considering different factors:

Reason for settling in a specific location: In 46% of the sites that were assessed in May, good security was seen as the primary pull factor for IDPs to the location, and for the IDPs in 43% of sites, the presence of family or friends was the key attracting factor.⁶⁷

64 A. Massella, above note 51, p. 10.

65 ICRC, above note 9, p. 19.

66 ICRC, "ICRC Concerned about the Plight of Civilians in Iraq", News Release No. 05/26, 16 May 2005.

67 ACAPS, above note 49.

When fighting becomes protracted or escalates, mass displacement becomes more frequent and more distant destinations are sometimes chosen. As a result, the displacement may initially go unnoticed because people go to another city, renting hotel rooms or apartments or staying with friends of family, or may be hosted directly by local communities.⁶⁸ The destination may also be selected on the basis of factors such as language, religion and ethnicity.⁶⁹ Fighting leads to displacement if it takes place in populated areas; even full compliance with IHL will not entirely prevent this kind of displacement, which is often the best way for people to save their own lives.

That said, the problem, first and foremost, is that the law is too often broken during hostilities. It is not always easy to establish with certainty whether specific acts carried out in combat are lawful, but it is apparent that the principles of precaution, distinction and proportionality are not always respected. Whether accidental or deliberate, such violations of the law affect displacement. The less the law is complied with, the more civilians will suffer directly or indirectly from the fighting, and this will make them more likely to flee. It may be stating the obvious, but IHL violations adversely affect civilians and generate or encourage displacement. Conversely, compliance with IHL helps limit the destruction and encourages displaced people to return home relatively quickly once hostilities have ended and once the security situation allows. It also helps limit the damage to infrastructure that is vital for civilian life.

Attacks that are indiscriminate or directly target civilians

If certain IHL violations, such as disrespect for the principle of distinction, may be accidental and may cause unintended displacement, others involve violence targeting certain portions of the population and are intentional breaches of the law in violation of the principle of distinction. In Iraq, some displacement has not been directly caused by major battles or military operations. In 2008, the ICRC publicly stated that in Iraq, “civilians are often deliberately targeted, in complete disregard for the rules of international humanitarian law”.⁷⁰ Some categories of civilians were more likely to be displaced than others, because they were the target of direct attack. They were threatened or targeted because of their ethnic, religious or socio-professional status. For example, thousands of doctors fled the country after 2003;⁷¹ many teachers, engineers and journalists were also targeted because of their status and decided to leave.⁷² Ethnic violence was the most common cause of displacement. This primarily concerned people who were

68 L. Higel, above note 44, p. 16.

69 *Ibid.*

70 ICRC, “Iraq: Millions Struggle to Cope with the Impact of Five Years of War”, News Release No. 08/46, 17 March 2008.

71 Precise statistics are not available. Joseph Sassoon has collected various data, with estimates that between 12,000 and 18,000 doctors – out of a total of 34,000 living in Iraq in 2003 – left the country. The Iraqi Red Crescent estimated that 50% of doctors and 70% of specialists left Iraq. J. Sassoon, above note 17, p. 143. The figures are quoted in E. Ihsanoglu, above note 5, p. 921.

72 J. Sassoon, above note 17, p. 62.

targeted or threatened because they belonged to a certain ethnic or religious group. In January 2009, between 15% and 64% of Iraqi refugees were from Christian, Circassian, Turkmen or Yazidi minorities, depending on the host country.⁷³ A 2008 IOM report states that 63% of families surveyed left after receiving direct death threats and that 89% of them felt threatened because of their ethnic or religious background.⁷⁴ Another study of minorities in Iraq concluded that

[t]hey have suffered from killings, kidnappings, torture, harassment, forced conversions and the destruction of homes and property. ... [M]inorities [have] suffered disproportionate levels of targeted violence because of their religions and ethnicities, and have formed a large proportion of those displaced, either by fleeing to neighbouring countries or seeking asylum further afield.⁷⁵

Many displaced people said they left because they had received threats and feared for their lives. Threats may have various objectives, such as forcing someone to do something or to convert – “some have received death threats, usually offering the same three choices: convert, leave Iraq, or be killed”.⁷⁶ It is commonplace for people to be kidnapped and held to ransom; this prompts civilians to flee through fear of being taken hostage.⁷⁷ The same is true of sexual violence, another cause of displacement.⁷⁸ In some cases, displaced people have been raped before fleeing.⁷⁹ If people see violence being inflicted on friends, family or neighbours, they will obviously draw their own conclusions and flee pre-emptively, to escape potential harm and avoid falling victim to attacks or abductions, which are IHL violations.

When civilians are intentionally targeted, IHL violations are much more obvious. Although violations in connection with the conduct of hostilities may be subject to debate or explained away as mistakes, the reasons for targeted attacks against civilians are much harder to understand. Such attacks may result from ignorance of the law and a lack of training among those bearing arms, but they are often carried out deliberately and knowingly in order to make people flee or suffer. Unlike displacement inevitably caused by hostilities, displacement caused by targeted attacks on civilians is more likely to be long-term or permanent. One author sees targeted attacks against ethnic groups in Iraq as a way of countering the demographic change caused by the previous regime’s Arabization campaigns, by preventing the return of these ethnic groups.⁸⁰ A study on minorities returning to Iraq even states that:

73 C. Champman and P. Taneja, above note 44, p. 13.

74 IOM, *Iraq Displacement 2007 Year in Review*, 2008, available at: <https://reliefweb.int/report/iraq/iraq-displacement-2007-year-review>.

75 C. Champman and P. Taneja, above note 44, p. 9.

76 *Ibid.*, p. 13.

77 *Ibid.*, p. 13.

78 *Ibid.*; José Riera and Andrew Harper, “Iraq: The Search for Solutions”, *Forced Migration Review*, Special Issue, “Iraq’s Displacement Crisis: The Search for Solutions”, 2007.

79 C. Champman and P. Taneja, above note 44.

80 L. Higel, above note 44, p. 14.

The daily situation faced by Iraqi refugees from minority communities in neighbouring countries puts a large amount of strain on individuals and families to survive, as well as to keep their religious and cultural traditions alive. It is telling that despite these conditions, however, a large proportion of those interviewed for this report say that they have no intention of ever voluntarily returning to Iraq.⁸¹

Similarly, civilians suspected of having been, or having someone in their family who has been, affiliated with ISG are unable to return because they fear for their life and so may be permanently displaced.⁸² The IOM study on return notes that 64% of displaced people and 81% of people who have returned home fear reprisals.⁸³

The type and objectives of violence also influence displaced people's destination. Where attacks are targeted against them or where the security situation is generally poor, the displacement will not only last for a longer time, but people will also potentially move further away. This was particularly clear after the attack on the Samarra mosque and the violence that followed. Previously, displaced people moved to certain regions because they were regarded as safer, but the displacement that followed the ethnic conflict caused civilians to move to specific areas depending on their ethnic background or preference. This does not mean that the usual short-term displacement – caused by people fleeing violence – ceases to take place; the two types of displacement, along with their consequences, coexist. In any event, when displaced people move to other locations for a longer period, without being formally identified or helped, their presence may become a source of resentment among host communities if it pushes up prices, rents or unemployment, or causes tension in other ways.⁸⁴

Unfortunately, it is harder to put a stop to IHL violations if they are deliberate. Becoming aware of such violations and their intentional nature is a first step towards taking wider action.⁸⁵ Although there is no ready-made solution to this problem, some suggestions can be made. Firstly, the parties to the conflict must comply with the law and ensure that those bearing arms do not break it. Where that is not the case, they must take suitable measures to change the situation, such as education, training, prevention and punishment. If the parties are reluctant to make changes, for example because they are intentionally seeking to violate the law, their allies, sponsors and the international community as a whole must put pressure on them and ensure that they respect their legal obligations.⁸⁶

However, attacks targeted against civilians – a clear breach of IHL – do not just affect the communities they are directly aimed at. The ICRC has found that

81 C. Chapman and P. Taneja, above note 44, pp. 28–29.

82 L. Higel, above note 44, p. 21.

83 IOM, *Obstacles to Return in Retaken Areas of Iraq*, 2017, p. 14.

84 ICRC, above note 9, pp. 29–31; ICRC, above note 7, pp. 20–21.

85 ICRC, above note 7, pp. 38–40.

86 Knut Dörmann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014. See also ICRC, above note 7, pp. 62–65.

violence also affects displacement in a much more general way.⁸⁷ Families that are not directly targeted leave home because the environment has become too dangerous. Among the warning signs that prompted them to flee, those displaced mention checkpoints manned by insurgents, curfews, increasing interrogation of civilians, and fighting between insurgents and government forces. It is therefore not surprising that the number of Iraqi people displaced increased dramatically from February 2006 following ethnic violence, because the violence also affected civilians who were not specifically targeted.

The cumulative effect of violence

In Iraq, therefore, displacement has been caused by various factors acting in parallel. One of these factors relates directly to the conduct of hostilities, and another consists of targeted breaches of the law. These two factors can coincide, for example during ethnic clashes that result in particularly severe episodes of violence – in both cases, displacement may result from either the violence and violations of the law, or a decision taken in expectation of that violence. The literature clearly shows that displaced people are not passive spectators, and while some decide to leave urgently to escape an imminent threat, many others decide to leave after due consideration of their various options.⁸⁸ Perception of danger therefore drives displacement. The fear of becoming an unintended victim or a target prompts people to take pre-emptive action – i.e., to flee. However, the line between reactive and pre-emptive displacement is blurred, and decisions are driven by highly personal factors. While some civilians are unable to flee or are prevented from leaving, some prefer to stay because they think it is the best solution, because they do not want to lose their possessions, because they are concerned about what could happen during their displacement, because they are afraid of being mistaken for a member of a warring party, or because they are worried they will not adapt to their destination.⁸⁹ Others, in the same circumstances, prefer to flee pre-emptively.

This pre-emptive displacement may be motivated by the memory of past events. This article has already touched on the fact that in 2003, the chemical attack on the city of Halabja was still sufficiently fresh in the public memory to prompt some people to flee and later return after realizing that there was no real danger. This memory of past IHL violations deserves more in-depth research, because it could shed light on their long-term negative impact.

When accumulated in time and space, the combined effect of violence and violations of the law – real or perceived – is even more severe for the entire

87 Robert Zimmerman, “Responding to Iraq’s Ever-Deepening Violence”, *Forced Migration Review*, Special Issue, “Iraq’s Displacement Crisis: The Search for Solutions”, 2007, pp. 29–30; ICRC, “The Ever-Worsening Humanitarian Crisis in Iraq”, Press Release No. 07/49, 11 April 2007.

88 Emilie Combaz, *Effects of Respect for International Humanitarian Law on Displacement*, GSDRC Helpdesk Research Report No. 1393, Birmingham, 2016, p. 14; A. Massella, above note 51, p. 7.

89 A. Massella, above note 51, p. 7.

population. For example, when conditions remain unsafe for an extended period, people start to see no prospect of an end to the violence, and its negative effects increase. The chances of ending the conflict, either by military or political means, begin to seem very remote. An unsafe environment becomes the new normal, insidiously forming part of everyday life. Similarly, the longer or more repeated military operations are, the more risk there is that serious destruction will take place, affecting civilian objects and vital infrastructure. For example, if systematic destruction takes place, people may no longer have access to electricity or fuel. Power cuts can also disrupt the water supply and medical facilities. Although they may not be directly targeted, many civilians pay the price for the constant build-up of destruction, which makes life almost impossible, to the point that they need to flee. The cumulative effect of violence and violations of the law is a characteristic of protracted conflicts, and displacement is not just a direct, contemporaneous consequence of high-intensity fighting. Situations worsen over time, and eventually force people to leave their homes. The cumulative effect of hostilities also has an impact on the duration of the displacement.

However, this does not mean that a protracted conflict will necessarily cause protracted displacement. The varying intensity and duration of protracted conflicts create a complex picture. Large waves of displacement over a short period take place alongside longer-term displacement.

Sometimes, those displaced seek long-term solutions such as establishing a home and integrating into their host community or another destination.⁹⁰ Others seek to return home as quickly as possible, even if the security situation remains volatile and large-scale destruction has taken place. In Iraq, as in many other conflicts, displaced people often have a great desire to end their displacement and move back home:

There was a strong desire to return to home communities to resume their lives, to be reunited with extended family, tribal members and neighbours. ... Remarkably, they have expressed consistent desires to return to their communities of origin, to resume their lives and livelihoods, and to rehabilitate their homes and community structures.⁹¹

An IOM report found that 76% of displaced persons surveyed wanted to return home one day.⁹²

An IOM report on people returning to various regions of Iraq states that 52% decided to do so because they regarded the situation as sufficiently safe, while 28% of those displaced chose not to go home because of the unsafe situation, destruction and lack of services in their home region.⁹³ Access to basic services such as drinking water and electricity is often mentioned by displaced people who are reluctant to return home.⁹⁴ The same is true of health care, which

90 ICRC, above note 7, pp. 51–57.

91 A. Massella, above note 51, pp. 7–8, 19.

92 IOM, above note 83, p. 12.

93 *Ibid.*, p. v.

94 A. Massella, above note 51, p. 19.

displaced people regard as important for their future, especially when their household includes children or the elderly.⁹⁵ It is in the nature of war that civilians will flee fighting and temporarily leave their homes, and compliance with IHL is important to protect people's living conditions and safety at all stages of their displacement.⁹⁶

Conclusion

Displacement is an intrinsic part of war, and even full compliance with IHL cannot remove the root causes and triggers of displacement. Unfortunately, however, as the example of Iraq shows very clearly, breaches of the law play a direct role in displacement. Violations of the IHL principles on the conduct of hostilities lead to displacement, not only directly when civilians flee to save their lives, but also indirectly when the cumulative effect of the violations, for example on vital infrastructure, forces civilians to seek better living conditions elsewhere. Often, IHL violations are committed intentionally, with certain categories of people being targeted. Such cases typically lead to long-term or permanent displacement. All these elements are amplified and prolonged in protracted conflict. The simultaneity or accumulation of different conflicts over the same territory makes it very hard for displaced people to find durable solutions.

While this Iraq-focused article has aimed to shed light on displacement and the role of IHL in protracted conflicts, many more general questions on protracted conflict remain. Is it possible or even desirable for humanitarian organizations to take over the responsibilities of States, for example by distributing food, over the long term? How can displaced people become more independent and less reliant on assistance and protection? How can the humanitarian response be adjusted to the various types of displacement? These questions force us to consider the long-term role of humanitarian organizations and what they tell us about protracted conflicts. Humanitarian action is obviously necessary, because it responds to genuine and often vital needs. But does it also symbolize a sort of transfer of skills and duties from the State to other organizations? Does this broadening of humanitarian organizations' remit suggest that the international system is broken? Although emergency situations still arise during a protracted conflict, the long-term involvement of humanitarians, carrying out tasks that are normally done by States or development organizations, suggests that a kind of "normalization" is taking place, making war—which should be an exceptional event—the norm. People find it hard to imagine an end to the hostilities, and living conditions that should be only temporary become entrenched. Worse, in Iraq and other countries affected by protracted conflict, generations of people are being born and growing up in the context of war, with no experience of what it means to live in peace. This has major consequences for their cognitive

95 J. Sassoon, above note 17, p. 158.

96 ICRC, above note 7, pp. 60–61.

development, their worldview, their culture and, in the final analysis, the way they live and interact with the world. Unfortunately, Iraq illustrates this perfectly. This may be one of the main features of protracted conflicts: even more than their duration, they are characterized by the fact that war ceases to be exceptional and becomes the norm.

We should remember that although humanitarian organizations can make up for the shortcomings of States and the international community – albeit partially and imperfectly – it is not their job to end conflicts. The primary intention of humanitarian action and IHL is not to bring wars to an end, but to minimize the damage they cause. The responsibility for ending armed conflicts falls on the parties involved, States and the international community in general. Although the financial and moral support of third-party States is crucial in ensuring that humanitarian action is effective, that support must never absolve those States of their responsibility to ensure respect for the law and to help achieve a political resolution.

Humanitarians and IHL naturally have a role to play as well – a recent ICRC study shows that better compliance with IHL helps to prevent displacement.⁹⁷ However, this is only part of the solution to protracted conflicts.

In 2007, the editorial of a double issue of the *International Review of the Red Cross* focusing on the conflict in Iraq stated:

Perhaps one way back to a stable Iraq, one that would serve equally the needs of its entire people, is through the unanimous acceptance of impartial humanitarian action. Such action, which makes no distinction between victims, could foster reconciliation and serve to counter the pernicious idea that human lives must inevitably be sacrificed – an idea that will only further encourage hatred and then more hatred, revenge followed by more revenge. ... At the same time, humanitarian action can and must be supplemented by political measures aimed at preventing the country's slide into a much vaster conflict that could engulf the entire region.⁹⁸

Alas, these partly prophetic words have lost none of their relevance a decade later.

⁹⁷ *Ibid.*, pp. 60–61.

⁹⁸ Toni Pfanner, "Editorial", *International Review of the Red Cross*, Vol. 89, No. 868, 2007, p. 783.



Q&A: The ICRC and the “humanitarian–development–peace nexus” discussion

In conversation with Filipa Schmitz Guinote, ICRC Policy Adviser

Filipa Schmitz Guinote is a Policy Adviser in the ICRC’s Policy and Humanitarian Diplomacy Division. She guides and supports the institution’s policy reflection and external engagement on issues related to the long-term consequences of conflict and violence, including the question of missing persons, access to education and the links between humanitarian action, development and peace efforts more broadly.

Over the past five years, various developments in the international aid policy sphere have resurfaced a decades-old discussion about the link between humanitarian action, development and peace efforts—the so-called “triple nexus”. This discussion focuses on protracted conflicts and fragile settings, as these are environments where humanitarian funding and response are overstretched and where development and peace struggle to take hold.

Three important reference points in this policy environment are the Sustainable Development Goals (SDGs),¹ the Agenda for Humanity² and the twin United Nations (UN) resolutions on sustaining peace.³ These various commitments have been driving development actors to seek ways to engage earlier and remain present in conflict-affected areas.⁴ They have mobilized many donors and organizations around a vision in which humanitarian action works to reduce needs, risks and vulnerability, in addition to responding to needs,⁵ and they have spurred the UN

system into organizational reforms to ensure a system-wide coherent effort towards the SDGs, including in places affected by conflict.⁶ They have also been accompanied by renewed calls for, and efforts towards, greater transparency, efficiency, accountability, collaboration and results across the international aid system.

Efforts to achieve the right synergy between humanitarian action, development and peace efforts have again regained momentum globally. But they have also raised concerns within the humanitarian community about a shrinking space for neutral, impartial and independent humanitarian action during armed conflict.

In this Q&A, Policy Adviser Filipa Schmitz Guinote discusses the International Committee of the Red Cross's (ICRC) policy reflections on the interface between humanitarian action, development and peace, and the so-called "triple nexus" discussion. She unpacks some of the conceptual and practical tensions around humanitarian principles and humanitarian identity in the interaction between humanitarian, development and peace actors. She also outlines the rationale behind the ICRC's work with affected people in protracted conflicts, against the backdrop of an ICRC Institutional Strategy which commits the organization to building sustainable humanitarian impact with affected people and working with others.

Keywords: humanitarian response, humanitarian–development divide, humanitarian–development–peace nexus, protracted conflict, humanitarian principles, partnerships.

: : : : : :

What is the traditional distinction between humanitarian relief and development?

The traditional distinction between humanitarian relief and development has revolved around three main elements: time frame, purpose and mode of action.

Development is traditionally conceived as a strategically planned activity driven by governments to reduce poverty and create prosperity, social cohesion and a good quality of life for their citizens. It is a whole-of-society and whole-of-country endeavour with a long-term horizon, though it can also include small-scale and shorter-term measures. There is a diversity of development models in which the State plays different roles, but broadly speaking, development naturally

- 1 UNGA Res. 70/1, "Transforming Our World: The 2030 Agenda for Sustainable Development", UN Doc. A/RES/70/1, 25 September 2015.
- 2 *One Humanity: Shared Responsibility: Report of UN Secretary-General for the World Humanitarian Summit*, UN Doc. A/70/709, 2 February 2016, Annex, "Agenda for Humanity".
- 3 UNGA Res. 70/262, "Review of the United Nations Peacebuilding Architecture", UN Doc. A/RES/70/262, 27 April 2016; UNSC Res. 2282, UN Doc.S/RES/2282 (2016), 27 April 2016.
- 4 See, for instance, Organization for the Economic Cooperation and Development (OECD), *DAC Recommendation on the Humanitarian-Development-Peace Nexus*, OECD/LEGAL/5019, 2020; World Bank Group. *Strategy for Fragility, Conflict, and Violence 2020–2025*, Washington, DC, 2020.
- 5 The Grand Bargain launched at the World Humanitarian Summit in Istanbul has sought to improve the effectiveness and efficiency of humanitarian action along these lines. This agreement initially gathered a group of thirty-five donors and humanitarian organizations, including the ICRC and the International Federation of Red Cross and Red Crescent Societies. As of 2020, it has over sixty signatories. See *The Grand Bargain: A Shared Commitment to Better Service People in Need*, Istanbul, 23 May 2016.
- 6 UNGA Res. 72/279, "Repositioning of the United Nations Development System in the Context of the Quadrennial Comprehensive Policy Review of Operational Activities for Development of the United Nations System", UN Doc. A/RES/72/279, 31 May 2018.

and legitimately rests on strong government ownership. It generally involves an investment in strengthening State institutions, particularly their regulatory, revenue generation and public service provision functions, and an investment in strengthening a form of social contract between the State and the population. It also encourages investment in people and empowering them to use their human capital to sustain themselves and contribute to individual and national welfare.

In contrast, humanitarian relief is traditionally conceived as an exceptional, temporary emergency measure to save lives and alleviate the suffering of people in armed conflict, disasters and other crises. As an exceptional emergency response, humanitarian relief can involve the direct delivery of assistance, with humanitarian workers substituting the authorities when the needs are acute and where the authorities are unable or unwilling to assist the population.⁷ It should be noted that this traditional conception of humanitarian action emphasizes the “relief” component, which is more immediately visible and tangible in a crisis. But humanitarian action also includes a protection component which involves a more continuous and long-term engagement with duty bearers (and institutions) who have a responsibility to preserve the safety, physical integrity and dignity of those affected by armed conflict and other situations of violence.⁸

A hallmark of humanitarian relief is that it should respond to needs in an impartial manner. In armed conflict, addressing needs impartially means understanding but striving to stay outside of political, ethnic, religious and military fault lines. Often, this requires an approach based on neutrality and independence from the government and other parties to the conflict. For this reason, the planning, design, delivery and funding of humanitarian operations have been kept administratively distinct from those of development.

Historically, the structural and administrative separation by donors between humanitarian and development planning, programming, funding and coordination frameworks has been viewed as a key enabler for a principled response in politically and militarily fragmented contexts.

What efforts have there been to bridge the “humanitarian-development divide” in recent years?

Conceptions of how humanitarian relief and development should link up have evolved over time; they are part of a decades-old discussion in the aid sector.⁹ Initially, the link was conceived in a linear manner – a *continuum* – as a transition from short-term emergency relief activities conducted by humanitarian actors to

7 ICRC, “ICRC Assistance Policy”, *International Review of the Red Cross*, Vol. 86, No. 855, 2004.

8 ICRC, “ICRC Protection Policy”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008.

9 For an overview of the different stages of the policy reflection on the link between relief and development, see Joanna Macrae and Adele Harmer (eds), *Beyond the Continuum: The Changing Role of Aid Policy in Protracted Crises*, Humanitarian Practice Group (HPG) Report No. 18, Overseas Development Institute (ODI), London, July 2004; Irina Mosel and Simon Levine, *Remaking the Case for Linking Relief, Rehabilitation and Development*, HPG Report, ODI, London, March 2014; Hugo Slim, “Joining What Belongs Together? The Triple Nexus and the Struggle for Policy Synthesis”, *Rural 21*, Vol. 53, 2019, pp. 6–10.

longer-term development carried out by the State. Operationally, the keywords were “handover” and “coordination”.

The linear relationship between humanitarian relief and development was challenged in the 1990s as being ill-adapted to the reality of protracted conflicts and to cyclical disasters. Policy thinking then evolved to a *contiguuum* model which conceives humanitarian relief and development as actions that may take place – and be financed – simultaneously in a given context.¹⁰ The notion of resilience played an important role in the operationalization of this *contiguuum* model – though a contested one. Operationally, the keywords of the *contiguuum* paradigm are “collaboration” (among humanitarian and development actors and with local actors) and “coherence” (between relief and development action).

The current discussion about the “humanitarian–development–peace nexus” is in many ways another iteration of the *contiguuum* paradigm. The relative novelty of the nexus is the fact that it is part of a global multilateral agenda – namely, the commitment by States and a range of partners, including international financial institutions and civil society, to deliver on the SDGs. This is unlike previous iterations of the link between relief and development, which were articulated separately by a few donors. The other relative novelty is the addition of “peace” to the humanitarian–development equation, but we will come to that later.

Efforts to conceptualize and operationalize the link between relief and development have pushed the various actors to critically assess the relevance, efficiency and effectiveness of their work and take measures to improve it. But these efforts have also faced operational, financial and mindset challenges that are still visible today – for instance, the difficulty faced by some humanitarian responders in committing to longer-term support to populations while maintaining their technical, operational and financial capacity to respond to sudden-onset emergencies; or the continuing low risk tolerance of development actors and donors, which prevents them from fully engaging in conflict-affected environments; or differences in the *modus operandi* and principles guiding humanitarian relief and development, which can create challenges for collaboration, especially in environments that are highly polarized and fragmented politically and militarily. The fact that the discussion on the link between relief and development has been a constant feature of aid policy over decades reflects these persistent challenges.

You mentioned that resilience is a contested notion when it comes to the humanitarian response in conflict environments. What are the main arguments and what is the ICRC’s position on this issue?

In the humanitarian assistance sphere, the notion of resilience is traditionally linked to natural disaster situations, but it started being used in connection to conflict because of the chronic challenges posed by protracted conflicts. Resilience-oriented approaches are focused on helping affected people and communities to

10 An illustration of this evolution is the two European Commission communications on “Linking Relief, Rehabilitation and Development” issued in 1996 and 2001 (COM (96) 153 Final, 30 April 1996; COM (2001) 153 Final, 23 April 2001).

address their own needs and supporting existing structures and coping strategies. Resilience-oriented approaches involve a shift in the position of affected people, from (passive) *beneficiaries* of aid to *agents* of their own change. It also marks a shift in relational dynamics between affected people and humanitarian organizations. Resilience is an important concept in the policies of many donors, as an avenue to ensuring aid effectiveness, aid efficiency and aid coherence.¹¹

The question of resilience and conflict has raised concerns among some in the humanitarian sphere.¹² The first concern is that resilience approaches *de facto* transfer the onus of recovery to communities and overshadow the responsibility of those who are creating the needs and challenges in the first place. The second concern is operational – that the focus on resilience might shift financial resources away from the emergency response and that humanitarians may not be well equipped to read the financial and commercial power dynamics of war economies in order to ensure that their resilience-oriented interventions are well designed. The third concern is that the deep work on systems which resilience-oriented approaches imply may jeopardize humanitarian principles. Some of these concerns are the same ones as those raised in relation to the current discussion on the humanitarian–development–peace nexus.

Approaches towards resilience among humanitarian organizations have created a spectrum of positions – and even identities – ranging from a stronger focus on emergencies to a stronger focus on resilience.¹³ This is one of the factors that creates diversity within the humanitarian ecosystem.¹⁴

Overall, the ICRC is positioned in the middle of that spectrum. Wherever needed, emergency life-saving relief is the top priority, even if it includes short-term measures. Alongside this, the ICRC also sees resilience-strengthening approaches as a positive policy and operational adjustment to the reality of protracted conflict. Strategies and practical measures that seek to decrease the vulnerability of populations and their exposure to threats in protracted conflicts are in line with international humanitarian law’s [IHL] focus on reducing the impact of conflict on civilians.

Importantly, however, reducing risks and vulnerabilities is an effort that concerns duty bearers, not only humanitarian actors. For the ICRC, resilience-strengthening approaches are not a substitute for work centred on promoting respect for the law among duty bearers. In fact, a number of resilience-oriented

11 For an overview of the notion of resilience from a donor perspective, see Department for International Development, *Topic Guide: What Is Resilience?*, London, May 2016.

12 See, in particular, Simon Levine, Adam Pain, Sarah Bailey and Lilianne Fan, *The Relevance of ‘Resilience’?*, HPG Policy Brief No. 49, ODI, London, September 2012; Jonathan Whittall, Mit Philips and Michiel Hofman, “Building Resilience by Deconstructing Humanitarian Aid”, *Médecins Sans Frontières Blog*, 6 February 2014. For an overview of the resilience debate, see Jérémie Labbé, “Humanitarian Aid vs Resilience Debate Should Put Priorities in Context”, *International Peace Institute Blog*, 28 March 2014.

13 Dorothea Hilhorst, “Classical Humanitarianism and Resilience Humanitarianism: Making Sense of the Two Brands of Humanitarian Action”, *Journal of International Humanitarian Action*, Vol. 3, 2018.

14 The Humanitarian Exchange and Research Centre in Geneva (HERE-Geneva) conducted a research project on the question of mandates between 2018 and 2020 which highlights this diversity clearly. See Marzia Montemurro and Karin Wendt, *Unpacking Humanitarianism*, HERE-Geneva, April 2020.

activities conducted by the ICRC are specifically designed with a combination of protection and assistance measures. Two examples are the Health Care in Danger project and its links to the ICRC's broader health activities, and the ICRC's work on urban essential services, which combines technical collaboration with utilities to keep systems afloat and an engagement (protection and legal dialogue) with parties to the conflict around the conduct of hostilities and the protection of civilians and civilian objects.¹⁵

Secondly, the ICRC does not promote people's resilience *to* violence and conflict, but people's resilience *within* a context of violence and conflict. For example, a resilience approach would not seek to prevent displacement in situations where vulnerability and threats are such that people need to leave, but rather would support them to become resilient in their new situation as displaced people.

In short, resilience-strengthening approaches are an important element in the ICRC's work with communities facing chronic and long-term needs and challenges, and they rest on a combination of assistance and protection work. Ultimately, the space for resilience in conflict areas is shaped by the actions of arms bearers and parties to the conflict, by the level of pressure they put on essential services and people's coping mechanisms, and by the level of threat they pose to people's safety and well-being.

How relevant is the relief–development distinction in protracted conflicts?

Protracted conflicts have challenged some aspects of the traditional distinction between relief and development. Time frame is a case in point. In long wars or “no war, no peace” situations, humanitarian actors often carry out activities which also go beyond short-term emergency relief.¹⁶

Looking at the ICRC's assistance operations, for instance, alongside emergency life-saving relief, we see activities that can challenge traditional conceptions of what is “humanitarian” and what is “development”. For instance, the ICRC supports micro-economic initiatives that help displaced people, returnees and other victims of the conflict generate income or diversify their livelihoods; we strengthen local agricultural and veterinarian capacity to safeguard animal health and improve agricultural yields. As mentioned already, we also work with municipalities and utilities to reduce public health risks by keeping urban water and sanitation systems afloat; and we support primary, secondary and tertiary health structures and local health workforces not only in emergency or trauma care, but also in longer-term health-care needs such as mental health,

15 For an articulation of the link between assistance, protection and legal work on urban services, see ICRC, *Urban Services in Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, 2014.

16 HERE-Geneva highlights this operational adaptation in a striking way in its case studies on Mali and the Central African Republic, having compared the stated goals of various organizations that began work in those countries during a crisis and stayed on afterwards. See Marzia Montemurro and Karin Wendt, *The Limits of Labels: HERE “Mandates Study” Mali Report*, HERE-Geneva, 2018, Annex 1; Marzia Montemurro and Karin Wendt, *From Macro to Micro: HERE “Mandates” Study Central African Republic Report*, HERE-Geneva, 2019, Annex 3.

physical rehabilitation of the war wounded and persons with disabilities, and non-communicable diseases.

This is not a mandate shift, but an operational adaptation to needs which evolve over time and for which a response based on an emergency mindset can quickly become irrelevant, onerous and even counterproductive by creating dependency.¹⁷ The humanitarian rationale behind these types of activities is to help affected populations meet recurrent or chronic needs in a more effective and autonomous manner, and to make future shocks less severe or at least more manageable. These types of activities can also help to preserve “development holds” by strengthening existing structures and service capacity. Importantly, the work of the ICRC in relation to longer-term needs and challenges is based on its added value, as a humanitarian actor, in terms of access, proximity to communities, linkages with National Red Cross and Red Crescent Societies [National Societies], and a granular knowledge of the impact of the fighting on people’s daily lives and on services and systems. In some places, this longer-term work can also be based on a residual responsibility towards populations with which the ICRC has engaged during more intense phases of a conflict, and which would otherwise not receive adequate support.¹⁸

Other aspects of the traditional distinction between humanitarian action and development may remain highly relevant, even in protracted conflicts.

The distinction between humanitarian and development planning, programming, coordination and funding frameworks, while largely administrative, was devised for a good reason. It provides humanitarian actors with the *possibility* of assessing, drawing attention to or responding to needs impartially, in environments where the State may have a bias or a limited presence or acceptance over parts of the territory. This is not to say that humanitarian programmes can never align with or even leverage development plans and investments driven by the State. It simply means that there needs to be an alternative avenue for independent programming in order to avoid blind spots and “leaving people behind” in fragmented and polarized environments such as armed conflict.

Another reason why this administrative distinction between humanitarian and development frameworks is necessary is that the State is not the only duty bearer that a humanitarian organization may need to interact with. All parties to the conflict – State and non-State – have obligations towards the population under their control. In conflict-affected places, it is important that planning, programming and funding frameworks and tools enable humanitarian actors to engage with non-State armed groups within the framework of IHL.¹⁹

17 In 2015, the ICRC removed the term “emergency” from its annual appeal to better reflect this dual operational time frame. See ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016, p. 4. In 2002, the ICRC developed internal guidance on its role and operational adaptation in “periods of transition”. See Marion Harroff-Tavel, “Do Wars Ever End? The Work of the International Committee of the Red Cross When the Guns Fall Silent”, *International Review of the Red Cross*, Vol. 85, No. 851, 2003.

18 M. Harroff-Tavel, above note 17.

19 UN Security Council Resolution 2462 on counterterrorism acknowledges this issue. It recognizes the need to ensure that its provisions are implemented in a manner consistent with IHL and urges States to take

Some commentators have brought up real or perceived threats to the humanitarian principles of neutrality, impartiality and independence. How can a “nexus approach” be compatible with humanitarian principles?

In all their iterations, efforts to operationalize the humanitarian–development–peace nexus by donors or operational agencies have largely focused on overcoming the *bureaucratic divide* between humanitarian and development planning, programming, funding and coordination frameworks and processes.

The risk that some humanitarians see, including the ICRC, is threefold. First is the risk of a “protection gap”. If planning, programming and funding become largely contingent to or subsumed under processes led by the State—a party to the conflict—there is a risk that priority will be given to areas and issues which are politically consensual for the government and its donors. The consequence, in some contexts, is potentially failing to address or even discuss needs and problems arising in areas outside the control of the State or needs and problems caused by the actions of the State. A related concern is that vulnerable individuals from groups who feel stigmatized, who fear persecution or who do not trust the authorities may choose not to seek support if that support is provided only by or through the State. Experience shows that ensuring independent avenues for support is a way to mitigate the risk that some people will deliberately forego the support they need for self-protection reasons.

Secondly, there is the risk of an “emergency gap”. Here the concern is that the prioritization of development considerations may drive resources towards long-term outcomes at the expense of urgent needs which humanitarian actors already struggle to address, or may shift the emergency response entirely to the State without the State necessarily having the requisite surge capacity to address an emergency in a timely manner.²⁰

Thirdly, there is the perception risk. Humanitarians need to have the possibility of distancing themselves from initiatives led by actors who may be perceived by communities and arms bearers as associated with a particular side of the conflict. They also need to maintain their ability to engage with communities and parties to the conflict from all sides. This is key for access, for the security of staff and for an impartial response. Pressure to operate with and alongside the government or national or international security forces (or non-State armed groups, for that matter), for instance, can easily affect the way humanitarian action is perceived locally, either presently or in the future, seeing that conflict dynamics evolve over time. A review of the ICRC’s post-9/11 approach in Afghanistan illustrates the importance of managing this perception risk.²¹

into account the effect of counterterrorism measures on “exclusively humanitarian activities” carried out by “impartial humanitarian actors”. UNSC Res. 2462, UN Doc. S/RES/2462 (2019), March 2019.

20 See, for instance, Monica de Castellarnau and Velina Stoianova, *Emergency Gap: Humanitarian Action Critically Wounded*, Emergency Gap Series No. 1, Médecins Sans Frontières, April 2016; Marc DuBois, *The Cost of Coherence*, Emergency Gap Series No. 4, Médecins Sans Frontières, December 2016.

21 For a detailed analysis of this case, see Fiona Terry, “The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011.

The underlying logic behind some humanitarians’ concern with “nexus approaches” focused on overcoming the *bureaucratic divide* is that the *administrative distinction* between humanitarian and development planning, programming, funding and coordination frameworks and tools is precisely one of the key enablers through which humanitarian principles have been operationalized, especially in contexts where the State is a party to the conflict.

The challenge, then, is to ensure that humanitarian and development (or peace) actors can interact on the substance (analysis, exchange of expertise) and collaborate operationally where appropriate (and this may imply a mindset change), but maintain those distinct administrative measures which are necessary *to ensure that affected people are supported safely and in an impartial manner, in highly polarized and fragmented contexts.*

Looking at the ICRC’s experience, the following seven points can be distilled as a basic checklist for a principled operational engagement with actors and donors situated outside the traditional humanitarian sphere:

1. Do **coordination and planning processes**, and in particular the role of the State and other political actors in these processes, allow for the humanitarian actor to assess and respond to needs impartially?
2. Is appropriate **financing**, notably for longer-term resilience-strengthening activities in conflict-affected areas, **accessible to the humanitarian actor directly** and not only through the government, in situations where humanitarians’ role in such activities is critical?
3. Are funding lines **unearmarked or earmarked** in such a way that they do not limit humanitarian operations to a particular community or area in the country or that they match needs that have been previously independently and impartially identified?
4. Do **reporting requirements** allow the humanitarian actor to outline the impact of its response while safeguarding data protection principles and without exposing the identity or the ethnic, political or religious make-up of their beneficiaries?
5. Do **due diligence** requirements, including those relating to counterterrorism, allow the humanitarian actor to work with all individuals and communities in need without discrimination?
6. Is the humanitarian actor *exempted from* **measuring the outcomes or impact** of its action against **political indicators** (e.g., national security, migration control, national peace priorities, adherence to peace processes)?
7. Are the **communication and visibility policies** of donors or partners sufficiently flexible to enable a humanitarian actor to manage the way it is perceived by local communities and arms carriers?

What this basic checklist shows is the importance of unpacking what humanitarian principles mean in concrete terms. This allows all actors involved to identify which aspects of the coordination, planning, programming and funding frameworks may need to be adjusted to make a collaboration between different “nexus actors” compatible with humanitarian principles, so that ultimately protection and assistance

“blind spots” are avoided and so that affected people are supported impartially – or, in development terms, inclusively – in polarized and fragmented settings.

Mentions of humanitarian principles are omnipresent in policy documents relating to the humanitarian–development–peace nexus,²² but these references are usually end-of-sentence caveats and are rarely developed further (“while fully respecting humanitarian principles”). This perpetuates the idea that humanitarian principles are a constraint to the nexus. Yet, what humanitarian principles aim to enable – access, trust, impartial response, management of security risks – is equally valuable for development or peace actors because it helps to ensure that “no one is left behind” in fragmented and polarized contexts. In this sense, humanitarian principles are a strength for the nexus, especially if humanitarian actors are at the same time equipped to better support affected people dealing with long-term needs and challenges in their own programmes.

What is the ICRC’s view on the concept of a humanitarian–development–peace nexus?

The ICRC sees the triple nexus as an ecosystem of actors of influence, resources and expertise – beyond the humanitarian sphere – that can help us build *sustainable humanitarian impact* with affected populations. In other words, the important part of the nexus for the ICRC is the *actors* behind “development” and “peace”. They are key for the sustainability of humanitarian protection and assistance efforts.

Behind “development”, we see primarily State authorities at the central and subnational levels and the donors and investors working with them, many of which are increasingly focusing on crisis preparedness and prevention. Their choices and actions can drastically and durably reduce humanitarian needs and mitigate the effects of crises on people’s lives, potentially at large scale. Behind “development” we also see the more informal community-based governance structures which equally play a leading role in the planning and implementation of development efforts at the local level.

Behind “peace”, we see primarily those involved in war: political decision-makers, State and non-State arms bearers and those who support them. Their decisions and actions, particularly in the conduct of hostilities, can determine the extent of destruction, suffering and grievances that people and countries sustain during conflict and that they will need to address in the future. In other words, respect for IHL needs to be part of the “nexus equation”. Behind “peace” we also see governmental and non-governmental actors involved in mediating and settling conflicts and in promoting measures to defuse the drivers of violence and conflict at local level. These actors can help to create breakthroughs on key humanitarian problems and can help to foster restraint in the behaviour of arms bearers.

A nexus that works is a situation where people affected by conflict can safely rebuild their lives with agency and dignity, and where there are no blind

22 See, for instance, OECD, above note 5.

spots – no vulnerable people ignored or excluded. This means that sometimes the nexus will need to give preference to humanitarian action, particularly in contexts where reaching people requires an impartial and independent approach.²³

This also means that the nexus should not only be about humanitarian, development and peace actors *working together*, it should also be about enabling each actor to be good and even better at what they do, separately. The exchange of knowledge, expertise and analysis plays a key role in this regard.

For instance, in 2018, the World Bank, the ICRC, UNICEF and the Centre for Mediterranean Integration launched a collaborative process of learning and knowledge exchange across the Middle East and North Africa region with and in support of urban water and sanitation utilities. The perspectives and expertise of the World Bank helped the ICRC improve its understanding of the institutional, legal and financial factors shaping the performance of utilities, as well as of ways to reduce non-revenue water and integrated water resource management – all of which help the ICRC build sustainability in its work with utilities before and during emergencies. Conversely, the ICRC’s experience supporting water and sanitation utilities during conflict in the region brought useful perspectives to the World Bank and other partners involved in this initiative on how systems break down during conflict and on ways to ensure continuity in service delivery with the humanitarian objective of safeguarding public health.

You’ve just referred to sustainable humanitarian impact. This is a term that the ICRC uses in its institutional strategy. Can you unpack what this means?

The ICRC’s Institutional Strategy 2019–2022 indeed coins the term “sustainable humanitarian impact” as the second of its five strategic orientations for this period. It forms the backbone of the strategy, together with the first strategic orientation around “influencing behaviour to prevent violations of IHL and alleviate suffering”, and it is closely connected to another orientation focused on “working with others”.²⁴ The institutional steer towards “building sustainable humanitarian impact with people affected” is about maintaining the relevance and effectiveness of the ICRC’s action in relation to people’s needs *as they evolve over time*, particularly in protracted conflicts and chronic situations of violence, bearing in mind that such needs emerge from compounded challenges of conflict, violence, governance, poverty, and environment and climate vulnerabilities, which may lie well beyond the scope and capacity of the ICRC and of the humanitarian ecosystem more broadly.

Unpacking the notion of “sustainable humanitarian impact” conceptually helps to shed further light on the rationale behind the ICRC’s view on the nexus discussion, and on some key operational implications of trying to support people facing long-term and chronic needs:

23 See Hugo Slim, “Nexus Thinking in Humanitarian Policy: How Does Everything Fit Together on the Ground?”, Keynote Address to the World Food Program Annual Partnership Consultations, Rome, 25 October 2017.

24 ICRC, *Institutional Strategy 2019–2022*, Geneva, 2019.

- (Sustainable) **Humanitarian (impact)** refers not only to life-saving but also to life-sustaining action that supports people's ability to live and (re)build their lives with autonomy, agency and dignity. It is also about putting people rather than the institution at the centre of the response, which means being accountable to affected people, addressing needs impartially, and understanding protection and assistance needs and risks in all their complexity *as people experience them*, even if these do not strictly fit our area of expertise. The importance of working with others comes into sharp focus in relation to this last point.
- **Sustainable (humanitarian) impact** is a situation where long-term or chronic needs and protection-related risks arising from armed conflict and chronic violence are durably reduced or prevented. Importantly, this should be done by supporting the resilience of affected people and the essential services and systems they rely on, but also through the actions of duty bearers. Indeed, the ICRC speaks of sustainable *impact*, not of sustainable *action*, and this semantic distinction is important: firstly, because emergency life-saving relief remains a top priority where needed, no matter how many times it may be required – that is the principle of humanity; and secondly, because *impact* is not achievable through humanitarian action alone – it requires and relies on decisions and choices made by authorities and by political, diplomatic and military stakeholders, as well as by development donors with the power and responsibility to bring about development and peace. It is for this reason that, for the ICRC, the “triple nexus” is a pool of interlocutors, resources, expertise and actors of influence which are critical for the sustainability of humanitarian gains, more than a triple set of objectives that the ICRC would set *itself* up to achieve.

In this sense, the steer towards *sustainable impact* is an expectation of *effort* institutionally. The ICRC alone cannot *ensure* impact, but what it can do is help to *build* impact by strengthening outcome-based anticipatory and preventive approaches across its operations so that long-term and chronic needs and risks are reduced, mitigated or made more manageable when a crisis hits.

Operationalizing sustainable humanitarian impact is not without challenges in fluid contexts which often require emergency response surges. It has implications in terms of mindset, planning and programming tools and methods, operational approaches (especially partnerships) and financing models. These are some of the areas where work is being done internally at the ICRC to support the implementation of the Institutional Strategy.

Another major area of focus in efforts to build sustainable humanitarian impact is strengthening cooperation with the International Red Cross and Red Crescent Movement. Collectively, the Movement combines speed and flexibility, access, proximity and sustained presence, complementary mandates and a distinct institutional relationship with States and other duty bearers, which are key to supporting affected people in a relevant and effective manner over time. Harnessing this potential includes a stronger investment in strengthening the organizational and response capacity of National Societies in humanitarian

contexts. The National Society Investment Alliance, a pooled fund managed jointly by the ICRC and the International Federation of Red Cross and Red Crescent Societies, is a good example of this effort to support National Societies’ capacity to deliver on their mission in a sustainable manner.

What are the challenges for the international community in grappling with the definition of “peace”? In your view, are concrete definitions necessary for the success of the triple nexus?

For many humanitarian actors, the idea that they should contribute to broader peace efforts is not straightforward, even though peace is something that humanitarian actors, like affected populations, want to see happen. There are not one but many visions of what the future of a country at war should look like, and efforts towards peace involve political, military and socio-economic choices and trade-offs. Aligning or being perceived to align with such choices can be a dangerous line for humanitarian actors, who rely on being accepted by all sides of the conflict to access affected communities impartially, and for their own security.

And so, it does not help that “peace” is a grey area of nexus policy and practice. In nexus discussions, “peace” has been interpreted by governments, donors, the UN and NGOs to mean peacebuilding, peacekeeping, peace processes, diplomacy, conflict prevention, stabilization, security and so on. The difficulty is that these various approaches to peace involve actors with entirely different profiles, responsibilities and modes of action.

Because discussions on the nexus put so much emphasis on collaboration among different actors, it is important to be clear on (a) which stakeholders have the primary responsibility for achieving and sustaining peace, (b) what actions and outcomes are necessary to achieve and sustain peace, (c) which stakeholders are directly involved in those actions for the *specific* purpose of achieving peace, and (d) which stakeholders are involved in those actions but for other purposes than achieving peace. A common understanding of these four elements would help the various actors to be clear on what type of collaboration is possible, and where a stricter distinction must be maintained between humanitarian and peace actors.

In terms of areas of distinction, there is the well-known issue around the delivery of humanitarian relief by armed forces or groups. This is a frequently cited example of where the blurring of lines between humanitarian and peace- or security-related objectives has an adverse effect on humanitarian efforts conducted in parallel by actors who strive to operate on the basis of neutrality and independence.

Another area where the distinction between humanitarian and peace actors needs to be managed carefully is negotiations with and between parties for humanitarian access which sometimes happen in parallel to broader “political tracks”. Here, ensuring clarity of purpose and a clear distinction between the two types of discussion is essential to avoid jeopardizing the humanitarian outcome sought. While sometimes humanitarian discussions advance better than political ones, blurring the lines between the two can invert the dynamic and make

humanitarian outcomes contingent on the progress of the political discussion. Decisions on the timing and location of the discussion, and on the profile of the stakeholders involved, are important concrete measures for creating a “firewall” against such risks.

In terms of areas of convergence, one basic but fundamental area is the principle of “do no harm”.²⁵ Humanitarian actors have an ethical responsibility to avoid that their actions inadvertently fuel tensions or create additional risks for affected people, and to seek ways to reduce grievances and ease tensions between communities. The principle of “do no harm” has been an important professional standard for humanitarian protection work for decades, but it requires that humanitarians invest in their capacity to analyze the drivers and dynamics of conflict and violence at all levels. An exchange of knowledge and analysis between humanitarian actors and actors in the peacebuilding community who have an expertise in political and conflict analysis is an important form of collaboration for operationalizing the “do no harm” principle and enhancing synergy between humanitarian action and peace efforts.

Another area where humanitarian action and peace efforts interface is respect for IHL and the protection of civilians more precisely. This is an area of frequent dialogue between humanitarian actors and arms bearers, including those deployed in the context of stabilization missions, counter-insurgency operations and peacekeeping missions.²⁶ Ultimately, if in an armed conflict, civilians and civilian objects are spared and humanitarian action is enabled and supported solely for its impartial humanitarian purpose, then IHL and humanitarian action can foster conditions for peace. They can have a stabilizing effect on people’s lives, mitigate the degradation of services and systems, and reduce the risk of grievances forming. In the face of rampant violations of IHL and a restricted space for humanitarian action, however, humanitarian actors can still play an important role in the difficult path towards peace by shedding light on the human cost of the conflict and on the grievances that are forming, and by calling on duty bearers—and on those with influence over them (diplomatically, militarily, economically)—for action.²⁷

Looking at ICRC practice, can you give any examples of good synergies between humanitarian action and longer-term outcomes linked to development and peace?

The first examples that come to mind are some of the ICRC assistance activities mentioned earlier. These are interesting not only because they are implemented

25 Mary B. Anderson, *Do No Harm: How Aid Can Support Peace—or War*, Lynne Rienner, Boulder, CO, 1999; ICRC, *Professional Standards for Protection Work*, Geneva, 2018.

26 For a discussion on the areas of convergence and divergence between humanitarian protection and protection of civilians, see Victoria Metcalfe, *Protecting Civilians? The Interaction between International Military and Humanitarian Actors*, HPG Working Paper, ODI, London, August 2012.

27 The OECD’s *DAC Recommendation on the Humanitarian-Development-Peace Nexus* acknowledges the importance of diplomatic influence when it calls on Development Assistance Committee members to leverage political influence to support, *inter alia*, “humanitarian access and outcomes”. OECD, above note 5, Section III.3b.

over several years, but also because they involve sustained operational and technical partnerships with National Societies and other local actors such as municipalities, utilities, health staff and line ministries. Some of these activities are also funded by development donors, based on contractual arrangements that enable a compatibility with humanitarian principles along some of the seven points outlined earlier. For instance, in South Sudan the ICRC is strengthening its support to primary and secondary health structures, including mental health and psychosocial support, as part of a partnership with the World Bank. The project focuses on areas that are affected by conflict and are hard to reach for others. From a humanitarian perspective, the collaboration allows the ICRC to enhance health services and referral systems at the community and subnational levels. It is also further improving the ICRC’s knowledge of health systems. From a development perspective, the collaboration helps to cover a development “blind spot” and improve the overall geographical coverage of essential health services in the country.

Alongside assistance activities, the ICRC’s work to enhance the protection of people affected by conflict and violence and to prevent violations of IHL is an equally strong example of long-term action which complements broader efforts by others to foster development and peace.

One can think, for instance, of the ICRC’s work on missing persons. The question of missing persons requires cooperation between parties to the conflict and between parties and families. It is often an issue on the agenda of political talks facilitated by States or the UN, as is the case for Syria. It can be one of the last remaining items on the agenda decades after conflicts end, as is the case between Iraq and Kuwait, in Sri Lanka, in Peru, in the Balkans and the Caucasus, and until recently between Argentina and the United Kingdom. The ICRC plays an important role in the prevention of cases of missing persons, including in places of detention, as well as in efforts to search for missing persons and to support their families. For instance, the ICRC chairs five multilateral coordination mechanisms on missing persons, serving as a neutral actor between parties. It also provides legal and technical advice to parties and to authorities, and supports families throughout the process, including by helping them to regain a place in society and to overcome social stigmatization or isolation and economic, legal and administrative challenges.

More broadly, we can also think of the continuous engagement with law-makers, governments and defence, judicial, penitentiary and law enforcement authorities through advisory services, trainings and humanitarian diplomacy, and the similar engagement with non-State armed groups in armed conflict settings, based on our mandate under the Geneva Conventions. While the primary purpose of this work is not to prevent armed conflict and violence, it can play an important role in reducing some of the long-term consequences of armed conflict and violence on infrastructure, on essential services, on people’s lives and future prospects, and on the trust they place on State institutions. Along similar lines, the ICRC’s role as a neutral intermediary to help parties implement IHL obligations or humanitarian measures requiring cooperation can also foster a

level of trust between parties. All of these are relevant factors for both development and peace.

A concrete example which combines assistance, protection and prevention approaches is the case of our work on water in Ukraine, particularly in 2017–18. This example is emblematic because it involves a humanitarian actor (the ICRC), a development stakeholder (in this case, the authorities) and peace stakeholders (the Minsk Group), and leverages their respective roles, responsibilities and comparative advantages.

In the east of Ukraine, water systems span both sides of the line of contact between government- and non-government-held areas. The infrastructure serves hundreds of thousands of people and when there was fighting, it was exposed to the risk of shelling. To prevent the disruption of water supply and public health risks, the ICRC worked with municipalities to identify and map critical infrastructural nodes and to strengthen redundancies and build back-up systems around these nodes, so that the systems could remain functional even if some parts were hit.

In parallel, the ICRC developed an IHL-based dialogue with parties to the conflict on the protection of civilians and civilian infrastructure, including the critical water infrastructure nodes that had been mapped. This engagement included the mobilization of stakeholders involved in the Trilateral Contact Group, or Minsk Group – a multilateral diplomatic process aimed at finding a peaceful resolution to the conflict in Ukraine, and which looked at essential services as part of a broader agenda item on social and economic issues.

These initiatives required a sustained dialogue with all stakeholders, and they were not fail-proof. But they helped to ensure the continuity of an essential service of critical humanitarian importance, they helped to preserve large-scale infrastructure and to prevent a development reversal, and they helped to ground issues discussed by the Minsk Group on tangible measures requiring cooperation among the parties to the conflict and the various actors of influence.

The bottom line is that synergies between humanitarian action and longer-term outcomes linked to development and peace do not result solely from programmatic partnerships with development or peace actors. Synergies can also come from humanitarian action itself, especially where forward-looking preventive approaches are adopted, and where efforts to convene, mobilize and influence others are given due strategic operational value.

Delivering water services during protracted armed conflicts: How development agencies can overcome barriers to collaboration with humanitarian actors

Edoardo Borgomeo* 

Edoardo Borgomeo is an Honorary Research Associate at the Environmental Change Institute, University of Oxford, and a Water Management Consultant for the World Bank and the United Nations Food and Agricultural Organization.

Abstract

This note discusses the challenges of water service delivery before, during and after protracted armed conflict, focusing on barriers that may impede successful transition from emergency to development interventions. The barriers are grouped according to three major contributing factors (three “C”s): culture (organizational goals and procedures), cash (financing practices) and capacity (know-how). By way of examples, the note explores ways in which development agencies can overcome

* The findings, interpretations and conclusions expressed in this note are entirely those of the author. They do not represent the views of the International Bank for Reconstruction and Development/World Bank and its affiliated organizations, or those of the executive directors of the World Bank or the governments they represent. The author would like to thank Anders Jägerskog, Dominick de Waal, Michael Talhami, the anonymous reviewers and the editorial team of the *Review* for their comments, which greatly improved this note.

these barriers during the three phases of a protracted armed conflict, using examples of World Bank projects and experiences in the Middle East and Sub-Saharan Africa. Before the crisis, development agencies need to work to prevent armed conflict. In a situation of active armed conflict or when conflict escalates, development agencies need to remain engaged as much as possible, as this will speed up post-conflict recovery. When conflict subsides, development agencies need to balance the relative effort placed on providing urgently needed emergency relief and water supply and sanitation services with the effort placed on re-establishing sector oversight roles and capacity of local institutions to oversee and manage service delivery in the long term.

Keywords: water services, humanitarian–development divide, water and habitat, water wars, water conflict, World Bank.

: : : : : :

Introduction: Development and protracted armed conflict

Armed conflicts remain the biggest challenge for human development and poverty eradication efforts.¹ At the time of writing, 2 billion people live in countries where development outcomes are affected by fragility, conflict and violence, and more than 65 million people are forcibly displaced because of armed conflicts whose protracted nature also prevents many from returning to their homes.² If the current trends persist, by 2030 half of the world's poor will live in contexts affected by violence and conflict, rising from 20% today.³

Conflicts prevented many countries from reaching the Millennium Development Goal (MDG) targets. The MDGs were defined in 2000 by world leaders gathered at the United Nations (UN) as a set of eight international development goals (and twenty-one targets) focused on tackling poverty and hunger, disease, gender inequality and environmental sustainability.⁴ Analysis of progress towards the MDGs shows that countries affected by fragility, conflict and violence had the highest proportion of MDGs not achieved, with most such countries only achieving two out of the twenty-one targets.⁵ Conflicts can also reverse hard-won development gains, confirming the maxim that conflict is

- 1 United Nations (UN), *The Millennium Development Goals Report 2015*, New York, 2015, p. 8, available at: www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20%28July%201%29.pdf (all internet references were accessed in May 2020).
- 2 World Bank, *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts*, Washington, DC, 2017.
- 3 Organisation for Economic Co-operation and Development (OECD), *States of Fragility 2015: Meeting Post-2015 Ambitions*, Paris, 2015.
- 4 UN, above note 1, p. 4.
- 5 John Norris, Casey Dunning and Annie Malknecht, *Fragile Progress. The Record of the Millennium Development Goals in States Affected by Conflict, Fragility and Crisis*, Center for American Progress and Save the Children, 2015.

essentially development in reverse.⁶ Contexts affected by armed conflicts will also face the greatest hurdles in progressing towards the Sustainable Development Goals (SDGs), which replaced the MDGs in 2015. The SDGs are a global agenda that commits all countries to work towards a peaceful and resilient world by addressing a set of seventeen integrated goals, which range from eradicating poverty (SDG 1) and reducing inequality (SDG 10) to providing clean water and sanitation (SDG 6) and peace, justice and strong institutions (SDG 16). Compared to the MDGs, the SDGs present a much wider and ambitious set of targets, which will require significant efforts in order to be achieved.⁷

Protracted armed conflicts pose particular challenges to development because of their characteristics. First, these conflicts are characterized by longevity, intractability and mutability.⁸ Second, protracted armed conflicts are also characterized by cumulative impacts on water infrastructure and institutions; these impacts compromise, among other things, the ability of national and local authorities to provide basic water services,⁹ which are a key enabler of development interventions. Finally, protracted armed conflicts are characterized by volatile aid flows. This latter characteristic is particularly relevant for the work of development agencies, as in high-risk contexts volatile aid flows can amplify existing instabilities and constrain the capacity for post-conflict recovery.¹⁰

Protracted armed conflicts can also have significant spillover effects beyond the countries directly affected, dramatically impacting the stability, development gains and economic prospects of neighbouring countries and beyond. For instance, the still ongoing war in Syria has not only caused devastating human suffering (between 400,000 and 470,000 estimated deaths, and more than 12 million forcibly displaced) and economic damage (\$226 billion from 2011 to 2016) in the country, but has also affected the neighbouring countries of Turkey, Lebanon, Jordan, Iraq and Egypt.¹¹ The cost to these five countries is close to \$35 billion in output, equivalent to Syria's GDP in 2007 (measured in 2007 prices).¹² In Jordan alone, the World Bank estimates the cost of hosting Syrian refugees at

6 Paul Collier, V. L. Elliott, Håvard Hegre, Anke Hoeffler, Marta Reynal-Querol and Nicholas Sambanis, "Breaking the Conflict Trap: Civil War and Development Policy", World Bank and Oxford University Press, Washington, DC, 2003, pp. 13 ff.

7 For a discussion of the ambition and challenges of SDG 6 on clean water and sanitation for all, see Veronica Herrera, "Reconciling Global Aspirations and Local Realities: Challenges Facing the Sustainable Development Goals for Water and Sanitation", *World Development*, Vol. 118, June 2019.

8 International Committee of the Red Cross (ICRC), *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016, p. 9.

9 For a discussion of the importance of considering the cumulative impacts of conflict, see ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, 2015.

10 World Bank and UN, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*, Washington, DC, 2018, p. 255.

11 World Bank, *The Toll of War: The Economic and Social Consequences of the Conflict in Syria*, Washington, DC, 2017.

12 Shantayanan Devarajan and Lili Mottaghi, "The Economic Effects of War and Peace", *Middle East and North Africa Quarterly Economic Brief*, World Bank, Washington, DC, January 2016.

about \$2.5 billion a year, equivalent to 6% of GDP and a quarter of the government's annual revenues.¹³

The far-reaching impacts of protracted armed conflicts on development outcomes raise important questions for development actors. In order to achieve poverty reduction and sustainable development objectives, development actors need to revise their approach for engaging during protracted armed conflicts and step up their collaboration with humanitarian agencies and governments in these settings.¹⁴ With the goal of alleviating human suffering and not undermining the basis for human development efforts, development actors are increasingly working to reduce vulnerabilities to shocks, address the underlying causes of protracted armed conflict, and meet humanitarian needs. Recent international commitments, including the Paris Declaration (2005), the Accra Agenda for Action (2008)¹⁵ and the new deal for engagement in fragile states (2011) have emphasized the role that development actors and development assistance can play in countries affected by conflict and violence.¹⁶ The recently adopted SDG 16 also recognizes the importance of ending violence and encouraging the rule of law to support the global sustainable development agenda, specifically aiming to reduce all forms of violence (Target 16.1), particularly against children (Target 16.2), and to promote the rule of law (Target 16.3).¹⁷

However, inasmuch as development agencies are increasingly willing to engage in contexts experiencing protracted armed conflicts, several barriers to successful engagement remain. This note examines some of the barriers that affect the ability of development actors to successfully bridge the development–humanitarian divide before, during and after protracted armed conflicts. Systematically examining and organizing these barriers can serve to advance understanding of the issues for both development and humanitarian actors. Using the water sector as an example, the note presents the experience of the World Bank—one of the world's largest sources of funding for development—in trying to overcome some of the barriers. The primary goal of this note is (1) to advance the discussion on the barriers that prevent more successful and effective interaction between development and humanitarian actors, and (2) to describe some of the World Bank's experiences related to water service delivery and the ways in which it has tried to overcome these barriers, as examples of good practice for development and relief efforts. The note provides a personal perspective on some aspects of humanitarian and development work and the links between them; hence, it is not intended to provide a thorough and comprehensive review of the literature on the humanitarian–development interface.

13 *Ibid.*

14 Shantayanan Devarajan, "An Exposition of the New Strategy: Promoting Peace and Stability in the Middle East and North Africa", World Bank, Washington, DC, 2015.

15 OECD, *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action*, 2008, p. 4, available at: www.oecd.org/dac/effectiveness/34428351.pdf.

16 "A New Deal for Engagement in Fragile States", International Dialogue on Peacebuilding and Statebuilding, p. 2, available at: <https://tinyurl.com/yc9zgb19>.

17 More details on SDG 16 can be found on the Sustainable Development Knowledge Platform, available at: <https://sustainabledevelopment.un.org/sdg16>.

Defining development and humanitarian work

This section defines the terms “development” and “humanitarian” in the context of a protracted armed conflict. The objectives and activities that characterize development and humanitarian work are discussed, highlighting some of the differences and complementarities. Recognizing the complexities around the definitions of humanitarian and development work, this section makes reference to specific cases and organizations rather than trying to provide a comprehensive review of the conceptual differences between the two sectors, which is outside the scope of this note. Based on the author’s experience, development work is described from the point of view of the World Bank, and only humanitarian organizations with which the World Bank has collaborated in the past or is collaborating at the time of writing are considered (some UN agencies and the components of the International Red Cross and Red Crescent Movement (the Movement)).

The key message from this section is that development and humanitarian interventions have different objectives and that there is limited overlap between these objectives. Although development work will ultimately contribute to improving conditions and living standards for humanity, thus converging with humanitarian objectives, it usually does not have as its only focus saving lives and reducing suffering, which is the purpose of humanitarian action.¹⁸ This difference should not prevent development and humanitarian actors from working together; however, it should be acknowledged and carefully considered in order for development and humanitarian actors to align their work and avoid undermining each other.

The development approach

Development actors appraise their interventions based on concepts such as poverty reduction, economic opportunity, resource use sustainability and cost-effectiveness.¹⁹ A development approach recognizes the centrality of country institutions (national and local governments) to both implement and sustain interventions. A development approach is based on the premise that the beneficiaries of these interventions directly manage the assets created, or that the assets are managed by country institutions.²⁰ Increasingly, development actors recognize the importance of addressing issues such as social justice, accountability,

18 For an elaboration of this point, see Filipa Schmitz Guinote, “A Humanitarian–Development Nexus that Works”, *Humanitarian Law and Policy Blog*, 21 June 2018, available at: <http://blogs.icrc.org/law-and-policy/2018/06/21/humanitarian-development-nexus-that-works/>.

19 Perspectives on development are varied and multifaceted. For a more detailed account of development from the perspective of the World Bank, see Mary Morrison and Shani Harris, *Working with the World Bank Group in Fragile and Conflict-Affected States: A Resource Note for United Nations Staff*, World Bank, Washington, DC, 2015.

20 For a more detailed account of the significance of institutions in economic development, see Daron Acemoglu and James Robinson, “The Role of Institutions in Growth and Development”, in David W. Brady and Michael Spence (eds), *Leadership and Growth*, World Bank, Washington, DC, 2010.

political stability and climate change when working with developing countries to reduce poverty.²¹

Development actors focus their work on constructing long-term relationships with government stakeholders and representatives from civil society and the private sector in order to build institutions and to promote strategic agendas and projects, including social and economic reforms as well as major infrastructure. This type of relationship and focus constrains international development actors in their ability to engage in situations where there is rapid decline in institutional integrity and capacity. As well as the deterioration of policy and institutional indices being linked to shrinking financing envelopes, financing often has to be suspended when country institutions are unable to demonstrate the required levels of fiduciary control.²² At early signs of risk and in fragile contexts, these constraints often limit the scope for development programming to address causes of tension.²³

The World Bank is one of the world's largest sources of funding and knowledge for development. The World Bank finances its programmes via capital markets and by receiving contributions from member governments in donor countries. The World Bank is best known for its financial services, consisting of loans to client countries. The terms of the loans differ depending on the client country's eligibility. The investment lending provides financing for a range of activities aimed at creating the social (capacity, institutions) and physical (roads, dams) infrastructure needed to eradicate extreme poverty and achieve sustainable development.

Work in post-war areas is one of the core businesses of the World Bank, exemplified in Article I of the World Bank's Articles of Agreement, which states that "the purpose of the Bank is: To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war".²⁴

The humanitarian approach

Humanitarian actors centre their work on the protection and assistance of victims of conflict, violence and other disasters. There is no standard definition for humanitarian actors or, more broadly, the humanitarian system.²⁵ Broadly

21 On the role of climate change, see, for instance, Asian Development Bank, *A Region at Risk: The Human Dimensions of Climate Change in Asia and the Pacific*, Manila, 2017. On the importance of justice and political stability, see UN Briefing on SDG 16, available at: <https://unstats.un.org/sdgs/files/metadata-compilation/Metadata-Goal-16.pdf>.

22 Fiduciary control ensures that development funds are transparently used for the intended purposes, that they achieve value for money, and that they are accounted for. In fragile contexts, countries are often not able to guarantee this fiduciary control, which increases the risk of corruption and inappropriate use of development funds.

23 World Bank and UN, above note 10, p. 249.

24 United Nations Monetary and Financial Conference, *Articles of Agreement: International Monetary Fund and International Bank for Reconstruction and Development*, US Treasury, Washington, DC, 1944, available at: https://fraser.stlouisfed.org/files/docs/historical/martin/17_07_19440701.pdf.

speaking, this note relates humanitarian action with emergency situations, in line with the common understanding of humanitarian action. More specifically, the term “humanitarian actor” is used here to refer to relevant UN agencies and the components of the Movement. Although this somewhat narrow focus is challenged by the proliferation of other “non-traditional” humanitarian actors such as the private sector, bilateral donors and the military,²⁶ it is used here because all examples provided, and the ensuing discussion, involve activities carried out by UN agencies and the Movement. The work and characteristics of other essential components of the humanitarian system, such as emergency relief non-governmental organizations (NGOs), are not described here.

The work of the UN humanitarian agencies and the Movement is governed by a common set of principles that make it different from the work of other actors in the humanitarian space who provide emergency relief not necessarily based on principles and often underpinned by political, military and economic objectives.²⁷ These principles are humanity (addressing human suffering wherever it is found), neutrality (not taking sides in conflict or favouring a particular ideological, racial, political or religious group), impartiality (providing aid on the basis of need alone, giving priority to the most urgent cases and making no distinction on the basis of nationality, race, gender, religious belief, class or political opinions) and independence (being autonomous from any political, economic or military objectives).²⁸ In upholding these principles, humanitarian organizations build long-term partnerships with a range of stakeholders, to support both their emergency relief work and their conflict prevention activities.

Within the UN system, three entities have primary roles in delivering humanitarian assistance, including water services, during protracted armed conflict: the Office of the UN High Commissioner for Refugees, the UN Children’s Fund (UNICEF) and the World Food Programme, with the Office for the Coordination of Humanitarian Affairs being responsible for coordinating responses.²⁹ At the regional level, the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) provides assistance and protection for some 5 million registered Palestinian refugees, including those affected by armed conflict.³⁰

25 John Borton, *Future of the Humanitarian System: Impacts of Internal Change*, Feinstein International Center, Somerville, MA, 2009

26 Justin Armstrong, *The Future of Humanitarian Security in Fragile Contexts*, European Interagency Security Forum, 2013.

27 Claudia McGoldrick, “The State of Conflicts Today: Can Humanitarian Action Adapt?”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015.

28 UN Office for the Coordination of Humanitarian Affairs, “OCHA on Message: Humanitarian Principles”, 2012, available at: www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf; World Food Programme, “Humanitarian Principles”, WFP/EB.A/2004/5-C, Rome, 2004; UNICEF, “UNICEF’s Humanitarian Principles”, 2003, available at: <https://tinyurl.com/y7cgmsay>; Office of the UN High Commissioner for Refugees, “Humanitarian Principles”, available at: <https://emergency.unhcr.org/entry/114728/humanitarian-principles>.

29 See the UN’s “Deliver Humanitarian Aid” web page, available at: www.un.org/en/sections/what-we-do/deliver-humanitarian-aid/.

30 For more details on UNRWA’s work, visit the UNRWA website at: www.unrwa.org/who-we-are.

In specific regard to the International Committee of the Red Cross (ICRC), neutral, independent and impartial humanitarian action in situations of armed conflicts and other situations of violence³¹ is at the heart of the organization's mandate and is a fundamental part of its identity and its ability to operate in conflict zones. Alongside these principles, the ICRC also operates under the principles of voluntary service, unity and universality.³²

The ICRC seeks dialogue with all actors involved in a given situation of armed conflict or violence as well as with the people suffering the consequences in order to gain their acceptance and respect. This approach generally provides the ICRC with the widest possible access both to the victims of violence and to the actors involved. It also helps to ensure the safety of the organization's staff. In this way, the ICRC is able to reach people on all sides of the front lines in active conflict areas around the world.

Barriers to bridging the humanitarian and development divide

Despite the broad recognition that protracted conflicts are challenging development and poverty reduction efforts and that humanitarian and development interventions need to be better linked, challenges to effective coordination and collaboration between humanitarian and development actors remain. Some of the challenges depend on the protracted armed conflict in question, the country contexts, and the specific organizations involved. However, some general challenges common to most if not all protracted conflicts can be identified. Based on experience and the existing literature,³³ this section groups the challenges into *barriers* that make working across the humanitarian and development divide difficult.

Barriers can arise for a range of reasons, including the different goals and mandates of the organizations involved, the type of financing mechanisms relied upon and the expertise available. The barriers identified here relate to the organizational environment (reflecting institutional culture and incentives, capacity and financing practices) within which development and humanitarian workers carry out their functions before, during and after a protracted conflict. The key message from this section is that an improved understanding and identification of these barriers can help development and humanitarian actors

31 "Other situations of violence" are situations in which acts of violence are perpetrated collectively but which are below the threshold of armed conflict according to the ICRC. See ICRC, "The International Committee of the Red Cross's Role in Situations of Violence Below the Threshold of Armed Conflict", *International Review of the Red Cross*, Vol. 96, No. 893, 2014.

32 ICRC, "Fundamental Principles: Yesterday, Today, Tomorrow", 7 October 2015, available at: www.icrc.org/en/document/red-cross-principled-humanitarian-action.

33 See, for instance, Christina Bennett, *The Development Agency of the Future: Fit for Protracted Crises?*, Overseas Development Institute Working Paper, London, 2015; Lucy Earle, "Addressing Urban Crises: Bridging the Humanitarian–Development Divide", *International Review of the Red Cross*, Vol. 98, No. 901, 2016; Kristalina Georgieva and Jakob Kellenberger, "Discussion: What are the Future Challenges for Humanitarian Action?", *International Review of the Red Cross*, Vol. 93, No. 884, 2011.

achieve better integration of their respective efforts and ultimately help them to accomplish their respective objectives without undermining each other's work.

To help individuals engaged in humanitarian and development work describe and analyze the barriers affecting their actions, the barriers are grouped according to three major contributing factors: culture, cash and capacity.

"Culture" refers to an organization's set of goals, processes, communication practices and attitudes, among other factors. It also encompasses the institutional architecture, including institutional frameworks and policies. Different organizations have different institutional policies—including legal agreements—that guide a project's preparation, appraisal, negotiation and approval. This is reflected in the type of institutional requirements that have to be met for a project to be approved in a development organization as compared to a humanitarian organization. Many of the economic, technical, environmental, social and fiduciary aspects used to appraise projects within a development organization may not be relevant for a humanitarian intervention, in turn creating a culture barrier.

Culture includes barriers such as lack of career incentives, which can prevent successful interactions between humanitarian and development actors by discouraging workers from designing and implementing projects outside of their respective organizations' comfort zones. In practice, lack of career incentives also means that staff from development organizations are not rewarded (i.e., in terms of career advancement) for their work in fragile and conflict-affected countries.

Barriers related to culture might arise from the different types of stakeholders with whom development and humanitarian actors engage. Development actors tend to work with national governments and private sector stakeholders, whilst some humanitarian agencies often work through NGOs and directly with the affected population.³⁴ This focus on national-level decision-making means that development actors are often unable to assist those outside of the reach of national authorities, who are often the most vulnerable and in need. In contrast, the principle of neutrality underpinning humanitarian action means that humanitarian assistance can be directed to groups and communities which development actors may not consider as counterparts or implementing partners because of political reasons or existing international sanctions, allowing these organizations to have a much wider reach.

The different purpose, and related language and practices, driving humanitarian and development workers constitutes the most significant barrier related to culture. Humanitarian work focuses on saving lives—that is, directly addressing the immediate and primary needs of individuals affected by conflict and violence—while development work traditionally seeks to develop and implement more systemic and transformational economic and social agendas, aimed at strengthening institutions and favouring equitable economic growth, among other factors. These different lenses through which humanitarian and development actors "live the missions" of their respective organizations and view

34 World Bank and UN, above note 10, p. 249.

the reality on the ground can act as a significant culture barrier, creating communication problems and misunderstandings.

“Cash” refers to all aspects related to financing practices employed by humanitarian and development actors. It includes barriers arising from the nature of the financial instruments used and the “business” models applied. For instance, the short-term financing traditionally provided to humanitarian actors can make multi-year planning difficult, therefore reducing the incentives to connect with development actors and their longer-term plans. It also covers barriers arising from financing conditions, which may mean in practice that development agencies release financing too late in a crisis to promote synergies with humanitarian work. Cash barriers are also engendered by risk attitudes, with development agencies typically trying to avoid the added uncertainty layer created by implementing projects in areas at risk of conflict or with active conflict. Although World Bank documents suggest that addressing violent conflict is becoming a strategic priority in many countries,³⁵ the risk-taking needed to carry out such engagements is still lacking.³⁶

“Capacity” includes all barriers arising from human resources and expertise. Staff within humanitarian and development organizations may face a range of barriers related to a lack of knowledge of the mandates, approaches and practices of other organizations. The protracted nature of armed conflicts raises issues that are not within the traditional comfort zone and know-how of many humanitarian organizations, such as supporting the institutional capacity of utilities, water resources management and allocation, and urban planning. Similarly, staff from development organizations are oftentimes not familiar with humanitarian practices and mandates or with designing projects in contexts affected by conflict and violence, where, for instance, there are real risks of these same projects reinforcing inter-group tensions and fuelling divisive narratives.³⁷ This lack of capacity often makes communication between development and humanitarian actors challenging, compounding the culture barrier. In other instances, barriers related to capacity may be a result of a lack of willingness or possibilities for staff to learn from other departments or of the difficulty encountered when transferring operational experience gained from long-term engagements from one organization to another.

These three “C”s provide a structure for grouping and communicating some of the barriers encountered when working across the humanitarian–development divide, not a normative guidance on what to do to remove them, as this will depend on the context and project in question. Under each factor, a series of commonly encountered barriers is listed in [Table 1](#).

Overcoming the barriers helps to generate synergies, joint planning – while not undermining humanitarian principles and the funding modalities of development

35 World Bank, *World Development Report 2011: Conflict, Security, and Development*, Washington, DC, 2011.

36 World Bank, *World Bank Group Engagement in Situations of Fragility, Conflict, and Violence*, Washington, DC, 2016, available at: <https://openknowledge.worldbank.org/handle/10986/24915>.

37 World Bank and UN, above note 10, p. 250.

Table 1. *Barriers encountered at the humanitarian–development divide, grouped according to the main contributing factor*

Contributing factor	Barrier	Example
Culture: the organization’s set of goals, institutional policies, processes, communication practices and attitudes	Legal	Extent to which legal policies are informed by agreements with borrowers versus international humanitarian law (IHL) and special agreements to improve/supplement IHL.
	Organizational goals and mandates	Objectives of organizational activities (e.g., activities aimed at financing and facilitating the reconstruction and development of member countries (International Bank for Reconstruction and Development, part of the World Bank) versus saving lives and alleviating human suffering).
	Project identification criteria	Criteria used to identify and prioritize intervention. Development actors use cost-benefit analysis, national government priorities or the need to restore productive assets and services in an emergency to identify interventions. Humanitarian action is based on impartial assessment of needs.

Continued

Table 1. *Continued*

Contributing factor	Barrier	Example
	Mode of operation and engagement	Extent to which operations focus on strategic objectives (e.g., strategic planning may be considered as a distraction from important day-to-day activities in humanitarian organizations following a disaster, but it is at the core of development).
	Career incentives/ reward system	Types of rewards offered to employees working in areas affected by conflict (work in violent and conflict-affected contexts not rewarded in development organizations).
	Reporting requirements	Frequency with which reporting needs to take place (every six months, quarterly, daily) and type of indicators used to measure project progress.
	Type of stakeholders	Type of stakeholders with whom priorities are established and projects are designed/ implemented. Development actors typically interact with national governments, while humanitarians engage with a broader range of non-State actors, including NGOs, charities and non-State armed groups.

Table 1. *Continued*

Contributing factor	Barrier	Example
	Jargon	Usage and understanding of some terms.
Cash: financing practices	Financial planning horizons	Financial planning takes place at different time scales (multi-annual in development versus annual or shorter for humanitarian operations).
	Conditions for releasing financing	Disbursement procedures utilized to release financing.
	Funding	Ways in which activities are funded. In the case of development, activities are funded through capital markets and contributions from member governments in high-income countries, while voluntary contributions from member governments and private sources form the core of humanitarian funding.
	Risk aversion	Risk-taking attitude affects the willingness of organizations to invest in projects in conflict-affected areas where outcomes are highly uncertain.
Capacity: human resources and know-how	Know-how	Expertise in preparing and implementing projects in conflict-affected contexts.
<i>Continued</i>		

Table 1. *Continued*

Contributing factor	Barrier	Example
	Knowledge management	Extent to which knowledge on engaging in fragile contexts is explicitly presented as organizational knowledge.
	Type of project	Expertise in designing, managing and delivering projects over different scales – for instance, large infrastructure and reform projects for development agency workers versus rehabilitation of smaller-scale and emergency infrastructure for humanitarian workers.
	Security	Extent to which staff are trained on safety and security in conflict-affected contexts, as this determines in part the extent to which staff are able and willing to work in these contexts.

actors/banks – and eventually implementation as one work stream. On the other hand, not overcoming the barriers means disjointed operations in the field and, in some cases, humanitarian action undermining development responses and vice versa.

Overcoming the barriers: Working at the humanitarian–development interface in the water sector

To understand how the barriers described in the previous section can be overcome, this section provides a personal perspective building on World Bank water sector projects in the Middle East (Yemen, Jordan, Lebanon) and in several countries in

Sub-Saharan Africa.³⁸ By describing these experiences, the note will give some insight on the type of approaches that development actors can employ to overcome the barriers. The three phases of a protracted armed conflict are examined, as the nature of engagement of development actors and their complementarities with humanitarian work might change over time as the crisis evolves. The first phase (before the crisis) covers all interactions between development and humanitarian agencies targeted at preventing armed conflict in fragile contexts, and is discussed because it offers significant opportunities for overcoming the humanitarian–development barriers and paving the way for coordinated efforts should conflicts arise. In a situation of shock or when conflict escalates (second phase), development agencies need to remain engaged as much as possible. In situations of recovery and development opportunity (third phase), agencies need to balance the short-term efforts placed on providing urgently needed water supply and sanitation services with the longer-term effort placed on re-establishing sector oversight roles and the capacity of local institutions. The rationale for discussing humanitarian–development interactions separately for each of these three phases stems from the recognition that operating contexts and priorities change during the different phases of a protracted armed conflict, requiring different types of responses to be implemented and different barriers to be overcome.

Before the crisis

Before the crisis, development agencies need to work to prevent armed conflict in contexts that are already fragile in order to prevent countries from slipping into instability and to protect development gains (i.e., as a risk mitigation measure for existing interventions). Preventing conflict requires a range of measures, from addressing inequalities and exclusions in access to power and services, to making institutions more legitimate and inclusive. The UN and the World Bank have identified sustainable and inclusive development as key to preventing violent conflict.³⁹ In the water sector, this translates into dialogue, policies and investments targeted at promoting sustainable and inclusive water management and service delivery. Although the primary responsibility falls on governments, development agencies play a role in supporting the creation of systems and practices aimed at avoiding issues such as groundwater over-exploitation, pollution of surface water bodies or politically biased water service delivery. Creating incentives for sustainable management and delivery means acting before the resources are depleted or water-related disasters strike, in order to prevent such disasters from becoming risk multipliers in fragile contexts.⁴⁰

38 The countries that the World Bank Water and Sanitation Program worked in were the Democratic Republic of the Congo, Liberia, Nigeria, the Republic of Congo, Sierra Leone, Somalia, South Sudan and Zimbabwe.

39 World Bank and UN, above note 10, p. xviii.

40 Claudia W. Sadoff, Edoardo Borgomeo and Dominick de Waal, *Turbulent Waters: Pursuing Water Security in Fragile Contexts*, World Bank, Washington, DC, 2017.

Development agencies are increasingly realizing the importance of adapting their culture and practices to operate in areas at high risk of armed conflict and to contribute to peacebuilding. First, development agencies are increasingly applying conflict-sensitive approaches to their interventions,⁴¹ evaluating the impact of investments also on the basis of their potential to reduce or increase the risk of conflict. At the World Bank, this has meant requiring project teams to identify any potential linkages between their proposed projects and drivers of fragility or resilience identified by the institution's country fragility analyses.⁴² This helps in overcoming the culture and capacity barriers arising from project design and evaluation criteria that do not account for the potential interactions between development interventions and armed conflict.

Designing development interventions before the crisis means building teams that include expertise on fragility and conflict, to overcome capacity barriers. It also entails building capacity outside of the development agency, using convening power to bring together humanitarian actors with stakeholders typically labelled "development-oriented" such as the private sector, water utilities, river basin authorities and government agencies. This could go as far as offering formal training to humanitarian workers on issues such as cost recovery in urban utilities, regulation of private water vendors, and the experiences of successful transitions from humanitarian to country-led water service delivery programmes.

Beyond addressing barriers related to capacity, World Bank experience shows that integrating water-related interventions within broader, country-wide strategies as well as sector strategies implemented by other operators in fragile contexts can improve outcomes and linkages with other agencies, overcoming the culture barriers. Sharing information and formally setting up venues for exchange and discussion helps to overcome barriers related to different mandates and modes of operation. Development agencies are set to benefit from a more systematic interaction and consultation with humanitarian actors in developing their long-term (typically five-year) country engagement plans (called "country partnership frameworks" at the World Bank). A framework for discussion with humanitarian actors helps to ensure that their expertise in specific dynamics, vulnerabilities and needs deriving from potential conflict (e.g., predictions of new influxes of displaced persons) is considered in development plans.

In the case of Palestine, this translated into the Water Sector Working Group, a forum for information-sharing between the Palestinian Water Authority, donors, and international and local implementing agencies, including humanitarian actors.⁴³ This type of information-sharing approach can yield better support for governments as well as building relationships and communication

41 Several development agencies have produced guidelines for understanding and applying conflict sensitivity approaches in their interventions, including the "do no harm" approach. See, for example, Swedish International Development Cooperation Agency, "Conflict Sensitivity in Programme Management", Stockholm, 2017; Conflict Sensitivity Consortium, "How-to Guide to Conflict Sensitivity", UK Department for International Development, London, 2012.

42 World Bank, "Results Framework and M&E Guidance Note", Washington, DC, 2013.

between humanitarian and development actors. In particular, producing and sharing asset inventories of stocks (i.e., spare parts in the warehouse), equipment, and the laydown of critical water infrastructure should become a key element of water sector dialogue in contexts at risk of conflict.

Information-sharing frameworks between humanitarian and development actors before a crisis can also extend to setting up communication protocols to be activated in the event of a crisis. An example of this measure to overcome culture barriers comes from the World Bank–UN operational annex communication protocol.⁴⁴ According to this protocol, immediate contacts must be made between the most senior World Bank and UN officials at the country level at the outset of a crisis, followed by close and continued communication among institutional teams responsible for projects in headquarters to ensure that all relevant information is shared.⁴⁵

During the crisis

In a situation of active armed conflict or when conflict escalates, development agencies tend to decrease their engagement or withdraw altogether, while humanitarian agencies step up their engagement to promote respect for international humanitarian law and provide basic services. Given that international development is based on engagement with States and national governments, development agencies are highly constrained from engaging in situations of armed conflict because of the emergence of non-State actors who are uninterested in poverty reduction and are oftentimes in conflict with national governments. This constraint is particularly true nowadays because most conflicts involve more than one armed group, thus making it more difficult for development agencies to engage.

Development agencies often refrain from engaging with non-State actors, including non-State armed groups, because this may be perceived by national governments as legitimizing them, and may pose additional challenges if these same actors are also internationally sanctioned. In addition, given the inherent political nature of development planning, development agencies may not be perceived as impartial by non-State actors, or, if they do engage with non-State actors, they incur the risk of legitimizing them in the eyes of national governments, thus compromising important relationships and further constraining their ability to operate in a situation of crisis and recovery.

Development agencies are increasingly realizing, however, that withdrawing altogether can be damaging for future post-conflict development efforts. While the World Bank's articles prevent it from providing humanitarian assistance, this culture barrier has been partly overcome by operational policy OP8.00,⁴⁶ which

43 Sandra Ruckstuhl, *Conflict Sensitive Water Supply: Lessons from Operations*, Social Development Working Paper No. 127, Washington, DC, 2012.

44 M. Morrison and S. Harris, above note 19, p. 24.

45 *Ibid.*

allows for rapid response to emergencies, including to restore essential water supply and sanitation services, and policy OP10.00, which allows for accelerated project preparation or restructuring in situations of urgent need.⁴⁷

National governments, which are the typical counterparts of development agencies, may not be able to implement the needed emergency activities during a crisis, and the development agency may partner with different organizations, such as the UN or the ICRC, to develop and implement programmes in collaboration. This increased collaboration between the World Bank and humanitarian agencies is a recent positive trend, and is part of broader World Bank efforts to develop strategic partnerships with key humanitarian actors such as the ICRC.⁴⁸ In the long term, these strategic partnerships should allow for more systematic handovers of essential services and some projects between development and humanitarian actors when a conflict sets in. They should also allow for an improved understanding of mandates, which will help to remove some of the culture barriers and ensure that key organizational aspects such as neutral, independent and impartial humanitarian action for humanitarian organizations are respected.

The active conflict in Yemen provides a first example of how barriers can be overcome during a crisis. The protracted armed conflict is posing serious risks to human development in Yemen. Just in relation to water access, about 20 million Yemenis are estimated to lack access to clean drinking water and sanitation services.⁴⁹ To mitigate these long-term impacts of conflict, the World Bank has approved an emergency crisis response project of which a significant part deals with maintaining water service provision and expanding community infrastructure associated with clean water supplies. Staying engaged in Yemen has meant first of all overcoming barriers related to financing constraints, to allow for the implementation of an emergency water, health and nutrition project, budgeted at \$683 million, through the World Health Organization and UNICEF.⁵⁰

To overcome the cash and culture barriers, the project applies the Fiduciary Principles Accord developed by the World Bank in partnership with the UN.⁵¹ Rather than seeking project-based convergence on policies and procedures, the Accord recognizes the differences between the World Bank and UN organizations and focuses on defining a shared set of principles⁵² (on financial management, procurement, project design, implementation and monitoring, treatment of fraud

46 World Bank, *Operational Manual: OP 8.00 – Rapid Response to Crises and Emergencies*, Washington, DC, 2013.

47 M. Morrison and S. Harris, above note 19, p. 24.

48 See World Bank, “ICRC, World Bank Partner to Enhance Support in Fragile and Conflict-affected Settings”, 9 May 2018, available at: www.worldbank.org/en/news/feature/2018/05/09/icrc-world-bank-partner-to-enhance-support-in-fragile-and-conflict-affected-settings.

49 World Bank, *Yemen Integrated Urban Services Emergency Project*, Washington, DC, 2017.

50 World Bank, “Yemen Emergency Health and Nutrition Project”, Factsheet, Washington, DC, 2019, available at: www.worldbank.org/en/news/factsheet/2019/05/14/yemen-emergency-health-and-nutrition-project.

51 World Bank, *World Bank and United Nations Fiduciary Principles Accord for Crisis and Emergency Situations*, Washington, DC, 2008.

52 *Ibid.*, Annex C.

and corruption) that are consistent with the particular institutional policies of the other organization. In practice, this means that World Bank and UN organizations don't have to carry out *ex ante* assessments or due diligence of the other organization's practices and requirements before starting to execute activities. This approach overcomes the culture and cash barriers by relying on each organization's "self-certification" that its internal practices are consistent with the agreed standards of the Fiduciary Principles Accord. Similar approaches could be tested and implemented with other humanitarian and development agencies.

The World Bank's efforts to remain engaged in Yemen's protracted conflict are the result of a clear change in approach and organizational culture that advocates for the institution to be an active promoter of peace and social stability. This stems from the recognition that maintaining basic services, as well as national implementation capacity and structures, helps to preserve the foundations for post-conflict recovery of the water supply and sanitation sector, as well as other sectors. Yet this is a one-of-a-kind activity, illustrating how much still needs to be learned from engagement during active conflicts, as also demonstrated by the request of the World Bank's board for sharing and building upon the knowledge generated from this type of engagement.⁵³ Other organizations with different mandates and modes of operations (e.g., Mercy Corps) have also managed to change and adapt their operations in response to the evolution of conflicts.⁵⁴ For example, the ICRC has adapted its operations to provide immediate assistance and is increasingly taking on long-term projects to aid civilians in need, notably water and habitat services and provision of prosthetics.

As noted above, the consequences of protracted armed conflicts often spill over into neighbouring countries not directly involved in the conflict. A development approach to addressing the consequences of protracted armed conflict requires supporting the humanitarian efforts of governments whose ability to provide basic services and regulate resource use has been strained by spillover effects, such as a sudden influx of refugees. To support countries hosting a large number of refugees, the World Bank has promoted a Global Concessional Financing Facility, which provides concessional loans (i.e., loans that have a zero or very low interest rate and repayments that are stretched over twenty-five to forty years) to middle-income countries affected by refugee crises across the world. To be eligible for this concessional funding, countries need to (1) host at least 25,000 refugees, or refugees must amount to at least 0.1% of the population; (2) have an adequate framework for the protection of refugees; and (3) have an action plan or strategy with concrete steps, including possible policy reforms for long-term solutions that benefit refugees and host communities.⁵⁵ Developing this facility required the development of an innovative financing model,

53 World Bank, Yemen Emergency Crisis Response Additional Financing Project and Yemen Emergency Health and Nutrition Project: Chair Summary", 2017, available at: <https://tinyurl.com/ybaas4wy>.

54 See Mayada El-Zoghbi, "Bridging the Humanitarian and Development Divide", *CGAP Blog*, 2017, available at: www.cgap.org/blog/bridging-humanitarian-and-development-divide.

overcoming the cash barriers related to the ineligibility of some countries for concessional loans. Allocations from the Global Concessional Financing Facility are now being used in Jordan and Lebanon to support projects to improve infrastructure and public service delivery, including water supply and sanitation.⁵⁶

The approach advocated here—and increasingly being adopted by the World Bank⁵⁷—means that reconstruction and development need to start before conflict is over. This might include, for instance, working with sub-national or local governments, NGOs and charities rather than more traditional World Bank partners such as national governments and UN agencies. In some contexts, there may not be a functioning national government; however, there might be local governments and institutions that can lay out the foundations of a recovery and reconstruction programme.

Engaging in a situation of crisis also means taking on a more non-conventional advocacy role. Development agencies should use their expertise and convening power to identify critical infrastructure (i.e., infrastructure essential for the health and well-being of people), including water infrastructure, and raise awareness about its importance for development, livelihoods and well-being. This is particularly important given the growing evidence of the impact of war on water infrastructure, resulting from incidental damage and intentional targeting of critical infrastructure during war.⁵⁸

Situations of recovery and development opportunity

When conflict subsides, humanitarian and development agencies need to work together to address remaining emergency needs (e.g., those of displaced people) while rehabilitating infrastructure and creating the conditions for sustainable resource use and service delivery. This requires balancing the relative effort placed on providing urgently needed emergency relief and water supply and sanitation services with the effort placed on re-establishing sector oversight roles and the capacity of local institutions to oversee and manage service delivery in the long term.⁵⁹

A first experience in bridging emergency relief with longer-term solutions comes from Somalia. The country is not eligible for International Development Association (IDA) financing from the World Bank due to outstanding arrears.⁶⁰

55 See World Bank, “Eight Countries Eligible for new IDA Financing to Support Refugees and Hosts”, 16 November 2017, available at: <https://reliefweb.int/report/world/eight-countries-eligible-new-ida-financing-support-refugees-and-hosts>.

56 For a list of projects supported so far, see the Global Concessional Financing Facility website, available at: <http://globalcff.org/supported-projects/>.

57 S. Devarajan, above note 14.

58 ICRC, *Bled Dry: How War in the Middle East is Bringing the Region’s Water Supplies to Breaking Point*, Geneva, 2015; Jeannie L. Sowers, Erika Weinthal and Neda Zawahri, “Targeting Environmental Infrastructures, International Law, and Civilians in the New Middle Eastern Wars”, *Security Dialogue*, Vol. 48, No. 5, 2017.

59 Dominick de Waal *et al.*, *Water Supply: The Transition from Emergency to Development Support*, World Bank, Nairobi, 2017.

To overcome this cash barrier, the World Bank has leveraged a first-of-its-kind partnership arrangement with the ICRC and the UN Food and Agricultural Organization in order to implement a \$50 million emergency drought response and recovery project to rapidly deliver food, water, cash and basic goods to half a million people and provide vaccinations or treatment to the livestock of 200,000 people.⁶¹

The project aims to bridge the humanitarian–development divide by focusing on short-term solutions for immediate response and delivery of services aimed at confronting the consequences of drought, as well as long-term solutions focused on livelihood-centred activities. To meet the immediate needs of up to 656,000 people in Somalia, the World Bank is financing activities not typically included in its projects such as water trucking, unconditional cash grants to assist households with purchase of water, household water treatment, deepening of hand-dug wells, and provision of extra storage.⁶² This set of short-term measures is accompanied by investments to support medium-term recovery, including rehabilitation of existing irrigation canals, restoration of catchments and erosion control.

At the core of this experience, there is a recognition of the dire humanitarian crisis in Somalia as well as a formal request for support from the Federal Government of Somalia. There is also, as noted for the case of Yemen, an increasing strategic interest in the part of the World Bank to engage early on in fragile contexts in order to reduce the risk of further fragility and provide support that overcomes cash barriers to successful humanitarian–development engagement.

Another set of experiences bridging emergency relief with development efforts in situations of recovery comes from the World Bank’s Water and Sanitation Program (WSP) engagement in Sub-Saharan Africa. Through its experience in fragile and conflict-affected countries in Sub-Saharan Africa, the WSP identified primary data collection as a key instrument for successfully working at the humanitarian and development interface in situations of development opportunity. Data on water service delivery – water point mapping, water quality monitoring, and service-level benchmarking – helps development agencies and donors to see which delivery models work well, contributing to a shift from humanitarian response and temporary coping arrangements to country-led government programmes.⁶³

Experiences from the WSP also suggest that timing is a critical issue for working at the humanitarian–development interface in situations of recovery.

60 IDA is the World Bank’s fund to provide concessional financing (loans extended on terms more generous than market loans, with interest rates below market rates and grace periods) through credits and grants to governments of the poorest countries. Eligibility for IDA support depends first and foremost on a country’s relative poverty, defined as gross national income per capita below an established threshold and updated annually (\$1,175 in fiscal year 2020). For some countries, like Somalia, there is no IDA financing because of protracted non-accrual status. For more information, see: <http://ida.worldbank.org/>.

61 World Bank, *Somalia Emergency Drought Response and Recovery Project*, Washington, DC, 2017.

62 *Ibid.*

63 D. de Waal *et al.*, above note 59, p. 13.

Development agencies should try as much as possible to remain engaged during a crisis, and should then engage as soon as they are able in the recovery period. Evidence from countries in Sub-Saharan Africa affected by armed conflict shows that as time passes, it becomes progressively harder to build government capacity to oversee the water sector and to reform utilities.⁶⁴ This is because, as time passes, governments and water utilities lose capacity and the number of non-State and informal private suppliers increases, making it harder to re-establish sector delivery and oversight capacity in the long term. Early engagement in the recovery period helps development agencies to interface directly with humanitarian actors, to build upon their understanding and actions and to allow for more systematic transfer of projects, services and contacts from humanitarian actors to national authorities, supported by development agencies.

Finally, in situations of recovery, development agencies need to enhance the internal capacities of government agencies and water utilities, particularly on aspects related to financial sustainability and regulation. Strengthening capacity with respect to financial sustainability helps promote cost recovery in water supply and sanitation services delivery.⁶⁵ Regulatory capacity-building provides governments with the ability to oversee and work more closely with the private sector and other independent service providers, which often account for a large share of water service delivery during and after a protracted conflict.

Conclusion

This note has discussed the challenge of water service delivery during the different phases of a protracted armed conflict, describing the barriers that might impede successful transition from humanitarian to development interventions and suggesting some possible ways of overcoming them. The note presented examples of World Bank engagements and projects in order to illustrate how coordination and transition from humanitarian to development interventions across phases of protracted conflict can be improved. This includes setting up a Water Sector Working Group in Palestine to overcome culture and capacity barriers and facilitate information-sharing, and applying the Fiduciary Principles Accord developed by the World Bank in partnership with the UN to overcome cash barriers and provide emergency crisis response in Yemen.

Most barriers between humanitarian and development efforts still persist. Some of the approaches required to bridge humanitarian and development action, most notably incentives within organizations and institutional policies, are still far from influencing mainstream development practice. This finding is in line with broader assessments of development action in fragile contexts, which have

⁶⁴ *Ibid.*, p. 36.

⁶⁵ Loan Diep, Tim Hayward, Anna Walnycki, Marwan Husseini and Linus Karlsson, *Water, Crises and Conflict in MENA: How Can Water Service Providers Improve Their Resilience?*, IIED Working Paper, 2017.

found that many of the constraints internal to the operations of development actors still prevent them from successfully engaging.⁶⁶

From the perspective of a development agency, several institutional policies and incentives need to be modified in order to mainstream engagement before, during and after protracted conflict. First, addressing human resource constraints is essential to bridging the humanitarian–development divide. In practice, this means increasing the number of staff in the field and improving incentives and means for career progression for development agency staff working in countries affected by protracted conflict. Second, operational approaches need to be revised and updated to more effectively consider and address the financial and technical difficulties associated with implementing projects during protracted conflict. Third, capturing, developing and disseminating knowledge on what works and what does not work in terms of engagement during protracted conflict is essential. This includes providing support and advice to internal as well as external actors (i.e., representatives from humanitarian agencies and governments) through specialized courses and guidance notes.

66 Erwin van Veen and Veronique Dudouet, *Hitting the Target but Missing the Point? Assessing Donor Support for Inclusive and Legitimate Politics in Fragile Societies*, International Network on Conflict and Fragility, OECD, Paris, 2017.

The notion of “protracted armed conflict” in the Rome Statute and the termination of armed conflicts under international law: An analysis of select issues

Dustin A. Lewis*

Dustin A. Lewis is the Researcher Director for the Harvard Law School Program on International Law and Armed Conflict.

Abstract

Legal controversies and disagreements have arisen about the timing and duration of numerous contemporary armed conflicts, not least regarding how to discern precisely when those conflicts began and when they ended (if indeed they have ended). The existence of several long-running conflicts – some stretching across decades – and the corresponding suffering that they entail accentuate the stakes of these debates. To help shed light on some select aspects of the duration of contemporary wars, this article analyzes two sets of legal issues: first, the notion of “protracted armed conflict” as formulated in a war-crimes-related provision of the Rome Statute of the International Criminal Court, and second, the rules, principles and standards laid down in international humanitarian law and international criminal law pertaining to when armed conflicts have come to an end. The upshot of the

* The author thanks Sonia Chakrabarty and Shira Shamir for their helpful preparatory research, and Naz K. Modirzadeh for her insightful comments and suggestions.

analysis is that under existing international law, there is no general category of “protracted armed conflict”; that the question of whether to pursue such a category raises numerous challenges; and that several dimensions of the law concerning the end of armed conflict are unsettled.

Keywords: protracted armed conflict, end of armed conflict, non-international armed conflict, temporal scope of armed conflict, International Criminal Court, war crimes.

.....

How might time matter when it comes to the legal aspects of armed conflict? Does, and should, international humanitarian law (IHL) treat relatively longer armed conflicts differently than their shorter counterparts? Might some armed conflicts come into existence only once hostilities have existed for a sufficiently long period? In respect of conflicts extending over relatively long periods, should the legal framework be adjusted with a view to enhancing and expanding the scale and scope of protective commitments, perhaps by shifting from IHL-based norms to norms rooted in other fields, such as international human rights law (IHRL)? Who would benefit, and who would lose, from such an approach, and who should be in a position to determine whether or not it is adopted?

This issue of the *Review*, which focuses on “Protracted Armed Conflict”, examines such topics as the impacts of long-duration armed conflicts on affected populations and strategies for humanitarian action in respect of such contexts.¹ At the outset, it bears emphasizing that, at least from this author’s perspective, the long duration of an armed conflict—including a military occupation—may not be invoked as a legal basis to exclude the application of IHL.² Yet that

1 The call for papers for this issue of the *Review* states in part: “As of 2016, some 20 ICRC [International Committee of the Red Cross] delegations were operating in protracted crises and around two thirds of the ICRC’s budget was spent in protracted conflicts. Prolonged humanitarian action in conflicts of various kinds means that the traditional binary paradigm of relief and development is giving way to policies adapted to address needs when people are struggling to survive in conflicts that last for decades. In 2015, the ICRC cut the word ‘emergency’ from its annual appeal in recognition of the fact that its work is often a mix of both urgent and long-term programming. The ICRC is by no means alone in this effort. The protracted conflicts seen today attract a large humanitarian sector.” ICRC, “Protracted Armed Conflict”, June 2017, available at: www.icrc.org/en/international-review/article/protracted-armed-conflict (all internet references were accessed in April 2020).

2 For instance, in relation to “prolonged occupation”, see International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Elaraby (Advisory Opinion), *ICJ Reports 2004*, p. 255 (“A prolonged occupation strains and stretches the applicable rules, however, the law of belligerent occupation must be fully respected regardless of the duration of the occupation”); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Koroma (Advisory Opinion), *ICJ Reports 2004*, p. 206 (“While it is understandable that a prolonged occupation would engender resistance, it is nonetheless incumbent on all parties to the conflict to respect [IHL] at all times”). Despite their potential salience, debates regarding “prolonged occupation” are outside of the scope of this article. For discussion of that notion, see, for example, Iain Scobbie, “International Law and the Prolonged Occupation of Palestine”, United Nations Roundtable on Legal Aspects of the Question of Palestine, The Hague, 20–22 May 2015, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611130; Vaïos Koutroulis, “The Application of International Humanitarian Law and International Human Rights Law in Situation[s] of Prolonged Occupation: Only a Matter of Time?”, *International*

contention only begins to bring into view the array of pressing concerns and associated legal dimensions regarding the duration of contemporary wars.

In this article, I seek to help inform discussions around “protracted armed conflict” by exploring two sets of legal questions concerning the timing and duration of contemporary wars. In doing so, I do not attempt to exhaustively canvass the vast range of potential legal issues that might arise in relation to armed conflicts of a long duration, however “long” might be defined. Instead, I zoom in on two sets of what might be characterized as somewhat technical legal issues. Firstly, I examine whether – under IHL and, especially, international criminal law (ICL) of war crimes – only non-international armed conflicts whose hostilities have taken place over a sufficiently long period may be characterized as “protracted armed conflict” in the sense of a provision of the Rome Statute of the International Criminal Court (ICC). I focus on such non-international armed conflicts because, so far as I am aware, it is only in relation to those conflicts that the term “protracted armed conflict” has been laid down in an IHL-related treaty. Moreover, I am not aware of the term having (purportedly) crystallized into a (separate) notion under customary international law. Secondly, I evaluate whether IHL and ICL of war crimes lay down sufficiently clear rules, principles and standards to discern when contemporary armed conflicts have come to an end – in other words, whether the law allows us to reliably detect when conflicts, including relatively long-duration conflicts, have ended. These two sets of questions are connected in various ways. Perhaps most obviously, discerning the end of an armed conflict that is deemed to be “protracted” turns – as with all armed conflicts – on an assessment of the international legal framework applicable in relation to the end of the conflict. To help flesh out why this all matters, at various points in the article I attempt to draw attention to some legal interests that might be at stake in the continuing applicability (or not) of IHL. I conclude by highlighting several challenging questions that arise when assessing whether or not “protracted armed conflict” should be developed into a (sub) category of armed conflict under international law.

“Protracted armed conflict”

In respect of war but also more broadly, time matters in no small part because humans’ experiences and understandings of the world are fundamentally structured, organized and conceived through notions of temporality. For example, to help comprehend our experiences, we often divide periods into discrete temporal units such as minutes, days, months, years or decades. Yet despite the centrality of time, its flow and its delineation, and despite some apparent recent

headway by scientists into better understanding its nature and its workings,³ we still grasp remarkably little about the foundational properties and conceptual frameworks that pertain to time.

International humanitarian law and temporality

Irrespective of our individual and collective deficiencies in understanding temporality more broadly, it seems indisputable that time matters in many diverse and impactful respects concerning war and the law that seeks to govern it. Indeed, in many ways, international law structures and organizes our experiences and understandings of armed conflict, not least regarding what periods we do and do not consider to validly count as “wartime”.⁴

In turn, with a legally recognized period of armed conflict come (it has been argued) not only the constraints but also the “enabling arrangements”⁵ of IHL and, as applicable, other relevant fields of international law.⁶ For its part, IHL is somewhat frequently characterized as seeking to infuse at least a modicum of humanitarian concern into the cruelties of war. Yet in several respects IHL might also be seen as legitimizing certain presumptions of dangerousness of perceived adversaries and perhaps even of perceived adversary populations. Those presumptions help lay the normative groundwork for IHL to be interpreted and applied in ways that, it might be said, at least tolerate certain manifestations of often extensive violence and other coercive measures that may result in levels of death, destruction and suffering which, while not unlimited, would nevertheless be impermissible under other potentially relevant fields of international law.⁷ Meanwhile, as it does in respect of time, the formulation, interpretation and application of IHL also helps delineate other connected dimensions of war: what

3 See, for example, Dean Buonomano, *Your Brain Is a Time Machine: The Neuroscience and Physics of Time*, W. W. Norton, New York, 2017; Richard A. Muller, *Now: The Physics of Time*, W. W. Norton, New York, 2016.

4 See generally Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences*, Oxford University Press, New York, 2012.

5 See Dino Kritsiotis, “War and Armed Conflict: The Parameters of Enquiry”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016, p. 8.

6 To be certain, several IHL provisions are also applicable in respect of “peacetime”; see, for example, Art. 2 (1) common to the four Geneva Conventions (Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV)); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 21 October 1950) (AP I), Arts 6(1), 18 (7), 60(2).

7 See, for example, Dustin A. Lewis, Gabriella Blum and Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, Harvard Law School Program on International Law and Armed Conflict, Cambridge, February 2017, p. 1, available at: <https://dash.harvard.edu/handle/1/30455582>.

situations amount to armed conflicts in the first place, how far wars extend spatially, and which individuals, entities and objects merit, or do not merit, various kinds and degrees of legal protection, as well as which individuals and entities are responsible for respecting which legal norms.

Unfortunately, the incarnadine spectacle of many contemporary armed conflicts – so often marked as they are by extensive death, destruction, upheaval, austerity, subjugation and despair – extends for years, even decades.⁸ *The War Report: Armed Conflicts in 2017*, edited by Annyssa Bellal, identifies fifty-five armed conflicts that occurred, in the view of the authors, at least at some point in 2017. The vast majority of the eleven listed military occupations have apparently existed for decades, including occupations of Azerbaijan by Armenia, of Cyprus by Turkey, of Lebanon by Israel, of Moldova by Russia, of Palestine by Israel, of Syria by Israel, and of Western Sahara by Morocco.⁹ Several of the thirty-eight non-international armed conflicts that Bellal characterizes as having occurred in 2017 are of what might be characterized as a long duration.¹⁰ For instance, at least two of those conflicts – Colombia versus the National Liberation Army and the Philippines versus the New People’s Army – apparently extend back to the 1960s. Certain others – including, under their currently listed configurations, Afghanistan and the United States versus the Quetta Shura Taliban, and the Democratic Republic of the Congo with the support of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo versus the Democratic Forces for the Liberation of Rwanda – are seemingly at least a decade and a half old. Among the six situations characterized in *The War Report* as “active” international armed conflicts, three are said to have existed since at least 2014: India versus Pakistan; an international coalition (Belgium, Canada, Denmark, France, Germany, Italy, Jordan, Morocco, the Netherlands,

8 I borrow the phrase “incarnadine spectacle” from Tom J. Farer, “Humanitarian Law and Armed Conflicts: Toward the Definition of ‘International Armed Conflict’”, *Columbia Law Review*, Vol. 71, No. 1, 1971, p. 37. While Farer was referring to situations of “internal war”, I use the phrase to refer to any type of armed conflict.

9 See Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2017*, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 2018, p. 30. Other military occupations identified by the authors of *The War Report* were the occupations of Eritrea by Ethiopia, of Georgia by Russia, of Syria by Turkey, and of Ukraine by Russia. At least some ongoing or recent conflicts of a relatively long duration – including Transnistria in Moldova, Abkhazia and South Ossetia in Georgia, and Nagorno-Karabakh in Azerbaijan – are, or at least recently were, said to be susceptible to the label of “frozen conflicts.” See Thomas D. Grant, “Frozen Conflicts and International Law”, *Cornell International Law Journal*, Vol. 50, No. 3, 2017, pp. 371, 377–399. Grant assesses that “frozen conflicts share certain characteristics: (1) armed hostilities have taken place, parties to which include a State and separatists in the State’s territory; (2) a change in effective control of territory has resulted from the armed hostilities; (3) the State and the separatists are divided by lines of separation that have effective stability; (4) adopted instruments have given the lines of separation (qualified) juridical stability; (5) the separatists make a self-determination claim on which they base a putative State; (6) no State recognizes the putative State; (7) a settlement process involving outside parties has been sporadic and inconclusive”. *Ibid.*, p. 390 (citation omitted). The term “frozen conflicts” seems to be anchored in “diplomatic vocabulary”. Marc Weller, “Settling Self-Determination Conflicts: Recent Developments”, *European Journal of International Law*, Vol. 20, No. 1, 2009, p. 137. At least for now, the expression, it has been said, “remains, at best, at the edges of legal discourse”. T. D. Grant, above, p. 413.

10 A. Bellal, above note 9, pp. 30–31.

Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom and the United States) versus Syria; and Ukraine versus Russia.¹¹

International criminal law of war crimes in respect of non-international armed conflict: Delineating “protracted armed violence” and “protracted armed conflict”

Close observers of the cascade of recent jurisprudence flowing from international criminal tribunals may have spotted a particular area in which time might matter in respect of war – namely, the provision concerning “protracted armed conflict” laid down in the 1998 Rome Statute of the ICC.¹² That provision concerns twelve sets of war crimes in respect of non-international armed conflict. (There are two main general categories, or classifications, of armed conflict broadly recognized in contemporary IHL: international armed conflict and non-international armed conflict.¹³) Since coming into force, that provision has been addressed, somewhat unevenly, by certain ICC chambers as well as by commentators.¹⁴

Stepping back for a moment, it might be useful to observe that the adjective “protracted” means – in its everyday usage – lengthened, extended or prolonged *in time*.¹⁵ The basic notion is, at least in certain key respects, relative and subjective, raising questions as to what durations, and in relation to what types of contexts, the label should or should not attach.

Perhaps the best legal starting point is not necessarily the relevant text of the Rome Statute itself but rather the International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence from which the notion of “protracted armed conflict” in Article 8(2)(f) of the Rome Statute has been said to be

11 *Ibid.*, pp. 29–30. The other three identified “active” international armed conflicts are listed as Egypt versus Libya, Israel versus Syria, and Turkey versus Iraq, all of which are characterized as forming “a series of short-lived international armed conflicts”. *Ibid.*, p. 29.

12 Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 8(2)(f).

13 See, for example, ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 201 ff., available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>; Andrew Clapham, “The Concept of International Armed Conflict”, and Lindsay Moir, “The Concept of Non-International Armed Conflict”, in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015; Jann K. Kleffner, “Scope of Application of International Humanitarian Law”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012. For a succinct essay concerning why classification may – and may not – matter under contemporary international law, see Elizabeth Wilmshurst, “Conclusions”, in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012.

14 For a sketch of ICC jurisprudence, see below notes 41–46 and corresponding text. For a succinct overview of scholarly commentary, see Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 80–83. See also Lindsay Moir, “The Concept of Non-International Armed Conflict”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 13, pp. 410–411, paras 53–56.

15 At the time of writing, the definition of “protracted” given in the *Oxford English Dictionary Online* is “[l]engthened, extended, prolonged ... [i]n time”.

“derived”.¹⁶ To situate that jurisprudence, however, a quick overview of the underlying treaty provisions concerning the concept of non-international armed conflict might be of value. For its part, Article 3 common to the four 1949 Geneva Conventions expressly applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”.¹⁷ This negative formulation – phrased as applying in the case of armed conflict *not* of an international character – represents something of a compromise text that covered a division of opinions at the time of drafting.¹⁸ On its terms, the 1977 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II) “develops and supplements [Common Article 3] without modifying its existing conditions of application”.¹⁹ Under Article 1(1), AP II shall expressly

apply to all armed conflicts which are not covered by Article 1 of [Additional Protocol I (AP I); that is, all international armed conflicts as recognized at least under AP I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [AP II].²⁰

Article 1(2) of AP II provides that the “Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

From some of the Tribunal’s earliest jurisprudence onwards, ICTY chambers have held that a non-international (or “internal”) “armed conflict exists whenever there is ... *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a State”.²¹ To make

16 ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 197: “[I]t is noted that during the drafting of Article 8(2)(f) of the [Rome Statute] covering ‘other’ serious violations of the laws and customs of war applicable in non-international armed conflict, delegates rejected a proposal to introduce the threshold of applicability of [AP] II to the section, and instead accepted a proposal to include in the chapeau the test of ‘protracted armed conflict’, as derived from the Appeals Chamber’s decision in *Tadić*” (citations omitted).

17 See also Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954 (entered into force 7 August 1956), Art. 19(1). Even though it is often called “Common Article 3”, while otherwise identical to the corresponding language in Geneva Conventions I, III and IV, the language of the first sentence of Article 3(2) of GC II, due to the nature of that instrument, adds “shipwrecked” to the category of persons – in addition to the “wounded” and “sick” – who “shall be collected and cared for”.

18 See T. J. Farer, above note 8, p. 50.

19 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 1(1).

20 *Ibid.*, Art. 1(1).

21 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 (*Tadić* Jurisdiction), para. 70 (emphasis added). See, further, the cases cited in ICTY, *Bošković and Tarčulovski*, above note 16, para. 175, fn. 703. Certain ICC chambers have also adopted this definition: see, for example, ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74

that determination and thus to establish that a non-international armed conflict subject to the Tribunal's relevant war crimes jurisdiction exists (or existed), ICTY chambers have held that it is necessary to establish two constitutive elements: (1) that hostilities are (or were) sufficiently *intense*, and (2) that a non-State party is (or was) sufficiently *organized*.²² The emphasis on "protracted armed violence" in the ICTY jurisprudence was meant in part, at least initially, to help distinguish a situation of armed conflict of an "internal" or non-international character – or of a "mixed" character – from situations such as "banditry, unorganized and short-lived insurrections, or terrorist activities, which" – it was held – "are not subject to [IHL]".²³ This approach seems to track in general the aim of Article 1(2) of AP II to distinguish between certain situations of violence which may be characterized as non-international armed conflicts falling under that instrument, and others which may not. For their part, ICTY chambers generally have not further required that the other material conditions listed in Article 1(1) of AP II must also be established in order for the Tribunal to exercise war crimes jurisdiction over a non-international armed conflict.²⁴ Recall that this provision of AP II

of the Statute: Public with Annexes I, II, and A to F (Trial Chamber III), 21 March 2016, para. 128 (*Bemba Trial Judgment*); reversed on other grounds in ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (Appeals Chamber), 8 June 2018.

22 See, e.g., ICTY, *Boškoski and Tarčulovski*, above note 16, paras 175–206.

23 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber), 7 May 1997, para. 562: "The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law" (citation omitted). See further, for example, ICTY, *Boškoski and Tarčulovski*, above note 16, para. 175, fn. 706 and corresponding text. Regarding acts of terrorism in relation to the "protracted armed violence" aspect(s) in the jurisprudence of the ICTY, see *ibid.*, para. 190: "[T]he Chamber considers that while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict."

24 See ICTY, *Boškoski and Tarčulovski*, above note 16, para. 197: "While the jurisprudence of the Tribunal requires an armed group to have 'some degree of organisation', the warring parties do not necessarily need to be as organised as the armed forces of a State. Neither does the degree of organisation for an armed group to a conflict to which Common Article 3 applies need [to] be at the level of organisation required for parties to Additional Protocol II armed conflicts, which must have responsible command, and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organisation required to engage in 'protracted violence' is lower than the degree of organisation required to carry out 'sustained and concerted military operations'. In this respect, it is noted that during the drafting of Article 8(2)(f) of the Rome Statute of the International Criminal Court covering 'other' serious violations of the laws and customs of war applicable in non-international armed conflict, delegates rejected a proposal to introduce the threshold of applicability of Additional Protocol II to the section, and instead accepted a proposal to include in the chapeau the test of 'protracted armed conflict', as derived from the Appeals Chamber's decision in *Tadić*. This indicates that the latter test was considered to be distinct from, and a lower threshold than, the test under Additional Protocol II. This difference in the required degree of organisation is logical in view of the more detailed rules of international humanitarian law that apply in Additional Protocol II conflicts, which mean that 'there must be some degree of stability in the control of even a modest area of land for

concerns the capacity of a non-State party to exercise such control over a part of the contracting State’s territory so as to enable that non-State party to carry out sustained and concerted military operations and to implement AP II. In summary, relevant ICTY jurisprudence arguably folds the “protracted armed violence” dimension into the assessment concerning the intensity of hostilities as a constitutive element of a non-international armed conflict.²⁵

Thus, the “protracted armed violence” aspect – as elaborated in ICTY jurisprudence – might entail countervailing dimensions. The thumbnail version is that on its face the key textual formulation requires armed violence to be sufficiently long, but in jurisprudence that duration dimension is often incorporated into a broader analysis of the intensity of hostilities as but one criterion concerning the existence (or not) of a non-international armed conflict.

Scholars Marco Sassòli and Julia Grignon have critiqued the part of the ICTY’s formulation which – at least on its terms – requires that armed violence must be of a minimally long duration before the hostilities may give rise to categorization as a non-international armed conflict that is capable of falling within part of the Tribunal’s war crimes jurisdiction. Their critiques concern several overlapping sets of issues. For example, this “protracted” dimension is said to be subjective in nature.²⁶ This contention seemingly implies that, at least from a legal policy perspective, it would be imprudent to make the existence of a non-international armed conflict dependent on such an unverifiable abstraction. Perhaps from this perspective, it might be far from clear whether, for instance, the thirty-hour period of violent clashes at the La Tablada military base in Argentina on 23–24 January 1989 – clashes that the Inter-American Commission of Human Rights considered to have “triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities”²⁷ – would qualify (assuming that the other conditions of jurisdiction were satisfied) as sufficiently “protracted” to fall under the ICTY’s war crimes jurisdiction. Moreover, in light of the retrospective nature of criminal prosecutions, the “protracted armed violence” formulation has been said to raise a concern as to whether or not an individual accused of a war crime may validly be held to have been operating under an understanding that an armed conflict

them to be capable of effectively applying the rules of the Protocol’. By contrast, Common Article 3 reflects basic humanitarian protections, and a party to an armed conflict only needs a minimal degree of organisation to ensure their application” (citations omitted).

25 See, for example, ICTY, *Boškoski and Tarčulovski*, above note 16, para. 177: “Various indicative factors have been taken into account by Trial Chambers to assess the ‘intensity’ of the conflict. These include ... the spread of clashes over territory and over a period of time” (emphasis added; citations omitted).

26 Marco Sassòli and Julia Grignon, “Les limites du droit international pénal et de la justice pénale internationale dans la mise en œuvre du droit international humanitaire”, in Abdelwahab Biad and Paul Tavernier (eds), *Le droit international humanitaire face aux défis du xxi^e siècle*, Bruylant, Brussels, 2012, p. 145 (“[s]ubjectif par essence”).

27 Inter-American Commission of Human Rights, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 55/97, 1 November 1997, para. 156.

falling within the ICTY's war crimes jurisdiction existed on, say, the first – or the second, or the thirtieth – day of the armed violence.²⁸ This line of criticism thus concerns the principle of legality. In addition, at least from the viewpoint of certain victims of armed conflict, a requirement that armed violence be “protracted” may raise a concern that victims of the first acts of violence might not be fully protected, at least in the sense of international criminal responsibility for war crimes.²⁹ Furthermore, outside the context of implementing IHL through ICL, the introduction of the notion of “protracted” armed violence has been said to pose a similar problem at least in respect of victims and of humanitarian organizations: it is unimaginable, it has been argued, not only that those victims have to wait a certain amount of time before they can know if they are or are not protected by IHL, but also that those humanitarian organizations may not know if they can invoke IHL, for example to obtain humanitarian access.³⁰ Having elaborated these considerations, Sassòli and Grignon have identified at least some benefits to the approach whereby “protracted armed violence” is evaluated by ICTY chambers – even if somewhat counter-textually – primarily in terms of an intensity-of-hostilities criterion, not (or at least not primarily) in terms of a standalone duration-of-armed-violence criterion.³¹

Moving on to the ICC, Article 8 of the Rome Statute concerns war crimes falling within the Court's jurisdiction.³² Article 8(2)(a–b) of the Rome Statute concerns such war crimes in respect of international armed conflict, while Article 8(2)(c–f) concerns such war crimes in respect of non-international armed conflict.³³ Article 8(2)(c) lays down – in its sub-provisions, (i–iv) – four sets of war crimes concerning “serious violations” of Common Article 3 that fall under the Court's jurisdiction “[i]n the case of an armed conflict not of an international character”.³⁴ Similar to the distinguishing effect of Article 1(2) of AP II

28 See M. Sassòli and J. Grignon, above note 26, p. 145.

29 *Ibid.*

30 *Ibid.*, p. 146: “Il n'est pas imaginable qu'elles doivent attendre un certain laps de temps avant de pouvoir savoir si elles sont protégées par, ou si elles peuvent invoquer le droit international humanitaire.”

31 *Ibid.* See also Marco Sassòli, “Humanitarian Law and International Criminal Law”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 119 (“Similarly, while it is today accepted in [ICL] that armed violence must be protracted to constitute a (non-international) armed conflict, such a standard is not useful for parties, fighters, victims and humanitarian organizations at the outbreak of a conflict. It is not imaginable that they must wait and see how it develops before they know whether they must comply with IHL, are protected by it, should have been complying with it from the beginning, or may invoke it” (citations omitted)) and fn. 39 (“One may therefore welcome that an ICTY [Trial Chamber] recently interpreted the term ‘protracted’ as referring more to the intensity of the armed violence than to its duration” (citation omitted)).

32 Article 8 *bis* of the Rome Statute pertains to the crime of aggression.

33 Article 8(1) of the Rome Statute provides that “[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”.

34 Rome Statute, Art. 8(2)(c). The ICC may exercise jurisdiction over that conduct only where the enumerated acts are “committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause”.

concerning which situations do not fall under that Protocol, Article 8(2)(d) of the Rome Statute provides that Article 8(2)(c) “applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”. For its part, Article 8(2)(e) concerns twelve sets of “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law”³⁵ – other, that is, than the four sets of “serious violations” of Common Article 3 laid down in Article 8(2)(c)(i–iv). Under Article 8(2)(f) of the Rome Statute:

Paragraph 2 (e) [of the Statute] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups [emphasis added].

Thus, whereas ICTY jurisprudence concerns protracted armed *violence*,³⁶ this provision of the Rome Statute concerns protracted armed *conflict*. Alongside the English, the other five equally authentic texts³⁷ of the Rome Statute – the Arabic, Chinese, French, Russian and Spanish texts – seem to support the contention that this provision in the second sentence of Article 8(2)(f) may be interpreted, at least on a plain reading of the text, as imposing a requirement that a non-international armed conflict must, for Article 8(2)(f) of the Statute to be applicable, be protracted in the sense of (prolonged) duration.³⁸

In the abstract, three potential conceptual approaches concerning “protracted armed conflict” – as formulated in the Rome Statute – might be drawn. Under the first, the insertion of this notion in the Statute might be considered to give rise to a (*sub*)category of non-international armed conflict. Under the second, it might be considered that a non-international armed conflict as a whole – not (merely) one or more of its constituent elements – must be of a sufficiently long duration, or else the ICC may not exercise jurisdiction over relevant war crimes; pursuant to that approach, the formulation would establish a

35 Many of these twelve sets of violations concern conduct-of-hostilities violations, including those laid down in Article 8(2)(e)(i–iv).

36 See notes 23–25 above and corresponding text.

37 Rome Statute, Art. 128. See also Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 33.

38 See relevant parts of the second sentence of Article 8(2)(f) of the Rome Statute (Arabic: “وتتطبق على ... المنازعات المسلحة التي تقع في إقليم دولة عندما يوجد صراع مسلح متطاوّل الأجل”; Chinese: “该项规定适用于在一国境内发生的武装冲突，如果政府当局与有组织武装集团之间，或这种集团相互之间长期进行武装冲突。”; French: “Il s’applique aux conflits armés qui opposent de manière prolongée ...”; Russian: “Он применяется в отношении вооруженных конфликтов, которые имеют место на территории государства, когда идет длительный вооруженный конфликт ...”; and Spanish: “Se aplica a los conflictos armados que tienen lugar en el territorio de un Estado cuando existe un conflicto armado prolongado ...”).

threshold requiring a minimum duration.³⁹ Finally, under the third approach, the “protracted armed conflict” notion might be considered to be *incorporated* into the analysis concerning one or both of the elements deemed necessary to establish the existence of a non-international armed conflict subject to the relevant war crimes jurisdiction of the Court. As noted above, those elements are (1) the intensity of hostilities and (2) the organization of the non-State party (or parties).

At the time of writing,⁴⁰ ICC jurisprudence concerning the “protracted armed conflict” provision in Article 8(2)(f) points in somewhat different, or at least not entirely coherent, directions. On the one hand, an ICC chamber has at least taken judicial cognisance of the phrase, holding that – unlike Article 8(2)(d) – Article 8(2)(f) requires the existence of a “protracted armed conflict”, which, it was said, “*may* be seen to require a higher or additional threshold to be met”.⁴¹ Yet on the other hand, when evaluating whether a non-international armed conflict exists such that a war crime laid down in Article 8(2)(e) of the Rome Statute falls within the jurisdiction of the Court, it is not necessarily clear that certain ICC chambers have considered that a specific duration of a relevant non-international armed conflict writ large must be established, in some or all cases, as an indispensable condition to exercise such jurisdiction.⁴² Recall that Article 8(2)(e), which lays down certain war crimes, is directly linked to Article 8(2)(f), which concerns the situations of non-international armed conflict in which those war crimes may have been committed. ICC chambers have seemed to align more or less with the third approach, though it is not necessarily clear that they have also excluded the second approach. In other words, much of the relevant ICC jurisprudence seems to criss-cross – or at least not to be at pains to distinguish – between (aspects of) an approach whereby the non-international armed conflict *as a whole* must be of a sufficiently long character, and an approach whereby the “protracted armed conflict” notion is folded into the analysis concerning one or both of the constituent elements considered necessary to establish the existence of a non-international armed conflict in the first place.⁴³ So far as I am aware, no

39 Namely, those laid down in Article 8(2)(e) of the Rome Statute.

40 Research for this article was updated most recently in 2018.

41 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), 15 June 2009, para. 235 (*Bemba* Confirmation of the Charges) (emphasis added).

42 See, for example, *Bemba* Trial Judgment, above note 21, para. 138: “Article 8(2)(f), which is stated to apply to Article 8(2)(e), contains a second sentence additionally requiring that there be a ‘protracted armed conflict’. This is in contrast to Article 8(2)(d), stated to apply to Article 8(2)(c), which does not include such a requirement. The Pre-Trial Chamber, while noting that this difference ‘may be seen to require a higher or additional threshold of intensity to be met’, did ‘not deem it necessary to address this argument, as the period in question covers approximately five months and is therefore to be regarded as “protracted” in any event’. Given that crimes under both Articles 8(2)(c) and 8(2)(e) have been charged in this case, the Chamber notes that the *potential* distinction would only have significance if the Chamber were to reach a conclusion that the conflict in question was not ‘protracted’, and therefore finds it unnecessary to address the difference further at this point” (emphasis added; citations omitted).

43 Consider, for instance, *Bemba* Trial Judgment, above note 21, para. 137 (“The first sentence common to Article 8(2)(d) and 8(2)(f) requires the conflict to reach a level of intensity which exceeds ‘situations of

chamber of the ICC has adopted the first, abstract approach mentioned above, according to which the reference to “protracted armed conflict” in Article 8(2)(f) of the Rome Statute would give rise to a *subcategory* of *protracted non-international armed conflict*. In any event, in ICC jurisprudence as of 2018, the minimum length of a non-international armed conflict found to have fallen under Article 8(2)(e) – and thus to be considered, at least implicitly, to constitute a “protracted armed conflict” in respect of the second sentence of Article 8(2)(f) – is apparently five months.⁴⁴

For their part, ICC chambers appear to have adopted the ICTY’s general conceptual approach (requiring two constitutive elements – namely, intensity of hostilities and organization of the non-State party or parties) to the establishment of the existence of a non-international armed conflict subject to the relevant war crimes jurisdiction.⁴⁵ The jurisprudence of the ICC is not uniform, however, in respect of the level and type of control (if any) that a non-State party must exercise – and for what duration – in order for a situation to qualify as a non-international armed conflict subject to the Court’s relevant war crimes jurisdiction. Some ICC chambers seem, for example, to require the level and type

internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’. In order to assess the intensity of a conflict, Trial Chambers I and II endorsed the ICTY’s finding that *relevant factors* include ‘the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations (‘UN’) Security Council, and, if so, whether any resolutions on the matter have been passed’. The Chamber follows the approach of Trial Chambers I and II in this respect” (emphasis added; citations omitted)); *ibid.*, para. 140 (“The Chamber considers that the intensity and ‘protracted armed conflict’ criteria [n.b.: plural] do not require the violence to be continuous and uninterrupted” (emphasis added)); *ibid.*, para. 139 (“The Chamber notes that the concept of ‘protracted [armed] conflict’ has not been explicitly defined in the jurisprudence of this Court, but has generally been addressed within the framework of assessing the intensity of the conflict. When assessing whether an armed conflict not of an international character was protracted, however, different chambers of this Court emphasised the duration of the violence as a relevant factor. This corresponds to the approach taken by chambers of the ICTY. The Chamber follows this jurisprudence” (emphasis added; citations omitted)); ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Jugement rendu en application de l’article 74 du Statut (Pre-Trial Chamber II), 7 March 2014, para. 1217 (“La Chambre se réfère notamment à la présentation qu’elle a précédemment faite des attaques postérieures à celle de Bogoro afin de conclure que le conflit armé était à la fois *prolongé et intense* en raison, notamment, de sa durée et du nombre élevé d’attaques perpétrées sur l’ensemble du territoire de l’Ituri, du mois de janvier 2002 au mois de mai 2003. Aussi, pour elle, les éléments de preuve en sa possession *suffisent à satisfaire l’exigence d’intensité du conflit*” (emphasis added; citation omitted)); *Bemba* Confirmation of the Charges, above note 41, para. 235 (“The Chamber is also mindful that the wording of article 8(2)(f) of the Statute differs from that of article 8(2)(d) of the Statute, which requires the existence of a ‘protracted armed conflict’ and thus may be seen to require a higher or additional threshold to be met” (emphasis added)).

44 *Bemba* Confirmation of the Charges, above note 41, para. 235: “The Chamber is also mindful that the wording of article 8(2)(f) of the Statute differs from that of article 8(2)(d) of the Statute, which requires the existence of a ‘protracted armed conflict’ and thus may be seen to require a higher or additional threshold to be met – a necessity which is not set out in article 8(2)(d) of the Statute. The argument can be raised as to whether this requirement may nevertheless be applied also in the context of article 8(2)(d) of the Statute. However, irrespective of such a possible interpretative approach, the Chamber does not deem it necessary to address this argument, as the period in question covers approximately five months and is therefore to be regarded as ‘protracted’ in any event” (emphasis added).

45 *Bemba* Trial Judgment, above note 21, para. 128.

of control (or at least the capacity to exercise such control) by a non-State party laid down in Article 1(1) of AP II, while certain other chambers seem not to have adopted that approach; moreover, the Court's jurisprudence does not appear to establish whether – and if so, to what extent – the *duration* of such control (or at least the capacity to exercise such control) does or does not matter in this context.⁴⁶

It would seem to be unfair to lay whatever blame is due for today's somewhat confusing, criss-crossing jurisprudential approach at the ICC concerning the phrase "protracted armed conflict" solely at the feet of the Court's judges. The States which drafted that provision in the Rome Statute should not escape their due measure of responsibility.⁴⁷ Regardless, it appears that many (perhaps all) of the criticisms raised by Sassòli and Grignon concerning the notion of "protracted armed violence" in respect of the ICTY

46 Compare *Bemba* Trial Judgment, above note 21, p. 68, fn. 318 ("In this regard, the Chamber notes that at the Conference on the Establishment of the Court, the Bureau's initial proposal for the content of Article 8 (2)(f) was taken from Article 1(1) of Additional Protocol II, which referred to 'sustained and concerted military operations'. Several delegates were concerned that the use of this provision would set too high a threshold for armed conflicts not of an international character. In the amended text, in addition to other changes, 'sustained and concerted military operations' was replaced by the phrase that now constitutes part of Article 8(2)(f), 'protracted armed conflict'"), with ICC, *Katanga*, above note 43, paras 1209, 1211 ("En ce qui concerne enfin la milice ngiti, parfois appelée FRPI à partir de la fin de l'année 2002, la Chambre entend se référer à l'ensemble de ses constatations factuelles relatives à l'organisation de cette milice avant le mois de février 2003: ... Enfin, les membres de cette milice poursuivaient des objectifs communs et ils ont, *ensemble et sur une longue période, conduit des opérations militaires*. ... Au vu de ces différents éléments de preuve, la Chambre est en mesure de conclure qu'au moins au mois de janvier 2003, chacun de ces groupes, en l'occurrence l'UPC, l'APC ainsi que la milice ngiti, était armé et présentait un *degré d'organisation suffisant*, comme en attestent leur structure et leurs modalités de fonctionnement, leur participation à des opérations militaires et, le cas échéant, aux processus politiques alors mis en œuvre" (emphasis added; citation omitted)); ICC, *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges: Redacted Version (Pre-Trial Chamber I), 16 December 2011, para. 103 ("Consistent with the case law of the Chamber, for the purpose of Article 8(2)(f) of the Statute, an organised armed group must have 'the ability to plan and carry out military operations for a prolonged period of time'" (citations omitted)); ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir: Public Redacted Version (Pre-Trial Chamber I), 4 March 2009, para. 60 ("The Chamber has also highlighted that article 8(2)(f) of the Statute makes reference to 'protracted armed conflict between [...] organized armed groups', and that, in the view of the Chamber, this focuses on the need for the organised armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time. In this regard, the Chamber observes that, to date, control over the territory by the relevant organised armed groups has been a key factor in determining whether they had the ability to carry out military operations for a prolonged period of time" (citations omitted; square bracket ellipsis interjection in original)); and ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges: Version publique avec annexe 1 (Pre-Trial Chamber I), 29 January 2007, para. 234 ("La Chambre relève que l'article 8-2-f du Statut fait mention des 'conflits armés qui opposent [des groupes armés] de manière prolongée'. Selon la Chambre, ces termes mettent l'accent sur la nécessité que les groupes armés en question aient la *capacité de concevoir et mener des opérations militaires pendant une période prolongée*" (emphasis added; square bracket interjection in original)).

47 On the drafting history of the provision, see Sandesh Sivakumaran, "Identifying an Armed Conflict not of an International Character", in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court*, Brill, Leiden, 2009, pp. 371–373.

jurisprudence may apply just as strongly, if not more so, in respect of the “protracted armed conflict” provision of the Rome Statute.⁴⁸

IHL concerning the end of armed conflict: Key tests, interests and concerns

Broader debates around “protracted armed conflict” might benefit from stepping back to evaluate whether international law supplies sufficient guidance to discern the end of an armed conflict—whether that end is analyzed as a *factual* matter (when does the armed conflict *end*?), as a *legal* matter (when does a relevant portion of the international legal framework of armed conflict *cease to be applicable*?) or as a *normative* matter (when *should* the war end?).⁴⁹ There are areas of overlap as well as of disjuncture between the “protractedness” of armed conflict and the end of armed conflict, and examining those areas may be informative for thinking about questions related to wars spanning a long duration. Perhaps the most obvious connection is that for a “protracted armed conflict” to be terminated, it is necessary (as with any armed conflict) to discern which end-of-armed-conflict test is applicable in relation to it. Thus, the actual length of time of a “protracted armed conflict” necessarily turns in part on interpreting and applying international law pertaining to the end of armed conflict. Moreover, connecting the question of “protractedness” with the question of when armed conflicts end may help to reveal whether arguments in favour of a (sub)category of “protracted armed conflict”—and with it the continuing applicability of IHL—might ultimately lead to a legal situation that gives an illusion of more protection but that, in practice, leads to more death, destruction and suffering that are not unlawful under IHL, in comparison to international human rights law. Finally, a certain *lack* of connection between these two areas may be illuminating: namely that, to date, States and courts have not, so far as I know, invoked the “protracted” character of an armed conflict as a legal element, standard or threshold to discern the end of an armed conflict—or at least the end of applicability of the legal framework of armed conflict to the situation. Rather, as noted above, some international tribunals have discussed “protractedness” in relation to the *onset* of an armed conflict—but only then with respect to certain non-international armed conflicts, and in doing so, more often than not, by collapsing the “extended in time” everyday meaning of “protracted” into one of several factors to establish the element of sufficiently intense hostilities.

In 2017, together with two colleagues, I argued that by and large, international law does not provide enough such guidance concerning the end of war, or at least not in several important respects.⁵⁰ In this section, I highlight select issues pertaining to the termination of an armed conflict under existing

48 See above notes 26–31 and corresponding text.

49 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7.

50 *Ibid.*

international law.⁵¹ I focus on IHL tests and other aspects of the guidance that might be necessary to discern the end of armed conflict, alongside relevant legal interests and concerns from various perspectives.

Different tests, interests and stakes

At the outset, two broad, interconnected points might help frame this part of the analysis. First, there is no single, comprehensive test to discern the end of an armed conflict and the applicability of the relevant international legal framework writ large to that conflict. Whether this is seen as more or less beneficial or as more or less detrimental may largely turn on one's perspective. That is in part because, secondly, as elaborated below, at various points and across varying contexts, different sets of actors may disagree as to whether (to seek to continue) to recognize or to terminate a situation of armed conflict – and, correspondingly, whether (to continue) to recognize or to terminate the applicability of (a portion of) the international legal framework of armed conflict in relation to it.⁵²

As to the first point, the contemporary international legal framework pertaining to armed conflict has often been formulated, interpreted and applied in ways that typically focus on different sets of concerns at different levels affecting different sets of actors and interests at different points in an armed conflict. For instance, at what might be termed a macro level, the legal framework focuses in part on general categories – that is, on when either an international armed conflict (including a military occupation) or a non-international armed conflict, considered *as a whole*, terminates. In respect of international armed

51 See also Yoram Dinstein, *War, Aggression and Self-Defence*, 6th ed., Cambridge University Press, Cambridge, 2017, pp. 36–64; Julia Grignon, “The Geneva Conventions and the End of Occupation”, and Gabriella Venturini, “The Temporal Scope of Application of the Conventions”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 13; Alice Debarre, “When Does War End?”, *Humanity in War*, 17 December 2015, available at: <https://lawsofarmedconflict.wordpress.com/2015/12/17/when-does-war-end/>; Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Schulthess, Zürich, 2014; Marko Milanovic, “The End of Application of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014; Rogier Bartels, “From *Jus in Bello* to *Jus Post Bellum*: When Do Non-International Armed Conflicts End?”, in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds), *Jus Post Bellum*, Oxford University Press, Oxford, 2014; Robert M. Chesney, “Postwar”, *Harvard National Security Journal*, Vol. 5, No. 1, 2014; Tristan Ferraro, “Determining the Beginning and End of an Occupation under International Humanitarian Law”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012; Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Pedone, Paris, 2010; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart, Portland, OR, 2008, pp. 99–106; Christine Bell, “Peace Agreements: Their Nature and Legal Status”, *American Journal of International Law*, Vol. 100, No. 2, 2006; Derek Jinks, “The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts”, Background Paper, Program on Humanitarian Policy and Conflict Research, 2003, available at: <https://web.archive.org/web/20170217170439/http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf>.

52 See M. Milanovic, above note 51, p. 165, explaining that the analysis by an actor of when IHL ceases to apply may be affected “by whether that actor ultimately *wants* IHL to continue applying, in light of the consequences of continuation or termination” (emphasis original). This section draws extensively on D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 13–20.

conflict, for example, different general sets of conflict-terminating temporal formulations have arisen:

- in the territory of the parties to the armed conflict, the application of Geneva Convention IV (GC IV) of 1949 concerning the protection of civilian victims of war – as well as the application of relevant provisions of AP I, at least for contracting States thereto – shall cease “on the general close of military operations”;⁵³ and
- in the whole territory of the warring States, IHL more broadly, at least according to ICTY jurisprudence, shall continue to apply “until a general conclusion of peace is reached”.⁵⁴

Different formulations have also been crafted in respect of military occupations:⁵⁵

- with respect to the application of relevant provisions of GC IV, the third paragraph of Article 6 of that instrument provides that in the case of occupied territory, “the application of [GC IV] shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of [GC IV]: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143”; and
- with respect to the application of GC IV and AP I, at least for High Contracting Parties to AP I, Article 3(b) of AP I lays down that both GC IV and AP I “shall cease, ... in the case of occupied territories, on the termination of the occupation”.

In respect of non-international armed conflicts, no treaty provision establishes a general test or sets out another type of temporal formulation pertaining to when the conflict as a whole may terminate and when the applicable legal framework writ large may cease to be applicable in relation to it.⁵⁶ For its part, jurisprudence of the ICTY (and more recently, emerging jurisprudence of the ICC⁵⁷) holds that

53 GC IV, Art. 6, para. 2; AP I, Art. 3(b). That provision of AP I also contains the following savings clause: “except for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.”

54 *Tadić* Jurisdiction, above note 21, para. 70.

55 See the discussion in J. Grignon, “The Geneva Conventions and the End of Occupation”, above note 51, pp. 1584–1585.

56 AP II contemplates that some of its provisions may continue to apply even after the conflict. See AP II, Art. 2(2): “At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted *after the conflict* for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty” (emphasis added).

57 With respect to discerning the end of a non-international armed conflict under its jurisdiction, an ICC Trial Chamber considers “that the intensity and ‘protracted armed conflict’ criteria do not require the violence to be continuous and uninterrupted. Rather, as set out in the first sentence common to Article 8(2)(d) and 8(2)(f) [of the Rome Statute], the essential criterion is that it go beyond ‘isolated or sporadic acts of violence’.” *Bemba* Trial Judgment, above note 21, para. 140. This approach forms part of a broader package of jurisprudence according to which it seems that, at least in the current ICC

IHL of non-international armed conflict “applies ... and extends beyond the cessation of hostilities until ..., in the case of internal [or non-international armed] conflicts, a peaceful settlement is achieved”.⁵⁸ Thus, at least under that jurisprudence, until such “a peaceful settlement is achieved”, the legal framework applicable in relation to non-international armed conflict – both in its so-called protective and enabling dimensions – continues to be applicable.

On balance, that “peaceful settlement” test is arguably impracticable at least in respect of several variants of contemporary non-international armed conflicts, perhaps not least those involving non-State parties that are (also) treated as terrorist entities.⁵⁹ Moreover, in demanding a “peaceful settlement”, the test also seems at variance with a contemporary turn – going back at least to the adoption of Common Articles 2 and 3 of the 1949 Geneva Conventions – toward more factually oriented determinations of the existence (or not) of an armed conflict irrespective of whether a formal (in the sense of political) recognition of the conflict has or has not (also) been made.⁶⁰

At what might be termed a micro level, the international legal framework of armed conflict lays down certain tests and other formulations that concern specific obligations, rights, permissions and other legal interests pertaining to particular sets of individuals, communities, entities and the like at points leading up to, at, or after the end of an armed conflict. Such formulations have arisen, for instance, in respect of:

- certain categories of individuals deprived of liberty;⁶¹

framework, once a non-international armed conflict comes into existence (by going beyond, among other things, “isolated and sporadic acts of violence”), that armed conflict will not terminate until a “peaceful settlement” is reached. *Bemba* Trial Judgment, above note 21, paras 140–141. This appears to remain the case, at least in principle, irrespective of whether, for instance, even an extremely long (relatively speaking) period of cessation of hostilities takes place.

58 *Tadić* Jurisdiction, above note 21, para. 70; *Bemba* Trial Judgment, above note 21, para. 141.

59 For proposals on other potential tests to determine the end of a contemporary non-international armed conflict, including those involving designated “terrorist” entities, see D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 96–103.

60 See ICRC Commentary on GC I, above note 13, paras 491–492.

61 For instance, in respect of international armed conflict, concerning prisoners of war (who shall, under the first sentence of Article 118 of GC III, be “released and repatriated without delay after the cessation of active hostilities”), certain wounded and sick prisoners of war (who “shall be repatriated direct” under the chapeau of Article 110 of GC III), “protected persons” as defined in Article 4 of GC IV (restrictive measures concerning them shall, under the first sentence of Article 46 of GC IV, be “cancelled as soon as possible after the close of hostilities”), interned persons (internment of them shall, under Article 133 of GC IV, “cease as soon as possible after the close of hostilities”) and certain other persons (under Article 75(6) of AP I, relevant persons shall be protected “until final release, repatriation or reestablishment, even after the end of the armed conflict”). See Nathalie Weizmann, “The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF”, *Columbia Human Rights Law Review*, Vol. 47, No. 3, 2016; Bettina Scholdan, “‘The End of Active Hostilities’: The Obligation to Release Conflict Internees under International Law”, *Houston Journal of International Law*, Vol. 38, No. 1, 2016; Marco Sassòli, “Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War”, and Bruce Oswald, “End of Internment”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 13; Deborah N. Pearlstein, “Law at the End of War”, in *Minnesota Law Review*, Vol. 99, No. 1, 2014; Deborah N. Pearlstein, “How Wartime Detention Ends”, *Cardozo Law Review*, Vol. 36, No. 2, 2014. For an argument that more or less the same norms will be applicable in respect of persons deprived of liberty irrespective of the existence or not of an armed conflict, see R. M. Chesney, above note 51.

- certain measures in relation to minefields, mined areas, mines, booby traps and certain other devices⁶² as well as to explosive remnants of war;⁶³ and
- at least in respect of military occupations, the restoration and the fixing of compensation both for seized or destroyed submarine cables⁶⁴ and for seized private *munitions de guerre*.⁶⁵

As to the second framing point for this section (that is, that different actors may not agree on whether to argue for or against the continued existence of an armed conflict), consider just a few of the many examples. Humanitarian actors in general may have stronger bases in IHL than other fields of international law (such as IHRL) to make claims for obtaining and maintaining access to populations in need.⁶⁶ Those actors might therefore be more prone to err on the side of not prematurely terminating an armed conflict, even though not only the protective aspects but also the “enabling” aspects of IHL would continue to be applicable.⁶⁷ Furthermore, to adjudicate war crimes (which, at least by most definitions, may be committed only with a sufficient connection to an armed conflict), courts need to determine the existence of a relevant armed conflict to establish jurisdiction. Those courts might therefore have an institutional interest in holding that a particular situation constituted an uninterrupted period of armed conflict.⁶⁸ Such an approach might help to avoid a purported “revolving door between [IHL] applicability and non-applicability”—a “revolving door” that, according to an ICTY chamber discussing international armed conflict, might lead “to a considerable degree of legal uncertainty and confusion”.⁶⁹ Certainty may come at a cost, however, of presuming the applicability of relatively more permissive IHL rules instead of more restrictive provisions established in other international legal frameworks

62 Protocol on Prohibitions or Restrictions on the Use of Mines, Boobytraps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 3 May 1996, 2048 UNTS 133 (entered into force 3 December 1998), Arts 9(2), 10(1) (affixing temporal formulations concerning “the cessation of active hostilities” to obligations in respect of mines, booby traps and certain other devices).

63 Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V), 28 November 2003, 2399 UNTS 126 (entered into force 12 November 2006), Arts 3(1–3), 4(2) (affixing a number of obligations concerning clearance, removal or destruction of explosive remnants of war, or certain information concerning such activities, to the period “after the cessation of active hostilities”).

64 1907 Hague Regulations, Art. 54: “Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed *when peace is made* [à la paix]” (emphasis added).

65 *Ibid.*, Art. 53, para. 2: “All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed *when peace is made* [à la paix]” (emphasis added).

66 D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 19–20.

67 See ICRC Commentary on GC I, above note 13, paras 398–390.

68 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 17–18.

69 ICTY, *Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač*, Case No. IT-06-90-T, Judgment (Trial Chamber I), 15 April 2011, para. 1694.

and (corresponding) domestic regimes.⁷⁰ Meanwhile, claims for asylum may, in respect of certain contexts, pivot at least in part on the existence or not of a relevant armed conflict.⁷¹ In addition, neutral States or States otherwise not party to an armed conflict may have several interests in the continued existence, or not, of an armed conflict that gives rise to the application of the law of neutrality.⁷²

Furthermore, the approaches that individual civilians and civilian populations might adopt may be difficult to anticipate. On the one hand, it seems clear that civilians would prefer for a war to end as quickly as possible so that the regime of IHL—more tolerant as it is in general (compared to IHRL and domestic law enforcement regimes regulating “peacetime” measures) of “incidental” civilian death and injury and destruction or other harm to civilian objects⁷³—ceases to be applicable. On the other hand, and perhaps somewhat paradoxically, the civilian population or individual members of it may, depending on the circumstances, prefer to argue in favour of extending the application of relevant IHL provisions. For instance, IHL—unlike IHRL⁷⁴—is generally recognized as binding on all parties to armed conflict, including States and, where relevant, non-State parties. Moreover, the scope of some IHL norms might be more protective than analogous provisions established in IHRL or domestic law. One example of seemingly more protective IHL norms concerns IHL treaty provisions that prohibit punishment of those who provide ethically sound medical care, irrespective of who benefits therefrom.⁷⁵

70 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 17–18.

71 See *ibid.*, p. 16, noting that “EU Directive 2011/95/EU provides one example. That Directive sets out guidance on international protection for refugees or persons eligible for ‘subsidiary protection.’ Article 2(f) of the Directive establishes that a person eligible for such ‘subsidiary protection’ may include certain third-country nationals or stateless persons who do not qualify for refugee status but who are facing, in certain scenarios, a real risk of ‘suffering serious harm.’ In turn, Article 15(c) of the Directive establishes that such ‘serious harm’ may consist of ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’” (citations omitted).

72 See, for example, *ibid.*, pp. 15–16.

73 See, for example, Jelena Pejic, “Conflict Classification and the Law Applicable to Detention and the Use of Force”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 104–105: “The principle of proportionality in attack prohibits attacks against legitimate military objectives that may be expected to cause incidental death, injury to persons or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. *The crucial difference between the relevant [IHL] and human rights rules is that under the former, the principle of proportionality aims to limit incidental (‘collateral’) damage to protected persons and objects, while nevertheless recognizing that an operation may be carried out even if such damage is likely, provided that it is not excessive in relation to the concrete and direct military advantage anticipated.* In contrast, the aim of the principle of proportionality under human rights law is to prevent harm from happening to anyone else except to the person against whom force is being used. Even such a person must be spared lethal force if there is another, non-lethal way of achieving the aim of a law-enforcement operation” (emphasis added; citation omitted).

74 But see, for example, Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017.

75 See AP I, Art. 16(1); AP II, Art. 10(1). See also GC I, Art. 18, para. 3.

In addition, armed forces may also have interests in the termination or the continuation of the applicability of the legal framework of armed conflict.⁷⁶ Perhaps most importantly in this context, in general, conduct-of-hostilities rules under IHL are often conceptualized as permitting—or at least tolerating—more extensive (though not unlimited) lawful death, injury, destruction, damage and other harm compared to the rules governing the use of lethal force against persons under IHRL or domestic law enforcement frameworks.⁷⁷ In addition, certain other measures that armed forces might take in attempting to secure victory might be considered lawful in respect of war but not in respect of other situations. Such measures might include capturing and detaining enemy forces, seizing or destroying property, or controlling territory and populations. Further, discerning a fighter’s status under IHL might also be important with respect to conferring (or not) prisoner-of-war status on that fighter upon capture, as well as in respect of the operation (or not) of the so-called “belligerent’s privilege”.⁷⁸

For their part, political leaders may have their own (perhaps also often mixed) sets of incentives concerning the continued existence or termination of an armed conflict. Adopting a war footing—and thus an IHL framework—may allow them to fight with access to more permissive powers and greater resources.⁷⁹ That might be because, for example, the recognition of an armed conflict may make the invocation of emergency powers more palatable to their constituencies. Yet political leaders might seek to evade recognition that an armed conflict exists because, for example, doing so might be interpreted as conferring legitimacy on the adversary.

Finally, while not the focus here, legal concerns regarding the end of armed conflict might also arise in respect of domestic law. For example, the existence of an armed conflict may (also) implicate diverse domestic laws concerning such issues as compensation, insurance, frustrations of contracts, and trade restrictions.⁸⁰

Over all, it seems that contemporary international law does not provide a single comprehensive normative theory concerning the end of armed conflicts, including those of a relatively long duration.⁸¹ Nor, in turn, does international law arguably provide a sufficient basis from which to understand what connections, if any, can—and should—be drawn between the legal thresholds for the initiation of an armed conflict, the political and strategic articulation of the aims of a war, and the criteria by which we should determine that an armed

76 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, p. 14.

77 See, for example, *ibid.*, p. 1.

78 According to that privilege, under IHL qualifying fighters “cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime”. Knut Dörmann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003, p. 45.

79 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 13–14.

80 See, for example, Jennifer K. Elsea and Matthew C. Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service, 14 April 2014, available at: <https://fas.org/sgp/crs/natsec/RL31133.pdf>, pp. 26–75; Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed., Cambridge University Press, Cambridge, 1966, pp. 117–202.

81 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, p. 105.

conflict has ended.⁸² Fleshing out these criteria might help strengthen international law's claim to guide behaviour in relation to war.

Conclusion

Having analyzed the emerging ICC jurisprudence concerning the notion of “protracted armed conflict” and having raised several issues regarding the end of armed conflicts under IHL, it might be useful to conclude by briefly exploring whether or not “protracted armed conflict” *ought* to be developed into a (sub)category of armed conflict under IHL and ICL of war crimes. In short, should it move from a single war-crimes-related provision of the Rome Statute to a standalone category of armed conflict? In evaluating that question, three sets of preliminary considerations, some with at least seemingly conflicting pulls, might be borne in mind (among no doubt many others): (1) how long a conflict should be in order to count as “protracted”; (2) marking long-term conflicts as differently important; and (3) calibrating legal norms as more or less restrictive or permissive.

Perhaps the initial consideration might be that it is not clear that a principled line is (or lines are) capable of being drawn—with sufficient specificity—concerning what constitutes the particular period(s) that should merit a “protracted armed conflict” designation.

Furthermore, a legal (sub)category propelled by the (relatively) long-duration character of an armed conflict might highlight that time matters differently—and, perhaps, more significantly—than certain other dimensions of an armed conflict, such as geography. Such a (sub)category might (also) mark relatively long conflicts and the suffering associated with them as differently important. The (sub)category might therefore more accurately capture part of the reality—including the long-term suffering—of many existing contemporary armed conflicts, extending as they do into many years, even decades. Yet it ought to be kept in mind that such a (sub)category might thereby function in ways that could make non-protracted wars seem less—not just differently—important. In any event, for those in favour of conceiving of IHL as a single normative system of protection, perhaps especially one that can easily be made known to those who are making difficult life-and-death decisions amid the turmoil of hostilities, the

82 *Ibid.* See also Jens Iverson, “War Aims Matter: Keeping *Jus Contra Bellum* Restrictive While Requiring the Articulation of the Goals of the Use of Force”, *Minnesota Journal of International Law*, Vol. 27, No. 1, 2018; Gabriella Blum, “Prizeless Wars, Invisible Victories: The Modern Goals of Armed Conflict”, *Arizona State Law Journal*, Vol. 49, Special Issue, 2017; Tess Bridgeman, “When Does the Legal Basis for U.S. Forces in Syria Expire? The End Point of the ‘Unwilling or Unable’ Theory of Self-Defense”, *Just Security*, 14 March 2018, available at: www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire/; Startsun Viktor Nikolaevich and Balkanov Il'ya Vladimirovich, “Indefinite War: Unregulated Field of International Law Pertaining to an Armed Conflict Termination Criteria”, *Journal of Military Law*, No. 3, 2017; Gabriella Blum and David Luban, “Unsatisfying Wars: Degrees of Risk and the *Jus ex Bello*”, *Ethics*, Vol. 125, No. 3, 2015; Gabriella Blum, “The Fog of Victory”, *European Journal of International Law*, Vol. 24, No. 1, 2013.

establishment of another (sub)category of armed conflict might weaken that system’s claims to universality, coherence and discernibility.

Finally, at least in relation to some long-running contemporary armed conflicts, the current legal framework is considered by some to be difficult to discern, interpret or apply. Perhaps from their perspective, a (sub)category of “protracted armed conflict” might have a stabilizing effect concerning those situations, at least in terms of more clearly delineating applicable legal norms – and their accompanying principles, rules and standards – in respect of relevant periods and situations.

Yet concerns may arise here as well. In designing a (sub)category of “protracted armed conflict”, it seems likely that a key fulcrum will concern how to calibrate the tension between the more or less “protective” and the more or less “enabling” aspects of relevant legal norms. Not taking sufficient cognisance of the concerns entailed in adjusting that balance poses several risks, including the potential to effectively extend the “enabling arrangements”⁸³ of IHL without also making sufficient coinciding (or even countervailing) adjustments from a “protection” standpoint. For example, an effort to encompass and address “the humanitarian–development–peace nexus” within a legal (sub)category of “protracted armed conflict” might operate in a way that unintentionally and/or unknowingly extends the applicability of IHL, including its “enabling arrangements”, in lieu of other frameworks – such as IHRL – that might, on the whole, be considered to be more protective of, or otherwise beneficial to, affected populations. Against that backdrop, pursuing a (sub)category of “protracted armed conflict” might present a legal situation that gives an illusion of more protection but which, in practice, leads to more death, destruction and suffering that are not unlawful under IHL.

Thus, in evaluating whether to pursue a (sub)category of “protracted armed conflict”, due consideration should be given to assessing which legal norms should be adjusted – together with the time point(s), if any, at which they should be adjusted – and which legal norms should remain constant irrespective of the length of the conflict. Such a determination, if conducted from as wide, principled and realistic a perspective as possible, would seem to entail a large undertaking, including an overarching assessment of which normative commitments that are entailed in the existing legal framework should matter, and which should not, in respect of the duration of armed conflict (assuming that any such distinction may be drawn in the first place). Moreover, it is not necessarily obvious that utilizing an approach based on the normative “balance” which is often characterized as being at the root of contemporary IHL⁸⁴ – sometimes framed, for instance, as resulting in a “parallelogram of forces” that moulds every norm by working out a compromise between the demands of military necessity

83 D. Kritsiotis, above note 5, p. 8.

84 See Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law*, Vol. 50, No. 4, 2010.

and humanitarian considerations⁸⁵ – will necessarily yield results that are more protective of the civilian population; far from it. For example, scholar Vaos Koutroulis demonstrates in respect of occupation that adopting the justificatory framework and normative rationales underlying the contemporary international law of military occupations *might* give rise to a result that is more protective of civilians. But doing so might alternatively result in an approach that instead weighs more heavily (perhaps, at times, much more heavily) in favour of the security interests of the Occupying Power.⁸⁶

Prudently calibrating the normative content pertaining to a (sub)category of “protracted armed conflict” would thus also necessitate assessments of the relationships of other fields of law – not least IHRL – to that (sub)category. This is because, at least in line with the jurisprudence of the International Court of Justice, at a minimum two branches of law – IHL and IHRL – must be taken into consideration in respect of situations of armed conflict.⁸⁷ In turn, determining where the normative line(s) will and should be drawn in respect of a (sub)category of “protracted armed conflict” seems likely to pivot in no small part on which set(s) of background assumptions will be adopted concerning such matters as:

- the scale, scope, feasibility and desirability of IHRL norms compared to their IHL counterparts;
- the extent to which those IHRL and IHL norms are considered binding not only in relation to a relevant State but also in relation to a non-State party to an armed conflict; and
- the geographic scope of applicability of those IHRL and IHL norms.

In addition, the legal framework pertaining to a (sub)category of “protracted armed conflict” might also implicate ICL of war crimes. For example, an assessment might be undertaken as to whether at least certain violations of IHL – including those violations characterized as war crimes – may be committed in respect of an armed conflict of any duration, or whether those violations may be committed only in respect of an armed conflict lasting at least a certain minimal duration.⁸⁸

In sum, it is submitted that under existing international law there is no standalone category of “protracted armed conflict”, that whether to pursue such a

85 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed., Cambridge University Press, Cambridge, 2016, p. 10, para. 26, arguing that “[e]very single norm of [the law of international armed conflict] is moulded by a parallelogram of forces, working out a compromise formula between the demands of military necessity and humanitarian considerations”.

86 See V. Koutroulis, above note 2, pp. 192–193.

87 See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, para. 216. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, paras 104–106; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25.

88 For its part, one of the elements of the crime against humanity of enforced disappearance of persons – as laid down in Article 7(1)(i) of the Rome Statute – is that “[t]he perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time”. ICC, *Elements of Crimes*, Art. 7(1)(i), para. 6 (emphasis added). As to the status of the *Elements of Crimes* in the Rome Statute, see Articles 9(1) and 21(1)(a) of the Statute.

category poses numerous challenging questions, and that several dimensions of the law concerning the end of armed conflict are currently unsettled. Whether this situation is ultimately deemed satisfactory or not may depend in no small part on one’s perspective as to what are, and ought to be, the objectives, norms and parameters of the legal framework applicable to armed conflict. In the meantime, numerous long-running wars continue to devastate populations.

International humanitarian law in Colombia: Going a step beyond

Marcela Giraldo Muñoz and Jose Serralvo*

Marcela Giraldo Muñoz is a Justice at Colombia's Special Jurisdiction for Peace.

Jose Serralvo is Operational Legal Coordinator at the Delegation of the International Committee of the Red Cross in Colombia.

Abstract

Ever since the first quarter of the nineteenth century, Colombia has shifted from one war to the next, be it the War of Independence, the fierce confrontations between liberal and conservative parties or the countless conflicts among guerrillas, paramilitary groups and the State. These wars have brought along a unique contribution to the development of international humanitarian law (IHL). The purpose of this article is to explore the myriad of ways in which Colombia has implemented (and at times made progress on) IHL rules, and to analyze how different conflicts have led the country to explore issues such as the protection of minors, the meaning of the principle of precaution, the compensation of armed conflict victims and the creation of some rather sophisticated transitional justice mechanisms.

Keywords: Colombia, international humanitarian law, protracted armed conflict, conflict classification, use of force, nexus to the conflict, principle of precaution, child recruitment, protection of minors, State

* The views expressed here are those of the authors and do not necessarily reflect the position of Colombia's Special Jurisdiction for Peace or that of the ICRC. The authors would like to warmly thank Monica Angarita, Legal Adviser at the ICRC's Delegation in Colombia, and María Catalina Usta, Assistant at the Special Jurisdiction for Peace, for their thorough research assistance.

responsibility, compensation of war victims, internally displaced people, transitional justice system, amnesties, prosecution of war crimes, search for the missing.

: : : : : :

Never had a war-torn nation demonstrated such altruism. Destiny bestowed upon Colombia the glory of giving the world lessons not only with regard to courage and determination, but also humanity, and the above took place in the mist of all the hatred and rage that the right of reprisals against one's enemies had spurred in everyone's hearts.

Pedro Briceño Méndez, 28 November 1820¹

Introduction: A unique tradition of the laws of war

It is a much-repeated mantra among international humanitarian law (IHL) scholars that “the roots of the modern law of war lie in the 1860s”.² The 1861 Lieber Code – a military manual prepared on behalf of President Lincoln during the American Civil War – and the 1863 Geneva Convention are often cited as the origin of present-day IHL.³ Despite the unprecedented nature of both instruments, our traditionally eurocentric narrative tends to disregard other seminal experiences that also contributed to shaping this branch of public international law. This is particularly true in the case of Colombia, one of the countries that has arguably contributed the most to the development and practical implementation of IHL.

The first example of this long-lasting tradition dates back to 1820, four decades before the notorious battle of Solferino or the American Civil War. At that time, Colombia was entangled in its War of Independence against the Kingdom of Spain, a conflict marked by bloody confrontations that took place between 1810 and 1824. By 1820, reprisals had become commonplace. The country was ravaged by death, wanton retributions and the systematic ill-treatment of all those deprived of liberty. It was in this context that Simón Bolívar, the first president of Colombia, and Pablo Morillo, the representative of the Spanish Empire, agreed upon the signing of an agreement, the Treaty of Trujillo, to regulate the war between the two parties and to put an end to its excesses.⁴ In its preamble, the Treaty referred to “the laws of civilised nations”, as well as to

1 Letter from Pedro Briceño Méndez, Trujillo, 28 November 1820, cited in Daniel Florencio O’Leary, *Memorias del General O’Leary*, Book XVII, Imprenta de la Gaceta Oficial, Caracas, 1881, p. 580.

2 Burris M. Carnahan, “Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity”, *American Journal of International Law*, Vol. 92, No. 2, 1998, p. 213.

3 See, for example, Mary Ellen O’Connell, “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, paras 117–118. See also Gary Solis, *The Law of Armed Conflict*, Cambridge University Press, Cambridge and New York, 2010, p. 39.

4 Jules Basdevant, “Deux conventions peu connues sur le droit de la guerre”, *Revue Générale de Droit International Public*, Vol. 21, No. 1, Paris, 1914, p. 17. For a refined historical account of this treaty, including the way in which it preceded the Lieber Code and the Battle of Solferino, see Alejandro

“liberal and philanthropic principles”.⁵ In just fourteen brief articles, the Treaty encapsulated the bulk of modern IHL. It provided for the humane treatment of prisoners of war (PoWs), in accordance to their rank, and included an obligation to exchange them with PoWs of the adverse party “as soon as possible”.⁶ Unlike the 1949 Geneva Convention III, the agreement considered that spies (“those in charge of exploring, observing, or gathering news on one of the armies to share it with the commander of the other”) should also be entitled to PoW status.⁷ In order to ensure that these rules were respected, the parties agreed upon the need to appoint special “commissioners”, who should be granted access to PoW camps with a view to examining the situation of detainees and trying to “improve their condition and make it less dire”.⁸

Far from the sight of IHL scholars, the decisions made by men gathered in the remote Colombian village of Trujillo foreshadowed some of the features of the current system of Protecting Powers and of the monitoring role of the International Committee of the Red Cross (ICRC).⁹ Similarly, long before the 1863 Geneva Convention, the belligerents of the Colombian War of Independence acknowledged the duty to treat the wounded and sick “with respect and twice as much consideration” and the need to provide them with “at least the same level of assistance, care and relief than that granted to the wounded and sick of the Party under whose control they are placed”.¹⁰ In addition, the Treaty of Trujillo prefigured many other modern IHL norms, including the existence of limits to impose the death penalty upon a PoW,¹¹ the responsibility to dispose of the dead in an honourable manner¹² and the obligation to guarantee the liberty and safety of, and respect for, the civilian population.¹³ It even foreshadowed the present obligation to respect and ensure respect for IHL.¹⁴

What is remarkable about this almost forgotten (and exhaustive) epitome of the laws of war is the fact that it did not constitute an isolated example. Throughout the nineteenth century, Colombia came back time and again to the spirit of the 1820 Treaty of Trujillo. For instance, during the 1860–61 Civil War between conservative and liberal factions, the parties signed three truce agreements providing, among other things, for the exchange of the wounded and sick and PoWs.¹⁵ As a result of this

Valencia, *La humanización de la guerra: Derecho internacional humanitario y conflicto armado en colombia*, Ediciones Uniandes and Tercer Mundo Editores, Bogotá, 1992, pp. 25–37.

5 The whole text of the Treaty of Trujillo, signed in 1820, can be found in D. F. O’Leary, above note 1, pp. 575–577.

6 Treaty of Trujillo, Arts 2, 3, 8.

7 *Ibid.*, Art. 6.

8 *Ibid.*, Art. 9.

9 See common Article 8/8/8/9 and common Article 9/9/9/10 of the 1949 Geneva Conventions.

10 Treaty of Trujillo, Art. 4.

11 *Ibid.*, Art. 7.

12 *Ibid.*, Art. 12.

13 *Ibid.*, Art. 11.

14 *Ibid.*, Art. 13. For more details on the scope of this obligation, see Knut Dörmann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014.

15 Hernando Valencia Villa, “The Law of Armed Conflict and its Application in Colombia”, *International Review of the Red Cross*, Vol. 30, No. 274, 1990, p. 6.

conflict, Colombia approved the 1863 Rionegro Constitution, whose Article 91 established that “the law of nations [was] part of national legislation” and that “its provisions shall govern, in particular, cases of civil war”.¹⁶ As shown by the negotiating history, the drafters of the Rionegro Constitution had in mind very broad views regarding the way in which the so-called law of nations limited the means and methods of warfare. The initial draft version of Article 91 – which was deemed excessively detailed and thus rejected – prohibited the use of poison, the murder of prisoners, the burning of buildings or fields, sexual violence against women and the pillage of private property.¹⁷ It also provided for the protection of civilians – including children, women, the elderly and foreigners – and limited the right of reprisals.¹⁸ By way of reminder, it should be noted that the Rionegro Constitution was approved at the same time as the 1863 Geneva Convention (which did not really restrain the conduct of hostilities) and preceded by more than a decade the 1874 Brussels Declaration concerning the Laws and Customs of War, which is often cited as one of the first modern attempts to regulate what was later known as Hague law.

Another example of this unwavering humanizing trend is the exchange of letters between the two commanders that fought against each other at the Battle of Garrapatas, one of the turning points of the 1876 Colombian Civil War, which once again saw confrontation between liberal and conservative factions. On 18 November, the day before the fighting took place, General Vélez – one of the leaders of the conservative rebels – sent a letter to his counterpart, with these opening lines:

I wish to know whether the ambulances, the wounded and those who have surrendered are sacred for you and the army under your command, so that the day of the battle I can adapt my conduct to the one observed by you and your men.¹⁹

The reply of the liberal General Santos Acosta left no room for doubt:

Our [1863 Rionegro] Constitution and the law of nations are binding upon both you, as chief of a rebellion, and myself, as constitutional representative.

Since the respect of medical units in all its forms is one of the rules of this body of law, there is nothing to be discussed. With regard to the compassion due to the prisoners and those who surrender, I hope that you will harbour the same feelings that inspire me and my army.²⁰

By the end of the twentieth century, Colombia’s ripened tradition of incorporating international law, and in particular IHL, as part of its domestic legal system had no trouble finding its way into the 1991 Constitution – which is currently in force.

16 *Ibid.*, p. 8.

17 Constitución Política para los Estados Unidos de Colombia de 1863, Facsimile Edition of the Universidad Externado de Colombia, 1977, pp. 275–276.

18 *Ibid.*, p. 276.

19 Iván Orozco Abad, *Combatientes, rebeldes y terroristas: Guerra y derecho en Colombia*, Editorial Temis, Bogotá, 2006, p. 126.

20 *Ibid.*

Nowadays, Colombia is an almost perfectly monist system.²¹ Article 93 of the 1991 Colombian Constitution recognizes that international treaties and agreements ratified by Congress have priority over domestic law. Article 214, regulating states of emergency, explicitly mentions that “the rules of international humanitarian law will be observed”. Finally, Colombia’s Constitutional Court has issued countless sentences arguing that IHL is binding “in and of itself, even without prior ratification or in the absence of specific regulations”.²² This theory has allowed Colombian judges to maintain that international obligations and fundamental rights are part of the so-called “Constitutional Block”, thus upholding a wealth of IHL elements in the domestic order, for instance regarding the notion of command responsibility.²³

All of the above has laid the groundwork for the emergence of one of the most sophisticated legal systems in the world when it comes to the promotion of the laws of war. The purpose of this article is to provide an overview of the myriad of ways in which Colombia’s contemporary practice has implemented and developed IHL rules, often going beyond what is actually provided for in international treaties and custom. First, the article will address Colombia’s efforts to determine IHL applicability, with particular reference to jurisprudence elucidating the notion of nexus to the conflict and outlining the status of rebels. Second, the article will focus on some of the solutions found by the country’s legislative branch and judiciary for ensuring respect for obligations related to the vicissitudes of the battlefield, especially when it comes to the protection of minors and the implementation of certain rules on the conduct of hostilities. Later on, the article will focus on mechanisms giving expression to the State’s responsibility vis-à-vis victims of serious IHL violations, with reference to the plight of Colombia’s internally displaced people. Finally, the article will explore the country’s experience with transitional justice, linking it to IHL rules such as the obligation to prosecute war crimes, the granting of amnesties at the end of hostilities, and the obligation to search for the missing.

IHL applicability and the nexus to the conflict

The logical precondition to implementing, respecting and developing IHL is to recognize its applicability. Like many other countries undergoing situations of protracted violence, Colombia has occasionally flirted with the idea of denying the existence of an armed conflict – and thus disputing the relevance of the laws

21 Two main theories have tried to elucidate the interplay between domestic and international law. On the one hand, dualism considers that “the rules of the system of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other”. So-called monists, on the other hand, accept a “unitary view of law as a whole” and oppose a strict division between a State’s internal legal system and the international legal order. See Malcolm N. Shaw, *International Law*, 7th ed., Cambridge University Press, Cambridge, 2014, pp. 93–94.

22 Constitutional Court of Colombia, *Sentence C-574*, 1992.

23 Rodrigo Uprimny Yepes, “El bloque de constitucionalidad en Colombia: Un análisis jurisprudencial y un ensayo de sistematización doctrinal”, *Dejusticia*, 12 December 2005.

of war.²⁴ However, the general rule has been the exact opposite. All of the branches of government have continuously acknowledged the validity of IHL, be it through laws, military manuals, ministerial decrees or judicial decisions.

At the time of writing, the ICRC has classified five non-international armed conflicts (NIACs) in the country. All except one are taking place between the Government of Colombia and the following organized armed groups: the National Liberation Army (Ejército de Liberación Nacional, ELN), the Popular Liberation Army (Ejército Popular de Liberación, EPL), the Gaitanistas Self-Defence Forces of Colombia, and certain armed structures of the former Revolutionary Armed Forces of Colombia–People’s Army (Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo, FARC-EP) that did not join the 2016 peace process.²⁵ The fifth NIAC involves two armed groups, the ELN and the EPL, who are fighting each other in the Catatumbo region bordering Venezuela. Before characterizing these confrontations as armed conflicts, the ICRC assessed the two “traditional” requirements established by the jurisprudence of international tribunals—namely, the intensity of the violence and the level of organization of the parties.²⁶ These very same criteria are observed by Colombia’s executive branch. Ministerial Directive 015, issued in 2016 by the Ministry of Defence, starts by recalling the indicative elements of a NIAC as laid down in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and moves on to clarify that IHL will not apply to situations below this threshold, such as riots or internal disturbances.²⁷ Furthermore, in a continent where some States have questioned the existence of an armed conflict based on the absence of political motivation of the groups against whom they are fighting, Colombia’s executive branch has adhered without reservations to the most widely accepted view on this matter, whereby “the question of whether a situation of violence amounts to a non-international armed conflict should ... be answered solely by reliance on the criteria of intensity and organization”.²⁸ Indeed, Directive 015 considers that “[t]he purpose or motivation of the [armed] group will not be relevant to establish the resort to lethal use of force under an IHL framework”.²⁹

24 See, for example, Fernando Travesí and Henry Rivera, “Delito político, amnistías e indultos”, *ICTY Análisis*, March 2016, p. 1. See also Rodrigo Uprimny Yepes, “¿Existe o no conflicto armado en Colombia?”, *Dejusticia*, July 2005.

25 ICRC, *Humanitarian Challenges in 2018*, Geneva, March 2018, pp. 1, 7.

26 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 421. The ICRC Commentary, in turn, incorporates an array of jurisprudence from international tribunals; see, for example, ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-I-T, Judgment (Trial Chamber), 7 May 1997, para. 562.

27 Republic of Colombia, Ministry of Defence, *Directiva 015 para expedir los lineamientos del Ministerio de Defensa Nacional para caracterizar y enfrentar a los grupos armados organizados*, 22 April 2016, pp. 5–7.

28 ICRC Commentary on GC I, above note 26, para. 451. For a different view on this matter, see Hans-Peter Gasser, “International Humanitarian Law: An Introduction”, in Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, Henry Dunant Institute, Geneva, 1993, p. 555.

29 Republic of Colombia, Ministry of Defence, above note 27, p. 7.

If an armed group does not meet the criteria laid down in Directive 015 to trigger IHL applicability, the government will treat it in accordance with the United Nations Convention against Transnational Organized Crime.³⁰ A second ministerial directive further elaborates on the procedure for carrying out this determination.³¹ Directive 016 tasks the so-called Integrated Intelligence Center against Organized Criminal Groups and Organized Armed Groups – made up of both the Military Forces and the National Police – to “receive, combine and assess the information on [armed groups]” and make a proposal with regard to the pertinence of using an IHL framework.³² This proposal is then validated by the Joint Intelligence Board, which in turn submits it to the National Security Council. The latter has the final word on the application of the laws of war.³³

Despite the existence of detailed criteria and a well-grounded methodology, the fact that Colombia is affected by a myriad of situations of violence – some of which do not reach the minimum levels of intensity and/or organization mentioned above – has often sown confusion on the applicable legal framework. In a context where parties to a NIAC coexist with many other armed actors, such as urban gangs, it can be troublesome to ascertain whether a particular act is actually related to the conflict and therefore falls under the scope of IHL. Against this backdrop, the importance of determining the nexus to the conflict has gained importance over the last few years.

The notion of nexus to the conflict

Although IHL applies to the whole territory of a country undergoing one or several NIACs, it will only regulate acts that are actually related to the conflict.³⁴ In particular, and as pointed out by the ICTY, a specific act will only be governed by IHL if it is “closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict”.³⁵ This is what is often known as the nexus to the conflict. Most of the reflections that have tried to shed light on this notion evolved around the application of IHL to the conduct of hostilities.³⁶ Colombia’s Constitutional Court has explored this very same question from a completely different perspective – namely, the need to compensate victims of war.

Customary IHL provides that “a State responsible for violations of international humanitarian law is required to make full reparation for the loss or

30 *Ibid.*

31 Republic of Colombia, Ministry of Defence, *Directiva 016 sobre instancias de coordinación Directiva 015 de 2016*, 17 May 2016.

32 *Ibid.*, pp. 2–4.

33 *Ibid.*, pp. 4–5.

34 ICRC Commentary on GC I, above note 26, para. 460.

35 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-I-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70. This interpretation has also been followed by the International Criminal Court (ICC). See ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Trial Judgment, 2014, para. 1176; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Judgment, 2016, paras 142–144.

36 See ICRC Commentary on GC I, above note 26, paras 460–463.

injury caused”.³⁷ To give effect to this provision, Colombia enacted the 2011 Law to Assist and Compensate Victims of the Internal Armed Conflict, also known as the Victims’ Law. In accordance with this piece of legislation – to which we will return further below – the State shall treat as victims “persons who, either individually or collectively, have suffered harm ... as a consequence of violations of international humanitarian law ... which occurred in the framework of the internal armed conflict”.³⁸ The existence of a link to the conflict became a prerequisite for receiving the indemnities of the State. This, in turn, led to an array of legal debates. In a country with thousands of missing people and millions of forcibly displaced, the arduous task of determining whether certain conducts occurred (or not) “in the framework of the internal armed conflict” was eventually left to the judiciary. Colombia’s Constitutional Court was thus obliged to tackle the notion of nexus to the conflict. This question, in turn, has an impact on the scope of application of IHL – and, therefore, on the legal classification of the conflict.

Earlier jurisprudence anteceding the Victims’ Law had considered – in line with the ICTY – that “the conflict must not necessarily constitute the cause of the crime, but the existence of a conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it”.³⁹ To clarify the scope of application of IHL, Colombia’s Constitutional Court also resorted to a set of criteria established a few years earlier by international tribunals – for instance, the fact that the perpetrator was a “combatant”, the fact that the victim was a “non-combatant”, the fact that the victim was a member of the opposing party or the fact that the crime was committed as part of or in the context of the perpetrator’s official duties.⁴⁰ Over time, however, the Court had to acknowledge that there were also grey areas in which it was burdensome to elucidate whether the act causing the harm was linked to the armed conflict or simply stemmed from ordinary violence.⁴¹ To overcome these hurdles, the Court considered that, in case of doubt, the presumption must always be in favour of the victims – meaning, in this case, that a nexus to the conflict had to be acknowledged.⁴² It also argued that the notion of nexus to the conflict should be construed in the broadest possible way, especially in situations in which applying IHL led to a more protective outcome.⁴³ In one of its most recent cases on this subject, Colombia’s judiciary restated its previous decisions and listed the following considerations:

37 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 537–550.

38 Law 1448 of 2011, “Por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno” (Victims’ Law), Art. 3.

39 Constitutional Court of Colombia, *Sentence C-291*, 25 April 2007. See also ICTY, *Prosecutor v. Dragoljub Kunarac Kovac and Zoran Vukovic*, Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002, paras 58–59.

40 Constitutional Court of Colombia, *Sentence C-291*, 25 April 2007; ICTY, *Kunarac*, above note 39.

41 Constitutional Court of Colombia, *Sentence C-253A*, 29 March 2012.

42 *Ibid.*

43 Constitutional Court of Colombia, *Sentence C-781*, 10 October 2012.

1. First and foremost, the notion of armed conflict must be understood in the broadest possible manner—i.e., as opposed to a restrictive view of such situations, since the latter would violate the rights of the victims.
2. The authorities should take into consideration objective criteria to determine the nexus to the conflict, and use such criteria to decide whether an act should be excluded therefrom and attributed to common violence.
3. In the event of grey areas, it is paramount to weigh both the concrete case and the context before assessing whether there exists a “close and sufficient relationship” to the internal confrontation.
4. Finally, the authorities should apply the definition of “nexus to the conflict” that better protects the rights of the victims.⁴⁴

All the above are but a few examples of the manner in which Colombia has dealt with the applicability of IHL and clarified the notion of nexus to the conflict, thus contributing to ongoing legal debates on the laws of war. However, as will be seen further below, the issue of the nexus to the conflict is now being revisited by Colombia’s Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP). But before moving forward, it is worthwhile to say a word on the unprecedented history of the country’s criminalization of the act of rebellion.

The status of “rebel” and its legal consequences

Under IHL applicable to international armed conflict, a combatant is someone who has “the right to participate directly in hostilities”.⁴⁵ This basically means that combatants must not be punished for the mere act of fighting, provided that they respect the limits imposed by the laws of war, including the rules on the means and methods of combat and the respect of people deprived of liberty.⁴⁶ In other words, if they respect such rules, combatants “may attack and be attacked; they may kill and be killed”.⁴⁷ However, States have always rejected the application of this “combatant’s privilege” to internal conflicts.⁴⁸ This stance has been based on States’ concerns about restraining their own ability to sanction rebels under their domestic legislation for belligerent acts.⁴⁹ Furthermore, States have wished to avoid “imply[ing] that their own armed forces are legitimate targets in a civil war”.⁵⁰ They have argued that applying the combatant’s privilege to a NIAC would be tantamount to accepting that the member of an organized armed group should not be punished for killing a soldier from the national armed forces or for

44 Constitutional Court of Colombia, *Sentence T-478*, 24 July 2017.

45 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 21 October 1950) (AP I), Art. 43(2).

46 Knut Ipsen, “Combatants and Non-Combatants”, in D. Fleck (ed.), above note 3, paras 301–302.

47 G. Solis, above note 3, p. 188.

48 Dieter Fleck, “The Law of Non-International Armed Conflict”, in D. Fleck (ed.), above note 3, para. 1202.

49 *Ibid.*

50 *Ibid.*

attacking a military base. Surprising as it may be, this was for many decades the position of the Colombian State.

A thorough analysis of the crime of rebellion under Colombian legislation goes well beyond the scope of this article.⁵¹ We will simply illustrate through a few examples the way in which domestic criminal law was used to put into effect the laws of nations – and later IHL – in the context of a civil war, and all in a very *sui generis* manner.

As was seen in the introduction to this article, Colombia's nineteenth century was awash with conflict and confrontations. When the country enacted its 1890 Criminal Code, there was no doubt that rebellion, or the act of "raising in arms against the government, either to overthrow it, or to change the Constitution", had to be considered an offence.⁵² This crime was nothing but a logical consequence of Colombia's history. What was unexpected is the fact that the same law considered that, as part of the act of rebellion, the rebels were somehow allowed to seize arms and munitions, recruit men, usurp official functions, collect taxes and fight against the constitutionally elected authorities.⁵³ In other words, fighting against the government was deemed a crime, but conducts intertwined (*conexas*) with the rebellion were not addressed as separate offences. Instead, they were simply seen as part of the crime of rebellion and led to no additional sanction.

The 1936 Criminal Code went one step further by considering that "rebels will not be responsible for death and harm caused on the battlefield", although – in line with the laws of war of the time – it explicitly prohibited murders outside the battlefield, arson, pillage, the poisoning of wells and reservoirs, and, "in general, all acts of ferocity and barbarism".⁵⁴ This meant that acts which violated IHL were prosecuted separately. A similar provision found its way into the 1980 Criminal Code,⁵⁵ and in fact, the 1980 Code was even broader – instead of referring to "death and harm caused on the battlefield", as done by its 1936 equivalent, it excluded from penal prosecution all acts related to the combat. This gave rise to much jurisprudence on the notion of combat. In general, courts admitted that acts taking place outside the fighting were covered by this exemption, "provided that they have a direct connection with the hostilities".⁵⁶ At the same time, the 1980 Criminal Code excluded from this exemption not only acts of ferocity and barbarism, but also acts of terror.⁵⁷

51 For a more detailed historical account of this issue, see I. Orozco Abad, above note 19, pp. 99–192.

52 See Law 19 of 1890 enacting the Penal Code, Art. 169.

53 *Ibid.*, Art. 177.

54 See Law 95 of 1936 enacting the Penal Code, Arts 140–142.

55 See Law 100 of 1980 enacting the Penal Code, Art. 127.

56 Cited in I. Orozco Abad, above note 19, p. 177. Needless to say, the debate on the "connection" (*conexidad*) between the act and the rebellion is closely related to the debate on the nexus to the conflict. Leaving aside the question of compensating victims of war, the bulk of this debate took place while discussing the granting of amnesties, and it will be addressed in more depth in the section below on transitional justice.

57 See the last sentence of Article 127 of Law 100 of 1980 enacting the Penal Code.

All the above had two main consequences. On the one hand, it created some sort of “combatant’s privilege” for NIAC. If the member of an organized armed group acted in accordance with the laws of war, he or she might have been prosecuted for the act of rebellion, but other conducts – from the killing of a soldier to the destruction of legitimate military objectives – would have been subsumed as part of the rebellion itself. Moreover, punishments imposed for the crime of rebellion were usually very lenient.⁵⁸ On the other hand, these provisions led to unprecedented jurisprudential developments regarding the prosecution of war crimes. Well before other States had started to criminalize serious violations of IHL as part of their adherence to the Rome Statute of the International Criminal Court, Colombian judges gained a great wealth of experience sanctioning the perpetrators of breaches to the laws of war.⁵⁹ This was done by construing what should be understood by acts of ferocity and barbarism. According to Colombia’s Supreme Court:

Acts of ferocity and barbarism are those condemned by international humanitarian law and the laws of nations, precisely because they lead to unnecessary suffering due to the means and methods used, or because they imply hostility, affliction, fear or exposure to equally unnecessary damage to children, women, the weak or the disabled, and in general the civilian population.⁶⁰

In some instances, the judges were far more specific. For instance, in February 1992 a member of an organized armed group planted a bomb in the city of San Vicente de Chucurí. Although the device exploded when a military convoy was passing by, it affected the civilians in the neighbourhood. Apart from killing one soldier and wounding a captain of the armed forces, the blast also put an end to the life of two young students and affected several other civilians. The bomb was filled with nail heads, screws and other pieces of metal. According to the judge in charge of the case, this act could not be seen as part of the rebellion because “the screws and other pieces of iron ... [were] aimed at aggravating the wounds and increasing the suffering of the victims affected by the explosion, rendering the act barbaric”.⁶¹

This long-standing tradition of incorporating certain domestic crimes as part of the act of rebellion came to an end in 1997, when the Constitutional Court ruled that the exemptions of the Criminal Code amounted to a “general clause of impunity” or a “general and indiscriminate amnesty”.⁶² Nevertheless, by that time IHL had already permeated the whole Colombian legal system, from

58 Alejandro Aponte Cardona, “Civiles y conflicto armado en la jurisprudencia de la Sala Penal de la Corte Suprema”, *Revista de Derecho Penal y Criminología*, No. 19, 2007, p. 90.

59 *Ibid.*, pp. 91–97.

60 Supreme Court of Colombia, *Sentence 12.051*, 25 September 1996.

61 Supreme Court of Colombia, *Sentence 12.661*, 27 May 1999. For more jurisprudence on the definition of “acts of ferocity and barbarism”, see Alejandro Aponte Cardona, *Derecho penal internacional: Textos escogidos*, Pontificia Universidad Javeriana, 2014, pp. 256–259.

62 A. Aponte Cardona, above note 58, pp. 93–94.

the Constitution to the rulings of local judges. When in 2016 the JEP was tasked with investigating the alleged war crimes of the NIAC between the Government of Colombia and the FARC-EP, both its mandate and its understanding of international law were rooted in fertile ground.

Limiting the consequences of war

For many decades, Colombia has striven to protect those who do not participate in hostilities – the civilian population – as well as those who no longer take part in the fighting – mostly detainees and the wounded and sick. One of the instruments used to accomplish this objective is the criminalization of certain conducts. The current Colombian Criminal Code includes a whole title on offences committed against “people and objects protected by international humanitarian law”.⁶³ It criminalizes, among other things, the murder of or sexual violence against protected persons, the act of torture of people deprived of liberty in the context of an armed conflict, perfidy, the use of unlawful means and methods of warfare, the pillage of dead bodies on the battlefield, and the hindering of humanitarian relief.⁶⁴ Together with the preventive nature of penal sanctions, Colombia’s judiciary has thoroughly analyzed *ex post facto* the conduct of the warring parties and has often attributed responsibility to one of them in the event of IHL violations. Furthermore, it has issued countless decisions requesting the State to take corrective measures, either to prevent future breaches of the laws of war or to compensate the victims of certain military operations. The Council of State – the supreme tribunal of the country when it comes to administrative issues – has been particularly active in this regard and has condemned the State on numerous occasions for acts such as the use of anti-personnel landmines, the killing of “non-combatants”, lack of respect for judicial guarantees, the carrying out of massacres, forced displacement, attacks against health-care personnel and the destruction of civilian objects.⁶⁵ Exploring the nuances of some of these issues would merit a separate article in itself, but by way of illustration, we will simply outline two particular matters of concern: the implementation of the principle of precaution when it comes to the location of police stations, and the obligation to protect minors.

Police stations and the principle of precaution

IHL obliges a party to an armed conflict to take all feasible precautions “to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians

63 Law 599 of 24 July 2000 enacting the Criminal Code, Title II.

64 *Ibid.*

65 For a detailed account of this jurisprudence, see Council of State of Colombia, “Graves violaciones a los derechos humanos e infracciones al derecho internacional humanitario”, in *Jurisprudencia Básica del Consejo de Estado desde 1916*, Third Section, 2017, pp. 308–498.

and damage to civilian objects”.⁶⁶ This is part of the so-called principle of precautions in attack, which requests the warring factions, among other things, to suspend an attack if it turns out that the target is not a military objective and to give advance warning of any attack that might affect the civilian population, unless circumstances do not permit.⁶⁷ A second prong of this principle implies that those involved in the fighting “must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks” and, “to the extent feasible, avoid locating military objectives within or near densely populated areas”.⁶⁸ The latter has been applied in Colombia with regard to the placing of police stations.

Colombia’s Constitutional Court has held that the National Police possesses a hybrid nature.⁶⁹ On the one hand, it is a civil organ in charge of law enforcement. On the other hand, it participates in “counter-insurgency operations, thus fitting the category of combatants”.⁷⁰ According to the Court, the proximity to a police station in peaceful areas of the country can be seen as an additional safeguard for the civilian population. However, in more volatile regions, closeness to a police station “dramatically increases the risk for the civilian population”.⁷¹ Indeed, and partly as a consequence of its role in “counter-insurgency operations”, organized armed groups have often launched attacks against the National Police, including police stations.⁷² And since police stations have traditionally been located in the centre of urban areas – sometimes in the neighbourhood of schools, churches or civilian houses – these hostilities created a risk because of the launching of inaccurate improvised explosive devices and the hazard of stray bullets. To mitigate such risks, and arguing on the basis of IHL rules on the conduct of hostilities, the Constitutional Court called upon the government to “rethink traditional schemes of [urban] planning, designed for situations in which the level of violence could be countered by the police itself”, and in some cases, to remove police stations from urban centers.⁷³ The court concluded that “the civilian population must be exposed to the minimum risk possible, not only vis-à-vis ‘military’ operations in a strict sense, but also vis-à-vis any service provided by the State security apparatus”.⁷⁴ In addition, the Council of State further strengthened this position by developing the so-called theory of “exceptional risk”, according to which:

[The location of police stations can give rise to the responsibility of the State] because State agents participate and promote the harm caused in the framework of their constitutional mandate ... by exposing the community to

66 ICRC Customary Law Study, above note 37, p. 51.

67 *Ibid.*, pp. 60, 62.

68 *Ibid.*, pp. 68–74.

69 Constitutional Court of Colombia, *Sentence T-1206*, 16 November 2001.

70 *Ibid.*

71 *Ibid.*

72 See, for instance, “Hostigamientos de las FARC a la estación de Policía de Jambaló”, *El País*, 27 July 2012; “Atacaron con ‘táticos’ la estación de Policía de Toribío”, *W Radio*, 8 August 2018; “Diez policías resistieron ataques del ELN contra la estación de Los Ángeles”, *RCN*, 22 December 2016.

73 Constitutional Court of Colombia, *Sentence T-1206*, 16 November 2001.

74 *Ibid.*

a situation of hazard Therefore, the risk generated due to the location of a representative of the State in the midst of an armed conflict, as well as the materialization of this hazard in the form of the harm caused to someone unrelated to the parties to the conflict, gives rise to the State responsibility, regardless of who was at the origin of the wrong-doing.⁷⁵

Sparing minors from the effects of the conflict

Another domain in which Colombia's legal regime has strengthened the safeguards afforded by international law is the protection of minors. Customary IHL prohibits the recruitment of child soldiers, and this is also a rule under treaty law. For instance, Article 4(3)(c) of Additional Protocol II to the Geneva Conventions states that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".⁷⁶ International human rights law (IHRL) has gone a step further. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ratified by Colombia in 2005, provides that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities" and that "armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years".⁷⁷ All in all, international law strictly prohibits that children under 15 are involved in the conflict. However, even the more protective IHRL framework allows the State to voluntarily recruit teenagers between 15 and 18, while recommending that they do not take a direct part in hostilities.

Since 1993, Colombia has categorically precluded the recruitment of minors below 18 years of age into the armed forces of the State.⁷⁸ At the same time, the country's legislative branch has criminalized not only the recruitment itself, but also the fact of forcing minors to participate in hostilities in any manner. Article 162 of the 2000 Criminal Code considers that the crime of illicit recruitment will be committed by anyone who, "on the occasion and in the development of the armed conflict, recruits minors under eighteen (18) years old or compels them to *participate directly or indirectly* in the hostilities or armed actions".⁷⁹

Once more, the above-mentioned provision has been construed very broadly by Colombia's Constitutional Court. Interestingly, this broad interpretation was carried out with full knowledge of the fact that domestic norms on this matter were actually more protective—as in other domains—than their international law

75 Council of State of Colombia, *Sentence No. 28711*, 27 September 2013.

76 See also AP I, Art. 77(2), applicable in international armed conflict.

77 See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN Doc. A/RES/54/263, 25 May 2000, Arts 1, 4(1).

78 See Law 48 of 1993, Art. 10, regulating compulsory military service.

79 Law 599 of 2000, Art. 162 (emphasis added).

equivalent. In a landmark ruling on the use of minors by organized armed groups, the highest tribunal of the country shared the following views:

[Recruitment of minors is prohibited] regardless of the tasks they are carrying out, since the participation or use of minors, either directly or indirectly, is tantamount to admitting them to the ranks of irregular armed groups. The notion of admission should be understood as the mere participation in the activities of the group, regardless of whether they are involved as combatants or not, thus going beyond the framework laid down in international law [The prohibition is] independent from the type of activities, that is, independent of whether they participate in the hostilities or serve as couriers, messengers, cooks, etc.⁸⁰

A similar approach has been taken by the law regulating intelligence operations, which has also excluded minors from the duties it regulates,⁸¹ as well as by the Code of Minors and Teenagers, which calls upon State authorities to protect minors from the consequences of war and armed conflict, from their recruitment or use by organized armed groups, and even from the scourge of anti-personnel mines.⁸²

But as in any other armed conflict, and despite the existence of legal instruments to ensure respect for IHL on the battlefield, violations do still take place. Luckily, Colombia has also adopted many measures to protect the rights of victims.

Compensating victims of war

As mentioned earlier, in 2011 Colombia enacted the so-called Victims' Law, the aim of which was to provide humanitarian aid, attention, assistance and reparation to anyone who had seen his or her rights violated in the context of the armed conflict.⁸³ This piece of legislation gave effect to – and at times clarified – many of the concepts included in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The latter considers that in order to grant effective reparation to a victim for the harm he or she has suffered, State authorities should not only (whenever possible) restore the victim to the original situation,⁸⁴ but should also compensate him or her, give him or her satisfaction and provide him or her with guarantees of non-repetition.⁸⁵ In a similar vein, Colombia's Victim's Law enshrines a broad list of entitlements for those who have been affected by the

80 Constitutional Court of Colombia, *Sentence C-240*, 1 April 2009, para. 7.3.4.

81 Law 1621 of 2013, Art. 60, establishing the normative framework for intelligence and counterintelligence operations conducted by the armed forces.

82 Law 1098 of 2006, Art. 20.

83 Victims' Law, above note 38, Art. 2.

84 UNGA Res. 60/147, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", 16 December 2005, para. 19.

85 *Ibid.*, paras 20–23.

plight of war, including the right to receive humanitarian relief “in accordance to their immediate needs”,⁸⁶ the right to education⁸⁷ and the right to have an adequate level of access to health-care services,⁸⁸ to name but a few of its provisions. That said, the most revolutionary aspect of this statute is the way in which it deals with internally displaced persons (IDPs).

Making a difference for those who flee their homes

IHL contains a series of provisions regarding IDPs. First and foremost, the laws of war prohibit the displacement of the civilian population “in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand”.⁸⁹ But in the event that an act of displacement takes place, IHL emphasizes that IDPs must receive “satisfactory conditions of shelter, hygiene, health, safety and nutrition” and that members of the same family must not be separated.⁹⁰ In addition, it also establishes that IDPs have a right to “voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist”⁹¹ and that their property rights must be respected.⁹² One of the most innovative features of the Victims’ Law is precisely that it regulates all of these aspects.

Colombia has one of the highest numbers of IDPs in the world. According to recent estimates, the last few decades of conflict have led 6,509,000 Colombians to flee their homes.⁹³ This figure is only surpassed (slightly) by Syria, with 6,784,000 IDPs, and goes well beyond equivalent numbers in other war-torn countries such as the Democratic Republic of the Congo (4,480,000), Iraq (2,648,000), Sudan (2,072,000) or Yemen (2,014,000).⁹⁴ With a view to mitigating this humanitarian calamity, Colombia has put in place a mature institutional framework. In the late 1990s, it established the Social Solidarity Network, whose aim was to cover the needs of displaced people in a rather holistic manner, covering aspects such as emergency transport and psychological support.⁹⁵ Colombia’s Congress also enacted legislation to ensure that local and regional authorities would create special plans to assist those who flee internal violence, and even to try to prevent

86 Victims’ Law, above note 38, Art. 47.

87 *Ibid.*, Art. 51.

88 *Ibid.*, Art. 52.

89 See ICRC Customary Law Study, above note 37, p. 457. The current Colombian Criminal Code, adopted by Law 599 of 24 July 2000, states in Article 180 that it is a crime to “arbitrarily cause that one or several individuals change their residence, either by violence or through other acts of coercion targeting a specific group of the population”. However, the same provision lays down that “the crime of forced displacement will not cover movements of the population conducted by the State security apparatus, provided that the purpose is either to ensure the security of the population itself, or imperative military reasons, in accordance with international humanitarian law”.

90 ICRC Customary Law Study, above note 37, p. 463.

91 *Ibid.*, p. 468.

92 *Ibid.*, p. 472.

93 Internal Displacement Monitoring Center and Norwegian Refugee Council, *Global Report on Internal Displacement*, 2018, p. 48.

94 *Ibid.*

95 See Law 368 of 1997, creating the Social Solidarity Network.

and curb this widespread phenomenon.⁹⁶ According to these early norms, an IDP was someone

forced to migrate inside the national territory, abandoning his or her hometown or usual economic activities because his/her life, physical integrity, safety or personal liberty have been infringed or are immediately threatened due to the internal armed conflict, internal disturbances or riots, generalized violence, mass violations of human rights, breaches to international humanitarian law or other circumstances arising from any of the above.⁹⁷

The condition of displacement was deemed to cease whenever the person achieved “socioeconomic stability, either in his or her place of origin or in the resettlement area”.⁹⁸

Therefore, when the Victims’ Law was approved in 2011, Colombia had already taken several measures to tackle this problem. The main differences between the Victims’ Law and previous initiatives were the broad notion of “victim” and the scope of the proposals to compensate such victims, which sought to address the “individual, collective, material, moral and symbolic dimensions” of the violation.⁹⁹ In the context of land restitution, the Victims’ Law gave birth to several State organs in charge of restoring the rights of IDPs to their dispossessed land and of facilitating their return,¹⁰⁰ such as the Registry of Land Allegedly Disposed or Forcibly Abandoned.¹⁰¹ Moreover, it established a series of legal presumptions in favour of victims. For instance, it considered that the claim of a victim to his or her land could not be rejected on the basis of valid administrative acts that took place after the dispossession or forced abandonment.¹⁰² It also recognized a reversed onus clause for those who had been recognized as IDPs by judicial authorities and were trying to gain back their property rights.¹⁰³ In other words, it shifted the burden of proof from the IDP to the individual opposing the rights of the victim during the restitution process.¹⁰⁴ All this was done to comply not only with the above-mentioned IHL rules but also with IHRL instruments, including the so-called Pinheiro Principles.¹⁰⁵

96 See Law 387 of 1997, adopting measures to prevent forced displacement and to ensure the assistance, protection and socio-economic stability of people internally displaced by violence. See also Decree No. 2569 of 12 December 2000, clarifying the different obligations of each State authority when it comes to IDPs, and Decree No. 173 of 26 January 1998, adopting the national plan for holistic assistance to IDPs.

97 Law 387 of 1997, Art. 1.

98 *Ibid.*, Art. 18.

99 Victims’ Law, above note 38, Art. 69.

100 For an overview of this law, see Jemima García-Godos and Henrik Wiig, “Ideals and Realities of Restitution: The Colombian Land Restitution Programme”, *Journal of Human Rights Practice*, Vol. 10, No. 1, 2018.

101 Victims’ Law, above note 38, Art. 76.

102 *Ibid.*, Art. 77.

103 *Ibid.*, Art. 78.

104 *Ibid.*

105 Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Doc. E/CN.4/Sub.2/2005/17, 2005. According to Principle 2, “all refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or

Furthermore, Colombia's judiciary has strengthened even further the protection afforded by the Victim's Law. According to Article 3 of this piece of legislation, members of an organized armed group "cannot be considered as victims for the purposes of benefiting from [the State's compensation programmes], except in the event of children who were forcefully recruited". In 2019, a Colombian citizen challenged this provision. The plaintiff had been forcefully recruited by the FARC-EP at the age of 14, suffered sexual abuse at the hands of her comrades, and eventually quit the group and became an IDP.¹⁰⁶ She claimed that she was entitled to be considered a victim under the laws of war, including because of the violence to which she was subjected. The Court agreed that IHL protects not only those at the hand of the enemy, but also those who are faced with so-called "intra-group" violence.¹⁰⁷ It also provided that the plaintiff was entitled to receive compensation from the State and to receive specialized medical treatment to overcome her traumas.¹⁰⁸ The judge in charge of the case based her decision not only on the jurisprudence of international tribunals but also on Colombia's own developments on issues such as the notion of nexus to the conflict and the right to effective remedy.¹⁰⁹ Needless to say, the main challenge in the implementation of the provisions of land restoration of the Victims' Law – other than lack of financial resources – was the fact that Colombia was (and still is) undergoing several NIACs, making it difficult for IDPs to go back to their places of origin in safety.¹¹⁰ This is also one of the hurdles of Colombia's transitional justice mechanisms, and yet is one of the underlying reasons for the country's unmatched will to find legal solutions to some of the vicissitudes of war.

Transitional justice after the peace agreement with the FARC-EP

During the last few decades, Colombia has undergone several transitional justice processes.¹¹¹ The most recent one took place between 2012 and 2016 and

unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal".

106 Constitutional Court of Colombia, *Sentence SU599/19*, 11 December 2019.

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

110 See Jose Serralvo, "Internal Displacement, Land Restoration, and the Ongoing Conflict in Colombia", *Journal of Humanitarian Assistance*, June 2011. It should be reiterated that the purpose of this article is not to evaluate the success in implementing Colombia's legislation; instead, and as mentioned earlier, it focuses on the development of IHL both in the domestic legal framework and through judicial decisions. As a matter of fact, and leaving aside the issue of land restitution, State authorities have had many difficulties coping with the over 6 million IDPs in the country. Interestingly, this has led the Constitutional Court to declare an "unconstitutional state of affairs", since the rights of people forced to flee their homes due to the conflict were not being respected. See Constitutional Court of Colombia, *Sentence T-025*, 2004.

111 One of the most notorious examples was the agreement that put an end to the conflict with the Movimiento 19 de Abril, also known as M-19, during the government of President Virgilio Barco in the early 1990s. More recently, President Alvaro Uribe Vélez signed a peace agreement with the

involved the Government of Colombia and the FARC-EP. This process concluded with the signing of the so-called Final Agreement for Ending the Conflict and Building a Stable and Long-Lasting Peace (Final Agreement). Due to the humanitarian nature of many of its provisions, the Final Agreement has often been referred to as a Special Agreement in the sense of Article 3 common to the four Geneva Conventions; according to the Constitutional Court, its content must be used as a basis for construing all IHL-related norms giving effect to the peace negotiations.¹¹²

One of the main outcomes of the Final Agreement was the creation of the Comprehensive System for Truth, Justice, Reparation and Non-Repetition (Sistema Integral de Verdad, Justicia, Reparación y No Repetición, SIVJRNR). The purpose of the SIVJRNR is to deal with the consequences of the armed conflict bearing in mind the central position of the victims. In order to do so, it has developed a series of IHL norms, particularly in relation to the prosecution of war crimes, the granting of amnesties and the search for the missing. Most notably, Colombia has enacted new legislation to incorporate these obligations into the domestic legal framework. As mentioned in the Final Agreement itself:

The underlying principles on which the Comprehensive System is founded are the recognition of the victims as citizens with rights; the acknowledgement that the full truth about what has happened must be uncovered; the acknowledgment of responsibility by all those who took part, directly or indirectly, in the conflict and were involved in one way or another in serious human rights violations and serious infringements of international humanitarian law; [and] the realisation of victims' rights to the truth, justice, reparations and non-recurrence, based on the premise of non-negotiation on impunity, additionally taking into account the basic principles of the Special Jurisdiction for Peace, one of which is that "damage caused shall be repaired and made good whenever possible".¹¹³

In order to achieve this, the Government of Colombia and the FARC-EP agreed upon a system which includes both judicial and non-judicial mechanisms. More specifically, the SIVJRNR comprises five components: (1) a Truth, Coexistence and Non-Recurrence Commission; (2) a Search Unit for Missing Persons; (3) a Special Jurisdiction for Peace; (4) reparation measures for peacebuilding purposes; and so-called (5) guarantees of non-recurrence.¹¹⁴ All of these pillars are supposed to work in an articulated manner to successfully contribute to achieving justice, knowing the truth of what happened during the

Autodefensas Unidas de Colombia. This was regulated by Law 975 of 2005, often referred to as the Justice and Peace Law, which provided for reduced sentences in exchange for full confessions and a contribution to the reparation of the victims.

¹¹² See, for example, Alejandro Ramelli, *La naturaleza jurídica del Acuerdo de Paz en Colombia: Aspectos controversiales*, Editorial Académica Española, 2019.

¹¹³ Final Agreement for Ending the Conflict and Building a Stable and Long-Lasting Peace, 2016 (Final Agreement), p. 135.

¹¹⁴ *Ibid.*, p. 9.

NIAC, repairing the wrongful acts committed, and avoiding their repetition.¹¹⁵ Because of their relationship to salient IHL norms, the rest of this section will focus on components (2) and (3) of the system.

The Search Unit for Missing Persons

As a result of the long-lasting armed conflicts in Colombia, countless people have gone missing. Conservative estimates point to over 60,000 enforced disappearances between 1970 and 2014.¹¹⁶ IHL provides that each party to the conflict must “take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.¹¹⁷ This duty to locate the missing and share the information with their relatives persists even after the cessation of hostilities.¹¹⁸ The Search Unit for Missing Persons was conceived to comply with this obligation and to contribute to the satisfaction of the victims’ rights to truth and reparation.¹¹⁹ Although this organ was not the first Colombian attempt to tackle the thorny issue of enforced disappearances in the midst of war, its scope is much broader than that of previous initiatives.¹²⁰ Its mandate includes “searching for and locating people reported missing in the context and because of the armed conflict that are alive and, in cases of death, when possible, the recovery, identification and dignified delivery of skeletonized bodies”.¹²¹ One of the most innovative aspects of this legal framework is the so-called “differential approach”, which basically implies that State organs have an obligation to take into consideration the particularities of those who went missing—including their gender and ethnicity. To strengthen this broad mandate, the country’s Constitutional Court has recognized the humanitarian and extrajudicial nature of the Search Unit. This means, on the one hand, that it cannot substitute or prevent judicial investigations to be carried by the State’s judiciary.¹²² On the other hand, it also entails that the Search Unit’s staff enjoys functional immunity and cannot be called to testify in judicial proceedings. Regarding the latter, it should be noted that the legislation implementing the Final Agreement states:

In order to guarantee the effectiveness of the [Search Unit’s] humanitarian work to satisfy as much as possible the victim’s rights to truth and reparation and, above all, to alleviate their suffering, the information received or

¹¹⁵ *Ibid.*

¹¹⁶ ICRC, *Balance Humanitario*, Geneva, 2018, p. 2.

¹¹⁷ ICRC Customary Law Study, above note 37, p. 421.

¹¹⁸ *Ibid.* p. 427. See also UNGA Res. 3220 (XXIX), 1974, para. 76.

¹¹⁹ Decree 589 of 2017, Art. 1.

¹²⁰ For an overview of some of the experiences of searching for the missing in Colombia, and some insightful comments on best practices in other contexts, see Ximena Londoño and Alexandra Ortiz Signoret, “Implementing International Law: An Avenue for Preventing Disappearances, Resolving Cases of Missing Persons and Addressing the Needs of Their Families”, *International Review of the Red Cross*, Vol. 99, No. 2, 2017, pp. 557–564.

¹²¹ Decree 589 of 2017, Arts 2, 3; see also Legislative Act 01 of 2017, Transitory Art. 3.

¹²² Legislative Act 01 of 2017, Transitory Art. 3.

produced by the [Search Unit] cannot be used with the purpose of attributing responsibilities in judicial processes and will not have probatory value In any case, the forensic-technical reports and the material elements associated with the corpse may be required by the competent judicial authorities and will have probative value.¹²³

In other words, most of the information in the hands of the Search Unit – such as data allowing for the identification of perpetrators or the circumstances of the death – will remain confidential. The Government of Colombia and the FARC-EP agreed upon this under the understanding that it would facilitate the Search Unit's access to information on the fate of the missing – including at the hands of weapons bearers – thus making it easier for family members to discover the fate and whereabouts of their loved ones.

As per Legislative Act 01 of 2017 (one of the main pieces of legislation implementing the Final Agreement), the Search Unit is in charge of producing a national registry of graves, illegal cemeteries and burial grounds. In addition, it is entitled to request the cooperation of any State organ in the whole national territory. Moreover, all the above must be done while promoting the participation of the relatives of the missing in the search process, bestowing upon them a sense of purpose. Article 3 of this law states the following:

[T]he State's entities will provide all the collaboration required by the Unit. The participation of the victims and their organizations in all phases of the search, location, recovery, identification and dignified delivery of remains of people reported missing in the context and because of the armed conflict should be promoted.¹²⁴

Although an in-depth analysis of the Search Unit would go beyond the scope of this article, it is worthwhile to note that this very same piece of legislation recognizes that the return to the relatives of the remains of the missing people should be done “in accordance with their different ethnic and cultural traditions”.¹²⁵ During its review of the law, and in line with the latter, Colombia's Constitutional Court laid down the principles that should be enforced so that the search for the missing would respect indigenous rights. Much of the conflict between the Government of Colombia and the FARC-EP took place in rural areas scattered along indigenous reserves (*resguardos*), which enjoy special protection under Colombia's Constitution. Hence, exhumation of dead bodies buried in these reserves must be done with the consent of local authorities and respecting the principle of prior consultation of indigenous people.¹²⁶ To say the least, all this constitutes a unique example of the articulation between the laws of war and indigenous rights – a refined legal hodgepodge that one can only find in Colombia.

123 Decree 589 of 2017, Art. 1; Legislative Act 01 of 2017, Transitory Art. 4.

124 Legislative Act 01 of 2017, Transitory Art. 3.

125 Decree Law 589 of 2017, Art. 5.3F.

126 Constitutional Court of Colombia, *Sentence C-067/18*, 20 June 2018.

All in all, the creation of the Search Unit goes well beyond the stipulations of IHL. To give effect to the IHL obligation to locate those who went missing in the context of the armed conflict,¹²⁷ Colombia has created a specialized entity whose tasks will surely have a profound impact on the whole State apparatus, and it has done so while respecting an ethnic, cultural and gender approach, as well as the need to promote the participation of victims and human rights organizations.

The Special Jurisdiction for Peace

An equally remarkable component of the transitional justice system created after the Final Agreement with the FARC-EP is the Special Jurisdiction for Peace, or JEP. The JEP is the judicial component of the SIVJRNR. It exercises autonomous and prevalent judicial functions over issues within its jurisdiction, particularly regarding acts considered to be serious breaches of IHL or serious violations of human rights. In accordance with the Final Agreement:

The objectives of the judicial component of the Comprehensive System are to give effect to the victims' right to justice, offer truth to the Colombian society, protect victims' rights, contribute to achieving a stable and lasting peace, and take decisions that offer full legal certainty to those who participated directly or indirectly in the internal armed conflict with regard to acts committed in the context of and during said conflict and which represent serious breaches of international humanitarian law and serious violations of human rights.¹²⁸

IHL provides that States must "investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects".¹²⁹ At the same time, IHL lays down an obligation to grant the broadest possible amnesty at the cessation of hostilities to persons who participated in an internal armed conflict or who are deprived of liberty for reasons related to the conflict.¹³⁰ The goal of the JEP is to comply with both of these rules simultaneously.¹³¹ On the one hand, it must investigate serious breaches of IHL and serious violations of human rights. On the other, as a transitional justice mechanism, and following the long-standing treatment of "rebels" in Colombia's legal system, it seeks to concede amnesties to those who acted in accordance with the laws of war. In other words, the JEP can grant amnesties to those who were members of the FARC-EP or collaborators of this armed group, and whose crimes committed in relation to the NIAC before 1 December 2016 were

127 Or armed *conflicts*, plural, since the Search Unit is authorized to locate those who disappeared in the framework of hostilities involving organized armed groups other than the FARC-EP.

128 Final Agreement, above note 113, p. 153.

129 ICRC Customary Law Study, above note 37, Rule 158, p. 607.

130 *Ibid.*, p. 611. See also Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) Art. 6(5).

131 Law 1820 of 2016, Art. 2.

“political crimes” (*delitos políticos*) or, if they were common crimes, had a connection to political crimes and are not included in the list of conducts that cannot be a matter of amnesty.¹³²

As per Legislative Act 01 of 2017, the JEP has “prevalent jurisdiction” above other Colombian jurisdictions when it comes to acts committed “by cause of, on occasion of or in direct or indirect relation to the armed conflict, by those who participated in it, especially with regard to behaviors considered serious breaches of [IHL] or serious violations of Human Rights”.¹³³ The JEP’s Appeal Section has reaffirmed this “prevalent jurisdiction” rule since its early jurisprudence.¹³⁴

The JEP is divided into several sections and chambers.¹³⁵ Each of the chambers consists of six judges who—as is the case with the whole SIVJRNR—must reflect Colombia’s diversity on issues such as gender, ethnicity and geography.¹³⁶ The JEP’s structure is both ambitious and complex. First, it is composed of three chambers: the Chamber for Recognition of Truth, Responsibility and Determination of Facts and Conduct; the Chamber for Amnesty or Pardon; and the Chamber for Determination of Legal Situations. In addition, a Tribunal for Peace has been established with four sections, each made up of five judges. It includes a First Instance Section of the Tribunal for Peace in Cases of Acknowledgement of Truth and Responsibility and a First Instance Section of the Tribunal for Peace in Cases of Absence of Acknowledgement of Truth and Responsibility. Both sections will hand down rulings, either acquitting or convicting the person and imposing special, alternative or ordinary sanctions depending on the acknowledgement of truth and responsibility and the moment of such acknowledgement.

The Tribunal also has a Review Section with several tasks. Among other things, it is in charge of examining, at the request of the convicted person, rulings passed by the ordinary justice system.¹³⁷ Finally, the Tribunal has an Appeal Section to decide on objections to rulings passed by any of the other sections or chambers of the JEP. However, the Appeal Section will not be able “to increase the sentence at the second instance when the appellant is the only person sanctioned”.¹³⁸ Likewise,

132 *Ibid.*, Art. 23.

133 Legislative Act 01 of 2017, Transitory Arts 5, 6; Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 36.

134 JEP Appeal Section, *Sentence TP-SA 001*, 20 April 2018, para. 36: “one must address without hesitation the preferential character granted by Transitory Article [6] of Legislative Act 01 of 2017 to the [JEP] over other [Colombian] jurisdictions to know of any acts committed prior to 1 December 2016 by cause of, on occasion of or in direct or indirect relation to the armed conflict”.

135 Legislative Act 01 of 2017, Transitory Art. 7; Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 72.

136 See Final Agreement, above note 113, p. 178: “All these individuals will need to be highly qualified and they must include experts in different areas of law, with a focus on knowledge of international humanitarian law, human rights or conflict resolution. The Tribunal will need to be formed according to criteria of equal participation by men and women and respect for ethnic and cultural diversity, and members will be elected through a selection process that reassures Colombian society and its different sectors.”

137 *Ibid.*, p. 170.

138 Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 91.

[t]he resolutions of the [chambers] and [sections] of the judicial component may be internally appealed before the [chamber or section] that passed them, or appealed before the Appeal [Section] of the Tribunal, solely at the request of the person on whom the resolution or ruling was handed out, and of the victims with direct and legitimate interest or their representatives.¹³⁹

The JEP also has a Registry and an Investigation and Prosecution Unit, “which must realize the victims’ right to justice when there is no collective or individual acknowledgement of responsibility”.¹⁴⁰

To say the least, Colombia’s latest transitional justice mechanism was designed in a rather unique way. Those appearing before it do not need to follow the same path within the JEP. In other words, there is no single “door” to enter through; rather, there are several different options depending on the conduct being scrutinized, the benefits being sought and the role of the individual appearing before the JEP. As a result, for example, the three chambers as well as the Review Section can be deemed “doors” to the JEP, and those appearing before them can take different pathways once inside it. Likewise, the Section in Cases of Absence of Acknowledgement of Truth and Responsibility can also be a door to enter the JEP, especially when it comes to studying and adopting precautionary measures.¹⁴¹

The JEP has an unprecedented nature. Its design was not decided unilaterally by one of the parties to the conflict – instead, it was the result of a negotiation process between a State and an armed group. Moreover, the selection process of its magistrates and of the director of the Investigation and Prosecution Unit aimed at reflecting Colombia’s diversity. In addition, the process was completely open to the public – in fact, the interviews and résumés of the applicants were published online. Finally, the JEP is a robust model of transitional justice with several organs – each of them with specific tasks – working simultaneously and in a coordinated manner. Its ultimate goal is to establish the truth regarding the armed conflict with the FARC-EP and define the legal status of those who participated in it. Given its unprecedented nature, and the way in which it has contributed to developing the laws of war, we will now outline the main defining elements of the JEP.

Several IHL-friendly manners to end a conflict

Although there is no single pathway to fall under the jurisdiction of the JEP, the so-called Chamber for Recognition of Truth, Responsibility and Determination of Facts and Conduct is arguably the main point of entry. Members of any of the two parties

¹³⁹ *Ibid.*, Art. 144.

¹⁴⁰ Final Agreement, above note 113, p. 161; Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 87.

¹⁴¹ Such as the study on the request for precautionary measures for the protection, preservation and conservation of sixteen places throughout the country where it is indicated that there are presumably missing persons.

to the conflict, including alleged perpetrators of war crimes, are called to testify and openly share all they know about the dynamics of the conflict and acknowledge their responsibility. With this as a basis, among many other tasks, the Chamber will

[p]resent resolutions of conclusions to the first section of the Tribunal for Peace for cases of recognition of truth and responsibilities, with the identification of the most serious cases and the most representative conducts or practices, the individualization of responsibilities, particularly of those who had a decisive participation, the legal qualification of the behaviors, the acknowledgments of truth and responsibility and the proposed sanction project according to the list provided in Article 141 of [the Statutory Law]. ... In the definition of serious cases, ... conducts or practices committed within the framework of the armed conflict against the indigenous peoples or their members, criteria will be taken into account that allow the differentiated impact generated on the peoples, and its relationship with the risk of physical and cultural extermination, to be evidenced.¹⁴²

At the time of writing, the JEP is focusing its efforts on seven particular cases, which combine thematic and geographical concerns. For instance, Case No. 01 deals with “illegal retention of persons by the FARC-EP”, Case No. 03 Case tackles “deaths illegitimately presented as casualties in combat by State agents”, and Case No. 07 addresses the issue of “recruitment and the use of girls and boys in the armed conflict”. Other cases are set to scrutinize different conducts committed in some of the most war-ravaged regions of the country, such as Nariño, north Cauca and the Urabá region.¹⁴³ If an alleged perpetrator cooperates with the system, he or she might end up receiving some of the benefits of the JEP, which include penalties that fall short of deprivation of liberty. On the other hand, if the person refuses to cooperate or attempts to hide the truth, he or she might face heavier penalties. Indeed, more severe measures, such as deprivation of liberty, are foreseen in cases of “absence of acknowledgement of truth and responsibility”.

Among the different branches of the JEP, probably the most innovative from an IHL perspective is the Chamber of Amnesty or Pardon, whose procedure was established by Colombia’s Law 1820 of 2016 and the internal regulations of the JEP.¹⁴⁴ This chamber has the responsibility to analyze – case by case, either at the request of a party or *ex officio* – the possibility of granting amnesties or pardons for conducts that were committed by members or collaborators of the

142 Final Agreement, above note 113, p. 157; Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 79.

143 Case No. 02 “prioritizes the serious human rights situation suffered by the population of the municipalities of Tumaco, Ricaurte and Barbacoas (Nariño)”. Case No. 04 “prioritizes the serious human rights situations suffered by the population in the municipalities of Turbo, Apartadó, Carepa, Chigorodó, Muta, Dabeiba (Antioquia) and El Carmen del Darién, Riosucio, Unquía and Acandí (Chocó)”. Case No. 05 “prioritizes the serious human rights situation suffered by the population of the municipalities of Santander de Quilichao, Suárez, Buenos Aires, Morales, Caloto, Corinto, Toribío and Caldono (Cauca)”. Case No. 06 concerns the “victimization of members of the Patriotic Union (UP) by agents of the State”.

144 Law 1820 of 2016, Art. 21.

FARC-EP and that have been caused by, or on occasion of, or have a direct or indirect relation to the internal armed conflict. Moreover, and as per the Statutory Law interpreted by the jurisprudence of the Appeal Section, this chamber is also the one that must decide whether or not to grant “conditional release” to members or collaborators of the FARC-EP who had been condemned for crimes committed in the framework of the NIAC prior to the signing of the Final Agreement.¹⁴⁵ Those benefiting from this transitional justice regime may remain at liberty, at least until their situation has been determined by another organ of the judiciary. This means that they do not need to be detained in prison while the competent chamber or section of the JEP defines their situation. A similar regime is granted to State agents, whose cases are studied by the Chamber for Determination of Legal Situations.

It should be noted that all those who benefit from any of the special regimes mentioned above must honour a set of rules in order to maintain the said benefits. Indeed, the “conditionality regime” entails the following obligations: (1) reporting any change of residence to the JEP; (2) not leaving the country without prior authorization from the concerned chamber or section; (3) guaranteeing the abandonment of arms and committing not to relapse in the commission of intentional crimes; (4) participating in programmes that seek to contribute to the reparation of victims; (5) appearing before Colombia’s Truth, Coexistence and Non-Recurrence Commission, as well as before the Search Unit for Missing Persons, whenever required, and providing these organs with the complete truth; and (6) appearing in judicial proceedings before the JEP whenever required, including, but not limited to, proceedings involving the beneficiary himself/herself.¹⁴⁶

That said, in the Chamber for Amnesty or Pardon the “conditionality regime” is only applied to members or collaborators of the FARC-EP who have committed a so-called “political crime” or a common crime related to a political one.¹⁴⁷ Once again, this is very much in line with Colombia’s tradition of granting a special regime to “rebels” and waiving prosecution for acts intertwined with the rebellion itself. However, the powers of the Chamber of Amnesty or Pardon have very clear limits. Article 23 of Law 1820 establishes that in no case could an amnesty or pardon be granted regarding the following conducts:

- a) Crimes against humanity, genocide, war crimes, hostage-taking or other serious deprivation of liberty, torture, extrajudicial executions, enforced

145 Statutory Law 1957 of 2019 for the Administration of Justice in the Special Jurisdiction for Peace, Art. 81; JEP Appeal Section, *Sentence TP-SA-SENIT 2 de 2019*, 9 October 2019, paras 129–134; JEP Appeal Section, *Sentence TP-SA 004 de 2018*, 30 April 2018.

146 Constitutional Court of Colombia, *Decision 007/2018*, 2018; Law 1820 of 2016, Art. 14; Legislative Act 01 of 2017, Transitory Arts 1, 5.

147 See Law 1820 of 2018, Art. 23, which establishes the criteria to determine the nexus to the political crime. Additionally, the Constitutional Court pointed out that the JEP cannot exercise its competence over conducts whose primary goal was the personal enrichment of the individual, although it opened the door to an exception if the enrichment was not “the determining cause of the criminal conduct”. Constitutional Court of Colombia, *Decision C-007*, 2018, para. 540.

disappearance, violent carnal access and other forms of sexual violence, the abduction of minors, forced displacement, in addition to the recruitment of minors, in accordance with the provisions of the Rome Statute. In the event that any criminal judicial sentence has used the terms ferocity, barbarism or other equivalent, amnesty and pardon cannot be granted exclusively for the criminal conducts that correspond to those listed here as not amnestiable.

b) Common crimes that have no relation to the rebellion, that is to say, those that have not been committed in the context and because of the rebellion during the armed conflict or whose motivation has been to obtain personal benefit, either for the person himself/herself or for a third party.

In relation to these criteria for exclusion, Colombia's Constitutional Court has established – in its review of Law 1820 of 2018 – that their goal is precisely to respect victims' rights and to abide by the State's obligation to investigate, prosecute and punish violations of the laws of war.¹⁴⁸

In order to grant an amnesty, the Chamber must verify that three conditions are met. First, it must establish that the person was a member or a collaborator of the FARC-EP.¹⁴⁹ Second, it is necessary to ascertain whether the person participated in the NIAC prior to 1 December 2016, the date on which the Final Agreement entered into force, since the JEP cannot exercise its jurisdiction over more recent conduct.¹⁵⁰ Finally, it must determine the nexus to the conflict, thus revisiting some of the jurisprudence from the Constitutional Court mentioned earlier.¹⁵¹ According to Legislative Act 01 of 2017, to fall under the jurisdiction of the JEP the conduct must have been caused “by, on occasion, or in direct or indirect relation to the armed conflict” and by one of its parties.¹⁵²

There is already some case law detailing how to assess whether a conduct has been caused by, on occasion of, or in direct or indirect relation to the NIAC. The Appeal Section of the Tribunal for Peace has understood “caused by” as a causality assessment that requires establishing whether the conduct originated, or not, in the midst of the NIAC.¹⁵³ On the other hand, the Appeal Section has considered that the term “on occasion” should be seen as a synonym for a close and sufficient *relationship* with the development of the NIAC.¹⁵⁴ Regarding this relationship – and in line with what was outlined earlier – the Colombian Constitutional Court has argued that

far from being understood under a restrictive perspective that limits it to strictly military confrontations, or to a specific group of armed actors excluding others,

148 Constitutional Court of Colombia, *Sentence C-007*, 2018, para. 774.

149 Law 1820 of 2018, Arts 17, 22.

150 Legislative Act 01 of 2017, Transitory Art. 5 of Art. 1; Law 1820 of 2016, Art. 3.

151 Law 1820 of 2016, Arts 15, 16, 23, 24.

152 *Ibid.*, Art. 5.

153 JEP Appeal Section, *Sentence TP-SA 19*, 21 August 2018, para. 11.13; JEP Appeal Section, *Sentence TP-SA 110*, 30 January 2019, para. 41.4.

154 JEP Appeal Section, *Sentence TP-SA 19*, 21 August 2018, para. 11.12; JEP Appeal Section, *Sentence TP-SA 110*, 30 January 2019, para. 41.4.

it has been interpreted in a broad sense that includes all the complexity and factual and historical evolution of the Colombian internal armed conflict.¹⁵⁵

The Appeal Section has held that the expression “in direct relation to the armed conflict” is similar to the expression “caused by”, and that “an examination of causality between the conduct and the conflict must be made to establish whether the conduct has its origin in the conflict and, therefore, verify the link between them”.¹⁵⁶

Additionally, the Appeal Section has established that these criteria laid down in Constitutional Transitional Article 23 must be taken into consideration in order to establish whether a conduct is directly or indirectly related to the NIAC.¹⁵⁷ Indeed, the Appeal Section has argued that in order to understand the relationship of causality, one must assess “if the armed conflict was the direct or indirect cause of the crime”. It also indicates, following the wording of Article 23, that there is a subjective criterion – namely, whether the existence of the conflict “influenced the author, participant or cover-up of the punishable conduct committed by cause, on occasion or in direct or indirect relationship with the conflict”.¹⁵⁸

In relation to the material scope of application, there are two levels in the analysis pursued by the Chamber for Amnesty or Pardon. In the first, the Chamber establishes whether the conduct studied is related to the NIAC. If the conduct does indeed have a link to the NIAC, the Chamber takes the case to the second level. The latter implies carrying out an assessment of whether the conduct in question was a “political crime” (for which an amnesty would be granted) or, if it was not a political crime, the Chamber has to establish if it was a common crime related to the political crime and that it is not included in the list of conducts that, according to the law, cannot be the object of an amnesty. If the conduct is related to the NIAC but is within the list of exceptions that cannot be the object of an amnesty, the Chamber will refer the case to one of the other two chambers for them to exercise their competence over it.¹⁵⁹

155 Constitutional Court of Colombia, *Decision C-253 A*, 2012, para. 6.3.3.

156 JEP Appeal Section, *Sentence TP-SA 19*, 21 August 2018, para. 11.15.

157 Legislative Act 01 of 2017, Constitutional Transitional Art. 23: “a) that the armed conflict had been the direct or indirect cause of the commission of the criminal conduct; b) that the existence of the armed conflict had influenced the author, participant or concealer of the criminal conduct committed by cause of, on occasion of or in direct or indirect relation to the conflict, with regard to: his or her ability to commit it, that is, because of the armed conflict the perpetrator has acquired greater skills that served him or her to execute the conduct; his or her decision to commit it, that is, the resolution or disposition of the person to commit it; the manner in which it was committed, that is, the fact that, as a result of the armed conflict, the perpetrator of the conduct had the opportunity to count on the means that served him or her to consummate it; and the selection of the objective that was intended to be reached with the commission of the crime.” *Cf.* Final Agreement, above note 113, p. 145, 5.1.2, para. 9; JEP Appeal Section, *Sentence TP-SA 110*, 30 January 2019, para. 41.3; JEP Appeal Section, *Sentence TP-SA 166*, 28 May 2019, para. 15.

158 JEP’s Appeal Section, *Sentence TP-SA 110*, 30 January 2019, para. 41.2; JEP Appeal Section, *Sentence TP-SA 166*, 28 May 2019, para. 15.

159 *Ibid.*

In this scenario, the Chamber for Amnesty or Pardon has referred to the competent chamber—either the Chamber for Recognition or the Chamber for Determination—many cases related to conducts for which it has denied the granting of amnesty or has declared a non-amnesty (*la no amnistiabilidad*), as well as cases related to conducts that *prima facie* cannot be the object of an amnesty.¹⁶⁰

For example, the Chamber for Amnesty or Pardon referred forty-two cases of request for amnesty related to extortive kidnapping (*secuestro extorsivo*) to the Chamber for Recognition of Truth, Responsibility and Determination of Facts. In its decision, the Chamber for Amnesty considered that it

is of vital importance for the development of Case No. 01 that the Chamber for Recognition be aware of the cases that the [Chamber for Amnesty] advances on conducts that could be adapted to the illegal retention of persons by the FARC-EP, and that have been prioritized by the said Chamber for Recognition.¹⁶¹

All of these forty-two cases had in common the type of conduct involved, the fact that they were committed before 1 December 2016 by members or collaborators of the FARC-EP, and the fact that they had a *prima facie* relation to the NIAC.¹⁶² Additionally, the Chamber established that there were reasons to believe that the conducts in question might amount to war crimes or crimes against humanity.¹⁶³

To give a more concrete example, and one that constitutes a relevant development in international law, the Chamber for Amnesty or Pardon decided that the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, known as the Ottawa Convention, is also binding for organized armed groups. To reach this conclusion, the Chamber relied, among other things, on the Vienna Convention on the Law of Treaties. In particular, the Chamber considered that

the Ottawa Convention, in its quality as an IHL norm, is built on the declaration of prohibiting totally and globally anti-personnel mines ... as the most effective response to end the humanitarian crisis that has occurred due to their employment and which is a reflection of the lack of respect for the minimum norms of humanity that apply in any armed conflict.¹⁶⁴

160 For example, JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-RC-011-2019*, 26 August 2019 (extortive kidnapping); JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-D-014-2019*, 8 October 2019 (homicide of protected persons, attempted homicide of protected persons, attempted aggravated homicide and terrorism); JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-006-2019*, 4 February 2019 (aggravated homicide, acts of terrorism, homicide of protected persons, attempted homicide of protected persons); JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-T-MGM-254-2019*, 31 December 2019 (extortive kidnapping, forced displacement, homicide of protected persons, forced disappearance); JEP Chamber for Amnesty or Pardon, *Sentence SAI-LC-AOI-D-MGM-126-2019*, 5 December 2019 (illicit recruitment); JEP Chamber for Amnesty or Pardon, *Sentence SAI-LC-AOI-D-MGM-075-2020*, 4 February 2020 (forced displacement).

161 JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-RC-011-2019*, 26 August 2019, para. 11. After this decision, there have been many others referring cases to the other two chambers.

162 *Ibid.*, paras. 12, 13.

163 *Ibid.*, para. 17.

164 JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-010-2019*, 8 August 2019, paras 182, 183. See also JEP Chamber for Amnesty or Pardon, *Sentence SAI-SUBA-AOI-D-067-2019*, 2 December 2019 (terrorism,

In the case in question, the Chamber concluded that an infraction of IHL was committed and that it could amount to a war crime, framing the case within the list of conducts that cannot be the object of an amnesty.¹⁶⁵

Despite the fact that the JEP has been functional for barely two years, it has already given birth to an array of decisions that have tackled and advanced relevant IHL discussions on issues such as amnesties, war crimes, means and methods of warfare, the use of force in the conduct of hostilities, and missing persons, among many others. There is no doubt that in the near future it will continue to contribute to the development and understanding of IHL from the Colombian experience.

Conclusion

Ever since the first half of the nineteenth century, Colombians realized that wars must have limits. What started as the inspiring and humanizing vision of Simón Bolívar and Pablo Morillo in 1820—an attitude that to a certain extent prefigured that of the philanthropist Henry Dunant, who founded the ICRC over four decades later—became a pattern in how the country decided to tackle the scourges of war and, over the course of two centuries, has permeated all layers of society and the State apparatus.

The purpose of this article was not to focus on one particular aspect of this tradition. Instead, it aimed at providing a series of examples to demonstrate that Colombia has developed IHL on matters as varied as the need to clarify the nexus to the conflict, the combatant's privilege, the protection of minors, the implementation of the principle of precaution, the reparation of victims of war, the rights of IDPs, the search for the missing, the prosecution of war crimes and the granting of amnesties at the cessation of hostilities. Each of these topics would merit a separate contribution. If IHL scholars wish to provide a faithful account of the development of the laws of war, one would expect that they will pay more attention to Colombia in the coming years.

Wars always bring about death and wanton destruction. Civilian property is occupied or pillaged, children are forcefully recruited or used to gather intelligence, anti-personnel landmines kill and mangle whoever happens to detonate them, the environment is affected, explosive remnants of war restrain freedom of movement, and cultural traditions become less vibrant or perish. In the case of Colombia, war has also led to the disappearance of thousands of people and the internal displacement of over 6 million individuals. But amidst all this endless tragedy, the country has managed to create one of the most sophisticated legal systems to protect those who do not participate—or who no

employment, production, commercialization and storage of anti-personnel mines and aggravated environmental pollution).

165 JEP Chamber for Amnesty or Pardon, *Sentence SAI-AOI-010-2019*, 8 August 2019, para. 211: “la Sala concluye que, en el caso particular, se cometió una infracción al DIH que tiene la entidad para adquirir la connotación de crimen de guerra”.

longer participate – in the hostilities. As is often the case, the main hurdles seem to arise in the implementation of, and respect for, the existing legal framework.¹⁶⁶ This might sound like a meagre consolation to the countless victims of Colombian armed conflicts, but nevertheless, thanks to these laws and judicial decisions, many citizens have received State support after their displacement, or have benefited from a State pardon, or have been spared the anxiety of living next to a military objective. No matter the numbers, each of these individual stories is a compelling case for the importance of IHL in situations of protracted armed violence.

¹⁶⁶ Human Rights Watch, *Guerra sin cuartel: Colombia y el derecho internacional humanitario*, 1998; ICRC, *Aplicación y respeto del DIH: Un reto para Colombia*, 28 November 2016.

Protecting the right to life in protracted conflicts: The existence and dignity dimensions of General Comment 36

Mona Rishmawi*

Mona Rishmawi is the Chief of the Rule of Law, Equality and Non-Discrimination of the Office of the UN High Commissioner for Human Rights. She was the Executive Director of the UN International Commission of Inquiry on Darfur, worked in the Occupied Palestinian Territory and Iraq, and was the UN Independent Expert on Human Rights in Somalia.

Abstract

With a focus on situations of protracted conflict, this article explores the new horizons offered by the recent explanation by the United Nations Human Rights Committee on the right to life in its General Comment 36. The freshly formulated contours of this right not only present normative clarity but are also valuable for conflict management and resolution. Considering the articulation by the Human Rights Committee, we can now see two dimensions of this right: existence and dignity. Although the existence dimension is not new, one now finds additional insights concerning the legality, transparency and accountability of the use of lethal force that have particular relevance to armed conflict. The new dignity dimension has practical implications for the conditions of life in protracted conflicts, taking us beyond norms to the policy spheres of humanitarian action and development.

* The author writes in her personal capacity. The views expressed in this piece do not necessarily reflect those of the United Nations or any other institution.

Tracing the origins of the term “protracted conflict” to the late Lebanese scholar Edward Azar, the article also introduces the reader to some of his work and thinking.

Keywords: dignity, grievances, Human Rights Committee, human rights, identity, identity conflicts, investigation, law enforcement, lethal force, protracted conflict, right to life, Sustainable Development Goals.

.....

Introduction

This article will focus on the right to life in protracted conflict. This right is chosen for three reasons. First, it is a supreme right that is precious not only on its own but also because it affects the enjoyment of other human rights, irrespective of the circumstances. Second, it is an umbrella right whose content can be informed by other human rights and legal regimes. Third, its scope has been freshly reformulated by the United Nations (UN) Human Rights Committee to guide our approach to addressing the challenges to the right to life in today’s world, including for those living in situations of armed conflict.

On 18 October 2018, the UN Human Rights Committee adopted a ground-breaking General Comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which pertains to the right to life.¹ General Comment 36 synthesizes this right’s main elements, drawing on the experience of the Committee over decades of engagement with States on the implementation of Article 6.

In several ways, General Comment 36 opens fresh horizons in normative thinking. It proposes, for instance, that the right to life concerns our entitlement as human beings not only “to be free from acts and omissions that are intended or may be expected to cause [our] unnatural or premature death”, but also “to enjoy a life with dignity”.² Relating the right to our existence as well as to our dignity is significant as it invokes our entitlement to certain commodities, services and protections, as will be explained later. Other developments in General Comment 36 include linking the realization of this right to the attainment of other non-ICCPR rights, weaving in economic, social and cultural rights. Also explained is the relevance of this right to a range of other legal regimes, including international humanitarian law (IHL).³

In today’s world there are around sixty-five armed conflicts, many of which have been running for decades.⁴ What most of these conflicts have in common is

1 Human Rights Committee, General Comment No. 36, “Article 6 (Right to Life)”, UN Doc. CCPR/C/GC/36, 30 October 2018 (General Comment 36).

2 *Ibid.*, para. 3.

3 *Ibid.*, Section V.

4 According to the Geneva Academy, in 2018, at least sixty-nine armed conflicts occurred on the territory of thirty States. A large number of them were of long duration, lasting for more than a decade. Annysa Bellal (ed.), *The War Report: Armed Conflicts in 2018*, Geneva Academy, April 2019, available at: www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf (all internet references were accessed in June 2020).

that they are long-lasting, causing human suffering through competitive violence and a spiral of grievances. They also have a social and economic dimension and are frequently fought along ethnic, religious or linguistic lines, leading to concerns over the security and well-being of individuals and groups. Rivalry over territorial control and other natural resources is often combined with quests for security and political and economic power. The main demands of victims of these conflicts are often centred around survival and dignity. General Comment 36 articulates an approach that helps in probing these factors.

This article applies the framework proposed for the right to life in General Comment 36 to situations of protracted conflict. It proposes that the freshly formulated contours of this right not only offer normative clarity but are also valuable for conflict management and resolution. The article will first trace the origins of the notion of “protracted conflict”, and will then consider how the UN Human Rights Committee articulates the various components of the human right to life. It will conclude by offering some thoughts on some of the broader impacts of the formulations in General Comment 36.

Who invented the term “protracted conflict”?

The phrase “protracted conflict” appears neither in the Geneva Conventions nor in their Additional Protocols. Perhaps the only international treaty reference to the expression is found in the Rome Statute of the International Criminal Court. Article 8(2)(f) of the Statute identifies certain war crimes that take place in the context of an armed conflict not of an international character on the territory of a State “when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.⁵

In law, the term “protracted” has mostly been combined with the noun “violence”. As is well known, the notion of “protracted armed violence” appeared in the 1995 decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case. It served as a criterion for the determination of the existence of a non-international armed conflict, particularly with regard to temporal scope.⁶ In subsequent jurisprudence, the ICTY clarified that the term could also be used to refer to the intensity of the

5 Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(f).

6 In *Tadić*, the ICTY states that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.” ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70, available at: www.icty.org/x/cases/tadic/acdec/en/51002.htm.

armed violence.⁷ The indicative factors relevant to assessing the “intensity” criterion include the following:

the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.⁸

The “protracted armed violence” phrase continued to be used to clarify, for instance, the legal regime applicable to counter-terrorism operations.⁹

The notion of “protracted” conflicts is often used beyond the meaning of military confrontations. It also has a long history beyond the legal field. An excellent report by the International Committee of the Red Cross (ICRC) attributes the term to the Lebanese scholar Professor Edward Azar.¹⁰ Azar was a scholar who taught in several universities in the United States. In the 1980s, he was a professor of government and politics and the director of the Center for International Development and Conflict Management at the University of Maryland at College Park.¹¹ Although his research and publications are difficult to find nowadays, the present author was able to get her hands on two of his works.¹²

Azar indicates that already in the late 1970s, he had started to associate the terms “protracted” and “conflict”, and to combine them with the word “social”.¹³ He appears to have developed his understanding of this type of conflict as he started “to look for patterns and to deal with the existential experience of Lebanon and the Middle East situation”.¹⁴ The formulation he thus used was “protracted social conflicts”.¹⁵ He clarified that the types of armed conflicts he studied had “several unique properties” and were characterized by their complexity and long duration.¹⁶

7 ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment, 3 April 2008, para.49, available at: www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf.

8 *Ibid.*

9 “Annex: Leiden Policy Recommendations on Counter-Terrorism and International Law”, in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, Cambridge University Press, Cambridge, 2013, p. 721, para. 62.

10 ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016, p. 9.

11 “Edward E. Azar, 53, A Middle East Scholar”, obituary, *New York Times*, 21 June 1991, p. B7 (Azar Obituary).

12 Edward E. Azar and John Wear Burton (eds), *International Conflict Resolution: Theory and Practice*, Wheatsheaf Books, Sussex, and Lynne Rienner, Boulder, CO, 1986 (copy available from the present author); Edward E. Azar, *The Management of Protracted Social Conflict: Theory and Cases*, Dartmouth Publishing Company, Dartmouth, 1990 (copy available at the library of the Graduate Institute of International and Development Studies, Geneva).

13 E. E. Azar, *The Management of Protracted Social Conflict*, above note 12, citing his own early work from 1986, 1984 and 1979.

14 *Ibid.*, p. 36.

15 *Ibid.*

16 E. E. Azar and J. W. Burton (eds), *International Conflict Resolution*, above note 12, p. 2.

We understand more of Azar's thinking when we examine his own chapter in the 1986 book that he co-edited with John Wear Burton.¹⁷ There, Azar elaborates on the features that led him to combine the three terms, explaining that "protracted social conflicts have typical characteristics that account for their prolonged nature"; these include "economic and technological under-development [and] distributive injustice which require the elimination or substantial modification of economic, social and extreme disparities in levels of political privilege and opportunity".¹⁸ In 1990, Azar asserted that the trigger for protracted social conflicts is social, reflecting "religious, cultural, or ethnic communal identity, which in turn is dependent upon the satisfaction of basic needs such as those for security, communal recognition and distributive justice".¹⁹

Azar recounts that there were sixty active conflicts in 1986.²⁰ They were situations that developed out of attempts to combat conditions of perceived victimization.²¹ The infrastructure for these conflicts consisted of "multi-ethnic and communal cleavages and disintegration, underdevelopment and distributive injustices".²² Azar's work leads to the conclusion that protracted conflicts are defined not only by their longevity but also by their intensity and multilayered complexity, ending with grievances that entrench them further.

Azar's research was operating in the policy domain, and his observations did not differentiate between international and non-international armed conflicts.²³ The State nexus, which often characterizes the distinction between these types of conflicts, was for him irrelevant. In fact, in the context of these conflicts, he saw the State as a "fiction".²⁴ At the end, "power ... rests with the identity group", he wrote.²⁵ This group identity, whether racial, religious, ethnic or cultural, is the most influential unit to study, and its analysis gives the best clue to the motivations, interests and needs of the group.²⁶

In reflecting on the role of the State versus the identity of the group, Azar was not interested in only making a theoretical point. His main concern was to develop a policy framework that could facilitate the management and resolution of these conflicts.²⁷ He therefore focused on the main players and on understanding the polarities involved in order to reduce or eliminate need deficiencies as causes for conflict. For these purposes, "the domestic and international are only arenas The motivations for action are internal, not systemic or international."²⁸ The origins of international conflicts, he thought, are

17 *Ibid.*

18 *Ibid.*, pp. 28–29.

19 E. E. Azar, *The Management of Protracted Social Conflict*, above note 12, p. 2.

20 E. E. Azar and J. W. Burton (eds), *International Conflict Resolution*, above note 12, p. 30.

21 *Ibid.*

22 *Ibid.*, p. 29.

23 The conflicts he studied include Israel/Palestine, Lebanon, Sri Lanka and the Falkland/Malvinas. *Ibid.*, p. 5.

24 E. E. Azar, *The Management of Protracted Social Conflict*, above note 12, p. 31.

25 *Ibid.*

26 *Ibid.*, pp. 31–32.

27 E. E. Azar and J. W. Burton (eds), *International Conflict Resolution*, above note 12, p. 2.

28 E. E. Azar, *The Management of Protracted Social Conflict*, above note 12, p. 33.

“in domestic movements for the satisfaction of needs and in the drives of nations and states to satisfy the same needs”.²⁹ In the end, “there is really only one social environment and its domestic face is the more compelling”, he wrote.³⁰

The analytical framework Azar developed for the consideration of the genesis and dynamics of such conflicts was presented in his study *The Management of Protracted Social Conflict*.³¹ This framework helps us to dig deep beneath the surface and unearth the social, economic and political factors which give rise to perceived grievances that lead to conflicts. It underlines questions of existence and dignity, including discrimination, disempowerment, inequitable access to resources and worries not only about the present but also the future, bringing us to the essence of what individuals and groups are entitled to and aspire to in life. For Azar, the causes for the grievances contributing to a conflict’s longevity are complex and are often expressed, as he sums up, in terms of cultural values, human rights and security.³² Fully understanding these concerns brings us closer to the management of such conflicts and contributes to their resolution. Azar died in June 1991. He was only 53.³³

The human right to life

Human rights law provides a powerful tool for individuals and communities to articulate their grievances and needs. The cardinal human right is our inherent right to life. A perceived unjustified attack on this right has a profound impact not only on the individual who died but also on his or her community and social group. It may also lead to a vicious cycle of violence and revenge.

Article 3 of the Universal Declaration of Human Rights (UDHR) enshrines the right to life in a simple formulation: “Everyone has the right to life, liberty and security of person.” Article 6 of the ICCPR, which bestows legal obligations on States Parties, is much more complex in its elaboration of the obligations to respect, protect and fulfil this right. It recognizes that this right is not absolute, but can be limited under very strict circumstances.³⁴

Article 6 is composed of six paragraphs. Paragraph 6(1) sets out the general principle with regard to the right to life. It states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Four of the paragraphs that follow are devoted to the question of the death penalty. Paragraph 6(3) establishes the nexus between the deprivation of life and

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ E. E. Azar and J. W. Burton (eds), *International Conflict Resolution*, above note 12, Chap. 1.

³² *Ibid.*, p. 2.

³³ Azar Obituary, above note 11. In an article published in 2005, Oliver Ramsbotham paid tribute to Azar, thirteen years after the latter’s death. He assessed the originality and significance of Azar’s work, proposing that it continues to offer pointers for understanding major armed conflicts. See Oliver Ramsbotham, “The Analysis of Protracted Social Conflict: A Tribute to Edward Azar”, *Review of International Studies*, Vol. 31, No. 1, 2005.

³⁴ General Comment 36, above note 1, para. 10.

the crime of genocide, prohibiting derogation from any obligation assumed under the Convention on the Prevention and Punishment of the Crime of Genocide.

In the discussion below, we will focus in particular on how the UN Human Rights Committee clarified the meaning of paragraph 6(1) of the ICCPR as contained in General Comment 36, and we will relate this analysis to situations of protracted armed conflict. Like other thematic outputs of human rights treaty bodies, General Comment 36 is intended to provide guidance to the 173 States party to the ICCPR. The UN Human Rights Committee's General Comments are based on regular dialogue between the Committee and States Parties in the context of the examination of periodic reports, and on the views expressed following the considerations of individual complaints. For coherence, they also take into account the formulations advanced by other treaty monitoring bodies, UN special procedures, regional bodies and other relevant sources.

Over time, these General Comments have gained legal authority. The International Court of Justice (ICJ) has specifically recognized their significance, clarifying that while it is not obliged to model its own interpretation of the ICCPR on that of the Committee, "it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty".³⁵ The ICJ also points out that the goal "is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".³⁶

The majority of States rely on the General Comments. A recent attempt by some States to question the legal value of such comments failed at the UN Human Rights Council.³⁷ The International Law Commission (ILC) also continues to cite them as an authoritative source of human rights law interpretation.³⁸

General Comment 36 updates two earlier General Comments on Article 6 of the ICCPR.³⁹ The previous texts were short and limited in scope: General Comment 6, adopted in 1982, considered the impact of war on human life, arbitrary deprivation of life (including arbitrary killings and enforced disappearances), and the question of the death penalty, while General Comment 14, adopted in 1984, was devoted to the impact of nuclear weapons on the right to life. By contrast, General Comment 36 is elaborate and comprehensive. It is twenty-four pages long, offering a new way of considering this right in the modern context.

35 ICJ, *Case Concerning Ahmadou Sadio Diallo*, Judgment, 30 November 2010, para. 66, available at: www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf.

36 *Ibid.*

37 On 27 September 2019, the UN Human Rights Council rejected an amendment to its resolution on the death penalty by a vote of eighteen for, twenty-three against, and five abstentions. The rejected text read: "Affirming that the general comments adopted by the treaty bodies are not legally binding on State parties, and do not constitute binding interpretations of treaties". Amendment L.46 to UN Doc. A/HRC/42/L.37.

38 See, for example, ILC, *Report of the International Law Commission, Seventy-first Session (29 April–7 June and 8 July–9 August 2019)*, UN Doc. A/74/10, 2019.

39 General Comment No. 6, adopted by the Human Rights Committee at its 16th Session in 1982, and General Comment No. 14, adopted at its 23rd Session in 1984.

Considering this fresh pronouncement by the UN Human Rights Committee, we can now see two dimensions of the right to life: existence and dignity. This deeper approach offers an additional tool for the management of armed conflicts and their eventual resolution.

As already indicated, General Comment 36 reminds us that we are entitled not only to be protected from acts and omissions that could cause our unnatural or premature death, but also “to enjoy a life with dignity”.⁴⁰ Accordingly, our right to life has two intertwined components: our inherent right to exist and survive, and our right to enjoy a life with dignity.

We will examine these two components below. Before we do so, however, it should be stated that while each of these dimensions has its own distinct features, they often cannot be easily de-linked. For instance, the use of armed force may not lead to immediate death but could cause an impairment that could impact a person’s ability to enjoy life with dignity. Consider also the use of the death penalty. While it is clearly a matter of existence, it has a strong dignity component too. It is not only the methods and circumstances of execution that affect dignity; the mere fact of its practice in some countries also affects human dignity, and its abolition “is both desirable and necessary for the enhancement of human dignity”, as the Human Rights Committee tells us.⁴¹

The existence dimension

In this part, we will focus on some aspects related to the use of lethal force against individuals outside and within the context of armed conflict. As stated before, while the right to life is supreme, it is not absolute and can be legitimately limited under very strict circumstances.⁴² It cannot, however, be entirely suspended, and it continues to apply even in situations of armed conflict and other public emergencies that threaten the life of the nation.⁴³

Article 6(1) of the ICCPR protects against arbitrary deprivation of life. The term “arbitrary” appears in the first paragraph of Article 6. It is a term commonly used in domestic law, particularly in constitutional, administrative and criminal law. It generally indicates that a decision or action is not supported by fair or substantial cause or reason.⁴⁴ In the ICCPR, the term appears in the context of prohibiting the deprivation of or interference in four rights: life, liberty, movement and privacy. In its General Comment 35 on Article 9, which prohibits arbitrary deprivation of liberty, the UN Human Rights Committee states:

The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness,

⁴⁰ General Comment 36, above note 1, para. 3.

⁴¹ *Ibid.*, para. 50.

⁴² *Ibid.*, para. 10.

⁴³ *Ibid.*, para. 2.

⁴⁴ See: <https://dictionary.law.com/Default.aspx?typed=arbitrary&type=1>.

injustice, lack of predictability and due process of law,⁴⁵ as well as elements of reasonableness, necessity and proportionality.⁴⁶

General Comment 36 adopts the same formulation regarding the arbitrary deprivation of life.⁴⁷

Below, we will explore the new insights offered by General Comment 36 concerning the legality, transparency and accountability of the use of lethal force, outside and within armed conflict settings. The two contexts will be examined by contrasting some paragraphs that deal with the law enforcement context, notably paragraphs 12, 13, 27, 28 and 29, with the formulations that appear in paragraph 64 focused on the situation of armed conflict. While General Comment 36 confirms some already established principles as will be seen below, it specifies some significant measures that bring the use of force within the framework of the rule of law.

The legal framework

To control the use of lethal force by law enforcement officials, General Comment 36 indicates that a clear legal framework must be put in place. This generally entails the adoption of appropriate legislation.⁴⁸ General Comment 36 insists on the conformity of this legal framework with human rights.⁴⁹ Even if lethal force is authorized under national law, it may be considered arbitrary under international law when certain standards are not met. Building on established formulations,⁵⁰ conformity with national legislation is not sufficient to render a measure not arbitrary under international human rights law. Other criteria kick in, such as establishing that the measure was necessary and proportionate.

In addition, procedures must exist to ensure that the risks posed to human life through law enforcement action are minimized.⁵¹ These measures include

procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life ... and supplying forces responsible for crowd control with effective, less-lethal means and adequate protective equipment in order to obviate their need to resort to lethal force.⁵²

45 See Human Rights Committee, *Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, 17 March 2005, para. 5.1; Human Rights Committee, *Van Alphen v. Netherlands*, Communication No. 305/1988, 23 July 1990, para. 5.8 (footnote added).

46 Human Rights Committee, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 12.

47 General Comment 36, above note 1, para. 12.

48 *Ibid.*, para. 13.

49 *Ibid.*

50 See, for example, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990 (BPUFF), para. 9, available at: www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx.

51 *Ibid.*

52 General Comment 36, above note 1, para. 13.

In particular, General Comment 36 recommends that all law enforcement officials engaged in such operations should be trained to comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF).⁵³ The aim is “to ensure, in all circumstances, the fullest respect for the right to life”.⁵⁴ The use of potentially lethal force for law enforcement purposes “is an extreme measure, which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat”.⁵⁵ The footnote to this text indicates that this last sentence derives from Principle 9 of the BPUFF.

Principle 9 specifies, however, that the use of potentially lethal force can be authorized only when “unavoidable to protect life”.⁵⁶ It does not mention the possibility of using potentially lethal force to “prevent serious injury from an imminent threat”. While the addition of this last phrase in General Comment 36 could be viewed as widening the authority to use lethal force, in reality, it may not be such a major departure from the standard; it might not be an obvious matter for law enforcement officials to distinguish between preventing a loss of life and preventing serious injury.

Paragraph 64, which is devoted to the application of Article 6 in situations of armed conflict, does not explicitly necessitate national legislation for the use of lethal force. It does, however, require that the action be in conformity with IHL, which itself requires that its rules be incorporated into national law and regulations.⁵⁷ There is also a transparency requirement, guiding States, as a general rule, to “disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life”.⁵⁸ The paragraph gives a non-exhaustive list of some elements that should be considered when assessing these criteria. These include:

the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.⁵⁹

The list stems from earlier observations made by the UN Human Rights Committee.⁶⁰ Examining these observations, further elements emerge. These

⁵³ *Ibid.*, para. 13.

⁵⁴ *Ibid.*, para. 13.

⁵⁵ *Ibid.*, para. 12.

⁵⁶ Principle 9 of the BPUFF, above note 50, states: “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

⁵⁷ See Inter-Parliamentary Union and ICRC, *International Humanitarian Law*, Handbook for Parliamentarians No. 25, 2016.

⁵⁸ General Comment 36, above note 1, para. 64.

⁵⁹ *Ibid.*

⁶⁰ The footnote to the relevant section of General Comment 36 refers to UN Doc. A/HRC/11/2/Add.4, 6 May 2009, para. 89.

include: the need for a definition and geographical and temporal scope of the armed conflict, clarification on who is a combatant or a civilian taking direct part in hostilities, and the position on the nexus that should exist between any particular use of lethal force and any specific theatre of hostilities, as well as the precautionary measures taken to avoid civilian casualties in practice.⁶¹ These indications are significant particularly as the military manuals of some countries, or parts of them, are not publicly available for examination.⁶²

Reporting, review and investigation

General Comment 36 lays down an accountability regime for the use of lethal force by requiring States to establish rules and procedures for mandatory reporting, review and investigation of lethal and other life-threatening incidents.⁶³ These measures must also apply to soldiers charged with law enforcement missions.⁶⁴ But what about a situation of armed conflict?

Recalling a principle that has been enshrined since the ICJ's Nuclear Weapons Advisory Opinion,⁶⁵ paragraph 64 affirms that the human right to life continues to apply, where IHL is also applicable, "even during the conduct of hostilities". The paragraph skips the reference to "mandatory reporting and review", but it insists on the duty to investigate.

When it comes to the scope of the investigation, General Comment 36 uses different formulations outside and within armed conflict. As a general principle, States have a general duty to investigate and where appropriate prosecute incidents involving "potentially unlawful deprivations of life".⁶⁶ Paragraph 29 specifies that outside the immediate context of an armed conflict, there is "a particular duty to investigate allegations of violations of Article 6 whenever State authorities have used or appear to have used firearms or other potentially lethal force". As for the armed context setting, paragraph 64 indicates that States "must also investigate alleged or suspected violations of Article 6 in situations of armed conflict."

Outside armed conflict, the use of force – particularly lethal force – is an extreme and exceptional measure.⁶⁷ As stated earlier, it can only be resorted to "when strictly necessary in order to protect life or prevent serious injury from an imminent threat".⁶⁸ Moreover, "the intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent

61 Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, para. 9.

62 See Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 48.

63 General Comment 36, above note 1, para. 13.

64 *Ibid.*

65 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25, available at: www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

66 General Comment 36, above note 1, para. 27.

67 *Ibid.*, para. 12.

68 *Ibid.*

threat”.⁶⁹ There is therefore mandatory reporting, review and investigation each time potentially lethal force is used. These can also extend to the permissible categories for the use of firearms included in Principle 9 of the BPUFF, as General Comment 36 brings in these principles as part of the framework. The reporting, review and investigation would be carried out to establish whether force was used

in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting [the police’s] authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.⁷⁰

Within the context of armed conflict, the use of lethal force is assumed and is subject to IHL constraints related to necessity, proportionality and distinction. While these principles, largely derived from IHL treaties and custom, might differ in their meaning from when they are used in a human rights law context, they are important safeguards for preventing the arbitrary deprivation of life.⁷¹ In any case, allegations of violations that would amount to arbitrary deprivation of life in the context of armed conflict must be investigated. They may amount to a grave breach of the Geneva Conventions, which requires investigating, and may involve the prosecution of acts such as wilful killings of protected persons.

Paragraph 64 clarifies that when lethal force is used in a manner consistent with IHL and other applicable international law norms, then in general, it is not arbitrary. This leaves open the way for concluding that some practices may be seen at face value as consistent with IHL, but could be in violation of human rights. Andrew Clapham reads this specific formulation in light of the ICJ determination in *Croatia v. Serbia*,⁷² where the Court stated:

There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.⁷³

Clapham suggests that as human rights law is concerned with all lives and not only those of civilians and persons *hors de combat*, some measures could be considered lawful under IHL but not under human rights law. He gives the example of where there are less lethal alternatives to achieve the same military objective or action that

69 *Ibid.*

70 See BPUFF, above note 50, para. 9.

71 Marco Sassòli, above note 62, pp. 53–54.

72 Andrew Clapham, “The Limits of Human Rights in Times of Armed Conflict and Other Situations of Armed Violence”, in Bardo Fassbender and Knut Traisbach (eds), *The Limits of Human Rights*, Oxford University Press, Oxford, 2019, p. 307.

73 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, para. 474, available at: www.icj-cij.org/files/case-related/118/118-20150203-JUD-01-00-EN.pdf.

is illegal under another branch of international law, such as an act of aggression.⁷⁴ One may also add the example of a killing that is motivated by race or ethnic identity and could constitute genocide. This was the question before the ICJ in the *Croatia v. Serbia* case, though the Court found that the killings in question did not meet the genocide criteria.

More straightforward is the statement in paragraph 64 that practices which are inconsistent with IHL entailing a risk to the lives of civilians and other persons protected by IHL are considered violations of human rights. The paragraph lists examples of these inconsistencies, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population; indiscriminate attacks; failure to apply the principles of precaution and proportionality; and the use of human shields.⁷⁵ Additional examples can be drawn from the source of the enumeration. These include direct targeting of civilians and civilian infrastructure, such as wastewater plants and sewage facilities; the use of civilians as human shields; refusal to evacuate the wounded; firing live bullets during demonstrations against a military operation; and detention in degrading conditions in violation of Articles 6 and 7 of the ICCPR.⁷⁶

There is also some difference in the standards of investigations outside and within the context of conflict. As a general proposition, investigating allegations of a violation of the right to life must always be carried out in an independent, impartial, prompt, thorough, effective and transparent manner.⁷⁷ As the relevant footnotes in General Comment 36 indicate, these standards stem from earlier Concluding Observations of the UN Human Rights Committee.

By contrast, paragraph 64 requires that the investigations be carried out in accordance with “relevant international standards”. This implies that some international investigation standards may not be “relevant” to the situation of armed conflict. The citation to these obligations refers to certain paragraphs in the Minnesota Protocol on the Investigation of Potentially Unlawful Death,⁷⁸ which indicate that the standards for investigating potentially unlawful death apply generally in “peacetime, situations of internal disturbances and tensions, and armed conflict”.⁷⁹ The same elements and principles related to independence, impartiality, promptness, thoroughness, effectiveness and transparency are spelled out in the Minnesota Protocol.⁸⁰

The Minnesota Protocol recognizes, however, that in certain situations such as armed conflict, there might be some practical challenges in fully applying these standards. The example that is given is “the obligation on a State, as opposed to another actor, to investigate deaths linked to armed conflict when they occur on

74 A. Clapham, above note 72, p. 307.

75 General Comment 36, above note 1, fn. 259.

76 *Ibid.*

77 *Ibid.*, para. 28.

78 Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016 (Minnesota Protocol), paras 20–22, available at: www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf.

79 *Ibid.*, para. 20.

80 *Ibid.*, pp. 7–10.

territory the State does not control”.⁸¹ Here the suggestion is to record the constraints and reasons for non-compliance and publicly explain them. In other words, while the investigation may not be thorough, it should still be transparent and its limited scope justified.⁸²

Confidential operational briefings would not be sufficient to replace an investigation in the context of military operations.⁸³ The Minnesota Protocol touches on the particularities of investigations related to the conduct of hostilities.⁸⁴ In case of casualties, it requires a post-operation assessment to establish the facts, including the accuracy of the targeting. If there are “reasonable grounds” to suspect that a war crime was committed, the State is obliged to carry out a full investigation and prosecute those who are responsible.⁸⁵ At a minimum, further inquiry is necessary even if the death resulted from a violation of IHL that would not amount to a war crime, and “where an investigation ... into the death is not specifically required under IHL”.⁸⁶

The dignity dimension

A significant addition to our understanding of the right to life is the new formulation in General Comment 36 that we are entitled “to enjoy a life with dignity”.⁸⁷ The ICCPR makes three references to dignity: twice in the preamble and once in Article 10 regarding the deprivation of liberty. The references in the preamble are rooted in the classical philosophical position that human rights derive from the inherent dignity of the individual, which is “the foundation of freedom, justice and peace in the world”.⁸⁸

There is no reference to dignity in Article 6 of the ICCPR, and the term does not appear in the previous General Comments on this provision.⁸⁹ General Comment 36, however, refers to this notion seven times: when commenting on euthanasia, the impact of the denial of basic rights such as food, water and shelter, the effects of poverty, and environmental degradation.⁹⁰

Nowhere in General Comment 36 do we find a definition of dignity, but paragraph 26 offers some indications as to how the notion connects to the right

81 *Ibid.*, para. 20.

82 *Ibid.*

83 Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 9.

84 Minnesota Protocol, above note 78, para. 21.

85 *Ibid.*

86 *Ibid.* See also Office of the UN High Commissioner for Human Rights (OHCHR), *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, Guidance and Practice*, New York and Geneva, 2015, available at: www.ohchr.org/Documents/Publications/Col_Guidance_and_Practice.pdf; Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Geneva, September 2019, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf.

87 General Comment 36, above note 1, para. 3.

88 Universal Declaration of Human Rights, UNGA Res. 217 A (III), 10 December 1948, Preamble.

89 See above note 39.

90 General Comment 36, above note 1, paras 9, 26, 50, 62.

to life. This is done through providing examples of the type of general conditions in society that could threaten life and by specifying measures that could be taken to establish adequate conditions to protect life.

Understanding “dignity”

“Dignity” is an old notion with historic, religious, moral and philosophical connotations.⁹¹ Since its inclusion in normative legal documents, scholars have been grappling with the question of whether it has normative content.

Multiple references to dignity in human rights and IHL can be found in instruments adopted in the immediate aftermath of World War II. In 1945, the UN Charter used two terms, “dignity” and “worth”, when reaffirming faith in every human being, while also referring to equality. In 1948, the UDHR echoed the Charter by asserting in its first article that all human beings are born free and equal in dignity and rights. The 1949 Geneva Conventions prohibit outrages against personal dignity in their Article 3 common to the four Conventions. These references reflect the belief that the restoration of human dignity was a main challenge in the post-war era.

An important early consideration of the meaning of dignity in modern international law came in the work of Oscar Schachter. Schachter, a UN legal adviser in the 1940s,⁹² published in 1983 an article on the normative meaning of dignity.⁹³ Tracing the term to its etymological Latin root, he concluded that “when the UN Charter refers to the ‘dignity and worth’ of the human person, it uses two synonyms for the same concept”.⁹⁴

Schachter reviewed the reference to dignity in a number of human rights treaties to establish whether it has a coherent normative content.⁹⁵ His aim was to see if there are practical consequences arising from invoking this notion, particularly “whether violations of dignity should as a rule be dealt with through legal action and the assertion of rights”.⁹⁶ When concretely invoked, “it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined”.⁹⁷ He concludes, however, that the meaning of dignity is better left “to intuitive understanding”.⁹⁸

Looking afresh at how the term “dignity” features in human rights law today, one finds it in articulating the principle of equality,⁹⁹ the protection of

91 Jack Donnelly, “Human Rights and Human Dignity”, in *Protecting Dignity: An Agenda for Human Rights*, Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, June 2009.

92 Wolfgang Saxon, “Oscar Schachter, 88, Law Professor and U.N. Aide”, obituary, *New York Times*, 17 December 2003.

93 See Oscar Schachter, “Human Dignity as a Normative Concept”, *American Journal of International Law*, Vol. 77, No. 4, 1983.

94 *Ibid.*, p. 849.

95 *Ibid.*, pp. 848–854.

96 *Ibid.*

97 *Ibid.*, pp. 849.

98 *Ibid.*

99 UDHR, Preamble and Art. 1.

persons deprived of liberty,¹⁰⁰ the right to education,¹⁰¹ the rights of children with disabilities, discipline of children at school, and with regard to juvenile justice.¹⁰² The Convention on the Rights of Persons with Disabilities includes the most references to dignity, as the term appears in the general principles, and with regard to non-discrimination, individual autonomy, freedom from exploitation and violence and abuse, as well as health, education and awareness-raising.¹⁰³ None of these provisions offers a legal definition of dignity, however.

As the ICRC president has noted, dignity is among the principles that IHL and international human rights law hold in common.¹⁰⁴ Additional Protocols I and II¹⁰⁵ broaden the scope of personal dignity beyond what appears in common Article 3 by adding references to “enforced prostitution and any form of indecent assault”.¹⁰⁶ Protocol I relating to international armed conflicts takes the issue a step further by considering that attacks against dignity committed on racial grounds may constitute war crimes.¹⁰⁷ The term “dignity” also appears in the Commentaries to the Geneva Conventions, and in multiple explanations of customary IHL rules, concerning the treatment of prisoners of war, the treatment of the sick, wounded and dead and in the context of detention or internment,¹⁰⁸ enforced disappearances, collective punishment, and rape and sexual violence.¹⁰⁹ The notion of dignity is also used in the context of humanitarian relief—as an illustration, in some conflicts, relief workers distribute “dignity kits” containing hygiene and sanitary items, as well as other items explicitly tailored towards the local needs of women and girls of reproductive age.¹¹⁰

As Christopher McCrudden points out, there is reference to dignity in national constitutions, laws and court decisions.¹¹¹ Despite its inclusion in the

100 ICCPR, Art. 10.

101 International Covenant on Economic, Social and Cultural Rights, Art. 13.

102 See, for instance, Convention on the Rights of the Child, Preamble and Arts 23, 28, 37, 39, 40.

103 See, for instance, Convention on the Rights of Persons with Disabilities, Preamble and Arts 1, 3, 8, 24.

104 Dignity is a common principle underlining the complementary relationship between human rights and IHL, as the ICRC president has stated. He has noted that IHL and international human rights law both “hold some of the answers, and they are crystalized in the principles of impartiality, non-discrimination, inclusion, equality and in humanity, dignity and agency.” ICRC, “The Law Does Not Discriminate: Neither Can We”, President’s Address to the Human Rights Council, 26 February 2019, available at: www.icrc.org/en/document/law-does-not-discriminate-nor-can-we.

105 Additional Protocol I (AP I), Art. 75; Additional Protocol II (AP II), Art. 4. See also the ICJ *Nicaragua* case.

106 AP I, Art. 75; AP II, Art. 4.

107 AP I specifies that “practices involving outrages upon personal dignity, based on racial discrimination” are a grave breach of the Protocol, when committed wilfully and in violation of the Geneva Conventions or the Protocol (Art. (85(4)(c)). Outrages upon personal dignity are always prohibited, “whether committed by civilian or military agents” (Art. 75(2)(6)).

108 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rules 87, 90, 113, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

109 *Ibid.*, Rules 90, 93, 98, 148, 187.

110 See, for example, Global Protection Cluster, GBV Sub-Cluster Turkey (Syria), “Dignity Kit Guidance Note”, Turkey, 2015, available at: www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/dignity_kits_guidance_note_en.pdf.

111 Christophe McCrudden, “Human Dignity and Judicial Interpretation of Human Rights”, *European Journal of International Law*, Vol. 19, No. 4, 2008.

statutes of the international criminal tribunals,¹¹² there is no international jurisprudence that defines dignity. In reviewing the case law of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, one finds reference to the formulation in common Article 3.¹¹³ Nonetheless, the jurisprudence of these judicial bodies does not provide further indications as to the normative elements of dignity. There is mention of this notion in the context of other violations, such as hate speech towards members of certain groups,¹¹⁴ violations of physical integrity and in relation to protection from sexual assault, and the respect of the dead.¹¹⁵

The Rome Statute of the International Criminal Court refers to dignity when incorporating common Article 3 of the Geneva Conventions.¹¹⁶ The Statute also requires the taking of appropriate measures to protect the dignity and privacy of victims and witnesses.¹¹⁷ The Court's jurisprudence has not tackled these elements, however.

While the above overview indicates that it is difficult to ascribe a precise legal meaning to the notion of human dignity, we can identify some of its contours. McCrudden considers that there are three dimensions to dignity.¹¹⁸ The first is that every human being possesses an intrinsic worth of just being human. The second is that this intrinsic worth should be respected and recognized by others; McCrudden calls this a "relational claim".¹¹⁹ He suggests that human rights standards add a third important element: "the claim that the state should be seen to exist for the sake of the individual human being, and not vice versa".¹²⁰

Frédéric Mégret and Florian Hoffmann also emphasize the inner worth and relational elements of this notion.¹²¹ They stress that dignity is influenced by a host of psychological, cultural and social factors. Even if dignity belongs to each individual, it is constructed by and dependent on relations of the individual with others. It is also a holistic concept that is dependent on particular constellations of certain rights, and is in fact always something more than the sum of these

112 Article 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) gives the Tribunal explicit jurisdiction over violations of common Article 3 and AP II.

113 In several pieces of ICTY and ICTR jurisprudence, the various chambers refer to "the right to respect for dignity". See, for example, ICTY, *Prosecutor v. Vojislav Šešelj*, Case No. MICT-16-99-A, Judgment (Appeals Chamber), 11 April 2018, para. 163; ICTR, *Prosecutor v. Ferdinand Nahimana et al. (Media Case)*, Case No. ICTR-99-52-A, Judgment (Appeals Chamber), 28 November 2007, paras 986–987. Also see: <http://cld.irmct.org/advanced-search/?&keyword=dignity>.

114 ICTY, *Šešelj*, above note 113; ICTR, *Nahimana*, above note 113.

115 ICTY, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A; ICTR, *Prosecutor v. Théoneste Bagosora et al. (Military I)*, Case No. ICTR-98-41-A.

116 Rome Statute, above note 5, Arts 8(2)(b)(xxi), 8(2)(ii).

117 *Ibid.*, Art. 68(1).

118 C. McCrudden, above note 111, pp. 679–680.

119 *Ibid.*

120 *Ibid.*

121 Frédéric Mégret *et al.*, "Human Dignity: A Special Focus on Vulnerable Groups", in *Protecting Dignity: An Agenda for Human Rights*, Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, June 2009, available at: www.researchgate.net/publication/254903575_Dignity_A_Special_Focus_on_Vulnerable_Groups.

rights.¹²² The notion of dignity therefore affects the content of various rights, through the recognition of individual worth and the demand of conduct that is consistent with such recognition.

Is there a value, then, in referring to the notion of dignity when exploring the content of the right to life? In responding to this question, it is instructive to recall the work of Jack Donnelly, who suggests that human dignity can be considered an objective that is achieved through the respect of human rights.¹²³ Human rights provide “a road map and a set of practices for constructing a life of dignity in the conditions of the contemporary world”.¹²⁴ In other words, human dignity becomes the sum of all human rights. In this way, human rights not only provide the elements for understanding dignity, but also offer the mechanisms and fora for its realization.

General conditions and policy measures

General Comment 36 suggests that dignity serves a policy objective, particularly through its relational dimension. Paragraph 26 invites States to take “appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”.¹²⁵

The term “conditions” appears in the ICCPR. Its fourth preambular paragraph recognizes the need to create conditions “whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”, asserting therefore the indivisibility and interdependence of rights. The ICCPR’s sixth preambular paragraph recalls the realization that individuals have duties to each other and to the community to which they belong, and that they are under the responsibility to strive for the promotion and observance of human rights.

Seen from the relational perspective, the right to enjoy a life with dignity is dependent on the conditions created in society by individuals, the community and the State. The State must take “appropriate measures” to prevent these conditions from deteriorating in a way that could affect human dignity. The examples provided in General Comment 36 help in shedding light on the areas that require attention. These include:

high levels of criminal and gun violence, pervasive traffic and industrial accidents, degradation of the environment, deprivation of land, territories and resources of indigenous peoples, the prevalence of life threatening diseases, such as AIDS, tuberculosis or malaria, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness.¹²⁶

Some of the examples cut across the survival and dignity dimensions of the right to life. The illustrations above are also taken from both conflict and non-conflict

¹²² *Ibid.*, p. 10.

¹²³ J. Donnelly, above note 91, p. 13.

¹²⁴ *Ibid.*

¹²⁵ General Comment 36, above note 1, para. 26.

¹²⁶ *Ibid.*, para. 26.

settings, as the footnotes to paragraph 26 indicate. They mix civil and political dimensions with economic, social and cultural issues and touch on the basic protections that need to be established to ensure survival and protect dignity. The examples appear to correspond as well to the category of “minimum core obligations”, as elaborated by the Committee on Economic, Social and Cultural Rights.¹²⁷ These include addressing threats such as starvation,¹²⁸ lack of access to the minimum essential amount of water,¹²⁹ the absence of essential primary health care, including essential drugs,¹³⁰ and lack of essential basic shelter and housing, including sanitation.¹³¹ They also correspond to prohibitions under IHL and international criminal law.¹³²

Paragraph 26 further proposes some structural measures and policy responses and encourages the adoption of strategic plans. The language in this paragraph demonstrates how the various human rights obligations could be integrated into a road map that aims at transforming policies and perspectives. They help to identify the specific results that need to be realized for accomplishing the overall goal of the enjoyment of a right to life with dignity.

These considerations are also relevant to the situation of protracted conflicts. In its report *Protracted Conflict and Humanitarian Action*,¹³³ the ICRC draws on its operational experience to describe its approach to humanitarian assistance. The report emphasizes that in conjunction with protection, humanitarian assistance becomes essential to addressing the social, economic and personal needs of individuals and communities during the span of such a conflict.

There is an ongoing debate about the extent to which humanitarians should be involved in responding to systemic failures in protecting the basic rights and needs of individuals during an armed conflict. Should they worry about emergency relief

127 Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No. 3, “The Nature of States Parties’ Obligations”, UN Doc. E/1991/23, 14 December 1990 (General Comment 3).

128 *Ibid.*; CESCR, General Comment No. 12, “The Right to Adequate Food”, UN Doc. E/C.12/1999/5, 12 May 1995.

129 CESCR, General Comment No. 15, “The Right to Water”, UN Doc. E/C.12/2002/11, 20 January 2003.

130 General Comment 3, above note 127; CESCR, General Comment No. 14, “The Right to the Highest Attainable Standards of Health”, UN Doc. E/C.12/2000/4, 11 August 2000.

131 General Comment 3, above note 127; CESCR, General Comment No. 4, “The Right to Adequate Housing”, UN Doc. E/1992/23, 13 December 1991; CESCR, General Comment No. 7, “The Right to Adequate Housing: Forced Evictions”, UN Doc. E/1998/22, 20 May 1997.

132 Deliberately inflicting on a group conditions of life calculated to bring about its physical destruction, in whole or in part, may meet the threshold of the crime of genocide: Rome Statute, above note 5, Art. 6 (c). The crime against humanity of extermination entails intentional infliction of conditions such as deprivation of access to food and medicine, calculated to bring about the destruction of part of the population: *ibid.*, Art. 7(2)(b). With regard to war crimes, in international armed conflict, for example, it is a crime to use the starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies: *ibid.*, Art. 8(b)(xxv). In both international and non-international armed conflict, there is the crime of intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives: *ibid.*, Arts 8(b)(ix), 8(e)(iv).

133 ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016, available at: www.icrc.org/sites/default/files/document/file_list/protracted_conflict_and_humanitarian_action_icrc_report_lr_29.08.16.pdf.

response or system support and long-term activities that may intersect with development programmes? How can they ensure that such activities are sustainable and can easily transform from relief to development? Is this their role as humanitarians? Can they and should they assume the legal obligation of the duty barriers, States and non-State actors, as relevant? Support for systems sometimes indeed blurs the lines regarding legal obligations and the distinction between the supporting role of humanitarian assistance and that of development activities.

For some, humanitarian action is for addressing the immediate needs of humans to survive, rather than structural issues. One humanitarian worker puts it this way: “Would you want ambulance teams to aim at strengthening the hospital system or improving nutrition? No. Should humanitarians be held accountable for ending hunger? No. They should be held accountable for feeding people who are starving.”¹³⁴ Others consider that humanitarians must play a role in addressing structural challenges,¹³⁵ particularly in the context of the implementation of the international policy framework of the Sustainable Development Goals (SDGs).¹³⁶ As one commentator put it, “the commitment and cooperation of humanitarian actors is imperative to the achievement of the SDGs and focusing efforts on realizing the agenda is key to building resilience to and preventing complex emergencies”.¹³⁷

Looking at humanitarian action from the perspective of the enjoyment of the right to life with dignity is also important from the perspective of intergenerational rights. Here, we are confronted with law and policy considerations regarding the protection of the environment, for instance. General Comment 36 contributes to this debate by linking the right to life to broader international law regimes. Invoking the obligations under international environmental law, it considers the threats to a life with dignity that stem from environmental degradation, climate change and unsustainable development.¹³⁸ It points to the particular importance of ensuring respect for the right to life with dignity when designing environmental policies, including protection from “harm, pollution and climate change caused by public and private actors”.¹³⁹ Applying these principles to a specific case, the UN Human Rights Committee emphasized the State’s positive obligations in this regard, recalling that the State Party in question is also bound by the Stockholm Convention on Persistent Organic Pollutants in addition to its ICCPR obligations.¹⁴⁰

134 Marc DuBois, “Don’t Blur the Lines between Development and Humanitarian Work”, *The Guardian*, 12 May 2016, available at: www.theguardian.com/global-development-professionals-network/2016/may/12/dont-blur-the-lines-between-development-and-humanitarian-work.

135 Alex Lia, “What Role do Humanitarians Play in the Achievement of the Sustainable Development Goals?”, Humanitarian Advisory Group, available at: <https://humanitarianadvisorygroup.org/what-role-do-humanitarians-play-in-the-achievement-of-the-sustainable-development-goals/>.

136 See the SDGs website, available at: www.un.org/sustainabledevelopment/.

137 A. Lia, above note 135.

138 General Comment 36, above note 1, para. 62.

139 *Ibid.*

140 OHCHR, “Paraguay Responsible for Human Rights Violations in Context of Massive Agrochemical Fumigations”, 14 August 2019, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24890&LangID=E.

The entitlement of the future generation, including those living in conflict settings, to enjoy a life with dignity was recently highlighted by the work of the ILC, building on the linkages between environmental law, human rights law and IHL.¹⁴¹ In seeking authority for its draft principles on the protection of the environment in relation to armed conflict, the ILC draws attention to paragraph 26 of General Comment 36. It notes that “degradation of the environment” was listed “among general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”.¹⁴² This tells us that the two components of existence and dignity are essential for realizing the right to life in armed conflict.

Final remarks

For decades, human rights defenders and humanitarian practitioners have been working to develop ways to assist those living under protracted conflicts. With the elaboration of General Comment 36, the UN Human Rights Committee is offering us an additional sophisticated tool to assist all individuals, including those living in conflict, in attaining their right to life in its full meaning. We can now view this right from the two dimensions of existence and dignity and be backed by the Committee’s authoritative legal approach.

General Comment 36 takes us beyond legal norms and into the practical and policy spheres of humanitarian action, conflict management and resolution, recovery and development. Tracing the term “protracted conflict” to its initiator Professor Edward Azar, we can see how it was intended to speak of the complexity of identity, the social dimension and the grievances that brew over time. Azar’s pioneering work invites us to deepen our understanding of what causes the conflict in the first place and of the entitlements and aspirations of individuals and groups. His hope was that this more profound approach would strengthen the ability to assist in convincing people to come out of armed conflict. Time has shown that his analysis remains relevant and is enhanced by the contemporary experience of today’s conflicts. General Comment 36 takes us further on this path by highlighting that all people, including those living in protracted conflict, have the right not only to survive but also to live in dignity. It is now up to all those working to manage and end conflicts to take these principles forward in a practical way.

141 ILC, above note 38, Chap. VI, “Protection of the Environment in Relation to Armed Conflicts”.

142 *Ibid.*, p. 271, fn. 1304.

The notion of “acts harmful to the enemy” under international humanitarian law

Robert Kolb and Fumiko Nakashima*

Robert Kolb is Professor of Public International Law at the University of Geneva.

Fumiko Nakashima is a Protection Delegate with the International Committee of the Red Cross.

Abstract

This article provides a legal analysis of the largely uncharted notion of “acts harmful to the enemy” under international humanitarian law, which reconciles the humanitarian need to grant special protection to medical services (medical personnel, units and transports) in the interests of the wounded and sick with the military necessity to remove it when acts are committed contrary to good faith and for hostile purposes or with effects which harm the adverse party. The meaning of the notion is clarified by primarily looking into the legality of an attack against land-based medical services by the aggrieved party to the conflict as a consequence of harmful acts. It concludes with specific recommendations on how to interpret the law governing such an attack, considered prima facie lawful, on a hospital.

Keywords: international humanitarian law, acts harmful to the enemy, special protection of medical personnel and medical objects, general protection of civilians and civilian objects, perfidy, act of hostility, direct participation in hostilities, military objectives, proportionality, precautions.

: : : : : :

* The views expressed here are those of the authors and do not necessarily reflect the position of the International Committee of the Red Cross. The authors wish to express their gratitude to Chris Harland, Austin Shangraw and Rebecca Balis for their insights and comments on earlier drafts.

Introduction

In recent times – as the armed conflict in Syria demonstrates – there have been a number of attacks against hospitals and medical installations.¹ Hospitals and installations are protected under international humanitarian law (IHL) unless they are used for “acts harmful to the enemy” (AHTTE).² Belligerents are under an obligation to grant so-called “special protection” to “medical personnel, units and transports”³ on account of their humanitarian function in order to ensure medical care for the wounded and sick, or shipwrecked, in all circumstances. This “special protection” is a *lex specialis* (though not of a derogable nature) with regard to the so-called “general protection” of civilian persons under Articles 48 and 51 of Additional Protocol I to the four Geneva Conventions of 1949 (AP I), and civilian objects under Article 52(2) of AP I, with their related customary international law norms. General protection is lost when an object becomes a military objective. Simply put, this is the case when that object makes a military contribution to the enemy and its destruction or neutralization offers a military advantage to the attacking belligerent. Conversely, objects under special protection are normally placed under some higher threshold regarding the loss of protection. In the case of medical services, this occurs when these carry out AHTTE and after a warning has remained unheeded.

The 1949 Geneva Conventions and their 1977 Additional Protocols do not define the notion of AHTTE,⁴ nor the precise consequences of a loss of special protection.⁵ The present paper tries to partially fill this gap by offering a more in-

1 See, for example, UNSC Res. 2286, 3 May 2016; Médecins Sans Frontières, *Initial MSF Internal Review: Attack on Kunduz Trauma Centre, Afghanistan*, Geneva, 5 November 2015. An older example is provided by the Italian war in Ethiopia, in 1935: see Marcel Junod, *Le troisième combattant*, Librairie Payot, Lausanne, 1947, pp. 35 ff.

2 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 21; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 19(1); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 13(1); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 11(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 25, 28–29, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

3 For the definition of “medical service”, see Pietro Verri, *Dictionary of the International Law of Armed Conflict*, ICRC, Geneva, 1992, p. 71.

4 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed. Geneva, 2016 (ICRC Commentary on GC I), Art. 21, para. 1840; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on AP I/AP II), AP I, Art. 13, para. 550.

depth legal analysis on the notion of “acts harmful to the enemy” in relation to medical services⁶ and its precise relations to other relevant notions of IHL.⁷ It will be centred on land warfare⁸ and more particularly on the legality of military attacks,⁹ to the exclusion of lawful capture of medical personnel in case of AHTTE. The latter situation is not specifically relevant for an analysis of AHTTE: the personnel captured retain their legal status¹⁰ and are protected under the rules on retention.¹¹ What is specific to AHTTE is that under some circumstances the adverse belligerent is allowed to attack a medical unit. It is in this perspective that the notion of AHTTE has been shaped, and in this perspective that it must be scrutinized and interrogated in the first place. This, then, is the *punctum saliens* of the present article.

Before delving into the subject matter, some preliminary definitions of the relevant notions – notably, “special protection”, “medical personnel” and “medical units and transports” – are discussed, followed by an analysis of the conditions for the loss of special protection. The notion of AHTTE is then examined through its negotiating history and its relations with other concepts of IHL, such as “perfidy”, “direct participation in hostilities” and “military objective”. Building on the distilled findings, the consequences of the loss of special protection, as a result of AHTTE and not heeding a warning, are explored. Lastly, specific recommendations are provided on how to interpret the rules that govern an attack, considered *prima facie* lawful, on a hospital.

- 5 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8–10 December 2015, p. 32.
- 6 An analysis of the same term in relation to civilian civil defence organizations provided in Article 65(1) of AP I will be excluded.
- 7 This article will remain centred on IHL. For a double IHL and international human rights law perspective on the protection of medical services, see Alexander Breitegger, “The Legal Framework Applicable to Insecurity and Violence Affecting the Delivery of Health Care in Armed Conflicts and Other Emergencies”, *International Review of the Red Cross*, Vol. 95, No. 889, 2013. IHL is largely *lex specialis* in this context, which entails the application of the conduct of hostilities paradigm: cf. *ibid.*, p. 91.
- 8 See ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed. Geneva, 2017 (ICRC Commentary on GC II), Art. 36, para. 2481. According to the ICRC Commentary, it is more pertinent to analyze the notion of AHTTE in the context of land rather than sea warfare. The hospital ship’s personnel constitute an “integral part of the protected platform” and engagement in such an act becomes relatively less consequential.
- 9 The definition of “attack” is provided in Article 49 of AP I as “acts of violence against the adversary, whether in offence or in defence”.
- 10 For an exploration of divergent views, see ICRC Commentary on GC I, above note 4, Art. 24, para. 2010; Marco Sassòli, “When Do Medical and Religious Personnel Lose What Protection?”, in *Vulnerabilities in Armed Conflicts: Selected Issues*, Proceedings of the 14th Bruges Colloquium, 17–18 October 2013, pp. 55–57; Tom Haec, “Loss of Protection”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 848–849.
- 11 GC I, Arts 28–32. Cf. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 37.

Special protection

Medical personnel, units and transports, as well as the wounded and sick, are entitled to protection against direct attack in both international armed conflict (IAC) and non-international armed conflict (NIAC). This special protection is granted by a series of specific rules of IHL.¹² Originally, IHL only protected “wounded and sick” combatants;¹³ today, civilians are included in that notion. Indeed, AP I established a uniform protective regime.¹⁴ To be wounded or sick under IHL, two cumulative criteria have to be fulfilled: (1) a person must require medical care; and (2) he or she must refrain from any act of hostility.¹⁵ Thus, wounded or sick persons who commit an “act of hostility”¹⁶ (to be defined below) do not qualify as such under IHL and do not benefit from the protective regime granted to this category of persons.¹⁷ The legal status of being wounded or sick therefore depends as much on a person’s actual conduct as on their medical condition. This binary definition is relevant for both IAC and NIAC.¹⁸

The notion of “medical personnel” was similarly extended to cover both military personnel and civilians.¹⁹ Under contemporary IHL, the definition, which builds upon Articles 24–26 of Geneva Convention I (GC I) and Article 20 of Geneva Convention IV (GC IV), is codified in Article 8(c) of AP I. Qualifying as medical personnel under IHL supposes again the fulfilment of two cumulative criteria: (1) medical personnel must be assigned to their medical duties by a party to the conflict under whose control they are placed;²⁰ and (2) the assignment, whether temporary or permanent, must be exclusive – i.e., limited to the “search for, collection, transportation, diagnosis or treatment, including first-aid treatment, of the wounded, sick and shipwrecked, and the prevention of disease”²¹ – for all the time that the person is assigned to medical tasks. This definition is considered applicable in both IAC and NIAC,²² subject to the differences resulting from the presence of non-State armed groups. When civilian medical personnel do not fulfil the conditions set out above, they may still be protected against attacks by the general protection accorded to civilians.²³

Protected objects are in the first place “medical units and transports”, extending once again to both military and civilian ones.²⁴ Special protection is

12 ICRC Customary Law Study, above note 2, Rules 25–26, 28–30, 109–111, and the rules referred to therein.

13 ICRC Commentary on GC I, above note 4, Art. 12, para. 1321.

14 AP I, Art. 8(a). See also ICRC Commentary on AP I, above note 4, Art. 8(a), para. 304; Jann K. Kleffner, “Protection of the Wounded, Sick, and Shipwrecked”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 323–324.

15 AP I, Art. 8(a). See also ICRC Commentary on GC I, above note 4, common Art. 3, para. 737, and Art. 12, para. 1341.

16 IHL does not clearly define the term “act of hostility”. See J. K. Kleffner, above note 14, p. 324.

17 ICRC Commentary on AP I, above note 4, Art. 8, para. 306.

18 ICRC Commentary on GC I, above note 4, common Art. 3, para. 738.

19 J. K. Kleffner, above note 14, pp. 338–339.

20 ICRC Customary Law Study, above note 2, commentary on Rule 25, p. 82.

21 *Ibid.*, p. 81.

22 ICRC Commentary on AP II, above note 4, Art. 9, para. 4663.

23 AP I, Arts 48, 51; AP II, Art. 13; ICRC Customary Law Study, above note 2, Rule 1.

restricted to medical units and transports that are assigned to medical purposes by a party to the conflict. Unauthorized medical units or transports are protected according to the rules on the protection of civilian objects (general protection). Again, these rules are regarded to be applicable in both IAC and NIAC.²⁵ Both military and civilian medical objects are also under the purview of protection as civilian objects (AP I, Article 52).²⁶ Civilian objects are negatively defined as “all objects that are not military objectives”.²⁷ This is manifestly the case for both military and civilian medical units and transports.

The notion of special protection entails the substantive obligation to “respect and protect”. This term was first introduced in treaty law in the 1906 Geneva Convention²⁸ governing land warfare to safeguard the immunity, inviolability and neutrality enjoyed by ambulances, medical personnel and, by implication, the wounded and sick. The obligation to respect entails a series of obligations of a negative nature, notably to refrain from attacking protected persons. The obligation to protect implies a series of obligations of a positive nature – i.e., to take measures for the benefit of the protected persons.²⁹ This double obligation applies both in the relationships between a party to the conflict and the protected persons of the enemy, and in those with persons of its own armed forces.³⁰ Special protection of persons or units applies “in all circumstances”³¹ except when acts are committed for hostile purposes or with effects which harm the adverse party. The formulation indicates that operational reasons or military necessity cannot be invoked, as such, to justify non-compliance.³² The obligation exists regardless of whether or not the enemy complies with it;³³ belligerent reprisals are prohibited against protected persons in both IAC and NIAC.³⁴

The main aspect of special protection relevant for the present article relates to the prohibition against attacking protected persons and objects. This obligation concerns in the first place direct attacks on such persons or objects, but the question is also whether in attacking some military objective the proportionality

24 For units: GC I, Art. 19; GC IV, Art. 18; AP I, Art. 8(e). For transports: GC I, Art. 35; GC IV, Art. 21; AP I, Art. 8(g).

25 ICRC Commentary on AP II, above note 4, Art. 11, paras 4711–4712.

26 ICRC Commentary on GC I, above note 4, Art. 19, para. 1794; Laurent Gisel, “Can the Incidental Killing of Military Doctors Never Be Excessive?”, *International Review of the Red Cross*, Vol. 95, No. 889, 2013, pp. 219–220.

27 Cf. ICRC Customary Law Study, above note 2, Rule 9.

28 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 202 CTS 144, 6 July 1906 (entered into force 9 August 1907).

29 ICRC Commentary on GC I, above note 4, Art. 24, para. 1984.

30 *Ibid.*, para. 1986.

31 For the wounded and sick: GC I, Art. 12(1); GC IV, Art. 16(1); AP I, Art. 10(1); AP II, Art. 7(1). For medical personnel: GC I, Arts 24, 25; AP I, Art. 15(1); AP II, Art. 9; ICRC Customary Law Study, above note 2, Rule 25. For medical units and transports: GC I, Arts 19(1), 35; GC IV, Arts 18(1), 21; AP I, Arts 12(1), 21; AP II, Art. 11(1); ICRC Customary Law Study, above note 2, Rules 28–29.

32 ICRC Commentary on GC I, above note 4, Art. 24, para. 1983; J. K. Kleffner, above note 14, p. 326.

33 ICRC Commentary on GC I, above note 4, para. 1994.

34 GC I, Art. 46; GC II, Art. 47; AP I, Art. 20; ICRC Customary Law Study, above note 2, Rules 146, 148.

rule requires us to take account of the collateral losses to *military* medical personnel and installations (it is clear that the collateral losses to *civilian* medical personnel and objects must be taken into account). The answer to this question is controversial.³⁵ For some, the proportionality restriction fully applies also in this context.³⁶ There would be no apparent reason why the obligations under special protection should be limited to direct attacks and not extended to the conduct of hostilities in general. It would also be inadequate to conclude that specially protected persons should enjoy a lesser degree of protection than ordinary civilians.³⁷ Moreover, the opposite interpretation would hamper the fulfilment of the purpose of special protection: in order to provide medical care to the wounded and sick, the personnel and objects dedicated to that task have to operate in proximity of the fighting, and it is thus essential to uphold their protection against incidental harm. For some other authors, the obligation applies but the equation may be slightly more lenient than the one for civilian collateral damage, on account of the military nature of the personnel and objects at stake, especially in the midst of combat operations.³⁸ Lastly, there are authors denying that the proportionality requirement applies to military medical personnel and objects, or to the military wounded and sick, those persons remaining combatants.³⁹

The first or second view are the better ones: there is no reason to consider that protected persons, including those placed *hors de combat*, are protected less than civilians. On the contrary, IHL provides for obligations not to attack such persons,⁴⁰ notwithstanding their combatant status; when such an obligation against direct attack is stipulated, the lesser obligation not to exceed in collateral damage against these persons must be considered *a fortiori* as being contained in the main rule against attack (i.e., special protection). This is all the more true given that the principle of precautions in attack (as enshrined in Article 57 of AP

35 For a recent literature review that provides an assessment of the law and State practice regarding this question and develops further clarification in relation to protected military persons, see Aurel Sari and Kieran Tinkler, "Collateral Damage and the Enemy", *British Yearbook of International Law*, 2019.

36 ICRC Commentary on GC I, above note 4, Art. 19, para. 1797, and Art. 24, para. 1987; Laurent Gisel, "Relevant Incidental Harm for the Proportionality Principle", in *Urban Warfare*, Proceedings of the 16th Bruges Colloquium, 15–16 October 2015, pp. 121–123.

37 This does not imply that medical personnel, due to their humanitarian function, are assigned a higher normative value in comparison to the lives of civilians under the proportionality calculus. See, for example, Laurent Gisel (ed.), *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, Report of the International Expert Meeting, Quebec, 22–23 June 2016, ICRC and Université Laval, 2018, pp. 61, 63.

38 Robert Kolb, *Advanced Introduction to International Humanitarian Law*, Edward Elgar, Cheltenham and Northampton, MA, 2014, pp. 174–175; Jann K. Kleffner, "Military Collaterals and *Jus in Bello* Proportionality", *Israel Yearbook on Human Rights*, Vol. 48, 2018, pp. 49–50. See also Geoffrey Corn and Andrew Culliver, "Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk", *Georgia Journal of International and Comparative Law*, Vol. 45, No. 3, 2017, pp. 455 ff. In this latter article, the authors conclude that the Martens Clause provides a basis for belligerents to consider a limited application of the proportionality obligation to protected military persons and military medical objects where operationally feasible.

39 Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, Martinus Nijhoff, Leiden and Boston, MA, 2009, pp. 195–196, 206–207.

40 For example, AP I, Arts 41–42.

I) undisputedly applies to such persons and objects.⁴¹ The obligation of precaution requires a belligerent to take measures to minimize collateral damage. Some provisions in Article 57 of AP I even make explicit reference to special protection, notably its paragraphs (2)(a)(i) and (2)(b), though such reference is not made in the paragraphs dealing with proportionality issues.⁴²

Let us now turn to the question of how special protection, an integral component of it being protection against direct attack, relates to general protection – i.e., what is the legal difference between the protection against attack under special protection and under general protection (as civilian objects)? The first point to be noted is that special protection does not technically derogate from general protection.⁴³ Both military and civilian medical units are at once civilian objects under the definition of Article 52 of AP I, and specially protected objects under the relevant provisions of IHL. There are two layers of protection which add up one to the other; if one protection disappears for some reason, e.g. because a medical unit has become a military objective, which eliminates the general protection, there remains the layer of the special protection, with its own requirements for the loss of immunity against attack (to be explained below). Conversely, if a medical object loses its special protection because it is used for AHTTE, it may remain a civilian object and entitled to the general protection against attack unless the usage for AHTTE converts it into a military objective. We are thus not in a configuration of *lex specialis derogat legi generali*; it would rather be *lex specialis “completat” legi generali*.

The second point to be noted is that special protection is somewhat more stringent than general protection. For the loss of the latter, a military contribution and a military advantage in destruction or neutralization (objects) or a direct participation in hostilities (persons) are sufficient; for the loss of the former, in principle, an advance warning must be issued, with a reasonable time limit provided for the warning to be observed whenever possible, and an ascertainment that the warning was not heeded made, before an attack against the medical services that have become military objectives are carried out. Notice that the latter *must* have become military objectives under Article 52(2) of AP I in order to allow an attack – it is not sufficient that they commit any type of AHTTE. For an attack, the legal standard to be applied comes from the regime of general protection and not from the one of special protection. If AHTTE are committed, a series of responses may be carried out, such as capture of a medical unit having indulged in such acts; but if an attack is to be performed, the object to be attacked must in any case be a military objective. This is so because Article 52(2) of AP I indicates in an exhaustive manner when an object can be attacked. To

41 A. Breitegger, above note 7, p. 108.

42 J. K. Kleffner, above note 38, pp. 53–58. Kleffner affirms that the category of protected persons must be treated the same under the rules governing precautions and those governing proportionality, as both are interrelated and anchored to the fundamental principles underlying targeting law.

43 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed., Cambridge University Press, Cambridge, 2016, pp. 187, 201; Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2016, pp. 135, 145.

these conditions under general protection, the ones under special protection (warning, etc.) must be added. For the moment, we may thus conclude that the rules granting special protection result in a higher threshold for the loss of protection against attack with regard to persons and objects under special protection in comparison with those just under general protection. We may now turn to a closer analysis of the conditions for the loss of special protection.

Loss of special protection

The special protection granted to medical services is “fundamental but not absolute”.⁴⁴ IHL takes into account the fact that parties to a conflict may be tempted to abuse their special status in order to commit AHTTE.⁴⁵ By way of illustration, “[d]uring the Second World War, members of the medical personnel in occupied territories sometimes concealed combatants in hospitals and helped them carry out military missions, such as intelligence activities and sabotage”.⁴⁶ These conducts may lead to a loss of special protection of these medical personnel and these hospitals. Such loss is considered an “exception”,⁴⁷ which is linked to the medical services’ definitional requirement that they are “*exclusively* assigned to medical duties [in order] to be accorded respect and protection”.⁴⁸ What are the exact conditions for such a loss of special protection?

First condition: AHTTE outside of humanitarian function

The first condition is that medical services commit AHTTE⁴⁹ outside their humanitarian function.⁵⁰ For IAC, Article 21 of GC I provides for the loss of protection for military medical establishments and units, Article 19(1) of GC IV for civilian hospitals, Article 13(1) of AP I for civilian medical units, and Article 21 of AP I for civilian medical vehicles.⁵¹ The phrase “humanitarian function” adopted in the Additional Protocols replaces “humanitarian duties” in the

Geneva Conventions.⁵² For NIAC, Article 11(2) of Additional Protocol II (AP II)

44 Elżbieta Mikos-Skuza, “Hospitals”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 10, p. 218.

45 *Ibid.*

46 Jean Pictet, “The Medical Profession and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 25, No. 247, 1985, pp. 198–199. For recent examples, see Leonard S. Rubenstein and Melanie D. Bittle, “Responsibility for Protection of Medical Workers and Facilities in Armed Conflict”, *The Lancet*, Vol. 375, 2010, pp. 334–336. In this latter article, an analysis is provided concerning attacks on wounded and sick individuals, attacks on medical personnel, medical facilities or medical transports, and improper use of medical facilities or emblems. The article covers reported incidents in armed conflicts in El Salvador, the Philippines, the former Yugoslavia, Rwanda and the Occupied Palestinian Territory, among others, between 1989 and 2008.

47 ICRC Customary Law Study, above note 2, commentaries on Rule 25, p. 84, Rule 28, p. 97, Rule 29, p. 102.

48 *Ibid.*, commentary on Rule 25, p. 84.

49 The notion of AHTTE needs refined legal analysis, which will be presented below in a separate section.

50 ICRC Customary Law Study, above note 2, Rules 25, 28–29; ICRC Commentary on GC I, above note 4, Art. 21, para. 1844.

51 Cf. GC II, Art. 34(1), for hospital ships.

provides for the loss of protection for medical units and transports. Here the phrase AHTTE is replaced with “hostile acts”. The meaning of the two phrases “AHTTE” and “hostile acts” is essentially the same.⁵³ The loss of special protection pertaining to medical personnel is nowhere expressly stated in IHL. The rules specifically applicable to the discontinuance of special protection pertaining to medical units are “applied by analogy to medical personnel”.⁵⁴

The provisions, both in treaty law and customary law, that govern the consequences of the commission of AHTTE by medical units and transports, and by analogy medical personnel, refer only to “loss of protection”, not “loss of special protection”. At first reading, a question arises as to what this loss really entails. Does it mean that these medical services lose their entitlement of being granted some treatment by the adverse party—the obligation to protect, but not respect (partial loss of special protection), or the obligation to protect and respect (full loss of special protection)? Does it lead to a loss of protection against direct attack? To consider that the loss is limited to the obligation to protect is too narrow an interpretation. This would not be feasible in practice, as “it is frequently impossible to clearly separate the obligation to ‘respect’ from the obligation to ‘protect’”.⁵⁵ To consider that the loss automatically results in the loss of protection against direct attack is, on the other hand, too wide an interpretation. AHTTE come in a wide range of different forms, and not all of them would be sufficiently grave for such a loss.⁵⁶ Even when the special protection is lost, it should be recalled that civilian medical personnel and medical objects retain their general protection unless engagement of AHTTE converts the person or object into a military objective. Thus, an interpretation that the loss of special protection automatically transforms the medical services in question into lawful targets is not sound. Summing up the foregoing, the loss should be interpreted as a loss of “special protection”, encompassing both the obligation to protect and respect, with a remark that it does not inevitably extend into a loss of protection against direct attack.

The separate notion of “outside their humanitarian function” is not defined under IHL,⁵⁷ but it does not give rise to particular problems of interpretation, as the functions of medical services are clearly defined.⁵⁸ It is simply a negative definition of the medical services’ function enumerated under IHL. The conduct of medical

52 ICRC Commentary on AP II, above note 4, Art. 11, para. 4724. This change is a matter of drafting.

53 *Ibid.*, paras 4720–4721. The ICRC Commentary explains that the term “hostile acts” was adopted for a NIAC context “to eliminate any possibility of an interpretation which would give any sort of recognition to the insurgent party”.

54 ICRC Customary Law Study, above note 2, commentary on Rule 25, p. 85.

55 ICRC Commentary on GC I, above note 4, Art. 24, para. 1985.

56 Examples of conducts that constitute AHTTE will be discussed in the next section.

57 ICRC Commentary on GC I, above note 4, Art. 21, para. 1840.

58 Medical personnel, units and transports must be assigned, by a party to the conflict, exclusively to the medical purposes exhaustively defined by IHL – i.e., the search for, collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or for the prevention of disease. AP I, Art. 8; ICRC Customary Law Study, above note 2, commentaries on Rule 25, p. 81, Rule 28, p. 95, Rule 29, p. 100. See also M. Sassòli, above note 10, p. 52.

services going beyond these duties may, depending on the circumstances, qualify as AHTTE outside their humanitarian function, which could entail a loss of special protection.⁵⁹ This understanding leads to an interpretation that “[e]ven if a particular type of conduct may appear to constitute an ‘act harmful to the enemy’, it will still not result in a loss of special protection where it remains within the humanitarian duties”⁶⁰ of the medical services. Obviously, the nursing of wounded and sick armed forces or combatants,⁶¹ which “enables them to return to the battlefield”,⁶² is considered a humanitarian function, as is “assistance with the health planning aspects of the military operation and involvement in the transmission of the health details of enemy patients, even though in some circumstances this information may have military value”.⁶³ Other factual scenarios of conduct that appears to be AHTTE but remains within the humanitarian function include “a mobile medical unit accidentally break[ing] down while it is being moved in accordance with its humanitarian function, and thereby obstruct [ing] a crossroads of military importance”.⁶⁴ Similarly, “the presence or activities of a medical unit might interfere with tactical operations”⁶⁵ due to the unit’s proximity to the battlefield, “its lights at night”,⁶⁶ or the use of X-ray apparatus emitting radiation that could interfere with the military radio communications of the enemy.⁶⁷ These conducts are compatible with the medical services’ humanitarian function and do not deprive them of their special protection.⁶⁸ However,

from a practical perspective, once such an act is identified as being harmful to the adversary, reasonable action should be taken to remedy the issue as soon as possible so as to not unnecessarily jeopardise the safety of the wounded and sick being cared for by the medical units.⁶⁹

AHTTE must be committed outside the medical services’ humanitarian function, but this does not lead to a conclusion that only acts deliberately committed to harm the adversary constitute AHTTE. Acts which could accidentally have an unfavourable effect on the enemy are arguably included as well (to be explained below).

59 ICRC Commentary on GC I, above note 4, Art. 24, para. 1978; ICRC Commentary on AP I, above note 4, Art. 8, para. 353.

60 *Ibid.*, Art. 21, para. 1844.

61 GC I, Art. 22(5); GC IV, Art. 19(2); AP I, Art. 13(2)(d).

62 Y. Dinstein, above note 43, p. 224.

63 Cf. ICRC Commentary on GC II, above note 8, Art. 36, para. 2485. This arguably applies by analogous reasoning to the medical services on land.

64 ICRC Commentary on AP I, above note 4, Art. 13, para. 552.

65 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (Pictet Commentary on GC I), Art. 21, p. 201.

66 *Ibid.*

67 *Ibid.*

68 Peter De Waard and John Tarrant, “Protection of Military Medical Personnel in Armed Conflicts”, *University of Western Australia Law Review*, Vol. 35, 2010, p. 175.

69 *Ibid.*

Second condition: A warning and a time limit, the warning remaining unheeded

The second condition to be met in order for the special protection to cease is established in the same treaty law provisions stipulating the first condition. Special protection granted to the medical units “*may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded*”.⁷⁰ Thus, in the first place, a warning must be given.⁷¹ The aggrieved party to the conflict must inform the medical service that

the latter has committed, or is committing, an act harmful to it, or that there are reasonable grounds for suspicion that such acts have been or are being committed, and that it is in danger of being attacked or subjected to an enforcement measure if it does not put an end to the activity in question.⁷²

The purpose of issuing a warning is to allow those engaging in AHTTE to terminate those acts or at least to evacuate the wounded or sick.⁷³ The underlying assumption is that medical services will normally not engage in harmful acts and that such acts, if committed, may have been caused either by mistake or negligence. In this regard, the warning requirement reflects the principle of necessity as *ultima ratio*: if no warning is given, it cannot be said that the attack was really necessary to curb the harmful acts; a request to that effect could indeed have been heeded. Conversely, the absence of a warning is an exception “in the extreme circumstances of an immediate threat to the lives of advancing combatants, where it is clear that a warning would not be complied with”.⁷⁴ The provisions do “not specify what is meant by a ‘due warning’, including what form it must take”.⁷⁵ Whatever the method selected, in order to achieve the purpose, the “warning should be clear and specific, and it should mention the harmful act in which the unit, establishment, or personnel is engaged”.⁷⁶

70 GC I, Art. 21 (emphasis added). The same requirement with slight modifications is provided in GC IV, Art. 19(1); AP I, Art. 13(1); AP II, Art. 11(2). Cf. GC II, Art. 34(1), for hospital ships.

71 The warning obligation examined here is more stringent than the one under general protection, set out in Article 57(2)(c) of AP I. In the context of special protection, there can be no attack without a prior warning, except in extreme situations where a warning is impossible - for example, when incoming fire requires an immediate response due to overriding military necessity. In the context of general protection, the warning shall as a principle take place unless the circumstances do not permit (e.g., because of mobile targets).

72 ICRC Commentary on GC II, above note 8, Art. 34, para. 2381. This arguably applies by analogous reasoning to medical services on land.

73 ICRC Commentary on GC I, above note 4, Art. 21, para. 1849.

74 *Ibid.* See also J. K. Kleffner, above note 14, p. 338. As an example of when fire could be returned immediately without issuance of a warning by the aggrieved party to the conflict, this article cites “a medical transport, which approaches a military checkpoint while firing upon those manning the checkpoint”.

75 ICRC Commentary on GC I, above note 4, Art. 21, para. 1850.

76 T. Haack, above note 10, p. 848. Haack refers to the *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, paras 596–652. The Mission concluded that the attacks on Al-Quds Hospital (which belongs to the Palestinian Red Crescent Society) and Al-Wafa Hospital by the Israeli armed forces constituted a violation of Article 18 of GC IV, and that the absence of concrete warnings prior to these attacks was in violation of Article 19 of GC IV. *Ibid.*, para.

Then, in the second place, when possible, a reasonable time limit for ceasing the harmful acts must be indicated. Sometimes, however, no delay in the response is possible. The often-mentioned example is “a body of troops approaching a hospital” who are “met by heavy fire from every window”;⁷⁷ “[i]n such a case, after the issuance of a warning, fire could be returned without delay”.⁷⁸ When a reasonable time limit is appropriate, it “must be long enough to achieve the purpose of a warning”;⁷⁹ that is, to allow those in charge of the medical services “enough time to reply to the accusations that have been made”;⁸⁰ “depending on the circumstances, to change their approach, to explain themselves if a mistake has been made”;⁸¹ to cease the unlawful acts;⁸² or to evacuate the wounded and sick.⁸³

Lastly, the warning must have remained unheeded. When the medical services ignore the warning issued by the aggrieved party to the conflict—i.e., “where the act harmful to the enemy is not terminated”⁸⁴—the relevant provisions relieve the obligation of the aggrieved party to respect and protect that specific medical service. Note again that the commission of AHTTE leads to the loss of special protection but conducting an attack against medical units or transports still requires the aggrieved party to satisfy Article 52(2) of AP I. Subsequent attacks or enforcement measures should be effective in inducing the adverse party to respect the law and should be proportionate to the committed AHTTE that the aggrieved party aims to stop. Such measures cannot be punitive in nature; they must be merely protective. The provisions do not specify “the measures that the aggrieved Party to the conflict is allowed to take if the warning remains unheeded”;⁸⁵ neither is it clear whether the aggrieved party may take some measures short of an attack even if the warning has been heeded.⁸⁶ Measures short of an attack that could be taken by the aggrieved party to the conflict include search operations or capture for medical units and transports, and interrogation, arrest or detention for medical personnel.⁸⁷ Although IHL does not specifically prohibit such measures against

646: “It [the warning] was not specific and no indication was given about when the attack would take place or how much time there was to evacuate the hospital.”

77 Pictet Commentary on GC I, above note 65, Art. 21, p. 202.

78 ICRC Commentary on GC I, above note 4, Art. 21, para. 1851.

79 *Ibid.*, para. 1852.

80 ICRC Commentary on AP I, above note 4, Art. 13, para. 556.

81 ICRC Commentary on AP II, above note 4, Art. 11, para. 4727.

82 ICRC Commentary on AP I, above note 4, Art. 13, para. 556; ICRC Commentary on AP II, above note 4, Art. 11, para. 4726.

83 ICRC Commentary on AP I, above note 4, Art. 13, para. 556; ICRC Commentary on AP II, above note 4, Art. 11, para. 4727.

84 ICRC Commentary on GC I, above note 4, Art. 21, para. 1853.

85 Cf. ICRC Commentary on GC II, above note 8, Art. 34, para. 2383.

86 Cf. Article 34 of GC II, for example, which allows the capture of a hospital ship having indulged in hostile acts, even if the warning has been heeded; but the ship cannot be attacked in such a case. For further details, see ICRC Commentary on GC II, above note 8, Art. 34, para. 2384; Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, paras 49–50.

87 See ICRC, *Promoting Military Operational Practice that Ensures Safe Access to and Delivery of Health Care*, ICRC, Geneva, 2014, pp. 25–27.

these medical services, whenever feasible, the way that these operations are conducted should be closely regulated, and practical measures should be developed to minimize the negative effects of health-care delivery in armed conflicts.⁸⁸

Summing up, AHTTE may have legal consequences even if the warning has been heeded,⁸⁹ which constitutes in part a sanction of their hostile attitude. But an attack is excluded in such cases, since the latter can only be protective in nature and no necessity exists any more in this regard once the warning has been heeded. Notice also that when medical units and transports have ceased their AHTTE, they automatically also lose their status as a military objective under Article 52 of AP I.⁹⁰ This is so because if there are no AHTTE, there is *a fortiori* no contribution to military operations, which is a definitional element of the military objective.

What if the warning is partially heeded? The attack should then be proportionate to the committed AHTTE, taking into consideration the concrete context of circumstances, including the (partial) response of the medical services and the conditions of the wounded and sick. In other words, the question here is one of full context viewed in the light of the principles of necessity and proportionality.

For NIAC, the *San Remo Manual on the Law of Non-International Armed Conflict* confirms: “An opportunity must be given to the other side to abide by the rules, and an attack can only be made if it is clear that the warning has been ignored.”⁹¹ The question has arisen as to whether the warning requirement also exists under customary international law for NIACs. Strictly speaking, for the International Committee of the Red Cross’s (ICRC) Customary Law Study, the warning procedural requirements are not obligatory in a NIAC for States that

88 *Ibid.*

89 The assertion that proportionate enforcement measures are allowed by the aggrieved party to the conflict even when warnings are heeded by the medical service engaging in AHTTE, outside its humanitarian function, is a logical conclusion. Consider an ambulance transporting wounded and sick combatants while simultaneously collecting intelligence near a military checkpoint. The aggrieved party to the conflict issues the legally required warning informing the ambulance that if it does not cease this harmful act immediately, it will be stopped and searched. The ambulance hastily returns to its depot. The following week, the ambulance returns and restarts the same act. Several issues arise. First, can the ambulance get away with its harmful act committed on the first day, as it had heeded the subsequent warning issued by the aggrieved party? The law arguably does not allow such a manoeuvre, especially if the harmful act was of significant gravity—for instance, if the intelligence collected was crucial to launching an important military operation against the aggrieved party. Second, when the ambulance starts to collect intelligence again the following week, is the aggrieved party obliged to issue another warning? If so, and if the ambulance heeds the warning a second time, is the aggrieved party still obliged to grant special protection to it? If not, is the aggrieved party allowed to immediately take an enforcement measure against the ambulance without giving an opportunity for the safe evacuation of the wounded and sick occupants inside it? Does last week’s warning remain valid? What if a similar incident occurs the next month, or the next year? Battalions rotate, as do medical personnel, and the circumstances of war are fluid. Should no consequence be attached to these abuses? Not only is this interpretation unreasonable, but a lot of uncertainty would arise in its practical application.

90 For a nuanced analysis of a medical object used for AHTTE in relation to the definition of military objective in Article 52(2) of AP I, see the next section.

91 Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein (eds), *The San Remo Manual on the Law of Non-International Armed Conflict: With Commentary*, International Institute of Humanitarian Law, Sanremo, 2006, Chap. 4.2.1.

have not ratified AP II.⁹² It should be recalled, however, that this study “did not distinguish between the two categories of non-international armed conflict [AP II and Article 3 common to the four Geneva Conventions] because it was found that States did not make such a distinction in practice”.⁹³ Some warning obligation could perhaps be implied in common Article 3, which reflects customary law, though that is uncertain. The question as to the reach of customary international law on this issue consequently remains debatable.

Finally, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Galić* case⁹⁴ sheds some light on the warning obligation. In this case, the lawfulness of shell attacks by a belligerent directed against a hospital was discussed.⁹⁵ The hospital, while still treating the wounded and sick, had become a “military base”⁹⁶ from which weapons were being fired by the adverse belligerent against this belligerent.⁹⁷ The Appeals Chamber asserted that a hospital becomes a legitimate target when used for hostile or harmful acts unrelated to its humanitarian function.⁹⁸ However,

relying on relevant provisions of AP I (Article 13(1)) and AP II (Article 11(2)), the Appeals Chamber qualified the loss of protection by requiring that an advance warning be given of an attack. In its view, the lack of a due warning, including a reasonable time period for compliance, would render any subsequent attack unlawful, despite the fact that the protected object constituted a military objective.⁹⁹

The notion of “acts harmful to the enemy”

Negotiating history

The concept of AHTTE – though differently worded – was introduced for the first time in treaty law in Article 7 of the 1906 Geneva Convention, specifying that the

92 ICRC Customary Law Study, above note 2, Rules 25, 28–29. See, for example, Luisa Vierucci, “The Protection of Wounded and Sick in IAC and NIAC”, in Carl Marchand and Gian L. Beruto (eds), *The Distinction between International and Non-International Armed Conflicts: Challenges for IHL? 38th Round Table on Current Issues of International Humanitarian Law (Sanremo, 3rd–5th September 2015)*, Franco Angeli, Milan, 2016, p. 213: the fact that, by and large, a warning has not been given before attacking medical facilities in Syria might not only be indicative of lack of existence of the relevant IHL rule in NIAC but also calls into question the respect for the principle of precaution in general, since the obligation to give a warning is one of the corollaries of this principle.

93 Jelena Pejic, “The Protective Scope of Common Article 3: More Than Meets the Eye”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p. 191.

94 ICTY, *Prosecutor v Stanislav Galić*, Case No. IT-98-29-A, Judgment (Appeals Chamber), 30 November 2006.

95 *Ibid.*, paras 336–352.

96 *Ibid.*, para. 337.

97 *Ibid.*, paras 338–339.

98 *Ibid.*, para. 340.

99 Iain Bonomy, *Principles of Distinction and Protection at the ICTY*, FICHL Occasional Paper Series, No. 3, 2013, p. 21. See also ICTY, *Galić*, above note 94, para. 344.

protection of sanitary formations and establishments ceases if they are used to commit “acts injurious to the enemy”.¹⁰⁰ Still in 1949, AHTTE was not defined in any meaningful sense. As was stated at the 1949 Diplomatic Conference:

The term *acts harmful* to the enemy is perhaps not very elegant. We endeavoured to find a better wording; but we returned to the traditional expression The expression is, perhaps, somewhat elastic, but it seems to us clear. It covers not only acts of warfare proper but any activity characterizing combatant action.¹⁰¹

The ICRC’s alternative wording, expressing the same idea for AHTTE in preparation for the Diplomatic Conference, was “acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations”.¹⁰² Jean Pictet in 1985 wrote that “[s]uch acts [AHTTE] have the aim or effect, by favouring or impeding military operations, of being detrimental to one of the belligerents”.¹⁰³ In the context of Article 13(1) of AP I, the ICRC Commentary explains that “the definition of *harmful* is very broad. It refers not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever”.¹⁰⁴

Conducts amounting to AHTTE

Examples of AHTTE leading to the loss of special protection for medical units include “firing at the enemy for reasons other than individual self-defence”,¹⁰⁵ “installing a firing position in a medical post”,¹⁰⁶ “the use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition dump, or as a military observation post”,¹⁰⁷ the use of a hospital “as a centre for liaison with fighting troops”¹⁰⁸ and “the placing of a medical unit in proximity to a military objective with the intention of shielding it from the enemy’s military operations”.¹⁰⁹ This last act is specifically prohibited under Article 12(4) of AP I. Examples of AHTTE leading to the loss of special protection for medical transports include “the use of the vehicle as a mobile military command post or as a base from which to launch an attack”¹¹⁰ and “the transport of healthy troops, arms or munitions”.¹¹¹ Moreover, prohibited acts of medical aircraft

100 ICRC Commentary on GC I, above note 4, Art. 21, para. 1838.

101 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 818–819.

102 Pictet Commentary on GC I, above note 65, Art. 21, p. 200.

103 J. Pictet, above note 46, p. 204.

104 ICRC Commentary on AP I, above note 4, Art. 13, para. 551.

105 ICRC Commentary on GC I, above note 4, Art. 21, para. 1842.

106 *Ibid.*

107 Pictet Commentary on GC I, above note 65, Art. 21, pp. 200–201.

108 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, Art. 19, p. 154.

109 ICRC Commentary on GC I, above note 4, Art. 21, para. 1842.

110 *Ibid.*, Art. 35, para. 2389.

111 ICRC Customary Law Study, above note 2, commentary on Rule 29, p. 102.

under Article 28(1)–(2) of AP I apply not only to medical aircraft but also, by analogy, to any persons and objects enjoying special protection.¹¹² Although the phrase “acts harmful to the enemy” is not explicitly used, these are analogous forms of abuse¹¹³ with regard to the medical aircraft’s protected status.¹¹⁴ Thus, they can be applied by analogous reasoning to the medical services on land. The analogous application of this rule to medical units and transports is that these services will lose their special protection if they are used “to attempt to acquire any military advantage over an adverse party”, “to attempt to render military objectives immune from attack”, “to collect or transmit intelligence data” or “to carry any persons or cargo not related to medical function”.¹¹⁵ Finally, examples of AHTTE leading to the loss of special protection for medical personnel include when such personnel “take up arms for offensive or for non-recognized defensive purposes”,¹¹⁶ “[assist] in the operation of a weapon system or in the planning of a military operation, or [transmit] intelligence of military value”,¹¹⁷ or “help able-bodied combatants of their State to hide for a while in a hospital”.¹¹⁸

Some recent examples of AHTTE can be found in the ICRC’s *Health Care in Danger* report,¹¹⁹ which identifies the fact that “[h]ealth-care facilities were occupied and subject to misuse”¹²⁰ as one of its most important findings. Misuse includes “any use for purposes other than the exclusive function of providing health care”.¹²¹ This is a broader definition than AHTTE, as not every misuse is militarily harmful. The ICRC report documents misuse in several forms, including military occupation and/or military bases established in such facilities, services used by a belligerent for shelter from the adverse belligerent’s attacks (mainly in a context identified as one of active fighting), installation of weapons, and launching of attacks.¹²² These conducts transform these health-care facilities

112 ICRC Commentary on AP I, above note 4, Art. 28, para. 1052. See also Vaïos Koutroulis, “Loss of Protection of Medical Personnel in Armed Conflict”, in Odile Vandenbossche, Ware Vercamer and Arthur Fallas (eds), “Report of the Flanders Fields Conference of Military Law and the Law of War”, *The Military Law and the Law of War Review*, Vol. 55, No. 2, 2016–17, p. 230.

113 *Ibid.*, para. 1058.

114 *Ibid.*, para. 1046.

115 Vaïos Koutroulis, “Loss of Protection of Medical Personnel in Armed Conflict”, unpublished presentation delivered at the Flanders Fields Conference of Military Law and the Law of War, International Society for Military Law and the Law of War, Ypres, 12–15 October 2014, slide 10 (emphasis added), available at: <https://tinyurl.com/y9c9xf3w>.

116 ICRC Commentary on GC I, above note 4, Art. 24, para. 2005. Medical personnel may be equipped with light individual weapons in line with Articles 22(1) of GC I and 13(2)(a) of AP I, and are entitled to use these against unlawful violence either for their own defence or for that of the wounded and sick in their charge. These conducts do not constitute AHTTE and consequently do not forfeit their special protection.

117 *Ibid.*, para. 2000.

118 *Ibid.*

119 ICRC, *Health Care in Danger: Violent Incidents Affecting the Delivery of Health Care, January 2012 to December 2014*, ICRC, Geneva, 2015. This report provides an analysis regarding 2,398 incidents of violence against health care in eleven countries in the context of armed conflicts and other emergencies during the indicated three years.

120 *Ibid.*, p. 1.

121 *Ibid.*, p. 13, fn. 27.

122 *Ibid.*, p. 13.

into “objects serving military purposes”¹²³ and can thus be considered as AHTTE. Other forms of misuse have also been documented, including military personnel camping in the facility for a limited time, guarding the facility in order to conduct interrogations and identify opposition fighters, and keeping hostages and exercising ill-treatment.¹²⁴ For these conducts, further facts must be contextually assessed to establish whether the relevant conduct amounts to AHTTE.

Another more complicated question relates to when the wounded and sick are interrogated or tortured inside medical units. Would these conducts qualify as AHTTE, and if so, what would be the legal consequences? During the Iraq War in 2003, the US military commanders were advised that “the questioning of Iraqi detainees and EPWs [enemy prisoners of war] beyond the legally required identification information on board U.S. hospital ships during armed conflict might strip the ship of its protected status under GWS-Sea [Geneva Convention II], article 22”.¹²⁵ The ICRC Commentary on Article 34 of Geneva Convention II (GC II) takes the position that “the interrogation of enemy prisoners of war on board hospital ships, when the said interrogation seeks to acquire information beyond what they are required to disclose on the basis of Article 17 of the Third [Geneva] Convention”,¹²⁶ would qualify as AHTTE. This interpretation would apply by analogy to medical units on land. In the same vein, when the wounded and sick are subjected to prohibited torture and cruel, inhuman or degrading treatment inside medical facilities, this would arguably qualify as AHTTE as well. In these mistreatment cases, proportionate enforcement measures to respond to the harmful acts against the medical service in question, such as armed entry, inspection or capture, could be made. Whether these harmful conducts would justify a direct attack against the medical facility would then be subject to the rules on the conduct of hostilities. In most cases, these rules, together with the overarching obligation to protect and respect the wounded and sick, would render such an attack unlawful.

As evinced in the aforementioned examples, “[t]he notion of acts harmful to the enemy, despite the plural form, presumably applies to a singular act”.¹²⁷ There is indeed no reason to exclude single acts from the purview of the exception, all the more since a single AHTTE can be of significant gravity. AHTTE is restricted to specific “conducts” – i.e., “a person’s behaviour in a particular place or in a particular situation”¹²⁸ – and in principle, specific conducts relevant to AHTTE should not be blurred with other conducts that are not. Otherwise, this could inherently enlarge the scope of the loss of special protection to medical persons or objects that have not been used to commit AHTTE. Furthermore, AHTTE

123 ICRC, above note 87, p. 47.

124 ICRC, above note 119, p. 13.

125 Gregory P. Noone *et al.*, “Prisoners of War in the 21st Century: Issues in Modern Warfare”, *Naval Law Review*, Vol. 50, 2004, p. 39.

126 ICRC Commentary on GC II, above note 8, Art. 34, para. 2375.

127 Stuart Casey-Maslen, “The Status, Rights, and Obligations of Medical and Religious Personnel”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 10, p. 816.

128 Albert S. Hornby (ed.), *Oxford Advanced Learner’s Dictionary of Current English*, 7th ed., Oxford University Press, Oxford, 2005, p. 316.

supposes “use for military purposes”. The idea that hospitals lose protection when being used for military purposes can be traced back to Article 27 of the 1907 Hague Convention IV.¹²⁹ The law does not elaborate on the degree of use, the frequency or the gravity; any use of the medical services by a party to the conflict for military purposes may be considered an act harmful to the enemy,¹³⁰ and a threshold for severity, including volume, duration or intensity, is not required. Neither does the use necessarily need to be continuous or regular; it could be singular, sporadic or irregular. Even indirect, accidental or attempted¹³¹ use is arguably included.¹³² Conversely, there are also conducts that do not constitute AHTTE. Examples of such acts are codified in Article 22 of GC I for military medical units and establishments, Article 19(2) of GC IV for civilian hospitals, and Article 13(2) of AP I for civilian medical units.¹³³ Article 13(2) of AP I reads:

The following shall not be considered as acts harmful to the enemy:

- a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
- b) that the unit is guarded by a picket or by sentries or by an escort;
- c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
- d) that members of the armed forces or other combatants are in the unit for medical reasons.

This list is not exhaustive.¹³⁴ The analogous application of this rule to medical personnel implies that

it is not to be considered a hostile act if medical personnel are escorted by military personnel or such personnel are present or if the medical personnel are in possession of small arms and ammunition taken from their patients and not yet handed over to the proper service.¹³⁵

The list mentioned above is not applicable to NIAC and AP II, but it can serve as a basis for interpretation of the law¹³⁶ and also for the determination of customary international law. Let us look more closely at these conducts not constituting AHTTE.

129 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 205 CTS 227, 18 October 1907 (entered into force 26 January 1910).

130 Cf. ICRC Commentary on GC I, above note 4, Art. 21, para. 1842.

131 AP I, Art. 28(1). It is also recalled that the ICRC’s alternative wording, expressing the same idea for AHTTE in preparation for the 1949 Conference, was “acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations” (emphasis added).

132 The warning requirement is precisely for this reason: to alert medical personnel, hospital administrators, etc. to unintentional AHTTE that could strip them from protection from direct attack.

133 Cf. GC II, Art. 35, for hospital ships.

134 ICRC Commentary on GC I, above note 4, Art. 22, para. 1860.

135 ICRC Customary Law Study, above note 2, commentary on Rule 25, p. 85.

136 ICRC Commentary on AP II, above note 4, Art. 11, para. 4723.

Articles 13(2)(a) of AP I and 22(1) of GC I regulate that medical personnel may be armed and that they may, in case of need, use these arms to defend either themselves or the wounded and sick in their charge against unlawful violence.¹³⁷ This would not constitute AHTTE. Article 22(1) of GC I does not specify the type of arms that medical personnel could lawfully use,¹³⁸ but Article 13(2)(a) of AP I limits it to “light individual weapons”.¹³⁹ “Any use going beyond these permitted purposes, even with ‘light individual weapons’”,¹⁴⁰ or when medical personnel are equipped with “any weapons heavier than those stipulated”,¹⁴¹ would constitute AHTTE. Examples of AHTTE by medical personnel include using light individual “weapons in combat against enemy forces acting in conformity with the law of war, notably to resist capture”,¹⁴² “carrying weapons which are portable by one individual yet which go beyond the purpose of self-defence, such as a man-portable missile or an anti-tank missile”,¹⁴³ and installing “heavy weapons, such as ‘crew-served’ machine guns (requiring a team of at least two people to operate them)”,¹⁴⁴ on a medical unit. The main interpretational point—as manifested in practice—is that the allowed weapons are essentially handguns.¹⁴⁵ In an interpretation given by some States during the negotiations for the Additional Protocols at the Diplomatic Conference of 1974–77, fragmentation grenades, weapons which cannot fully be handled or fired by a single individual and those intended for non-human targets were excluded.¹⁴⁶

This provision is based on the experience that in situations of armed conflict, the ordinary police enforcement mechanisms have often crumbled, and that concomitantly, criminality spreads. A medical unit contains materials which can be economically valuable (the coronavirus crisis of 2020 shows how medical material can be sold on black markets).¹⁴⁷ A medical post must consequently be guarded, and to be efficient, the guards must be armed. However, their armed opposition must be directed only against the criminal elements, not against the military forces of the enemy. The medical unit may not be defended against

137 For the scope of defence, see ICRC Commentary on GC I, above note 4, Art. 22, paras 1866–1867; M. Sassòli, above note 10, p. 54; A. Breitegger, above note 7, p. 112.

138 ICRC Commentary on GC I, above note 4, Art. 22, para. 1864; ICRC Commentary on AP I, above note 4, Art. 13, para. 562.

139 ICRC Commentary on AP I, above note 4, Art. 13, para. 563.

140 ICRC Commentary on GC I, above note 4, Art. 22, para. 1865.

141 *Ibid.*, para. 1864.

142 ICRC Customary Law Study, above note 2, commentary on Rule 25, p. 85.

143 ICRC Commentary on GC I, above note 4, Art. 22, para. 1864.

144 *Ibid.*, para. 1868.

145 Michael Bothe, Karl J. Partsch and Waldemar A. Solf (eds), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden and Boston, MA, 2013, AP I, Art. 13, p. 131, and Art. 65, p. 459.

146 *Ibid.*, pp. 460–461. See also ICRC Commentary on AP I, above note 4, Art. 13, para. 563.

147 See, for example, Maria Caspani, “U.S. COVID-19 Cases Rocket Past 100,000 as Doctors Look for Black Market Medical Supplies”, *National Post*, 28 March 2020, available at: <https://nationalpost.com/news/world/u-s-coronavirus-cases-surpass-100000-as-doctors-cope-with-medical-shortages>; “Black Market for Coronavirus Test Kits Flourishes in Climate of Mistrust, Stigma in Nigeria”, *News 24*, 23 April 2020, available at: www.news24.com/Africa/News/black-market-for-coronavirus-test-kits-flourishes-in-climate-of-mistrust-stigma-in-nigeria-20200423.

the enemy belligerent; that would amount to AHTTE.¹⁴⁸ In view of this finality, the “necessity” requirement explains why only handguns are allowed, as only those guns are *necessary* to oppose crime; heavier weapons would have a belligerent function and are thus not *necessary* for the type of allowed defence. However, the question could arise as to whether such heavier weapons could be exceptionally conceded if the marauders display a level or organization and force which requires more than handguns to defend against them. In the absence of a permission under the applicable IHL provisions, the commander of the unit will have to seek an agreement with the enemy forces on this point.

It has been rightly said that arming of medical personnel, especially if civilian (as under Article 13 of AP I), is not without problems.¹⁴⁹ Such personnel could be mistaken as combatants or as abusing their civilian function. In view of the necessities of defence against crime, however, this shortcoming cannot be wholly avoided. For this reason, it is all the more important that the weapons carried be of a type (i.e., handguns) that immediately allows others to grasp their true purpose.

Articles 13(2)(b) of AP I and 22(2) of GC I regulate that when medical units are under armed protection by guards,¹⁵⁰ “specifically to the defence of the wounded and sick contained therein”,¹⁵¹ this does not constitute AHTTE. Guards include both “medical and non-medical personnel”.¹⁵² Under exceptional cases,¹⁵³ “non-medical members of the armed forces”¹⁵⁴ and “civilian uniformed police force”¹⁵⁵ are also envisaged. Guards are subject to the same conditions as armed medical personnel regarding the type and use of weapons permitted: “only the same type of weapons, notably ‘light-individual weapons’, may be carried and, where necessary, used for defensive purposes only”.¹⁵⁶

Articles 13(2)(c) of AP I, 22(3) of GC I and 19(2) of GC IV stipulate that the temporary presence of small arms and ammunition found inside the medical unit, which have been taken from the wounded and sick and have not yet been handed over to the proper service (“i.e. authorities outside the medical establishment or unit”¹⁵⁷), would not constitute AHTTE. The understanding of the arms concerned relates to “portable weapons”¹⁵⁸ and is broader than the “*individual*

148 ICRC Commentary on GC I, above note 4, Art. 22, para. 1867; ICRC Commentary on AP I, above note 4, Art. 13, para. 561.

149 M. Bothe, K. J. Partsch and W. A. Solf (eds), above note 145, AP I, Art. 13, p. 131. An analogous problem arises with the armament of civil defence personnel: *ibid.*, Art. 65, pp. 460–461. See also ICRC Commentary on AP I, above note 4, Art. 13, para. 560.

150 Article 22(2) of GC I includes the expression “in the absence of armed orderlies”. This does not mean that the simultaneous presence of armed orderlies and military guards is prohibited. See Pictet Commentary on GC I, above note 65, Art. 22, pp. 203–204.

151 ICRC Commentary on GC I, above note 4, Art. 22, para. 1870.

152 *Ibid.*

153 *Ibid.*, para. 1872; ICRC Commentary on AP I, above note 4, Art. 13, para. 566.

154 *Ibid.*, para. 1871.

155 ICRC Commentary on AP I, above note 4, Art. 13, para. 566.

156 ICRC Commentary on GC I, above note 4, Art. 22, para. 1874.

157 *Ibid.*, para. 1876.

158 *Ibid.*, para. 1877. Article 22(3) of GC I does not define the term “small arms”. The equally authentic French text, however, adopts the term “armes portatives” (portable weapons).

portable weapons”¹⁵⁹ authorized for medical personnel.¹⁶⁰ “[S]ome weapons which are slightly heavier than those which are authorized for medical personnel could be involved, such as, for example, small machine guns, provided that they are portable, even if this should require two or three soldiers.”¹⁶¹ Conversely, “to store arms or ammunition (other than the temporary storage of arms and ammunition taken from the wounded and sick and not yet handed over to the competent authority)”¹⁶² in medical units constitutes AHTTE. Moreover, “the presence of any weapons other than portable weapons inside a medical establishment or unit could not be justified even on a temporary basis”.¹⁶³

Articles 13(2)(d) of AP I and 19(2) of GC IV stipulate that the presence of armed forces or other combatants inside the medical unit for medical reasons would not constitute AHTTE. Arguably, a temporary presence of combatants or other military objectives inside the medical unit for non-medical reasons does not automatically constitute AHTTE either.¹⁶⁴ It cannot be assumed that these persons or objects are using the medical unit for military purposes—e.g., being combatants directing missions from the unit—without ascertaining further facts. The combatants could, however, be attacked as lawful targets, but then all precautions would have to be taken not to interfere with the medical unit. This will in most cases mean that the adverse belligerent will have to wait until these persons have left the unit, since otherwise the collateral damage would be excessive with regard to the military advantage anticipated (AP I, Article 51(5)(b)).

AHTTE versus perfidy

AHTTE may qualify as perfidy, codified in Article 37(1) of AP I, if done in order to kill, injure or capture an enemy combatant.¹⁶⁵ Consider an ambulance approaching a military checkpoint of the adverse party. The soldiers manning the checkpoint approach it to facilitate its passage, but are fired upon by combatants hiding inside it. This conduct qualifies not only as perfidy but also as AHTTE. Certain forms of AHTTE consequently overlap with perfidy—that is, abuse of the medical services’ special protection in order to gain some military advantage or to deny the adversary such an advantage. The two concepts have similar characteristics: both are deceptions characterized by an action contrary to the principle of good

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² ICRC, above note 87, p. 28, fn. 18.

¹⁶³ ICRC Commentary on GC I, above note 4, Art. 22, para. 1877.

¹⁶⁴ See, for example, US Department of Defense, *Law of War Manual*, June 2015 (updated December 2016), para. 7.10.3.6.

¹⁶⁵ ICRC Commentary on GC I, above note 4, Art. 21, para. 1842. The commission of AHTTE while displaying the distinctive emblems of the Geneva Conventions is specifically prohibited under AP I, Art. 38(1); AP II, Art. 12; Protocol Additional (III) to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 2404 UNTS 261, 8 December 2005 (entered into force 14 January 2007), Art. 6(1); and customary IHL (ICRC Customary Law Study, above note 2, Rule 59).

faith,¹⁶⁶ the gist of which consists of a belligerent using obligations under IHL for hostile purposes,¹⁶⁷ and both undermine compliance with the law.¹⁶⁸ The difference is that AHTTE do not have to result in the death, injury or capture of an enemy combatant.

AHTTE versus acts of hostility

AHTTE are broader than an “act of hostility” as codified in Article 8(a) of AP I. Harmful acts are acts causing or likely to cause harm, while hostilities refer to acts of warfare – i.e., to military operations. The legal understanding of “harmful”, as previously discussed, “refers not only to direct harm inflicted on the enemy, ... but also to any attempts at deliberately hindering his military operations in any way whatsoever”.¹⁶⁹ “[T]he concept of ‘hostilities’ refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy.”¹⁷⁰ Although the term “act of hostility” does not have a clear definition under IHL, it must be understood by analogy to the term “hostile act” in Articles 41(2)(c) and 42(2) of AP I, with guidance from Article 51(3) of AP I¹⁷¹ – i.e., “[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”.¹⁷² This is manifestly a narrower notion than the one on harmfulness, which encompasses indirect effects on military operations of the adverse party.

AHTTE versus direct participation in hostilities

For the same reason, AHTTE is also a broader concept than that of “direct participation in hostilities” (DPH) contained in Article 51(3) of AP I and Article 13(3) of AP II.¹⁷³ Acts of DPH are precisely linked to “hostilities” and not to “harm”. There are, however, some broad interpretations of DPH – such as by the United States – that end up making the concept of AHTTE a narrower one than DPH. This is particularly true when a hostile intent of an organization, without actual conduct to carry it out, is taken to allow an attack on an individual

166 On the role of the principle of good faith in IHL, in particular with reference to the prohibition of perfidy, see Robert Kolb, *Good Faith in International Law*, Hart Publishing, Oxford and Portland, OR, 2017, pp. 251–254.

167 *Ibid.*, pp. 252–253.

168 *Ibid.* See also R. Kolb, above note 38, p. 41: “no belligerent would be imprudent enough to implement IHL obligations, if there must be a constant and well-founded fear that these obligations are used for hostile purposes”.

169 ICRC Commentary on AP I, above note 4, Art. 13, para. 551.

170 ICRC and Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law”, *International Review of the Red Cross*, Vol. 90, No. 872, 2008, p. 1013.

171 J. K. Kleffner, above note 14, p. 324.

172 ICRC Commentary on AP I, above note 4, Art. 51(3), para. 1942.

173 Some, including the ICRC, perceive that the notion of AHTTE is broader than that of DPH. See ICRC, above note 5, p. 33; ICRC Commentary on GC I, above note 4, Art. 24, para. 2003: “In terms of acts covered, the scope of application of the notion of ‘acts harmful to the enemy’ is broader than that of ‘direct participation in hostilities’.” For the same line of argument, see Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 329.

member of that organization, to whom the overall hostile intent is imputed.¹⁷⁴ Apart from these peculiar interpretations, it can be said that (1) the required “threshold of harm” for AHTTE is lower than that of DPH, the latter supposing “hostilities”; (2) “direct causation”—i.e., a direct link between AHTTE and the performance of concrete military operations—is not required; and (3) “belligerent nexus” is a prerequisite for both notions, whereby the AHTTE must be specifically designed in support of a party to a conflict *or* to the detriment of another. This implies that if civilian medical personnel directly participate in hostilities, this would automatically amount to AHTTE. Conversely, if civilian medical personnel commit AHTTE that do not amount to DPH, these persons may lose their special protection; however, they do not lose their general protection, “unless and for such time as they take a direct part in hostilities”.¹⁷⁵ In other words, a civilian’s commission of AHTTE does not automatically render the person liable to direct attack. “This would only be the case if these acts equally qualify as acts of ‘direct participation in hostilities’.”¹⁷⁶

AHTTE versus military objective

The next question relates to when AHTTE would turn a medical object into a military objective under Article 52(2) of AP I. As is known, the test on whether an object is a military objective depends on two contextual cumulative elements, namely a military contribution and a military advantage. “Contribution” means that an object renders services and has usefulness to the concrete conduct of military operations. The link between the contribution and the military operations must be direct.¹⁷⁷ Moreover, the contribution must be effective, which implies that it must be real and discernible.¹⁷⁸ It must be recalled that AHTTE encompass both direct and indirect interferences with military operations;¹⁷⁹ a direct link of AHTTE with the performance of concrete military operations is not required. This implies that a medical object used to commit AHTTE does not automatically become an object that makes an effective contribution to military action. When it does, AHTTE could extend to its “location, purpose or use” but not to its “nature” aspect under Article 52(2) of AP I, as a medical object does not acquire an intrinsic military character.

As to the second element, the effectiveness of the contribution, would the medical object’s destruction, capture or neutralization offer a definite military advantage for the attacking side? “[A]n ‘advantage’ may be defined as everything which facilitates the military operations.”¹⁸⁰ It must be “military”, must be

174 US Department of Defense, above note 164, para. 5.8.3.3: “demonstrated hostile intent may also constitute taking a direct part in hostilities”.

175 AP I, Art. 51(3); AP II, Art. 13(3); ICRC Customary Law Study, above note 2, Rule 6.

176 ICRC, above note 5, p. 33.

177 R. Kolb, above note 38, pp. 160–162.

178 Agnieszka Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice*, Routledge, London and New York, 2015, p. 83.

179 ICRC Commentary on GC I, above note 4, Art. 21, para. 1841.

180 R. Kolb, above note 38, p. 162.

“definite”, and must exist “in the circumstances ruling at the time”.¹⁸¹ The answer is clearly in the negative. Not all objects, including medical objects used to commit AHTTE and/or effectively contributing to military action, would yield a definite military advantage when attacked. “[A] much wider pool of objects [may] be effectively contributing to the defender’s military action, but only some of them might offer a real military advantage in concrete circumstances.”¹⁸² Thus, the overall conclusion of the ICRC seems correct:

It is submitted that not all forms of ‘acts harmful to the enemy’ would make an effective contribution to military action and an attack directed against them would not, in the circumstances ruling at the time, offer a definite military advantage. The failure to fulfil either of these requirements implies that such medical objects may not be considered to have become military objectives.¹⁸³

Conversely, certain AHTTE may lead an object to become a military objective when the two-pronged test under Article 52(2) of AP I is satisfied, e.g. when the location is used to fire on opposing troops. It must be recalled again that committing AHTTE leads to the loss of special protection under the relevant provisions, which includes immunity from attack, but that conducting an attack still requires the attacking party to satisfy Article 52(2).

AHTTE in case of doubt

Based on “humanitarian considerations”,¹⁸⁴ “in case of doubt as to whether a particular type of conduct amounts to an ‘act harmful to the enemy’, it should not be considered as such”.¹⁸⁵ This interpretation is in line with the gist of the rules expressed in Articles 50(1) and 52(3) of AP I, with their legal presumptions of the civilian character of a person and of an object under the rules governing the conduct of hostilities. Although similar provisions are not found in AP II for NIAC, “[o]ne cannot automatically attack anyone who might appear dubious”.¹⁸⁶ These legal presumptions are in favour of the protection of the person and object in question, which leads to the protection of the wounded and sick – the ultimate aim of special protection under IHL.

Consequences of the loss of special protection

The main consequences of the loss of special protection are that the enemy is no longer obliged to refrain from interfering with the work of the medical services or

¹⁸¹ *Ibid.*

¹⁸² A. Jachec-Neale, above note 178, p. 116.

¹⁸³ ICRC, above note 5, p. 33.

¹⁸⁴ ICRC Commentary on GC I, above note 4, Art. 21, para.1844; see also Art. 24, para. 1998.

¹⁸⁵ *Ibid.*

¹⁸⁶ ICRC Customary Law Study, above note 2, commentary on Rule 6, p. 24: “In the case of non-international armed conflicts, the issue of doubt has hardly been addressed in State practice, even though a clear rule on this subject would be desirable.”

to take positive measures to assist it in its work,¹⁸⁷ after fulfilment of the warning requirements. Further, if the warning, time limit and non-heeding are fulfilled, the service can be attacked. But there remain open questions, such as: when a person commits AHTTE inside a medical unit, should the response be given to the person only, or can the entire unit be attacked? If only a part of the unit is abused, can the whole unit be attacked? Does the abusive act affect the entire unit’s protected status? And to what extent can medical personnel be attacked?

For *military* medical personnel, the commission of AHTTE does not change their status as medical personnel, just as DPH does not change the status of civilian into combatant.¹⁸⁸ The only consequence is the loss of special protection (because of AHTTE and the fulfilment of the warning-prong requirements).¹⁸⁹ In this case, the concerned medical personnel, normally protected against attack, will be liable to attack, exactly like civilians under the DPH doctrine.¹⁹⁰ It must also be recalled that military medical personnel, either generally or once having lost their special protection, can be targeted at all times,¹⁹¹ and are not subjected to a contextual two-pronged test as are objects under Article 52(2) of AP I. If *civilian* medical personnel engage in AHTTE, these persons analogously remain civilians. They cannot, however, be attacked all the time, since they enjoy general protection under Articles 48 and 51 of AP I, as well as related customary international law; it is only if the AHTTE amount to DPH (i.e., are not merely “harmful” but also “hostile” in the sense discussed above), or if medical personnel engage in DPH in addition to AHTTE, that an attack on them becomes lawful under IHL. Conducts to be discussed under AHTTE in this context include the collecting and communicating of intelligence related or unrelated to combat operations, the shielding of able-bodied combatants, or firing on adverse forces.

In order to determine the loss of special protection of *medical objects*, both military and civilian, so that they can be attacked, two tests need to be satisfied: an AHTTE test together with the two additional requirements for the loss of special protection (warning, unheeded), and a military objective test under Article 52(2) of AP I for the loss of general protection against direct attacks. In contrast to medical personnel, where the difference in the respective legal status of military medical personnel and civilian medical personnel leads to an additional DPH test

187 ICRC Commentary on GC I, above note 4, Art. 21, para. 1854, Art. 24, para. 2008.

188 For a detailed analysis, see P. De Waard and J. Tarrant, above note 68, pp. 175–182.

189 For an alternative view, see V. Koutroulis, above note 112, p. 231; M. Sassòli, above note 10, pp. 53–55. Sassòli asserts that the loss of special protection for both *military* medical personnel and *civilian* medical personnel should be limited to acts that amount to DPH, instead of AHTTE, as the latter is a relevant criterion developed for objects while the former is for persons.

190 Nonetheless, questions do arise as to whether an attack against a member of military medical personnel who has committed a single, low-level harmful act that does not amount to a hostile act (e.g., sending one email containing low-quality intelligence unrelated to combat operations) would indeed be necessary.

191 If a temporal loss rather than a permanent loss of special protection is justified, where the special protection is regained, the person is no longer liable to attack. For the temporal end of the loss of special protection with regard to military medical personnel, see ICRC Commentary on GC I, above note 4, Art. 24, para. 2009. For a similar discussion on civil defence personnel in the context of Article 65 of AP I, see M. Bothe, K. J. Partsch and W. A. Solf (eds), above note 145, AP I, Art. 65, pp. 458–459.

for civilian medical personnel in order to assess their loss of protection against direct attack, both military and civilian medical objects have the same civilian status under the rules governing the conduct of hostilities,¹⁹² and thereby undergo the same two tests (loss of special protection and loss of general protection).

An important question is to what extent single acts or localized action within a medical unit may turn the whole unit into a military objective liable to direct attack. The US Department of Defense *Law of War Manual* states that “a single enemy rifleman firing from a hospital window would warrant a response against the rifleman only, rather than the destruction of the hospital”.¹⁹³ The legal reasoning has not been made explicit, although mention is made that “[s]uch use of force in self-defense against medical units or facilities must be proportionate”.¹⁹⁴ Is this because the United States, in this specific case, considers that the military objective test has been narrowed down to the individual and not to the entire unit, as the conduct of the rifleman was not sufficient to transform the unit into a military objective? Or that the military objective test was satisfied for the unit, but the proportionality test was not automatically fulfilled by the same token?

In general terms, it must be said that a medical service cannot be automatically considered as a single military objective. If the military aim of neutralizing the AHTTE can be obtained by attacks on single parts of it, this narrower course must be chosen. This solution flows from the fact that the proportionality principle applies to all protected persons and objects, as well as from the fact that Article 57 of AP I requires precautionary measures in all types of situations.¹⁹⁵ This nuanced position finds some support in the jurisprudence of the aforementioned ICTY *Galić* case, which discussed the lawfulness of direct attacks against Koševo Hospital in Sarajevo by a party to the conflict: the Sarajevo Romanija Corps (SRK), a branch of the Army of Republika Srpska.¹⁹⁶ The hospital had become a dual-use object, an object serving at once civilian and military purposes. While the wounded and sick were being treated, it had also become a “military base”¹⁹⁷ of the opposing party to the conflict, the Army of Bosnia and Herzegovina (ABiH). Weapons were being fired from its grounds by

¹⁹² See above note 26.

¹⁹³ US Department of Defense, above note 164, para. 7.10.3.2.

¹⁹⁴ *Ibid.* The Manual stipulates that the proportionality principle creates obligations to “take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians *and other persons and objects protected from being made the object of attack*” (emphasis added): *ibid.*, paras 2.4.1.2, 5.11. It further underlines that “the requirement to take feasible precautions in planning and conducting attacks and the prohibition on attacks expected to cause excessive incidental harm are fundamentally connected and mutually reinforcing obligations”: *ibid.*, para. 5.10.5. It rejects, however, that the proportionality requirement applies to military medical personnel and objects, or to military wounded and sick, as they are deemed to have accepted the risk of incidental harm due to their proximity to military objectives: *ibid.*, paras 4.10.1, 5.10.1.2, 7.3.3.1, 7.8.2.1, 7.10.1.1, 17.14.1.2, 17.15.1.2, 17.15.2.2. For a detailed analysis on the Manual’s approach on this matter, see J. K. Kleffner, above note 38, pp. 52–55.

¹⁹⁵ See the above section entitled “Special Protection”.

¹⁹⁶ ICTY, *Galić*, above note 94, paras 336–352.

¹⁹⁷ *Ibid.*, para. 337

the ABiH forces against the SRK forces.¹⁹⁸ The relevant factual findings made by the Trial Chamber, also confirmed by the Appeals Chamber, were that there were attacks from both sides: “the SRK was fired at from the hospital grounds, and ... the SRK fired on the hospital grounds and building”.¹⁹⁹ The Court noted that the hospital “was regularly targeted during the Indictment Period by the SRK”,²⁰⁰ that the “ABiH mortar fire originated from the hospital grounds or from its vicinity and that these actions may have provoked SRK counter-fire”.²⁰¹ The Trial Chamber concluded that the SRK firing on the hospital buildings “was certainly not aimed at any possible military target”.²⁰² This was subsequently dismissed by the Appeals Chamber as “partially incorrect”.²⁰³

the Trial Chamber erred in law in determining that fire on the hospital was “not aimed at any possible military target”, because fire from the hospital turned it into a target. At the same time, however, military activity does not permanently turn a protected facility into a legitimate military target. It remains a legitimate military target only as long as it is reasonably necessary for the opposing side to respond to the military activity. Additionally, *an attack must be aimed at the military objects in or around the facility*, so only weaponry reasonably necessary for that purpose can be used.²⁰⁴

Conclusion

As a conclusion, some general recommendations can be presented. There are three points to be made.

First, *attacks against hospitals must be viewed only as a last resort*. This first recommendation subscribes to the one made as part of the ICRC’s Health Care in Danger project:

in consultations with military experts ..., a recommendation was made, not necessarily based on legal considerations, that kinetic strikes against a medical facility that has lost protection should be considered a last resort, and that options other than launching a direct attack on such a facility should be contemplated.²⁰⁵

Factoring not only the direct effects of the attack but also the reasonably foreseeable long-term and cumulative effects into incidental harm under the proportionality

198 *Ibid.*, paras 338–339.

199 *Ibid.*, para. 338.

200 *Ibid.*, para. 340.

201 *Ibid.*

202 *Ibid.*

203 *Ibid.*

204 *Ibid.*, para. 346 (emphasis added).

205 ICRC, above note 5, p. 33. See also ICRC, above note 87, pp. 41–42, for a set of “[s]pecific measures to guide the planning and conduct of an attack on a health-care facility which has lost its protection”.

calculus would in most cases outweigh the military advantage anticipated.²⁰⁶ This would consequently render an attack against a dual-use hospital that has become a military objective unlawful. In practice, the gist of the initial response to AHTTE is don't attack, provide a warning, and provide a time frame. "[T]he only remedy, practically speaking, available to the aggrieved Party to the conflict would most likely be capture or another appropriate measure of enforcing compliance."²⁰⁷

Second, *the notion of military objective and the attack allowed must be framed narrowly in the present context*. When an attack against a hospital is deemed *prima facie* lawful, as long as the hospital is simultaneously and continuously being used for the care of the wounded and sick, it is recommended, to the extent feasible, that the attack is made in a limited form and narrowed down to the exact military objective, as defined under Article 52(2) of AP I or its customary law equivalent,²⁰⁸ within the hospital, and not directed at its entirety. "Article 51(4)(a) of Additional Protocol I requires that the attack be directed at the 'specific' military objective."²⁰⁹ As much as possible, weapons used for the attack should be those necessary and proportionate to the exact military objectives defined within the military component of the hospital, so as to incapacitate those, and should not be directed against the civilian component or against the entire building.²¹⁰

Third, *a prior warning must be considered as a stringent requirement for "authorized" and "unauthorized" hospitals*.²¹¹ The following practical example illuminates the significance of this last recommendation even in atypical situations.

Consider a civilian hospital destroyed and abandoned due to an armed conflict. It no longer functions as a hospital. The medical personnel have left, so have the wounded and sick under their care. The local residents have also fled the area. After many months, new residents arrive, and a non-State armed group takes position in the building, which was once a hospital. Before an adverse belligerent launches an attack against this building, when such an attack is deemed lawful, a warning would arguably still be necessary. It is possible that a

206 Henry Shue and David Wippman, "Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions", in Henry Shue, *Fighting Hurt: Rule and Exception in Torture and War*, Oxford University Press, Oxford, 2016, pp. 306–309.

207 Cf. ICRC Commentary on GC II, above note 8, Art. 34, para. 2388.

208 ICRC Customary Law Study, above note 2, Rule 8.

209 Agnieszka Jachec-Neale, "How Can My Home, School or Church Ever Be a Military Objective? Loss of Protection by Use, Purpose or Location", in *Urban Warfare*, Proceedings of the 16th Bruges Colloquium, 15–16 October 2015, p. 19. Jachec-Neale maintains that a single multi-storey building used partially for military purposes can be considered in whole as a "specific" military objective within the meaning of Article 51(4)(a) of AP I, provided it fulfils the definition of a military objective under Article 52(2) of AP I. Conversely, a compound comprised of several independent buildings may not be qualified as such if the information reasonably available to the adverse belligerent at the moment of the attack indicates that only some of the independent buildings within the compound are used for military purposes. Determining such a compound as a single military objective in its entirety is incompatible with the definition under Article 52(2) and would likely constitute an indiscriminate attack under Article 51(5)(a) of AP I. *Ibid.*, pp. 19–20.

210 ICTY, *Galić*, above note 94, para. 346.

211 An authorized hospital means one that is assigned to medical purposes by a party to the conflict. See the definition of medical units in the above section entitled "Special Protection".

civilian seeking medical care could mistakenly enter the structure, for instance, due to the left signboards indicating that the structure is a hospital. How could the adverse belligerent know that the new population is aware that the structure is not a hospital anymore? How could they assume that a civilian, seeking medical treatment, will not enter it?

When, in the extreme, a hospital becomes a military objective and is liable to direct attack, it is recommended that the “warning procedural requirements” under the relevant provisions governing the loss of special protection are expanded to hospitals that do not fall within the meaning of IHL. According to the ICRC’s Customary Law Study, “a lot of practice does not expressly require medical units to be recognised and authorised by one of the parties”.²¹² Moreover, under the Rome Statute of the International Criminal Court, the war crime of “[i]ntentionally directing attacks against ... *hospitals and places where the sick and wounded are collected*, provided they are not military objectives”,²¹³ is not confined to the IHL definition of authorized medical units. These factors seem to indicate that States, upon recognition that a facility is being used to provide medical care to the wounded and sick, acknowledge the existence of special protection attached to it.²¹⁴ There is no difference between the protective status of the wounded and sick in “authorized” and “unauthorized” hospitals, and thus, it does not make much sense to deprive the latter of the opportunity of being evacuated. Finally, the principle of precaution requires belligerents to do everything feasible to verify that the objectives (persons and objects) are neither civilian nor enjoy special protection but are military objectives.²¹⁵ This further includes ascertaining whether the attack does not violate the principle of proportionality, to which the wounded and sick are also entitled.

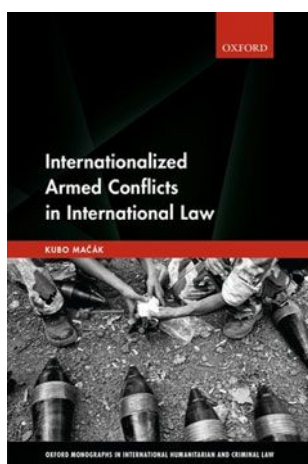
212 ICRC Customary Law Study, above note 2, commentary on Rule 28, p. 95.

213 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts 8(2)(b)(ix), 8(2)(e)(iv) (emphasis added).

214 This wider interpretation of hospitals has history. In the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 129 CTS 361, 22 August 1864 (entered into force 22 June 1865), Art. 5, it was codified that “[t]he presence of any wounded combatant receiving shelter and care in a house shall ensure its protection”.

215 AP I, Art. 57(2)(a)(i).

BOOK REVIEW



Internationalized Armed Conflicts in International Law

Kubo Mačák*

Book review by Andrea Harrison, Legal Adviser and Deputy Head of the Legal Department for the International Committee of the Red Cross's Regional Delegation for the United States and Canada, and PhD Candidate at the University of Leicester.

.....

Dr Kubo Mačák's *Internationalized Armed Conflicts in International Law* is a timely and engaging publication that tackles the internationalization of armed conflicts, the phenomenon whereby a non-international armed conflict (NIAC) takes on the characteristics of an international armed conflict (IAC) due to certain acts of third States. Although this issue has been simmering for many decades, it has become increasingly relevant in an era which is “defined by the twin forces of globalization and fragmentation, [where] virtually no armed conflict remains confined to the territory of one state, free from foreign involvement”.¹ Recognizing that the internationalization of conflict may have a wide range of humanitarian, political and legal consequences, Dr Mačák focuses on how internationalization impacts the application of international humanitarian law (IHL), and more specifically, on the questions that internationalization raises with respect to (1) conflict classification, (2) combatant status and (3) belligerent occupation.²

* Published by Oxford University Press, Oxford, 2018.

In his introduction to the book, Dr Mačák looks at the historical practice of “classifying” conflicts and their rules according to religious principles.³ This serves as a useful reminder that classification of conflicts is not a novel exercise invented by bored International Committee of the Red Cross (ICRC) lawyers, but rather a logical framing of conflict popularized by legal theorists and historians as early as the thirteenth century.⁴ The emergence of the Westphalian era concretized the practice of viewing conflicts through the lens of sovereign versus non-sovereign actors, rather than religion, and it was upon this distinction that modern classification of conflict rules are based.⁵ The Geneva Conventions of 1949 first codified this distinction, with States accepting robust and detailed rules for conflicts between themselves, so-called “international armed conflicts” as defined by common Article 2. Conflicts with non-State actors, on the other hand, were relegated to a few paragraphs contained in common Article 3, a visual reminder of the hierarchy of the Westphalian order.

The term “internationalized conflict” or “internationalized internal armed conflict” has not been without controversy. As Dr Mačák notes, the ICRC ultimately abandoned this terminology in light of concerns that it might be misconstrued as a “third category of armed conflict” to which different rules apply. Dr Mačák argues in favour of retaining the term, however, to describe not a third category of conflict as such, but the “*dynamic* idea of conflict transformation” (i.e., of a NIAC becoming an IAC and thereby “render[ing] the law of IAC applicable to such a conflict”).⁶ If one considers the nature of conflicts today in Ukraine, Syria, Yemen, Afghanistan and elsewhere, Dr Mačák’s reasoning is persuasive. The transformation of conflict from NIAC to IAC is increasingly pervasive, and the term “internationalization” is a useful construct for understanding and describing the legal and geopolitical dynamics involved.⁷

Dr Mačák explores a litany of ways in which a NIAC could become an IAC, including both “direct” and “indirect” involvement by States. He dismisses some of the proposed methods of internationalization of a conflict, such as consensual intervention by a third State at the invitation of the territorial State, and the consequent application of IAC as good policy but not the legal norm. Dr Mačák makes the case that the application of IAC rules would be more protective for civilians in these consensual interventions, and thus should always be desired as a matter of policy, but ultimately neither the treaty language nor State practice

1 *Internationalized Armed Conflicts in International Law*, p. 1.

2 *Ibid.*, p. 4.

3 *Ibid.*, pp. 9–23.

4 *Ibid.*, pp. 9–10.

5 *Ibid.*, pp. 11–14.

6 *Ibid.*, p. 27.

7 For an excellent discussion of many of the concepts and arguments found in Dr Mačák’s book, please see the *Opinio Juris* Symposium that took place in January 2019—see, for example, Kubo Mačák, “Symposium: Internationalized Armed Conflicts—The Wars of Our Age”, *Opinio Juris*, 14 January 2019, available at: <http://opiniojuris.org/2019/01/14/symposium-internationalized-armed-conflicts-the-wars-of-our-age/> (all internet references were accessed in July 2020).

would suggest any legal obligation to do so.⁸ However, according to Dr Mačák, only *non-consensual* intervention by a third State (or possibly an international or regional peacekeeping force) would trigger a legal requirement to apply IAC rules. He also addresses how certain forms of indirect intervention may lead to an internationalization of a NIAC. He takes the position that the “overall control test”⁹ is the most appropriate legal test¹⁰ for determining when internationalization has occurred, and that both prongs of the “overall control test” must be met: (1) support to the armed group, and (2) “organizing and coordinating rebels within another state’s territory”.¹¹ In addition, Dr Mačák argues that the overall control test must be interpreted to require a use of force *through* a non-State group by a State against another State (or State’s territory); the provision of weapons, materials or other support not amounting to a use of force is not sufficient to constitute an IAC.¹² The two other avenues for internationalization of an armed conflict described by Dr Mačák, but which will not be discussed in detail here, are (1) self-determination movements as defined by Article 1(4) of Additional Protocol I, and (2) political acts such as a recognition of belligerency or special agreements under common Article 3.

Prior to the publication of Dr Mačák’s monograph, internationalization was typically viewed either as creating a “global” conflict in which all parties had to respect the rules of IAC regardless of the parties’ status, or as a “mixed” conflict in which IAC would only apply between intervening and territorial States, but NIAC rules would apply to any conflict relationships involving a non-State party to the conflict.¹³ Dr Mačák introduces instead a new “hybrid” model, by which he proposes that one must look at the “degree of armed violence used and the extent to which it affects the other conflict pairs” and determine whether the “global” or “mixed” approach is the most appropriate in a given context. Under this hybrid model, when the use of force by the individual parties (i.e., the non-State actor and the State actor) “can no longer be distinguished”, the law of IAC must prevail for all parties involved (i.e., the “global” approach), but prior to that threshold, the “mixed” approach may be employed.¹⁴

Practically speaking, the “hybrid” model would seem to make sense by rejecting the view that conflict is binary in nature and instead adopting a “spectrum” approach, focusing on the ever-evolving nature of the “degree of armed violence used” as well as the relationship between parties which ultimately determines the applicability of a certain legal framework. The question remains,

8 *Internationalized Armed Conflicts in International Law*, pp. 36–37.

9 The “overall control test” is the test used for determining whether a State has become party to a conflict through its control of a non-State armed group that is party to an existing conflict. See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Case No. IT-94-I-A, Judgment (Appeals Chamber), 15 July 1999, paras 120 ff.

10 In contrast to other possible tests, such as the “effective control test” proposed by the International Court of Justice in the *Nicaragua* case. *Internationalized Armed Conflicts in International Law*, pp. 38, 40–46.

11 *Ibid.*, p. 46.

12 *Ibid.*, pp. 39–46.

13 *Ibid.*, p. 89.

14 *Ibid.*, p. 104.

however, as to what extent States will allow the application of IAC rules to non-State actors. The “global” approach, which is part and parcel of the “hybrid” model, is not well reflected in State practice or *opinio juris* by States, even if the theory is popular amongst academics and international tribunals. The practicality of the “hybrid” model may be challenged if States are unwilling to interpret IHL to require them to grant combatant immunity or prisoner-of-war (PoW) status to non-State actors,¹⁵ or to permit their non-State actor partners to grant PoW status to enemy combatants detained by the non-State actor. Dr Mačák makes a convincing argument for why States should apply IAC rules for combatant status in certain situations, but he does not explain how to overcome the reluctance of States to adopt this approach, and thus the “hybrid” model remains as theoretical as the “global” one (the “mixed” model, by contrast, is generally uncontroversial).

Take combatancy status, for example. Dr Mačák spends an entire chapter explaining why non-State actors should face no legal obstacle in being assimilated to the status of a combatant should a conflict become internationalized, yet as he notes, modern instances of States granting PoW status to non-State actors have been explicitly caveated as policy decisions rather than legal obligations.¹⁶ Most State practice that would support some informal or formal recognition of combatant status occurs post-conflict, in the form of amnesties, and not during a conflict, when PoW status and other benefits of combatant status would be most germane.¹⁷ Despite this obstacle, Dr Mačák is correct to assert that non-State actors should be *capable* of abiding by the IAC rules relevant to combatant status, either because these rules are “regulatory” in nature (i.e., prohibitions against engaging in criminal conduct) or because the resources required – for example, in order to properly detain PoWs – might also be a challenge for some States to provide. In any case, there is a strong argument that the partner State would have certain obligations under common Article 1 to make sure that IHL norms were respected by its non-State partners in this regard.

Dr Mačák makes a similar argument with respect to the rules controlling belligerent occupation. Analyzing the various obstacles to non-State actors “occupying” territory in the context of an internationalized armed conflict, he likewise finds that occupation does not require the occupier to be a formally “sovereign” State, and that the IAC obligations themselves are “chiefly negative in nature,” thus requiring the non-State actor “simply to refrain from conduct amounting to international crimes or from otherwise infringing on individual rights”.¹⁸ The most controversial aspect of this view is that occupation law would require non-State actors to engage in governing – including possibly administering courts or passing legislation – and many States would reject this as unlawful or illegitimate.¹⁹

15 Anne Quintin, “Symposium: Reflections on Conflict Classification”, *Opinio Juris*, 16 January 2019, available at: <http://opiniojuris.org/2019/01/16/symposium-reflections-on-conflict-classification/>.

16 *Internationalized Armed Conflicts in International Law*, p. 152.

17 *Ibid.*, p. 155.

18 *Ibid.*, p. 209.

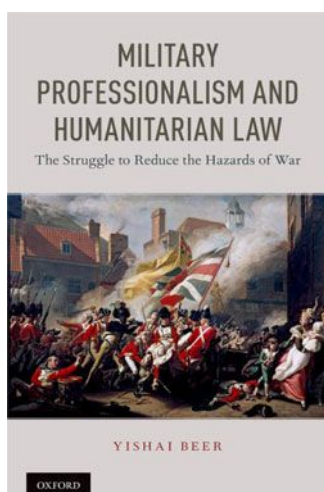
19 *Ibid.*, pp. 211–212.

While combatant status and belligerent occupation may pose some of the more perplexing legal arguments with respect to the internationalization of armed conflicts, perhaps the more pressing humanitarian issue in these situations is what happens to the civilians in the territory of a newly internationalized armed conflict. In a traditional IAC, those civilians would be protected persons and would be entitled to all the benefits set out in Geneva Convention IV, but while legally speaking this should not change with respect to an internationalized armed conflict, in practice it is not clear that this is the case. The recent examples of Syria and Ukraine, in which large segments of the population have been subject to the “occupation” of non-State armed groups that are arguably under the overall control of a third State, provide stark evidence of the impact of the failure of parties to an armed conflict to treat civilians as protected persons. From a humanitarian and protection point of view, it would have been useful for Dr Mačák to apply his superb analytical skills to these issues as well.

Conclusion

While Dr Mačák’s book delves into one of the more intricate and controversial legal issues facing IHL scholars and practitioners today, it’s important not to lose sight of the underlying premise of the book—that classifying a conflict efficiently and correctly is essential for ensuring the proper application of international law. Classification issues are often dismissed by parties to a conflict as abstract and irrelevant, but Dr Mačák adeptly demonstrates why such exercises are in fact both meaningful and necessary, and his proposal of a “hybrid” model for determining when to apply the rules of IAC is intriguing yet practical. The real-world application of such a test will be challenging in view of a notable lack of State practice of using even the existing approaches to classify such conflicts, but courts and other international bodies will likely find Dr Mačák’s “hybrid” model a welcome paradigm in which to analyze the multifaceted and multifarious conflicts facing the world today. This book uniquely provides a comprehensive overview of the history of classification of conflict, the legal criteria for determining when a NIAC has transformed into an IAC, and an intriguing proposal for how these “internationalized” armed conflicts could be approached in the future. It will not only be of great use to students of IHL wishing to better understand the complexities of conflict classification, but will also benefit practitioners attempting to establish appropriate legal frameworks on the battlefield.

BOOK REVIEW



Military Professionalism and Humanitarian Law: The Struggle to Reduce the Hazards of War

Yishai Beer*

Book review by Andrew Carswell,

Director of the International Rule of Law Initiative.¹

: : : : : :

With large-scale wars currently ravaging the Middle East, South Asia and Africa, often with limited regard for the lives of civilians, one may legitimately ask the question: are the United Nations (UN) Charter, Geneva Conventions and other relevant treaties of international law governing warfare effective? Could it be that the “lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us live in”?² Having both commanded an army corps and served as president of the Israeli Court of Appeals, retired major-general Yishai Beer is eminently placed to comment on the sizeable gulf between the law and the actual practice of States. *Military Professionalism and Humanitarian Law* challenges some of the very underpinnings of the law that practitioners and academics hold dear, and it does so with a combination of passion, strategic acuity and balance. The author recommends harnessing the inherent responsibility of a competent military chain of command with the aim of increasing compliance with both the *jus ad bellum* and *jus in bello*. In so

* Published by Oxford University Press, New York, 2018.

doing, he challenges some of the very precepts of the law, including the traditional international humanitarian law (IHL) concepts of military necessity and military advantage, and the UN Charter-based definition of self-defence, and questions whether they are fit for purpose.

Military necessity versus humanity?

Beer first takes issue with the concept of “military necessity”, a cardinal principle of IHL that is traditionally treated as diametrically opposed to, and therefore counter-balanced against, the concept of “humanity”. As an expert in military strategy he makes the excellent point that a disciplined armed force will in fact embrace humanitarian protections precisely as a function of military necessity, and that this terminology has created a false dichotomy which serves to alienate both sides of the military–civil society divide.³ He argues that the principle of military necessity is essentially hollow, as even the International Committee of the Red Cross (ICRC) admits that it is unlikely to restrict targeting which otherwise complies with the IHL rules governing the conduct of hostilities.⁴ In contrast, a professional armed force views military necessity as a strategic pillar, based in part on the economy of warfighting—an unusual example of the law’s permissibility relative to State practice.⁵ Beer further states that “[i]n order to effectively subdue an adversary, there is absolutely no need to kill all of its soldiers”,⁶ and that military force “should be lawful only to the extent that it is effectively necessary for achieving a given military advantage”.⁷ Viewed through his lens, the relevant question is whether a given unit of the opposing armed forces represents a threat, present or future. For example, he asks whether it was necessary to kill strategically unimportant and retreating Iraqi soldiers on the “highway of death” in Kuwait;⁸ the legal officer who made that call may have qualified the move as “lawful but awful”. Beer is also surprised that IHL’s proportionality equation ignores the strategic notion of military necessity and thereby allows a greater number of civilian casualties based on a greater number of unnecessary targets. In other words, military necessity not only drives the sword, it dictates restraint. Giving legal substance to such a doctrine is indeed a

1 Andrew Carswell has spent thirteen years in the ICRC at headquarters and in the field. He just returned from Syria, where he was the organization’s Delegate to the Armed Forces and Deputy Head of Delegation. He is Director of the International Rule of Law Initiative (irli.net), an international law consultant and a former Canadian Armed Forces legal officer.

2 *Military Professionalism and Humanitarian Law*, p. 14.

3 *Ibid.*, Chap. 1.

4 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2019, p. 50.

5 *Military Professionalism and Humanitarian Law*, p. 35.

6 *Ibid.*, p. 47.

7 *Ibid.*

8 *Ibid.*, p. 50.

persuasive nod to the inherent effectiveness of military strategy, and could well help to narrow the divide between the law and State practice.

Beyond imminence? Credibly timing self-defence

Beer then moves from the *in bello* to the *ad bellum*, addressing limitations in the prevailing law of self-defence under the UN Charter. Despite the 2003 Bush Doctrine and other attempts to enlarge the scope of self-defence to the point of rendering the prohibition on the use of force meaningless, the Charter is centred around the Security Council and only exceptionally allows self-defence in response to an armed attack, a term that has been defined by the International Court of Justice (ICJ) based in part on the General Assembly's 1974 "Definition of Aggression".⁹ The current right of the defending State extends to employing military force to halt an *imminent* attack—the precise meaning of which is the subject of serious debate, but which in the mainstream is characterized by manifest belligerent intent. Acknowledging the *lex lata*, the author goes on to suggest a novel standard *de ferenda*: "the last reasonable point, according to the self-defendant's military circumstances and doctrine, at which it can successfully face the aggressor's threat and still operationally defend itself—including, when necessary, by taking the initiative in its own self-defence".¹⁰ Given the relative ineffectiveness of the Chapter VII system of international peace and security, Beer wishes to give victim States the latitude to take more rationally proactive measures of anticipatory self-defence rather than waiting as a "sitting duck" for a first blow for which the aggressor may bank on the law guaranteeing a strictly necessary and proportionate response (and arguably score a military advantage through other elements of military strategy, such as initiative, surprise or concentration of power). His proposed framework is designed to deter such aggression. However, as he admits, the suggested standard "might be subject to mistakes, abuse and manipulation".¹¹ Indeed, existing State practice on Article 51 of the UN Charter is based on prudence and the tendency of States to misinterpret military signals from their neighbours. Just as a violation of Article 2(4) falling short of an armed attack does not trigger the victim State's right of self-defence (and the requirement to "turn the other cheek" is clear from the Charter's construction), in cases where self-defence is allowed, the intention of the drafters was to keep it circumscribed but credible, and then refer the matter back to the Security Council. Beer's logic is reasonably based on the dysfunction of the UN system combined with his country's crowded Middle Eastern military environment, in which a first blow could be fatal to any notion of self-defence. However, my fear is that in any environment, the risks of escalation brought on by a more permissive anticipatory response outweigh the benefits of more

9 UNGA Res. 3314, "Definition of Aggression", UN Doc. A/RES/3314, 14 December 1974.

10 *Military Professionalism and Humanitarian Law*, p. 72.

11 *Ibid.*, p. 114.

credible deterrence. What needs to be fixed is the UN system of international peace and security—but given the current P5 dynamic at the Security Council, is that plausible?¹²

Connecting strategic aims to the legal test of military advantage

Beer's third and most ambitious suggestion for improving the law goes to the very heart of his expertise: military strategy.¹³ This is where we see the retired major-general frustrated with IHL's affinity for the tactical level of warfare—i.e., the face of battle and its immediate humanitarian implications—and equally frustrated with strategic commanders' tendency in modern campaigns to expand their target list based on a "total war" logic, even when the actual aims of modern, self-defence-focused war are limited. Observing the humanitarian effects of current warfare, he expresses frustration that the law defines military objectives more expansively than is purely necessary to achieve those aims. He points to the voluntary "winning hearts and minds" focus of the US Department of Defense's counter-insurgency doctrine in Afghanistan¹⁴ as an example of the potential moderating influence of strategy on targeting, and asks whether existing IHL could be amended to harness the natural restraining force of a competent military chain of command. As it stands, the *jus in bello* allows for the complete decimation of an opponent's armed capability, subject only to the limitations on means of warfare causing unnecessary suffering and the protections afforded to those who are not taking part in hostilities; whereas modern war aims are generally much more limited—i.e., removing a particular threat. Indeed, "governing an adversary's land and people, once considered a desirable prize for the victor in war, has become a strategic burden and legal liability".¹⁵ Beer's view is that this new, restricted warfare requires a legal paradigm shift from the tactical to the strategic level of decision-making. The IHL concept of military advantage—whether as a component of the definition of military objective or as counterweight to collateral civilian damage in the legal test for targeting—should therefore be connected to the limited strategic aim of a campaign.

Following this logic, States would be "required to publicly declare their concrete aims when engaging in war, and to adjust the targeting rules of their

12 See irli.net for my own organization's approach to that issue, which revolves around empowering the UN General Assembly in the event of a Security Council veto that is not exercised in accordance with the purposes and principles of the UN.

13 *Military Professionalism and Humanitarian Law*, Chap. 3.

14 In a policy known as "courageous restraint", US armed forces were required to minimize civilian casualties, even if it necessitated incurring greater casualties. The general thinking was that fewer civilian casualties would equate to winning the support of the Afghan people. See, for example, Karl Eikenberry, "The Limits of Counterinsurgency Doctrine in Afghanistan: The Other Side of the COIN", *Foreign Affairs*, Vol. 92, No. 5, 2013.

15 *Military Professionalism and Humanitarian Law*, pp. 135–136.

war to its specific aims”,¹⁶ thereby reducing the potential number of military targets as well as incidental harm to civilian persons and objects. This is where the author’s analysis collides with *realpolitik*: would sovereign States willingly tie their hands, with legally binding effect, through a public statement of aims? If the IHL principle of equality of belligerents is followed, can we reasonably expect that non-State armed groups would make a similar public statement at the outset of their campaign to oust said governments? The author admits that his logic intertwines the existing *in bello* targeting principles with the *ad bellum* and inherently political question of resort to armed force. This is a potentially hazardous move in the already over-politicized domain of IHL application. Furthermore, it is unlikely that the international community would trust a government faced with an existential threat to craft its political war aims so as to ultimately minimize incidental civilian casualties.

Deterrence-centred self-defence

Beer’s final substantive argument¹⁷ is aimed at increasing the credibility of military deterrence with a view to preserving international peace and security. While designed to de-escalate tensions (“halt and repel”) to the extent possible, the current *ad bellum* law of self-defence does not in his view sufficiently deter potential aggressors from carrying out an armed attack in the first instance. He argues that the strategic initiative and gain of a calculated first blow are not counter-balanced in the law by any credible advantage bestowed upon the victim State, with the current self-defence limits of necessity and proportionality thereby incentivizing rather than deterring the aggressor. Accordingly, he recommends “professionally tailored and culturally based deterrence” to be exercised by a potential victim State, based on extensive intelligence that it would necessarily collect on its adversary. This would include the right to respond to an armed attack with unpredictable magnitude and dimensions of force, as practiced by General Colin Powell during the First Gulf War.¹⁸ Beer suggests a range of defensive deterrent measures unconstrained by the existing law, admitting that some may be mistakenly perceived as preparatory to aggression in and of themselves, leading to escalation rather than prevention of conflict.

The logic of the UN Charter, and of the law of self-defence in particular, is one of restraint, as reaffirmed by its *travaux préparatoires*, several General Assembly resolutions and the ICJ. Self-defence is neither punitive nor retaliatory, as a function of the Charter’s aim to promote peaceful settlement and avoid or minimize the use of force. Any attempt to loosen those restrictions in favour of a more credible deterrent effect against would-be aggressors is likely to enable potential self-defendants to send all of the wrong signals in the tit-for-tat escalation that tends

¹⁶ *Ibid.*, p. 152.

¹⁷ *Ibid.*, Chap. 4.

¹⁸ *Ibid.*, pp. 193–194.

to characterize State-on-State disputes. Add to this volatility the very subjective process of profiling the aggressor State with a view to tailoring an appropriate response, and the scope for fatal misunderstanding is wide. Although Beer is articulately responding to the gulf between the prohibition on the use of force and practice, he admits that deterrence may either serve as a pretext for aggression or lead to miscalculation.

Conclusion

The rules-based international order has been under sustained threat since 9/11, and has ebbed and flowed since its inception after the Second World War. “The wide consensual basis of the law of armed conflict is being eroded”, according to Beer, “partly due to its rejection by states and partly due to its unilateral extension by tribunals and NGOs”.¹⁹ His book has made an extraordinary normative effort to restore the law’s relevance and effectiveness, at the levels of preventing armed conflict and mitigating its humanitarian effects. Despite his nuanced and balanced approach to the substance of his arguments, however, he oversimplifies the state of international law itself as being torn between what he describes as utopians (NGOs) and apologetics (the executive level of States). Neither side of the divide is so predictable. The problem is that civil society and armed forces lawyers have different “clients” (civilian population versus military operations), emphasize different sources (treaties versus operations orders/rules of engagement) and speak different languages (IHL versus the law of armed conflict). It is only once both sides acknowledge those cultural differences that they will be able to move past them and to seek common ground. Given the current state of international affairs, redesigning the laws of war to appeal to the inherent structure and incentives of professional armed forces is a Herculean task – as Beer wisely posits, it can only be accomplished with the consent of both those who pull the trigger and those representing the civilians caught in the crossfire. As the pendulum of international relations has swung far to the side of State sovereignty, is meaningful compromise achievable in today’s world? Beer has valiantly made the case for re-examining some of the key presumptions underlying the international law governing warfare through his book.

¹⁹ *Ibid.*, p. 10.

REPORTS AND DOCUMENTS

The development of guiding principles for the proper management of the dead in humanitarian emergencies and help in preventing their becoming missing persons: First Expert's Meeting

Geneva, 30 November–1 December 2018, University of Geneva Law Faculty, Swiss National Science Foundation, Right to Truth, Truth(s) through Rights project, and the ICRC Missing Persons Project, with the participation of the University of Milan Medico-Legal Institute, Laboratorio di Antropologia e Odontologia Forense, and the

International Organization for Standardization

Conference report*

Report Coordinators: Sévane Garibian (RTTR) and Morris Tidball-Binz (ICRC)

Report Authors: Zahira Aragüete-Toribio, Adriana Schnyder and Marion Vironda Dubray (RTTR)

Invited Experts: José Alcorta (ISO), Lt. Col. Geoffrey Cardozo (retired British Army officer), Ben Carson (ISO), Cristina Cattaneo (University of Milan), Rudi Coninx (WHO), Stephen Cordner (Victorian Institute of Forensic Medicine and Monash University), Tania Delabarde (Centre National de la Recherche Scientifique), Caroline Douillez (ICRC), Serge Eko (International Criminal Police Organization), Francisco Ferrándiz (Spanish National Research Council), Oran Finegan (ICRC), Luis Fondebrider (Argentine Forensic Anthropology Team), Tony Fracasso (University Centre of Legal Medicine), Sévane Garibian (RTTR), Pierre Guyomarc'h (ICRC), Jamila Hammami (ICRC), Tom Holland (Defense POW/MIA Accounting Agency), Maria Dolores Morcillo (ICRC), Dina Shokry (Cairo University), Senem Skulj (ICRC), Morris Tidball-Binz (ICRC), Florian von König (ICRC)

Note-Takers: Zahira Aragüete-Toribio (RTTR), Arpita Mitra (ICRC), Adriana Schnyder (RTTR), Olivier van Den Brand (RTTR), Marion Vironda Dubray (RTTR) and Vanessa Vuille (RTTR)

Executive summary

When large numbers of people die as a result of humanitarian emergencies, their bodies and remains are often managed with little consideration for their dignity. This may impact the capacity to identify the deceased and prevent them from becoming missing persons. Many of the existing guidelines for managing the dead in emergencies, including those published by the International Police Organization, the World Health Organization and the International Committee of the Red Cross, are accomplished from a technical point of view, but offer little or no specific guidance on guaranteeing respect for the deceased and their remains. In 2018, the Missing Persons Project of the International Committee of the Red Cross and the Right to Truth, Truth(s) through Rights project of the University of Geneva convened a meeting of experts to discuss the need for developing guidance to guarantee the dignified treatment of the dead in humanitarian emergencies. Participants identified the need worldwide for a set of general principles to guide practitioners and decision-makers in their efforts to ensure respect for dead persons

* This report is a summary of a workshop. The views expressed here are those of the participants concerned and are not necessarily those of the organizations that they represent.

and human remains in humanitarian emergencies, and recommended their development.

Keywords: missing persons, humanitarian emergencies, dignified management of the dead.

: : : : : :

Introduction

At the end of 2018, the Missing Persons Project of the International Committee of the Red Cross (ICRC) and the Right to Truth, Truth(s) through Rights (RTTR) project of the University of Geneva¹ jointly organized an international meeting of experts to discuss the need to develop principles for the dignified management of the dead in humanitarian emergencies, including to prevent them from becoming missing persons.

The meeting, held at the Faculty of Law of the University of Geneva on 30 November and 1 December 2019, was the first of its kind, convening researchers and practitioners from the fields of forensic science, law and social anthropology, as well as humanitarian and military experts. Participants also included representatives from the International Organization of Standardization and of the International Police Organization (INTERPOL).

This was the first event organized by the Missing Persons Project,² a four-year institutional initiative launched by the ICRC in 2018 to develop technical standards for practitioners and policy-makers and to empower communities of practice for preventing and resolving the issue of the missing worldwide.

The Missing Persons Project had identified the mismanagement of the dead as one of the many reasons why the victims of humanitarian emergencies go missing.³ Existing guidelines for managing the dead, such as INTERPOL's *Disaster Victim Identification Guide*⁴ and the manual for first responders for the management of the dead published by the ICRC and the World Health Organization (WHO),⁵ are accomplished from a technical point of view, but offer little or no guidance for ensuring the respectful and dignified management of the dead and their remains. After consultation on this regard with the RTTR project of the University of Geneva, the latter offered to jointly convene a meeting of selected experts from around the world to discuss the pertinence of developing guidance on this matter.

1 Project funded by the Swiss National Science Foundation. See: www.right-truth-impunity.ch/en (all internet references were accessed in May 2020).

2 See ICRC, *Missing Persons Project: Working Together to Address a Global Human Tragedy*, Geneva, 2018, available at: www.icrc.org/en/publication/4375-missing-persons-project.

3 Stephen Cordner and Morris Tidball-Binz, "Humanitarian Forensic Action: Its Origins and Future", *Forensic Science International*, Vol. 279, 2017.

4 INTERPOL, *Disaster Victim Identification Guide*, 2018, available at: www.interpol.int/en/content/download/589/file/18Y1344%20E%20DVI_Guide.pdf.

5 Stephen Cordner, Rudi Coninx, Kim Hyo-Jeong, Dana van Alpen and Morris Tidball-Binz (eds), *Management of Dead Bodies after Disasters: A Field Manual for First Responders*, 2nd ed., WHO and ICRC, Geneva, 2016.

The report that follows summarizes the discussions, conclusions and recommendations from the two-day meeting held in Geneva.

Challenges of forensic practice in humanitarian emergencies for ensuring the proper management of the dead

Participants recognized that unprofessional and undignified management of dead persons and their human remains often follows humanitarian emergencies with large numbers of fatalities, and that this negatively influences their identification, including to help prevent them from becoming missing persons.

The need to address the challenges that forensic work faces in contexts of humanitarian emergencies was therefore presented as an important topic for discussion, specifically in relation to the dignified management of the dead, including to help prevent them from becoming missing persons. Two specific questions surfaced. On the one hand, there is a pressing need to address whether existing guidelines and standards for forensic practice in humanitarian emergencies are sufficient to ensure the successful application of forensic techniques to protect the dignity of the dead. On the other, this begs the question of whether forensic practice worldwide may be improved for ensuring the dignified management of the dead in humanitarian emergencies, including preventing their becoming missing persons, through a set of new guiding principles, which should be indisputable and agreed upon by all parties involved.

Over the years, forensic specialists have drawn on multiple recommendations issued by international organizations involved in the management, administration and assessment of humanitarian forensic response. These recommendations appear in documents such as the United Nations (UN) *Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (1991, revised in 2016);⁶ the ICRC report *The Missing and their Families* (2003); the WHO/ICRC's *Management of Dead Bodies after Disasters: A Field Manual for First Responders* (updated in 2016);⁷ INTERPOL's *Disaster Victim Identification Guide* for experts in the field (updated in 2018);⁸ the standards created by the Organization of Scientific Area Committees for Forensic Science,⁹ part of the National Institute of Standards and Technology of the US Department of Commerce; and the materials generated by the International Commission on Missing Persons, Justice Rapid Response, the UN Office on Drugs and Crime and the Disaster Mortuary Operational Response Team, part of the US Department of Health and Human Services. In addition to these, there is also the specialist literature on the field of forensics published in

6 UN, *The Minnesota Protocol on the Investigation of Potentially Unlawful Deaths: The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. HR/PUB/17/4, New York and Geneva, 2017 (UN Doc. E/ST/CSDHA/12, 1991).

7 S. Cordner *et al.*, above note 5.

8 INTERPOL, above note 4.

9 See OSAC, "OSAC Registry Approved Standards", available at: www.nist.gov/topics/organization-scientific-area-committees-forensic-science/osac-registry-approved-standards.

journals such as *Forensic Science International* and the *International Review of the Red Cross*.

A look into some of these manuals, and into forensic work as it happens in practice, shows that there is a gap in these recommendations with respect to guiding principles for protecting the dignity of the dead. Experts identified ongoing difficulties connected to the mobilization of first responders on the ground and the appropriate individualization and disposal of dead bodies. Further work should include the development of specific, complementary guidance in humanitarian forensic action for ensuring the dignified management of the dead.

Main discussion points

Thinking about the best ways of achieving a holistic approach to forensic action that ensures the dignified management of the dead in humanitarian emergencies was identified as a priority. Diverse examples revealed how issues of coordination, management, training and the evaluation of forensic performance at national and international levels play an important part in the implementation of forensic protocols in humanitarian settings.

First, participants identified that, though protocol is usually uniformly applied by all actors involved in a crisis scenario, principles of humanitarian response do not seem to pay enough consideration to forensic guidelines and standards. Moreover, there is a clear need to define the scale, location and characteristics of the humanitarian contexts in which forensic specialists operate. It is paramount to delineate the type of emergency that is being addressed, whether a situation of armed conflict or mass violence, or one of natural disaster or migration, in order to gauge the obstacles and facilities that might exist for access to and development of forensic work. Emergency contexts requiring the dignified management of the dead, including for preventing them from becoming missing persons, are diverse – socially, culturally and politically – and as such demand a differential approach.

Additionally, further consideration was given to problems related to the existing forensic capacity in local settings. One of the most challenging areas continues to be the frequent absence of forensic specialists on the ground in humanitarian emergencies, due to the unavailability, for the most part, of a “cluster” on the management of the dead in national and local emergency services. Professionals of the health “cluster” not experienced in the management of the dead are often mobilized instead, while forensic expertise remains mostly absent from national emergency plans. Shortage of forensic specialists can occur due to the lack of sufficient capacity, including specialized training and necessary resources, observed in some national medico-legal and police institutions. Moreover, in some humanitarian contexts, there might be a reluctance to care for the dead – in order to first care for the living – given the time constraints and the challenges that large-scale humanitarian emergencies present. This negatively impacts the dignified management of the dead and contributes to them becoming missing persons.

In relation to the evaluation of forensic performance connected to the treatment of the dead across contexts, practitioners commented on the limited scope of the assessments usually carried out to measure, in particular, the proper and dignified management of the dead in large-scale humanitarian emergencies. Such assessments, if and when carried out, are usually only based on the quantitative evaluation of forensic performance in connection to the number of bodies recovered and identified through DNA or other forensic analysis, and the time deployed to do so, often ignoring whether their dignity and that of their families and communities was respected and protected. This narrow approach has hindered other forms of qualitative evaluation, which can provide insights into often overlooked areas that also pose challenges for experts, such as the communication established between forensic practitioners and families, or the interface between forensic labour and context-specific cultural and religious factors (see the section below on the importance of recognizing social, cultural and religious diversity).

A review of the standards and guidelines on the management of the dead that already exist should assess the issue of “dignity” or how the dead are treated in practice. Despite the existence of various manuals on the subject, the frequent mismanagement of dead bodies, especially with regard to the disposal of unidentified corpses, remains high in large-scale humanitarian emergencies. Participants agreed that in many cases practitioners objectify dead bodies on the field, forgetting the fact that they were once living persons; this happened, for example, in the aftermath of the January 2010 earthquake in Haiti, when hundreds of dead bodies were hastily buried in pits with little or no consideration for their dignity.¹⁰ In addition to this, recommendations often take the position of the professionals carrying out the work, focusing more on processes and technical aspects than on the respect that the dead deserve. There is a need to shift the focus from the operator to the dead and to ensure the appropriate care and respect for the dead person. Some experts suggested the need to reflect further on the concept of dignity, bearing in mind that attempting a definition of the term can lead to controversies about its shifting social, cultural and legal meanings from one context to the next (see discussion below).

With a view to bridging the chasm between different domains of forensic action regarding the dignified management of the dead, participants agreed that forensic work ought to be set up multilaterally with, among others, governments and international humanitarian agencies, in order to enable an all-encompassing approach to the proper management of the dead in large-scale humanitarian emergencies. Guiding principles may include points that are common to all humanitarian emergency contexts and may later be adapted to specific national and cultural frameworks. More efforts ought to be directed at making political institutions, media outlets and international organizations aware of the value of these guidelines in order to ensure the dignified treatment of the dead.

10 “Haiti Shows the Importance of Dealing with Dead Bodies When Disaster Strikes”, *The Guardian*, 1 November 2012, available at: www.theguardian.com/global-development/2012/nov/01/haiti-dead-bodies-disaster-strikes.

Legal and ethical frameworks for managing the dead and preventing them from becoming missing persons

Identifying the specific international and national legal frameworks applicable to the dignified management of the dead and the prevention of persons becoming missing in large-scale humanitarian emergencies was highlighted as a crucial aspect for ensuring the appropriate development and implementation of forensic work in these situations. From this perspective, five different categories of norms were selected for discussion:

1. International humanitarian law (IHL), which includes in particular the four Geneva Conventions (1949) and their three Additional Protocols (1977/2005). These are binding over all parties to an armed conflict occurring between States Parties or on the territory of a State Party. Moreover, six of the 161 rules of customary IHL (Rules 112–117) address legal questions related to the dead and missing (i.e., the obligation to account for the dead and missing; the obligation to search for, collect and treat the dead respectfully; and the dignified disposal and return of human remains and personal effects to families). The Geneva Conventions and Additional Protocol I foresee three main institutional frameworks to reinforce these principles. According to these, belligerent parties must (1) set up an official Graves Registration Service at the beginning of hostilities to mark and maintain the graves; (2) establish national bureaux to centralize and transmit information, and initiate inquiries; and (3) create a Central Information Agency or resort to the ICRC Central Tracing Agency to prevent people from going missing. Additional Protocol I also protects the right of families to know the fate of their missing relatives.
2. International human rights law (IHRL), which applies in all contexts of humanitarian emergency—and is especially important in peacetime, when IHL does not generally apply. IHRL guarantees, among other rights, the right to life, the protection of human dignity and the prohibition of torture, the right to private and family life, the right to an effective remedy, the right to an effective investigation and the right to truth.
3. International criminal law (ICL), which is relevant in particular scenarios where serious violations of rules related to the dignified handling of the dead amount to an international crime, notably a war crime under Article 8(2)(b)(xxi) of the Rome Statute of the International Criminal Court, and the *Elements of Crimes*, which specify that this provision is applicable to acts committed against dead persons.
4. International disaster response law, which corresponds to various soft-law instruments that seek to ensure the effectiveness and quality of international disaster relief operations in situations of armed conflicts and natural disasters. Examples of such instruments include the 2011 Sphere Project handbook,¹¹ which provides a set of minimum standards to guide humanitarian response.

11 Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, 3rd ed, Practical Action Publishing, Rugby, 2011.

5. Domestic legal frameworks, which include the national implementation of international law (IHL, IHRL and ICL) and standards. These frameworks also include a great variety of domestic legal tools (e.g., criminal, civil, administrative, medical and bioethical law), reflecting national idiosyncrasies.

One of the most important concerns in relation to the above-mentioned bodies of law is the fact that not all of these have the same content, nature or binding force. This has generated multiple and diverse legal provisions and texts, which has led to a fragmentation of, and lack of harmonization between, legal tools. While this can be considered an advantage in relation to a need for legal pluralism, it creates a chaotic and sometimes conflictual legal configuration, filled with gaps – notably, in relation to the treatment of the dead and missing – and fraught with problems of interpretation and implementation.

Moreover, provisions relating to the respectful handling of the dead and the prevention of persons going missing represent a very small drop in the ocean of IHL, IHRL and ICL norms. In addition to this, most existing norms on this subject require further development. IHRL norms, for instance, remain poor in relation to the protection of the dead, as the legal status of a dead body continues to generate academic debate without reaching consensus. Defining the dead body as an object or a person could have profound consequences for the manner in which human remains are treated. It could also shape broader definitions of dignity, bearing in mind that distinctions made about the dead as an object or a person are deeply entrenched in specific socio-cultural understandings. All in all, conflicts between norms but also between the rights of the living and the (potential) rights of the dead demand a critical examination of existing legal instruments, their content and their implementation in order to ensure the respectful handling of the dead.

Main discussion points

In light of their concrete experience in the field, experts shared the view that international law does not necessarily cover every situation on the ground in relation to the proper management of the dead in humanitarian emergencies. Nevertheless, gaps in the current legal framework were perceived as a potential strength in order to address specific issues through other creative, non-legal means.

Discussions focused on the possibility of developing a general set of principles relating to the treatment of the dead in humanitarian emergencies. On the one hand, trying to reach consensus between all the parties involved in negotiating potential guidelines could risk creating an instrument that is meaningless in terms of guiding humanitarian forensic action. On the other, the quest for universality might undermine the need for social, cultural and religious sensitivity and respect for diverse mortuary practices – especially when the communities concerned are not adequately represented in the negotiations (see the section below on the importance of recognizing social, cultural and religious diversity). These issues could be mitigated by establishing guiding principles that

leave stakeholders some margin to decide how best to implement them depending on their social, cultural and heritage needs.

Participants debated whether principles should take as their focus or point of departure the “dead” or the “missing”. Referring to the “missing” in line with the use of the term by the ICRC’s Missing Persons Project could help settle this point, but this solution would not remove the need for a distinction between death and the absence that results from enforced disappearance or a person going missing, either dead or alive. Taking the broader concept of the “missing” – which is not defined in international law – as a point of departure would also require previous reflection on the understanding of this concept. Some experts argued that while the ICRC’s mandate is traditionally limited to armed conflicts and armed violence, the notion of “missing persons” in the proposed principles ought to be expanded to other situations of mass violence, disaster and migration. The ICRC has aimed to define the “missing” in a way that is open and inclusive enough to encompass persons

whose whereabouts are unknown to his or her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.¹²

Others, however, argued in favour of speaking only of the “dead”. Experts warned about the importance of not blurring categories of persons protected by the existing legal framework by overly broadening these definitions.

Discussions also dealt with the content of the proposed set of guiding principles. It was commonly agreed that principles should provide a definition of the process of “managing the dead”, which should be incorporated to the larger spectrum of responses to humanitarian emergency. Some specialists highlighted the need to develop such guiding principles addressed to non-forensic actors such as policy-makers, particularly on issues that are not contemplated in existing, mostly technical texts. Some of these relate but are not limited to philosophical and ethical considerations on the legal status of the dead and their dignity. On the one hand, the fact that legal personality generally ceases with death poses questions about whether the dead do indeed have “rights”, in addition to the controversies surrounding the definition of death *per se*. On the other, the notion of “dignity” remains an ambiguous concept, and there is no consensus on its meaning in legal terms – nor is there agreement from a philosophical, ethical or anthropological perspective. Trying to suggest a definition of the term “dignity” would thus be problematic and may not assist practitioners in achieving their goal. Agreement prevailed, however, on referring to the term “dignity”, as used in existing international instruments for the purpose of ensuring the respectful treatment of the dead and helping to prevent them from becoming missing persons.

12 See ICRC, *Missing Persons: A Handbook for Parliamentarians*, Geneva, 2009, available at: www.icrc.org/en/publication/1117-missing-persons-handbook-parliamentarians.

In terms of possible paths forward, participants discussed whether the proposed instrument should have binding force in order to be eventually incorporated by States as part of their domestic legislation. They also considered whether, on the contrary, the guiding principles should be compiled in the form of soft law, which might only give a sense of best practices. Participants agreed that this might not be the best moment to propose a new binding instrument; thus, alternative solutions were discussed. For example, it was pointed out that, at the domestic level, further standards of a technical kind could reinforce local communities of practice for improving the management of the dead. Moreover, at the international level, voluntary standards and non-binding provisions could be developed in conjunction with States. These could be combined within an ecosystem of norms or a pyramid framework, through which guiding principles could be created and implemented (see the section below on potential pathways for standardization). Agreement prevailed on the preference for a set of general, non-binding principles based on existing best practices and/or accepted normative frameworks.

The importance of recognizing social, cultural and religious diversity for the proper management of the dead

Discussions among participants at the meeting highlighted the fact that social, cultural and religious factors have a direct impact on the development and implementation of forensic work in humanitarian emergencies as it applies to the management of the dead. All cultural systems devote major symbolic and structural efforts to handling the dead. Appropriate ways of burying, mourning, remembering and commemorating the deceased have a deep impact on individuals and their communities. In humanitarian emergencies, social, cultural and religious understandings of death intersect but can also clash with forensic knowledge and practice. Incorporating the diversity and heterogeneity of these phenomena into existing guidelines, general principles and/or standards that inform the work of forensic experts in the aftermath of extreme violence or disaster thus remains a great challenge.

A multidisciplinary approach to forensic action in humanitarian emergencies opens up the possibility of collaboration with other fields in the social sciences, such as social and cultural anthropology. Socio-cultural anthropologists have been concerned with the cultural meanings and practices associated with the treatment and disposal of the dead since as far back as the nineteenth century. Recent anthropological studies concerned with the search for, recovery and identification of dead and missing persons en masse have warned about the importance of considering the relation between local ritual practices around death, aimed at securing the fate of the soul in its afterlife, and international forensic protocols. This can lead, they argue, to a better grasp of the misunderstandings that arise in the exchanges which take place between forensic experts and bereaved communities in the field.

International projects such as *Below Ground: Mass Graves Exhumations and Human Rights in Historical, Transnational and Comparative Perspective*,¹³ hosted at the Spanish National Research Council, examine the management or government of the dead – or necropolitics – in countries such as Spain, Argentina, Peru, Mexico, Poland and Vietnam. In these contexts, experience has revealed strong points of tension between the forensic logic of individualization and community-oriented forms of collective body disposal. Additionally, these case studies have observed that popular representations of forensic science – the so-called “CSI effect” – have generated distorted visions of the forensic method and what forensic science can achieve in complex scenarios of humanitarian emergency. This has often created false expectations and feelings of disappointment in surviving relatives and local populations.

Social, cultural and religious considerations demand a flexible approach to the implementation of humanitarian forensic action. Protocols should aim to be sufficiently “soft” in order to accommodate context-specific differences. In this regard, rethinking current guidelines in relation to specific social, cultural and religious factors might also entail reconsidering pre-established understandings of what the “dignified” treatment and burial of the dead means across contexts. It might also involve engaging with families from the early stages of the forensic process – instead of at the end, during the disposal of the body – or contemplating other forms of identification. Participants to the meeting gave as an example the case of mass graves from the Spanish Civil War (1936–39) and the post-war period, which have been exhumed in Spain mostly since the year 2000. Throughout the last two decades, in Spain – as well as in other places like Guatemala and Iraq – some communities have opted to bury the dead bodies of their relatives and neighbours in a collective manner, either because they simply preferred this course of action or because positive identification of all corpses was unlikely. Some experts described these as emerging “communities of death”, which identify and pay tribute to their dead through forms of collective reburial and memorialization.

Social scientists, such as socio-cultural anthropologists, can act as mediators between forensic practitioners and communities in order to facilitate the exchange between international guidelines of forensic practice and local approaches to the management of the dead. They might also aid with the translation of culturally diverse customs and language associated with the recovery, burial and commemoration of the dead and missing in different crisis scenarios.

13 See Francisco Ferrándiz, *Below Ground: Mass Grave Exhumations and Human Rights in Historical, Transnational and Comparative Perspective*, Instituto de Lengua Literatura y Antropología, 2016–18, available at: <http://illa.csic.es/en/research-project/below-ground-mass-grave-exhumations-human-rights-historical-transnational>.

Main discussion points

Reflecting on social, cultural and religious factors in humanitarian emergencies implies looking at the work of forensic specialists from a different angle. Forensic science has commonly been conceived in relation to the legal and judicial purposes that it serves. Some experiences recall that social, cultural and religious aspects are often subject to the requirements of judicial investigations and are thus overlooked in order not to compromise the outcome of legal processes. Indeed, as discussed above, the applicable law in a given context shapes humanitarian action. Nevertheless, according to some experts, considering forensic work in humanitarian emergencies requires attention to the tensions that emerge between law, science and social, cultural and religious dimensions connected to the treatment of the dead.

Important information transfer problems exist in relation to how international forensic guidelines and manuals are communicated to forensic practitioners on the ground. Specialists explained that the recurring mismanagement of unidentified bodies—which often suffer the most uncertain and neglectful of fates—and their improper disposal demonstrate the lack of a unified approach to this issue.¹⁴ Prioritizing the identification of some corpses over others, a common practice in some contexts, can be remedied through a better understanding of the power imbalances generated by class, ethnicity or ideological distinctions in the management of the dead in different contexts. Additionally, experts observed that efforts towards the dignified and equitable care of all dead are also hampered by the limitations in capacity and resources faced by many local forensic systems and their staff, as mentioned above. This is particularly true in humanitarian emergencies, when the existing capacity for properly handling the dead may be overwhelmed by the large number of fatalities.¹⁵

Furthermore, guiding principles for dealing with the dead in humanitarian emergencies ought to recognize that there are often local strategies for managing and caring for the dead, which can complement the practice of international and local forensic specialists. Serious consideration of and respect for cultural and religious rituals around death may help to solve ongoing difficulties and transcend dominant approaches to forensic action. Some participants agreed that more training on the management of the dead and their identification should be provided to forensic practitioners at all levels in order to generate an awareness of the unintended effects of forensic practices on local populations, encourage respect for site-specific customs, and promote flexibility and adaptability to the

14 Roberto C. Parra, Élisabeth Anstett, Pierre Perich and Jane Buikstra, “Unidentified Deceased Persons: Social Life, Social Death and Humanitarian Action”, in Roberto C. Parra, Sara C. Zapico and Douglas H. Ubelaker (eds), *Forensic Science and Humanitarian Action: Interacting with the Dead and the Living*, Wiley & Sons, Hoboken, NJ, 2020; Adam Rosenblatt, *Digging for the Disappeared: Forensic Science after Atrocity*, Stanford University Press, Stanford, CA, 2015.

15 Stephen Cordner and Sarah T. D. Ellingham, “Two Halves Make a Whole: Both First Responders and Experts are Needed for the Management and Identification of the Dead in Large Disasters”, *Forensic Science International*, Vol. 279, 2017.

local context. Experts also emphasized the importance of developing principles for appropriate communication with bereaved families – in compliance with their right to know and right to truth – as well as communities and religious leaders before, during and after forensic operations and the identification process. This might involve forms of community engagement in consultation with social scientists.

The group agreed that exploring social, cultural and religious dimensions in too much depth might render too arduous a general definition of what is meant by “dignified treatment of the dead”. Guiding principles should instead incorporate a broad reference to social, cultural and religious awareness. More specific standards could, however, be designed for particular contexts through multi-stakeholder processes, including participants from different outlooks and trajectories.

Potential pathways for standardization: The International Organization for Standardization

One of the avenues available for the development of a set of guiding principles is drafting them through the International Organization for Standardization (ISO). ISO is an independent, non-governmental international organization with a membership of 164 national standards bodies. Through its members, it brings together experts to share knowledge and develop voluntary, consensus-based, market-relevant international standards that support innovation and provide solutions to global challenges. ISO has published 22,656 international standards and related documents, covering almost every industry, from technology and food safety to agriculture and health care.

There are two main approaches for developing the intended principles through ISO: the formal standards development process via committee and the International Workshop Agreement. These differ on the level of consensus, time to market, intended users, and normative versus informative value. Both approaches are described in the ISO and International Electrotechnical Commission directives and policies, which define the basic procedures to be followed in the development of international standards and other publications.¹⁶ They may take from eighteen months to a maximum of four years to be completed, depending on the level of consensus, from the most basic standards to the most advanced. While the International Workshop Agreement route is based on inputs from invited stakeholders, the committee route implies drafting standards through one of the ISO 245 Technical Committees (TCs). TCs are arranged by subject and may be divided into subcommittees and/or working groups. TCs ensure wide representation from all relevant stakeholders at national and international levels. They secure the participation of national stakeholders through work with the National Mirror Committees, which represent the views on proposed standards from actors such as governments, academics, consumers, laboratories and non-governmental organizations.

16 See ISO, “Directives and Policies”, available at: www.iso.org/directives-and-policies.html.

The committee route corresponds to a formal standards development process, which can be summarized as follows:

1. Based on stakeholders' needs, a new work item proposal needs to be submitted to the committee.
2. If the set approval criteria are met, the proposal is allocated to a working group to build a consensus among the experts nominated by participating ISO members and international organizations in liaison.
3. The project is circulated to committee members (i.e., National Mirror Committees with wider stakeholder representation), to build consensus.
4. The inquiry on a draft international standard is opened to all ISO members (national public inquiries).
5. Members vote on the final draft international standard (proof-checked by the Secretariat).
6. International standards are published.

Participants discussed the committee approach as a possible avenue for the development of principles on the dignified management of the dead in humanitarian emergencies. In such a case, a committee that would be particularly interesting as a forum for discussion for the development of guiding principles is ISO/TC 292 on Security and Resilience, which has developed standards, for example, on emergency management,¹⁷ the involvement of spontaneous volunteers¹⁸ and the support of vulnerable communities in these situations.¹⁹ Under this approach, the ICRC would need to become a liaison organization in order to be allowed to submit a work proposal. Later, the liaison organization may propose a convener to move the discussion into a working group, for which member States interested in the topic might provide experts. Last, the text produced by the working group may be circulated and commented on by other ISO members.

Main discussion points

Experts discussed whether the ISO was the appropriate avenue for standardizing general rules or principles on the dignified management of the dead in humanitarian emergencies. Given the technical nature of ISO processes, some participants questioned the benefit of ISO standards in the development of guiding general principles beyond what may already be found in existing guidelines such as the ICRC/WHO manual. Nevertheless, other participants considered that the ISO's procedures offered an opportunity to solve technical difficulties in a simple and organized manner. Moreover, ISO standards might

17 ISO 22320:2018, "Emergency Management – Guidelines for Incident Management"; ISO/PWI 23804, "Emergency Management – Framework".

18 ISO 22319:2017, "Community Resilience – Guidelines for Planning the Involvement of Spontaneous Volunteers".

19 ISO 22395:2018, "Community Resilience – Guidelines for Supporting Vulnerable Persons in an Emergency".

also provide credibility and support to the intended set of general principles by disassociating their elaboration from the ICRC – which might not be endorsed by all organizations or countries.

Additionally, the group discussed whether the ISO was a plausible and authoritative enough source to which forensics practitioners could turn for guidance on their practice, and whether its expertise could help create a robust set of guiding principles. In that respect, the ISO has already established a committee, ISO/TC 272 on Forensic Sciences, which has published standards such as ISO 18385:2016, “Minimizing the Risk of Human DNA Contamination in Products Used to Collect, Store and Analyze Biological Material for Forensic Purposes – Requirements”, and ISO 21043-2:2018, “Forensic Sciences – Part 2: Recognition, Recording, Collecting, Transport and Storage of Items”. ISO standards also provide a basis for the accreditation of laboratories – a practice which has driven forensic professionalism at large. Moreover, accreditation is often required to help ensure public confidence in the procedures used – a key objective for the forensic humanitarian response system – and to ensure the mutual recognition of forensic professionals.

If ISO procedures were to be considered as a way forward, participants agreed on the need to evaluate the steps that the process might involve and the difficulties that it might entail. Experts highlighted the possibility of losing the necessary specific influence in the drafting process of the text and the inability to reach an agreement as the potential risks associated with a wide consensus-based process. These risks, however, might be mitigated by proposing an advanced version of the intended set of general principles, with an agreed terminology, which constitutes a solid basis from which to elaborate the document and set the margins for the discussion.

Conclusions: Open questions and the way forward

The discussions that took place over the course of this workshop led, firstly, to different open questions about the need to create guiding principles in order to fill the gaps identified in existing manuals and their implementation for the dignified management of the dead in large-scale humanitarian emergencies, including to prevent them from becoming missing persons. These considerations led to the conclusion that the best way to address the deficiencies observed in the planning and implementation of forensic practices in these scenarios could be through the development of a set of general principles. These should gather and recall, in a short and concise manner, the main norms and rules currently scattered and fragmented in the existing corpus of IHL, IHRL and forensic guides and manuals. This document should aim to reflect the spirit in which existing instruments and tools ought to be translated, applied and implemented on the ground.

In relation to the content of a set of guiding principles, participants highlighted the need to define what is meant by situations of “humanitarian

emergency” before delving further into other substantial issues. Experts argued that future conversations on new directives for humanitarian forensic action ought to address the challenges—and therefore the demands—that specific (past and present) contexts of armed conflict, mass violence, natural disaster or mass migration present. Defining the type of crisis scenario in which forensic techniques are applied can help identify appropriate forensic procedures as well as the needs of populations in diverse emergency settings. Moreover, these reflections might also shed clarity on the use of terms such as the “dead” and the “missing” as part of new principles, with the aim of avoiding referring to them interchangeably. Experts acknowledged that the lack of a nuanced definition of these terms, which recognizes their diverse signification in relation to different contexts of violence and mass death and avoids the potential hierarchization of the dead, demands further examination from a forensic, legal and socio-cultural perspective in future meetings.

Participants at the meeting also agreed on the need to address the appropriate and dignified handling of the dead not only in relation to how it might be conceived through forensic protocols, training and practice, but also in connection to the social, cultural and religious aspects that surround the recovery and identification of the dead in crisis scenarios. In this regard, experts recognized the need to factor diversity into existing guidelines by acknowledging the context-specific mortuary practices and beliefs already in place in the settings where humanitarian forensic action operates. Discussions addressed the necessity of taking into account social, cultural and religious understandings that might challenge pre-established notions around the “proper” identification and burial of the dead (in which individualized versus collective forms of body disposal might be in tension); the need to improve communication between forensic experts and bereaved communities; and the urgency of debunking misguided conceptions of the forensic method.

Serious consideration of social, cultural and religious phenomena was also conceived as necessary in order to enable the “dignified” treatment of the dead. Debates touched upon the ambivalence that surrounds the meaning of dignity from legal, philosophical, ethical and anthropological perspectives and, as a result, the difficulty of defining the concept. Thus, experts agreed that the proposed principles should not attempt to reach a definition of the concept of dignity. Similarly, they concluded that these principles should not aim to embark on convoluted legal or philosophical debates around controversial issues connected to the notion of death itself or the legal status of the dead and human remains. Instead, general principles should aim to connect the “dignified” treatment of the dead to the particular social, familial, cultural and religious demands that emerge in concrete situations of humanitarian emergency, as well as to the need to negotiate these with existing ethical assumptions entertained in international forensic protocols and practice.

With regard to a way forward, participants stressed the need to consider specific collective work on the drafting of such complementary principles through the establishment of multi-stakeholder efforts formed by a multiplicity of

forensic, civil society, governmental and community actors. Conversations also considered the possibility of collaboration with the ISO. Participants recognized, however, the challenges that standardization could pose, emphasizing the need to avoid the homogenization of situations of humanitarian emergency through a one-size-fits-all, standardized approach, and the importance of taking into account the diversity that characterizes the humanitarian contexts in which forensic practitioners work.

Participants at the meeting acknowledged the need to develop a set of guiding principles on the dignified management of the dead in humanitarian emergencies, including to prevent them from becoming missing persons. These principles shall reflect the considerations shared during the event. Participants agreed that the principles should be drafted in the months following the meeting and offered to contribute to the development and revision of the document. They also agreed on the pertinence of preparing a publication summarizing the discussions of the meeting and entrusted the organizers of the meeting with this task.

INTERNATIONAL REVIEW of the Red Cross

The Review is a peer-reviewed journal printed in English and is published three times a year.

Annual selections of articles are also published in Arabic, Chinese, French, Russian and Spanish.

Published in association with Cambridge University Press.

Submission of manuscripts

The *International Review of the Red Cross* invites submissions of manuscripts on subjects relating to international humanitarian law, policy and action. Issues focus on particular topics, decided by the Editorial Board, which can be consulted under the heading 'Call for Papers' on the website of the *Review*. Submissions related to these themes are particularly welcome.

Articles may be submitted in Arabic, Chinese, English, French, Russian or Spanish. Selected submissions are translated into English if necessary.

Submissions must not have been published, submitted or accepted elsewhere. Articles are subjected to a peer-review process. The final decision on publication is taken by the Editor-in-Chief. The Review reserves the right to edit articles.

Manuscripts may be sent by e-mail to: review@icrc.org

Manuscript requirements

Articles should be 7,000 to 10,000 words in length. Shorter contributions can be published as comments or opinion notes. Articles on themes other than the main theme of an edition may be published under the heading 'Selected articles on IHL and humanitarian action'.

For further information, please consult the website of the Review:
<https://international-review.icrc.org/>.

©icrc 2020

Authorization to reprint or republish any text published in the Review must be obtained from the Editor-in-Chief. Requests should be addressed to review@icrc.org.

Subscriptions

The subscription price is available online at: <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/subscribe>

Requests for subscriptions can be made to the following address:

Cambridge University Press, University Printing House, Shaftesbury Road, Cambridge CB2 8BS; or in the USA, Canada and Mexico, email journals_subscriptions@cambridge.org; Cambridge University Press, 1 Liberty Plaza, Floor 20, New York, NY 10006, USA, email journals_subscriptions@cup.org.

The *International Review of the Red Cross* is indexed in the Thomson Reuters Journal Citation Reports/Social Sciences Edition and has an Impact Factor. The Review is available on LexisNexis.

This journal issue has been printed on FSC™-certified paper and cover board. FSC is an independent, nongovernmental, not-for-profit organization established to promote the responsible management of the world's forests. Please see www.fsc.org for information.

Printed in the UK by Bell & Bain Ltd.

Protracted conflict

Editorial: Protracted Conflicts: The enduring legacy of endless war
Ellen Policinski and Jovana Kuzmanovic

Interview with Lieutenant-Colonel Joven D. Capitulo PA, Military Assistant
to the Office of the Undersecretary for Defense Policy, Department of
National Defense, Republic of the Philippines

Stretched: Protracted conflicts and the people living in the midst of it all

Fragmentation of armed non-State actors in protracted armed
conflicts: Some practical experiences on how to ensure compliance with
humanitarian norms

Hichem Khadhraoui

Reconstructing infrastructure for resilient essential services during and
following protracted conflict: A conceptual framework

Alexander H. Hay, Bryan Karney and Nick Martyn

From Operation Iraqi Freedom to the Battle of Mosul: Fifteen years of
displacement in Iraq

Cédric Cotter

Q&A: The ICRC and the “humanitarian–development–peace nexus”
discussion

Filipa Schmitz Guinote

Delivering water services during protracted armed conflicts: How
development agencies can overcome barriers to collaboration with
humanitarian actors

Edoardo Borgomeo

The notion of “protracted armed conflict” in the Rome Statute and the
termination of armed conflicts under international law: An analysis of
select issues

Dustin A. Lewis

International humanitarian law in Colombia: Going a step beyond

Marcela Giraldo Muñoz and Jose Serralvo

Protecting the right to life in protracted conflicts: The existence and
dignity dimensions of General Comment 36

Mona Rishmawi

The notion of “acts harmful to the enemy” under international
humanitarian law

Robert Kolb and Fumiko Nakashima

Book reviews

Internationalized Armed Conflicts in International Law

Kubo Mačák

Book review by *Andrea Harrison*

Military Professionalism and Humanitarian Law: The Struggle to reduce the
Hazards of War

Yishai Beer

Book review by *Andrew Carswell*

Reports and documents

Volume 101 Number 912

INTERNATIONAL
REVIEW
of the Red Cross



ICRC

ISSN 1816-3831

<https://international-review.icrc.org/>

Cambridge Core

For further information about this journal
please go to the journal web site at:
cambridge.org/irc



MIX
Paper from
responsible sources
FSC® C007785

CAMBRIDGE
UNIVERSITY PRESS